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The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?

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NOTE

The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?

Sean M. Lewis

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INTRODUCTION

It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.

— Justice Jackson¹

1. *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring).

One afternoon, a police officer spots a man driving a Cadillac through a run-down neighborhood.² His interest piqued, the officer decides to follow the vehicle. The Cadillac soon comes to rest in front of an apartment building, and the driver, Jimmy Barrios-Moriera, removes a shopping bag from the trunk and enters the building. The moment Barrios-Moriera disappears within the doorway, the officer sprints after him because he knows that the door to the apartment building will automatically lock when it closes. He manages to catch the door just in time and rushes in. Barrios-Moriera is already halfway up a flight of stairs in the common hallway and ignores the police officer when he identifies himself and indicates a desire to speak with him. Barrios-Moriera continues up the stairs and sets his shopping bag on the floor beside him as he hurriedly tries to open his door. The police officer sprints up the stairs after him and arrives before Barrios-Moriera can do so. He thrusts his hand into Barrios-Moriera's bag and withdraws a rectangular-shaped object wrapped in tape. He then orders Barrios-Moriera to go into his apartment, where he arrests him for possession of cocaine with intent to distribute.

If this story unfolded in the Second, Seventh, Eighth, or Ninth Circuits, Barrios-Moriera would have no constitutional basis for complaint.³ Each of these circuits refuses to recognize that a tenant has a reasonable expectation of privacy within the locked common areas of an apartment building for purposes of the Fourth Amendment.⁴ The Sixth Circuit, on the other hand, stands alone⁵ in maintaining that a

2. These facts are essentially those recounted by the court in *United States v. Barrios-Moriera*, 872 F.2d 12, 13-14 (2d Cir. 1989).

3. This story did, in fact, unfold in the Second Circuit, and Barrios-Moriera's constitutional claims were summarily rejected. *Id.* at 14-15.

4. See *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993); *United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991); *United States v. Holland*, 755 F.2d 253 (2d Cir. 1985); *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977). "For purposes of the Fourth Amendment" is a widely used expression in Fourth Amendment cases. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *United States v. Karo*, 468 U.S. 705, 712 (1984).

5. The First, Third, Fourth, Tenth, Eleventh and D.C. Circuits have not addressed the precise question raised in this Note. Many circuits have, however, addressed the question of whether a tenant has a reasonable expectation of privacy in *unlocked* common areas within an apartment complex. The First Circuit holds that there is no Fourth Amendment privacy interest in unlocked common areas. See *United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) ("It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.") (citing *United States v. Cruz Pagan*, 537 F.2d 554, 557-58 (1st Cir. 1976) (holding, in a case of first impression, that the defendant's Fourth Amendment rights were not violated when agents entered the apartment building's garage without a warrant, because defendant had no reasonable expectation of privacy in the garage)); *United States v. Thornley*, 707 F.2d 622, 625 (1st Cir. 1983) (holding that defendant, who was not a tenant of the searched apartment, had no Fourth Amendment claim regarding the search of an unlocked shared storage area, because defendant had no objectively reasonable expectation of privacy). The Third Circuit interprets the Fourth Amendment in this manner as well. See *United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992) (holding that a tenant's zone of privacy protected by the Fourth Amendment does not extend to the unlocked, common hallways of apartment buildings) (citing *Holland*, 755 F.2d

tenant does have a constitutionally protected right to privacy in such areas.⁶ This circuit split first arose in 1976,⁷ and the issue remains very much in dispute today.⁸ As the weight of precedent on each side of the divide continues to grow, there is an increasing need for the Supreme Court to resolve this important Fourth Amendment issue.

The Fourth Amendment protects persons against unreasonable searches and seizures.⁹ This protection of privacy embodied within the Amendment is not limited to the home or other specified locales;¹⁰ rather, it is aimed at the protection of the individual.¹¹ The Supreme Court interprets this protection broadly, so that “[w]herever a man may be, he is entitled to know that he will remain free from unreason-

253; *United States v. Dickens*, 695 F.2d 765, 777 (3d Cir. 1982) (holding, without citing any authority, that a stairwell is a public place, and holding that there can be no reasonable expectation of privacy within such areas); *United States v. Breland*, 715 F. Supp. 7, 10 (D.D.C. 1989) (holding that defendant’s claim to a protected privacy interest in a basement storage area was undermined by the unlocked door guarding the area)). Similarly, the Fifth Circuit does not interpret the Fourth Amendment to protect unlocked common areas. *See United States v. Clark*, 67 F.3d 1154, 1162 (5th Cir. 1995) (holding that there can be no reasonable expectation of privacy in an exterior breezeway of an apartment building that is “neither enclosed nor locked”); *United States v. Shima*, 545 F.2d 1026 (5th Cir. 1977) (distinguishing *McDonald v. United States*, 335 U.S. 451 (1948), on the basis that the common area in *McDonald* was both enclosed and locked while the exterior walkway in this case was available to the general public). The D.C. Circuit has adopted this view as well. *See United States v. Anderson*, 533 F.2d 1210, 1214 (D.C. Cir. 1976) (holding that “appellant’s constitutionally protected privacy interest began at the door to [his] room [in his boarding house] . . . rather than at the door to the [unlocked common areas of the] entire rooming house”); *Perkins v. United States*, 432 F.2d 612 (D.C. Cir. 1970) (embracing the district court’s holding that officers’ peaceable, yet warrantless, entry into the unlocked, relatively public, common hallways of a row house in which the defendant rented a room did not violate defendant’s privacy interests).

6. *See, e.g., United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976).

7. In 1976, the Sixth Circuit handed down *Carriger*, which held that a tenant has a reasonable expectation of privacy in the locked common areas of an apartment building. This holding stood in conflict with the Second Circuit’s holdings in *United States v. Miguel*, 340 F.2d 812 (2d Cir. 1965) and *United States v. Conti*, 361 F.2d 153 (2d Cir. 1976). *See also infra* notes 45-48 and accompanying text. The split immediately deepened with the Eighth Circuit’s decision in *United States v. Eister*, 567 F.2d 814 (8th Cir. 1977) holding that a tenant has no reasonable expectation of privacy in the locked common areas of an apartment building.

8. *See United States v. Heath*, 259 F.3d 522 (6th Cir. 2001) (reaffirming the Sixth Circuit’s original holding on this matter).

9. U.S. CONST. amend. IV:

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

10. *See, e.g., United States v. Chadwick*, 433 U.S. 1, 8 (1977). *Contra United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (suggesting that the privacy protections of the Fourth Amendment are inapplicable to locked common hallways because they are not part of the home).

11. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

able searches and seizures."¹² This protection of the person extends to the guilty and the innocent alike,¹³ but the question that remains is precisely what degree of protection the Fourth Amendment affords.

The answer to this question is found by an application of what has come to be known as the *Katz* test.¹⁴ Justice Harlan first articulated this test in his concurring opinion in *Katz v. United States*,¹⁵ where he stated, "there is a twofold requirement [for Fourth Amendment protection], 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.'"¹⁶ In *Katz*, the Court held that the FBI's use of an electronic listening device attached to the outside of a telephone booth violated the defendant's Fourth Amendment privacy rights.¹⁷ In so holding, the Court abandoned the traditional "trespass" doctrine upon which prior Fourth Amendment questions had turned.¹⁸

The Supreme Court subsequently adopted and refined Justice Harlan's standard as the binding test in Fourth Amendment cases.¹⁹ Consequently, in every Fourth Amendment case, the Court first seeks to determine whether a person had, or should have had, an actual

12. *Id.* at 359.

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

14. See, e.g., *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("Since *Katz* . . . the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'").

15. 389 U.S. 347 (1967).

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

17. *Id.* at 358-59.

18. *Id.* at 353 (abandoning the "trespass" doctrine). The trespass doctrine was based on the premise that property interests controlled the Government's right to search and seize. Under this doctrine, a physical invasion into a protected area was required before a Fourth Amendment violation could be established. See *Goldman v. United States*, 316 U.S. 129, 134-36 (1942); *Olmstead v. United States*, 277 U.S. 438, 457 (1928).

19. See *Bond v. United States*, 529 U.S. 334, 338 (2000) ("First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable.") (internal citations and quotations omitted); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'") (citing *Katz*, 389 U.S. at 516 (Harlan J., concurring)); *Oliver*, 466 U.S. at 176-77; *Smith v. Maryland*, 442 U.S. 735, 740, 743 (1979); *United States v. White*, 401 U.S. 745, 747-54 (1971).

subjective expectation of privacy.²⁰ The Court will then consider whether that expectation was reasonable under the circumstances.²¹

This Note contends that the police practice of entering the locked common areas of apartment buildings without permission or a warrant violates the Constitution. Part I examines the conflicting approaches adopted by the circuit courts in this area and argues that the approach adopted by the majority of circuits is flawed.²² Part II argues that interpreting the Fourth Amendment to protect tenants' privacy expectations within the locked common areas of their apartment buildings is most consistent with Supreme Court precedent in other Fourth Amendment cases. Part III argues that this broad interpretation of the Fourth Amendment is necessitated by the history of that Amendment and by the intent of the Framers. Part IV argues that a consideration of tenants' legitimate privacy interests, coupled with a respect for the rule of law, demands that the Court extend the protections of the Fourth Amendment to cover the locked common areas of multi-unit apartment buildings. This Note concludes that the Supreme Court should resolve this circuit split, which threatens the privacy and security of a large portion of the American population, by extending Fourth Amendment protection in the locked common area context.

I. EXAMINING CIRCUIT CASE LAW

This Part critiques the conflicting approaches adopted by the circuit courts in the locked common area context and argues that the Sixth Circuit's approach is superior to that adopted by the majority of circuits. Section I.A argues that the Sixth Circuit's analysis represents a well-reasoned approach to the issue and provides a solid starting point for the Supreme Court's resolution of this Fourth Amendment issue. Section I.B argues that the Supreme Court should reject the position adopted by the majority of circuits because it is lacking in persuasive authority and meaningful analysis.

20. See, e.g., *Smith*, 442 U.S. at 742-43; *id.* at 741 n.5 (noting that a lack of actual subjective expectation is not determinative of the case where one *should* have an expectation of privacy in a certain area); *id.* at 750 (Marshall, J., dissenting) (“[W]hether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept . . . but on the risks he should be forced to assume in a free and open society.”).

21. See, e.g., *Smith*, 442 U.S. at 740; *White*, 401 U.S. at 752 (determining whether the defendant's expectation was “justifiable,” “reasonable,” or “legitimate”).

22. “A majority of circuits,” as used in this Note, means a majority of the circuits that have addressed the question examined by this Note (that is, the Second, Seventh, Eighth, and Ninth Circuits).

A. *The Sixth Circuit Provides a Sound Starting Point*

The Sixth Circuit's approach in locked common area cases establishes a firm foundation for the Supreme Court's resolution of this important constitutional issue. The Sixth Circuit takes a well-reasoned approach in these cases, relying on Supreme Court precedent and carefully considering the subjective expectations of tenants. In *United States v. Carriger*,²³ the Sixth Circuit first considered whether a government agent's entry, without permission or a warrant, into the locked common areas of an apartment building violated a tenant's Fourth Amendment rights.²⁴ In holding that such entry violated the defendant's rights, the court took a number of factors into consideration. First, it noted that *Katz* expanded the scope of protection offered by the Fourth Amendment.²⁵ Second, it took great care to analyze the facts and holding of *United States v. McDonald*²⁶ and compare them to the case at hand. In *McDonald*, the Supreme Court held that police officers' warrantless entry into the locked common areas of a rooming house violated the defendant's Fourth Amendment rights.²⁷ The Sixth Circuit adopted Justice Jackson's explanation of the Court's holding and concluded that, as the facts of *McDonald* and *Carriger* differed only in degree but not in kind, *McDonald* should govern the controversy before the court.²⁸ The Sixth Circuit noted that although government entry in *Carriger* was effected through guile, whereas in *McDonald* it was by force, this distinction in no way altered the tenant's subjective expectation of privacy and was therefore irrelevant to the court's Fourth Amendment analysis.²⁹ Finally, the court cited a Louisiana Supreme Court case,³⁰ a Fifth Circuit case,³¹ and two

23. 541 F.2d 545 (6th Cir. 1976).

24. *Carriger*, 541 F.2d at 547 (holding "that because the officer did not have probable cause to arrest appellant or his accomplice before he invaded an area where appellant had a legitimate expectation of privacy [the locked common hallway of the apartment building], the subsequent arrest and seizure of narcotics were invalid").

25. *Id.* at 549 (noting that the "Supreme Court's determination that the 'trespass' doctrine could 'no longer be regarded as controlling' was intended to expand the protection afforded by the Fourth Amendment").

26. 335 U.S. 451 (1948); see *infra* Section II.A (discussing *McDonald*).

27. *McDonald*, 335 U.S. at 455-56.

28. *Carriger*, 541 F.2d at 550.

29. *Id.* at 551.

30. *State v. Di Bartolo*, 276 So. 2d 291, 294 (La. 1973) (recognizing a tenant's Fourth Amendment "right to reasonably expect privacy from government intrusion" within the hallway of his apartment building).

31. *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (holding that "the backyard area of Fixel's [apartment] home is sufficiently removed and private in character that he could reasonably expect privacy Thus . . . [the officer's] actual invasion into this protected area . . . violates the Fourth Amendment") (internal citation omitted).

Seventh Circuit cases³² that were closely on point, concluding that these cases, taken together with *Katz* and *McDonald*, demanded a holding in favor of the defendant.³³ That is, the court held that a tenant does have a constitutionally protected privacy interest within the locked common areas of an apartment building, and an officer's entry into these areas without permission or a warrant violates the Fourth Amendment.³⁴ The Sixth Circuit subsequently reaffirmed this holding, stating that "any entry into a locked apartment building without permission, exigency or a warrant is prohibited [by the Fourth Amendment]."³⁵

The Sixth Circuit's treatment of this issue represents a well-reasoned approach to the question of whether tenants have a constitutionally protected privacy interest within the locked common areas of their apartment buildings. Its jurisprudence in this area, however, is but a starting point for the resolution of this important constitutional question. A thorough evaluation of this issue should articulate why the Sixth Circuit's approach is superior to that taken by the other four circuits that have examined the locked common area question.³⁶ Furthermore, a thorough evaluation must consider what role Supreme Court precedent,³⁷ the history of the Fourth Amendment and the intent of the Framers,³⁸ and the demands of public policy should play in this process.³⁹

32. See *United States v. Case*, 435 F.2d 766, 769 (7th Cir. 1970) (finding a constitutionally protected expectation of privacy in the locked common hallway of a commercial building); *United States v. Rosenberg*, 416 F.2d 680 (7th Cir. 1969) (finding a constitutionally protected expectation of privacy in the unlocked but closed basement of a commercial building); see also *infra* notes 88-96 and accompanying text.

33. *Carriger*, 541 F.2d at 552.

34. *Id.* at 550.

35. *United States v. Heath*, 259 F.3d 522, 534 (6th Cir. 2001); see also *United States v. Taylor*, 248 F.3d 506 (6th Cir. 2001) (delimiting *Carriger* by holding that there is no Fourth Amendment violation where police gain entry to the locked common areas through the invitation of another tenant); *United States v. King*, 227 F.3d 732 (6th Cir. 2000) (holding that defendant had a reasonable expectation of privacy in the unlocked basement of his duplex, due, in large part, to "[t]he nature of the living arrangement in a duplex, as opposed to a multi-unit building . . ."). *United States v. Diaz*, 25 F.3d 392 (6th Cir. 1994) (declining to extend the recognized reasonable expectation of privacy to an apartment building's parking lot). But see *United States v. Smith*, 941 F.2d 1210, 1991 WL 158699, at *7 (6th Cir. 1991) (unpublished) ("Although this Court has recognized the principle that tenants of an apartment building have a reasonable expectation of privacy in the common areas of the building not open to the general public, the law is not well settled in this area.") (internal citations omitted).

36. See *infra* Section I.B.

37. See *infra* Part II.

38. See *infra* Part III.

39. See *infra* Part IV.

B. *The Majority Approach Is Unpersuasive and Should Be Rejected*

This Section criticizes the methodologies and holdings of the majority of circuits in locked common area cases and concludes that the Supreme Court should not adopt the position taken by these courts. The majority position is embodied within a long line of cases that stand for the proposition that a tenant has no reasonable expectation of privacy in the locked common areas of an apartment building.⁴⁰ Quantity of cases alone, however, is not enough to establish sound legal precedent, and all of these cases can be traced back to courts' unsupported conclusions or citation to inapposite cases.⁴¹ The analysis in these cases does not reflect an effort to establish a consistent test to measure the extent and type of privacy expectations possessed by tenants,⁴² and a meaningful application of the two-part *Katz* test is strangely absent.⁴³ Moreover, with two puzzling exceptions,⁴⁴ the majority of circuits entirely ignore *McDonald*. Each circuit's faulty analysis will be examined in turn.

1. *The Second Circuit*

The Second Circuit's analysis fails for three reasons. First, the court relies upon unsupported conclusions and citation to inapposite cases. Second, the court fails to apply the *Katz* test meaningfully in locked common area cases. Third, the court overlooks the fact that the Fourth Amendment's protections are not limited to the home.

The Second Circuit first considered whether a tenant has a reasonable expectation of privacy within the locked common areas of his

40. See, e.g., *United States v. Holland*, 755 F.2d 253, 255-56 (2d Cir. 1985) (listing cases). The Second, Seventh, Eighth, and Ninth Circuits have been grouped into a majority, not only because each refuses to recognize a reasonable expectation of privacy in locked common areas, but also because the reasoning and analysis of each bear striking similarities to the others. See *infra* notes 45-136 and accompanying text.

41. See *infra* notes 45-136 and accompanying text.

42. But see *Holland*, 755 F.2d at 256 (bolstering its conclusion by noting that the defendant did not have an absolute right to exclude others); *United States v. Penco*, 612 F.2d 19, 25 (2d Cir. 1979) (noting that the officers' entry was peaceful); *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966) (same).

43. *Contra* *United States v. McCaster*, 193 F.3d 930 (8th Cir. 1999) (determining, after careful consideration, that the defendant had no subjective expectation of privacy). As pointed out *infra* note 124 and accompanying text, this is an anomaly in the majority's jurisprudence.

44. The first exception arises in *United States v. Miguel*, 340 F.2d 812, 814 (2d Cir. 1965). See *infra* note 48. The second exception arises in *United States v. Eisler*, 567 F.2d 814, 816 n.2 (8th Cir. 1977) (citing *McDonald* to support the proposition that "an expectation of privacy would ordinarily cover conversations that took place inside . . . [the defendant's] apartment"). It is not at all clear why the Eighth Circuit cited *McDonald* for this purpose, as *McDonald* had nothing to do with conversations within an apartment. See *infra* Section II.A.

apartment building in *United States v. Miguel*.⁴⁵ The court concluded that the Fourth Amendment's protections that ensure the security and privacy of a tenant within his apartment do not extend to the lobby of an apartment building that is guarded by a door usually kept locked.⁴⁶ The court cited no authority for this conclusion.⁴⁷ Nevertheless, the Second Circuit has relied upon this unsupported conclusion as the basis for much of its subsequent jurisprudence in this area.⁴⁸

Although the genesis of the Second Circuit's case law in the common area context preceded *Katz*,⁴⁹ neither the Supreme Court's declaration that "the Fourth Amendment protects people, not places,"⁵⁰ nor the two-part *Katz* test⁵¹ affected the Second Circuit's approach to this issue after *Katz*.⁵² Instead, the court continued to rely on its holding in *Miguel*.⁵³ Moreover, *Katz* entirely escaped the Second Circuit's notice

45. 340 F.2d 812 (2d Cir. 1965).

46. *Miguel*, 340 F.2d at 814 (rejecting the defendant's contention that his arrest in the lobby of his apartment building was illegal because the lobby was within the "curtilage" of his residence).

47. *Id.* The entirety of the court's reasoning is as follows: "We have been cited to no authority which would include the lobby of a multi-tenanted apartment house within the 'curtilage' of each tenant. Such authority as there is points the other way." *Id.* The court did not mention what authority this might have been; instead, it summarily dismissed the defendant's claim. *See id.*

48. *See, e.g., United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966) (holding that the Fourth Amendment protection accorded to an apartment dweller's home does not extend to an area just inside a hallway door that was meant to lock but did not). The court relied solely on *Miguel* to conclude that "a lobby of an apartment house, guarded by a door usually kept locked . . . is not a protected area within which the individual tenants have Fourth Amendment rights." *Conti*, 361 F.2d at 157. The Court also distinguished the case from *McDonald v. United States*, 335 U.S. 451 (1948), on the basis that the police officers' entry in the case at bar was peaceable, and it cited *United States v. Buchner*, 164 F. Supp. 836 (D.D.C. 1958), *aff'd per curiam*, 268 F.2d 891 (D.C. Cir. 1958), and *United States v. St. Clair*, 240 F. Supp. 338 (S.D.N.Y. 1965), to support the proposition that "a technical trespass" will not defeat an otherwise permissible search. *Conti*, 361 F.2d at 157. *See also infra* notes 163-164 and accompanying text (arguing that a distinction on this basis is improper); *infra* Section II.A (discussing *McDonald*).

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

50. *Id.*

51. *Id.* at 361 (Harlan, J., concurring) ("[T]here 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.'").

52. The Second Circuit's first failure to address *Katz* came in *United States v. Soyka*, 394 F.2d 443, 450 n.2 (2d Cir. 1968) (upholding entry by federal officers into an unlocked apartment building citing). The Court did not even mention *Katz* and declined, in a footnote and without explanation, to reconsider its holdings in *Miguel* and *Conti*. *Id.* The Second Circuit again failed to address *Katz* in *United States v. Wilkes*, 451 F.2d 938, 941 n.6 (2d Cir. 1971) (dismissing the defendant's contention that government agents violated his Fourth Amendment rights when they entered an unlocked apartment building, walked along a common vestibule, and positioned themselves outside the defendant's apartment door, citing only to *Miguel*, *Conti*, and *Soyka*).

53. *See supra* notes 48, 52.

in common area cases until 1979, where in *United States v. Penco*,⁵⁴ the court summarily dispensed with *Katz* by stating, "The argument that the privacy expectations analysis of *Katz v. United States* somehow undercut the reasoning of *Miguel* and [*United States v.*] *Conti* was expressly considered and rejected by our Court in *United States v. Llanes*."⁵⁵

An examination of *United States v. Llanes*,⁵⁶ however, proves otherwise. In that case, the defendant relied on *Katz* to contend that a government agent, in stationing himself in the unlocked hallway of the defendant's apartment building and eavesdropping on his conversations, violated his Fourth Amendment right to privacy.⁵⁷ His contention was, in essence, that overheard conversations are constitutionally protected and therefore inadmissible as evidence.⁵⁸ The court rejected the argument that *Katz* forbids official eavesdropping altogether and invoked the *Katz* qualification, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."⁵⁹ The court concluded that conversations carried on in a manner that makes them accessible to an individual standing outside a person's apartment are conversations "knowingly exposed to the public."⁶⁰ The assumption implicit in this conclusion is that the unlocked hallway in this case was a public place in which the police officer had a right to be.

The *Penco* court was incorrect in stating that *Llanes* resolved the question of whether the *Katz* privacy expectation analysis undercut the Second Circuit's reasoning in *Miguel* and *Conti*.⁶¹ The question the *Llanes* court implicitly considered was whether an *unlocked* hallway in an apartment building was a public place.⁶² The court assumed that it was, but it did not consider whether a tenant's expectation of privacy

54. 612 F.2d 19 (2d Cir. 1979) (relying on *Miguel*, *Conti*, and *Wilkes* to support the conclusion that government agents did not violate the defendant's Fourth Amendment rights by, inter alia, stationing themselves in the locked common hallway outside the defendant's doorway, because their illegal entry was made in a peaceful manner).

55. *Penco*, 612 F.2d at 25 (internal citations omitted).

56. 398 F.2d 880 (2d Cir. 1968).

57. *Llanes*, 398 F.2d at 883-84.

58. *Id.* at 884.

59. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)) (alternation in original).

60. *Id.*

61. See *United States v. Penco*, 612 F.2d 19, 25 (2d Cir. 1979).

62. *Llanes*, 398 F.2d at 884; see also *United States v. Case*, 435 F.2d 766, 768-69 (7th Cir. 1970) (distinguishing *Llanes* on the grounds that the door to the common area in the case at bar was locked, hence the hallway in question was not a public area); *Commonwealth v. Hall*, 323 N.E.2d 319, 322 (Mass. 1975) (holding "that where a common area in an apartment building is not locked off, so that anyone can enter it, a tenant cannot complain if a policeman stationing himself there overhears a conversation in the apartment") (citing, inter alia, *United States v. Llanes*, 398 F.2d 880 (2d Cir. 1968)).

within the *locked* common areas of an apartment building, the issue at bar in both pre-*Katz* cases, met the two-part test set forth in *Katz*.⁶³ The *Penco* court failed to distinguish locked common areas from unlocked common areas and, instead, assumed that a locked door was irrelevant to a Fourth Amendment analysis.⁶⁴ Such an assumption is unjustified. In a *Katz* analysis, the distinction between a locked common area and an unlocked common area can play an important role in establishing both a subjective expectation of privacy and the reasonableness of that expectation.⁶⁵ Accordingly, the Second Circuit's reliance on *Llanes* to distinguish *Katz* in the locked common area context is misplaced.

The Second Circuit unequivocally reaffirmed its position on the locked common area question in *United States v. Holland*.⁶⁶ The court stated, "[I]t is the established law of this Circuit that the common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors."⁶⁷ In reaching this conclusion, the court placed great weight on the fact that the Supreme Court has not recognized common hallways as part of the home for purposes of the Fourth Amendment.⁶⁸

Even if the Second Circuit is correct in asserting a common hallway is not part of the home for purposes of the Fourth Amendment,⁶⁹ the court's subsequent conclusion that hallways are automatically out-

63. See *Llanes*, 398 F.2d at 884.

64. See *Penco*, 612 F.2d at 25.

65. See, e.g., *Case*, 435 F.2d at 768-69; see also *supra* note 62.

66. 755 F.2d 253, 254-55 (2d Cir. 1985) (rejecting the defendant's contention that his warrantless arrest, effected in the locked common hallway of his apartment building, took place within his home and was therefore unconstitutional); see also *Payton v. New York*, 445 U.S. 573, 576 (1980) (holding that the Fourth Amendment prohibits government officials from making a warrantless and nonconsensual entry into a suspect's home in order to execute a routine felony arrest).

67. *Holland*, 755 F.2d at 255. The Second Circuit cited the following cases in support of this proposition: *United States v. Martinez-Gonzalez*, 686 F.2d 93, 101-02 (2d Cir. 1982) (holding, without citing authority or offering an explanation, that the common hallways outside the defendant's apartment were public places); *United States v. Arboleda*, 633 F.2d 985, 991 (2d Cir. 1980) (holding that the defendant "had no legitimate expectation of privacy with respect to an object which he threw outside the apartment [onto an exterior fire escape] with the object of getting rid of it"); *Penco*, 612 F.2d at 24-25; *United States v. Corcione*, 592 F.2d 111, 118 (2d Cir. 1979) (noticing, but not reaching, the issue of whether the defendant's arrest "on the landing outside his actual apartment although inside the house owned by his stepbrother's father" was within his "home" for purposes of the Fourth Amendment); *United States v. Wilkes*, 451 F.2d 938, 941 n.6 (2d Cir. 1971); *Llanes*, 398 F.2d at 883-84; *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966); and *United States v. Miguel*, 340 F.2d 812, 814 (2d Cir. 1965).

68. *Holland*, 755 F.2d at 255.

69. This Note does not address this particular issue because it is irrelevant to the argument advanced. See *infra* notes 216-222 and accompanying text.

side the zone of privacy⁷⁰ protected by the Fourth Amendment is not justified. The Supreme Court has categorically rejected the notion that the Fourth Amendment protects only the home or other limited locales.⁷¹ Instead, the Court has broadly stated, “[T]he Fourth Amendment protects people, not places.”⁷² In light of this principle, a consideration of tenants’ privacy interests within locked common areas deserves more careful scrutiny under the *Katz* test.

The *Holland* court neglected meaningfully to apply the *Katz* test and, instead, based its reasoning upon an unduly narrow view of the Fourth Amendment that the Supreme Court here rejected in *Katz* and other cases.⁷³ The court reached its conclusion by relying on cases that either are not on point or lack persuasive authority.⁷⁴ The Second Circuit continues to adhere to the position it adopted in *Holland*, paying lip service to *Katz* while summarily dismissing any claim to privacy.⁷⁵

2. *The Seventh Circuit*

The Seventh Circuit has fared no better in the locked common area context because it relies on inapposite cases and the faulty analysis of the Second and Eighth Circuits.⁷⁶ In *United States v.*

70. See *New Jersey v. T.L.O.*, 469 U.S. 325, 361 (1985) (Brennan, J., dissenting) (“The Fourth Amendment was designed . . . to grant the individual a zone of privacy whose protections could be breached only where the ‘reasonable’ requirements of the probable-cause standard were met.”).

71. See *United States v. Chadwick*, 433 U.S. 1, 8 (1977) (rejecting the Government’s argument that “the Warrant Clause was . . . intended to guard only against intrusions into the home”); see also *California v. Acevedo*, 500 U.S. 565, 587-88 (1991) (Stevens, J., dissenting) (“The Government’s principal contention was that ‘the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home.’ We categorically rejected that contention, relying on the history and text of the Amendment, the policy underlying the warrant requirement, and a line of cases spanning over a century of our jurisprudence.”).

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

73. See *Chadwick*, 433 U.S. at 8; *Katz*, 389 U.S. at 351.

74. See *supra* note 67 and accompanying text (discussing these Second Circuit cases).

75. See *United States v. Barrios-Moriera*, 872 F.2d 12, 14-15 (2d Cir. 1989) (rejecting the defendant’s Fourth Amendment claim to a legitimate expectation of privacy in the locked common hallway of his apartment building) (citing *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Holland*, 755 F.2d 253 (2d Cir. 1985); *United States v. Martinez-Gonzalez*, 686 F.2d 93 (2d Cir. 1982)); see also *supra* notes 66-74 and accompanying text (discussing *Holland*); *supra* note 67 (discussing *Martinez-Gonzalez*). It is not at all clear why the court cited *Santana*, as that case considered whether an officer’s warrantless entry into a house while in “hot pursuit” of a suspect violated the Fourth Amendment and does not stand for the proposition that tenants have no expectation of privacy in common hallways, locked or otherwise. See *Santana*, 427 U.S. 38; *infra* note 108; see also *United States v. Carriger*, 541 F.2d 545, 551 n.2 (6th Cir. 1976).

76. See *infra* notes 97-125 and accompanying text (discussing the Eighth Circuit’s approach).

Concepcion,⁷⁷ the court's sole case addressing the precise question of whether a tenant has a constitutionally protected privacy interest within the locked common areas of an apartment building, the court held that a tenant could have no reasonable expectation of privacy in these areas.⁷⁸ The court stated that it was odd to think of an expectation of privacy in an entryway, and this view, coupled with the defendant's inability to exclude absolutely all others from the common areas, led the court to conclude that no Fourth Amendment protection attaches in these types of situations.⁷⁹ The court justified its holding with citations to two Seventh Circuit cases⁸⁰ and a combination of Second,⁸¹ Fifth,⁸² and Eighth Circuit⁸³ cases.

Although on its face the Seventh Circuit seems to marshal a fair amount of support for its conclusion, a brief examination of the cases

77. 942 F.2d 1170 (7th Cir. 1991).

78. *Concepcion*, 942 F.2d at 1172 (addressing whether police entry into the locked common area of the defendant's apartment building was an unreasonable search within the meaning of the Fourth Amendment).

79. The court provided the following analysis:

Concepcion could not assert an expectation of 'privacy' in the common area . . . because the other five tenants sharing the same entrance used the space and could admit as many guests as they pleased; Concepcion had no expectation that goings-on in the common areas would remain his secret. Indeed, it is odd to think of an expectation of 'privacy' in the entrances to a building. . . . The area outside one's door lacks anything like the privacy of the area inside. We think the district court on solid ground in holding that a tenant has no reasonable expectation of privacy in the common areas of an apartment building.

Id.

80. The *Concepcion* court first cites to *United States v. Acevedo*, 627 F.2d 68, 69 n.1 (7th Cir. 1980). In *Acevedo*, the court relied upon *United States v. Penco*, 612 F.2d 19 (2d Cir. 1979), and *United States v. Shima*, 545 F.2d 1026 (5th Cir. 1977), to dismiss the defendant's claim to Fourth Amendment protection in an unlocked gangway between his apartment and an adjacent tavern. While *Shima* is on point as to whether the defendant had a reasonable expectation of privacy in an exterior walkway open and available to the general public, it is inapposite to those areas that are enclosed or locked (such as those at issue in *Concepcion*). See *supra* note 5 (discussing the law of *unlocked* common areas). *Penco* and the cases on which it relies trace their intellectual and legal origin to blind assumptions and unsupported conclusions. See *supra* note 54 and accompanying text (discussing *Penco* and its origins). The second case that the *Concepcion* court relies upon is *United States v. Boden*, 854 F.2d 983, 990 (7th Cir. 1987). *Concepcion*, 942 F.2d at 1172. The *Boden* court declined to recognize an expectation of privacy in the common areas of a walk-in storage unit facility. *Boden*, 854 F.2d at 990. The court accorded great weight to the fact that the defendant lacked an absolute subjective expectation of privacy and analogized to the common areas of a locked apartment building before concluding that the defendant had no reasonable expectation of privacy. *Id.* It cited *Acevedo* as its only authority on this ground. *Id.*

81. *Concepcion*, 942 F.2d at 1172 (citing *United States v. Holland*, 755 F.2d 253 (2d Cir. 1985), and *United States v. Penco*, 612 F.2d 19 (2d Cir. 1979)); see also *supra* note 54 and accompanying text (discussing *Holland* and *Penco*).

82. *Concepcion*, 942 F.2d at 1172 (citing *United States v. Shima*, 560 F.2d 1287 (5th Cir. 1977)); see also *supra* notes 5, 80 (discussing *Shima*).

83. *Concepcion*, 942 F.2d at 1172 (citing *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977)); see also *infra* notes 97-125 and accompanying text (discussing *Eisler*).

cited reveals the court's authority as nothing more than a paper tiger.⁸⁴ For example, the Seventh Circuit cited a Fifth Circuit case, *United States v. Shima*,⁸⁵ in support of the proposition that there is no constitutionally protected privacy interest within the locked common areas of an apartment building.⁸⁶ The Seventh Circuit's reliance on *Shima*, however, was misplaced. The question in that case was whether a person had a reasonable expectation of privacy in an exterior walkway open and available to the general public; the court did not consider whether such an expectation exists in areas that are enclosed or locked.⁸⁷

Furthermore, the Seventh Circuit avoided any meaningful analysis of two of its past cases whose holdings weighed against the court's newly adopted position. In *United States v. Case*,⁸⁸ the Seventh Circuit considered whether the defendants had a right to privacy in a locked common hallway used by only a small number of people. The court found that because the hallway was not a public place, the defendants' privacy interests enjoyed constitutional protection.⁸⁹ The *Case* court distinguished *Llanes*⁹⁰ on the basis that, while the unlocked hallway in *Llanes* may have been a "public place," the locked hallway in the case at bar was not.⁹¹ Consequently, the court held that the officers' warrantless entry into the locked common area violated the defendants' Fourth Amendment rights.⁹² In *United States v. Rosenberg*,⁹³ the court

84. *Shima* simply is not on point. See *supra* notes 5, 80; *infra* note 108. *Boden* relies solely upon *Acevedo*. See *supra* note 80. *Acevedo*'s only source of authority that supports the breath of its holding is *Penco*. See *supra* note 80. The flaws in both *Penco* and *Holland* were discussed above. See *supra* notes 54-74 and accompanying text. The flaws in *Eisler* are discussed at length *infra* notes 97-125 and accompanying text.

85. 560 F.2d 1287 (5th Cir. 1977).

86. See *Concepcion*, 942 F.2d at 1172 (citing *United States v. Shima*, 560 F.2d 1287 (5th Cir. 1977)).

87. See *supra* notes 5, 80.

88. 435 F.2d 766, 769 (7th Cir. 1970).

89. *Case*, 435 F.2d at 768.

90. *United States v. Llanes*, 398 F.2d 880 (2d Cir. 1968); see also *supra* notes 56-65 and accompanying text (discussing *Llanes*).

91. The Seventh Circuit reasoned as follows:

Llanes, however, is based upon the finding that the hallway was a public place and that the defendants could hardly expect conversations audible to someone in a public place to be regarded as private. On the contrary, the district judge in this case found that the hallway 'was not such a public area as to entitle the Court to consider it a non-protected area' and we concur. The hallway was kept locked The hallway was used by a very confined group, and, most of the time, limited to the proprietors of the stores in the building.

Case, 435 F.2d at 768-69 (internal citation omitted).

92. *Id.* at 767-68 (holding for the defendant notwithstanding the fact that police officers had obtained a key from the landlord).

93. 416 F.2d 680 (7th Cir. 1969).

held that government officials' warrantless entry into the unlocked, but closed, basement of a commercial building violated the Fourth Amendment.⁹⁴

The court disposed of these cases by stating, without any explanation or justification: "To the extent that *United States v. Rosenberg* and *United States v. Case* imply otherwise, they have not survived changes in the Supreme Court's definition of protected privacy interests."⁹⁵ It is not at all clear why the court asserts that these two cases have not survived changes in the Supreme Court's jurisprudence, and there is little indication that either case has been overruled.⁹⁶

3. *The Eighth Circuit*

The Eighth Circuit independently developed its own line of cases in the locked common area context. Its analysis in this area, however, proves little better than that of the circuits discussed above because it relies on the mistaken premise that an absolute right to exclude is necessary to establish a legitimate expectation of privacy. In its seminal case, *United States v. Eisler*,⁹⁷ the Eighth Circuit rejected the defendant's contention that police officers violated his Fourth Amendment rights when they entered the locked common hallway of his apartment building and eavesdropped outside his door.⁹⁸ The court invoked the *Katz* test, but it concluded that the defendant had no legitimate expectation of privacy within the locked common areas of his apartment building because those areas were open to use by other tenants, their guests, the landlord, and other authorized individuals.⁹⁹ The court refused to recognize the defendant's limited privacy interests in these areas as meriting constitutional protection, stating, "An expectation of privacy necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions."¹⁰⁰ The court offered no

94. *Rosenberg*, 416 F.2d at 682-83 (rejecting the government's argument "that the commercial nature of the building constituted an implied invitation to enter" and holding that the government agents' entry was unlawful).

95. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (internal citations omitted).

96. While the portion of the court's holding in *Case* regarding the landlord's grant of permission to enter the premises may no longer be accurate in light of *United States v. Matlock*, 415 U.S. 164, 171 (1974), this in no way overrules the court's holding that the locked hallway was a protected area.

97. 567 F.2d 814 (8th Cir. 1977).

98. *Eisler*, 567 F.2d at 815-16.

99. *Id.* at 816.

100. *Id.* (alternation in original).

support for the proposition that an absolute right to exclude is necessary to establish a protected expectation of privacy.¹⁰¹

The fact that tenants do not have an absolute right to exclude all others from the locked common areas of their buildings should not obliterate their constitutional interests in these areas. Numerous Supreme Court decisions¹⁰² affirm the maxim that “[p]rivacy is not a discrete commodity, possessed absolutely or not at all.”¹⁰³ Rather, the scope of protection offered by the Fourth Amendment is colored in shades of gray. So long as an individual has some expectation of privacy, the Court has held that, with few exceptions,¹⁰⁴ the government may not tread there without prior approval by a neutral magistrate.¹⁰⁵ This principle applies with equal force to the locked common areas of apartment buildings. While tenants cannot expect to be free from observation by other tenants and their guests, they do expect to be free from the prying senses of trespassers and uninvited strangers.¹⁰⁶

While the Supreme Court has been unwilling to find a Fourth Amendment violation where government agents make an observation from an area where anyone has a right to be,¹⁰⁷ it has continued to rec-

101. *Id.*; see also *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (holding that the right to exclude must be absolute to merit any Fourth Amendment protection); *United States v. Boden*, 854 F. 2d 983, 990 (7th Cir. 1988) (same); *United States v. Holland*, 755 F.2d 253, 256 (2d Cir. 1985) (same).

102. Consider the Court’s reasoning in *Bond v. United States*:

[A] law enforcement officer’s physical manipulation of a bus passenger’s carry-on luggage violated the Fourth Amendment’s proscription against unreasonable searches When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another [But.] he does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here.

529 U.S. 334, 335, 338-39 (2000); see also *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313-15 (1978) (holding that while an employer’s privacy interest was not absolute, it was nevertheless protected by the Fourth Amendment).

103. *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

104. See *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (listing exceptions to the warrant requirement); *United States v. Sharpe*, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring) (listing exceptions based on “special law enforcement needs”).

105. See, e.g., *Bond*, 529 U.S. at 338-39; *Camara v. Mun. Court*, 387 U.S. 523, 533-34 (1967); *McDonald v. United States*, 335 U.S. 451, 456 (1948).

106. See, e.g., *McDonald*, 335 U.S. at 458 (Jackson, J., concurring); *State v. Di Bartolo*, 276 So. 2d 291, 294 (La. 1973) (“The fact that the location where the arrest took place was a hallway, not an integral part of the apartment which the defendant was visiting, does not vitate the defendant’s right to reasonably expect privacy from government intrusion.”).

107. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); see also *Florida v. Riley*, 488 U.S. 445 (1989) (holding that police observation of a greenhouse from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that police observation of a backyard from an airplane flying at an altitude of 1,000 feet did not violate the defendant’s reasonable expectation of privacy). In these cases, the Court reasoned that since

ognize a constitutionally protected interest in those areas where individuals have a right to exclude at least some people.¹⁰⁸ In *O'Connor v. Ortega*,¹⁰⁹ for example, the Court held that a government employee has a reasonable expectation of privacy in his office, even though "it is the nature of government offices that others — such as fellow employees, supervisors, consensual visitors, and the general public — may have frequent access to an individual's office."¹¹⁰ Again in *Chapman v. United States*,¹¹¹ the Court held that government agents' search of a rented house violated the tenant's Fourth Amendment rights even though the landlord had authority to enter the house for some purposes.¹¹² As Justice Scalia insightfully pointed out, the Fourth Amendment protects privacy, not solitude.¹¹³ While landlords and tenants may invite police officers into the locked common areas of their buildings without infringing on other tenants' reasonable expectation of privacy, this fact should not justify unauthorized, warrantless government intrusion into areas from which the public is excluded.¹¹⁴ The

any member of the public could have lawfully observed the defendants' properties by flying overhead, the defendants' expectations of privacy were not ones that society was prepared to recognize as reasonable. The questions in those cases differ in one material respect from the question presented by the controversy under discussion here. Those cases were decided on the basis that "any member of the public" had a right to be in the airspace above the defendants' property and could have seen what the officers saw. The locked common areas of apartment buildings, on the other hand, are not open to "any member of the public;" rather, they are exclusive in nature and have been reasonably secured against unauthorized entry.

108. Some circuit courts claim that *United States v. Santana*, 427 U.S. 38 (1976), holds that the hallways of apartment buildings are public places. See, e.g., *United States v. Calhoun*, 542 F.2d 1094, 1100 (9th Cir. 1976) (citing *Santana* as supporting the proposition that "[t]he hallway of an apartment building, as with the threshold of one's dwelling, is a 'public' place for purposes of interpreting the Fourth Amendment"). Contrary to this claim, *Santana* did not hold that the hallway of an apartment building is a public place and therefore outside the protection of the Fourth Amendment. *Santana* concerned "hot pursuit," and the Court held that a suspect could not defeat an arrest commenced in a public place — the threshold of the defendant's house — by retreating within. It made no statement about hallways, locked or otherwise. The leap from a threshold to interior hallways is unwarranted, especially when one considers the factors that led the Court to conclude that the threshold is a public place. A threshold, where a person is "not merely visible to the public but [is] exposed to public view, speech, hearing and touch as if . . . standing completely outside her house," *Santana*, 427 U.S. at 42, is materially different than an interior hallway of an apartment complex, especially a locked hallway. There, a tenant is not even visible to the public, let alone exposed to public speech, hearing, or touch.

109. 480 U.S. 709 (1987).

110. *O'Connor*, 480 U.S. at 717 (O'Connor, J., plurality opinion).

111. 365 U.S. 610 (1961).

112. *Chapman*, 365 U.S. at 616-17.

113. *O'Connor*, 480 U.S. at 730 (Scalia, J., concurring).

114. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), is probative here. In that case the Court held that a congressional act authorizing government agents to search places of employment for safety violations without first obtaining a warrant violated the Fourth Amendment. *Id.* at 315. The Court stated "[t]hat an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee

locked common areas of apartment buildings are not open to "any member of the public;" rather they are exclusive in nature and merit recognition by society as an area in which a tenant has a legitimate, although limited, expectation of privacy.¹¹⁵ This is especially true given the fact that these locked areas are in close proximity to tenants' homes.¹¹⁶

Contrary to what some courts suggest, there is not a parallel line of Supreme Court precedent standing for the proposition that an expectation of privacy is violated only if the place is one that the defendant has the right to keep subject to his exclusive control.¹¹⁷ In *Rakas v. Illinois*,¹¹⁸ the Supreme Court pointed to the passengers' inability to exclude others as one of many factors that established that the defendants did not have a legitimate expectation of privacy in an automobile in which they had neither a property nor possessory interest.¹¹⁹ The Court did not state that an absolute right to exclude is necessary to establish a legitimate expectation of privacy; rather, it pointed to the defendants' complete inability to exclude.¹²⁰ Moreover, the Court highlighted the fact that the defendants "made no showing that they had a legitimate expectation of privacy in the glove compartment or the area under the seat of the car in which they were merely passengers."¹²¹ Tenants in an apartment building are in a materially different position than the passengers in *Rakas*. They do have the right to exclude those who have not been invited in by other tenants or the landlord, and they do have an interest in the privacy and security of

observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search." *Id.*

115. See *Perkins v. United States*, 432 F.2d 612, 615 (D.C. Cir. 1970) (Bazelon, J., dissenting).

116. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986) (declining to recognize a privacy interest in an industrial area in part because "this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened"); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (noting that privacy expectations are most heightened in those areas intimately linked to the home); *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

117. See *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (citing *Rakas v. Illinois*, 439 U.S. 128, 149 (1978)).

118. 439 U.S. 128 (1978).

119. *Rakas*, 439 U.S. at 148-49 (holding that passengers in a vehicle, who had neither a property nor a possessory interest in the vehicle, had no legitimate expectation of privacy in the glove compartment and the area under the seat).

120. *Id.* at 149; see also *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (holding that the defendant's complete inability to exclude was a factor undermining his claim to an expectation of privacy in the purse of a third party into which he had dumped thousands of dollars worth of illegal drugs).

121. *Rakas*, 439 U.S. at 148.

their apartment buildings.¹²² Consequently, tenants' incomplete right to exclude is no reason for courts to deny their constitutional claims.

The Eighth Circuit has repeatedly reaffirmed *Eisler*,¹²³ and although the court has recently shown a willingness to apply the *Katz* test meaningfully in locked common area cases,¹²⁴ the court's holding in *Eisler* remains good law.¹²⁵ As that holding is based upon a mistaken premise, namely that an absolute right to exclude is a necessary prerequisite for Fourth Amendment protection, it should be rejected.

4. *The Ninth Circuit*

Finally, the Ninth Circuit's resolution of the locked common areas question is also unsatisfactory. In *United States v. Nohara*,¹²⁶ the court refused to recognize a defendant's privacy interest in the locked hallway outside his apartment. In refusing to recognize this interest, the court relied upon dicta from one of its earlier cases,¹²⁷ cited an inapposite case,¹²⁸ and relied upon the faulty reasoning of the Second¹²⁹ and

122. See *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring); *State v. Di Bartolo*, 276 So. 2d 291, 294 (La. 1973); *Commonwealth v. Goldoff*, 510 N.E.2d 277, 280 (Mass. App. Ct. 1987).

123. See *United States v. Luschen*, 614 F.2d 1164 (8th Cir. 1980) (declining, without explanation, to reverse its holding in *Eisler*); see also *United States v. McGrane*, 746 F.2d 632, 634 (8th Cir. 1984) (reaffirming the court's position that there is no expectation of privacy in the hallways of an apartment building) (citing *United States v. Luschen*, 614 F.2d 1164 (8th Cir. 1980)); *United States v. Penco*, 612 F.2d 19 (2d Cir. 1979); *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977).

124. See *United States v. McCaster*, 193 F.3d 930 (8th Cir. 1999) (examining whether a tenant in a duplex has a reasonable expectation of privacy in common areas shared only by the duplex's tenants and the landlord). The court invoked the *Katz* test and disposed of the case after it determined that the defendant had no subjective expectation of privacy on the particular set of facts presented in this case. *Id.* at 933. In evaluating the defendant's claim, the court looked to several factors: "whether the party has a possessory interest in the things seized or the place searched; whether the party can exclude others from that place; whether the party took precautions to maintain the privacy; and whether the party had a key to the premises." *Id.* The court concluded that the defendant had no subjective expectation of privacy in this case because he disavowed any possessory interests in the material, had not tried to exclude anyone, and had taken no steps to maintain privacy in that area. *Id.*

125. See, e.g., *United States v. King*, 227 F.3d 732, 745 (6th Cir. 2000) (citing *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977), as valid law).

126. 3 F.3d 1239 (9th Cir. 1993).

127. *Nohara*, 3 F.3d at 1241 ("The hallway of an apartment building, as with the threshold of one's dwelling, is a 'public' place for purposes of interpreting the Fourth Amendment.") (quoting dictum from *United States v. Calhoun*, 542 F.2d 1094, 1100 (9th Cir. 1976)); see also *supra* note 108 (criticizing *Calhoun*).

128. *Id.* at 1242 (citing *United States v. Cruz Pagan*, 537 F.2d 554 (1st Cir. 1976)); see also *supra* note 5 (discussing *Cruz Pagan*).

129. *Id.* (citing *United States v. Barrios-Moriera*, 872 F.2d 12 (2d Cir. 1989)); see also discussion *supra* notes 2, 3, 75 (discussing *Barrios-Moriera*).

Eighth Circuits.¹³⁰ The court noted the Sixth Circuit's holding in *Carriger*¹³¹ but summarily rejected it.¹³² Finally, the Ninth Circuit joined the Eighth in stating that an absolute right to exclude is a precondition for a constitutionally recognizable expectation of privacy.¹³³

In addition to the problems noted above, the Ninth Circuit also failed adequately to address *United States v. Fluker*,¹³⁴ an earlier Ninth Circuit case holding that a tenant had a reasonable expectation of privacy in the locked hallway outside his apartment.¹³⁵ The court brushed that case aside by noting that *Fluker* was limited to its facts. The court also pointed out that the apartment in *Fluker* was only one of two basement apartments, not an apartment in a multi-unit complex.¹³⁶ The court did not, however, discuss why the distinction between the two types of common areas should make a difference for constitutional purposes, nor did it explain why the absence of an absolute right to exclude was not determinative in *Fluker*, whereas the same condition barred the defendant's claim in the case at bar.

II. BROADLY INTERPRETING THE FOURTH AMENDMENT IS CONSISTENT WITH SUPREME COURT PRECEDENT

The Supreme Court has not ruled on the precise question of whether a tenant has a reasonable expectation of privacy within the locked common areas of an apartment complex. This Part argues, however, that a fair reading of relevant Supreme Court precedent demands that the provisions of the Fourth Amendment be interpreted to protect tenants' expectations of privacy within these areas. Section II.A argues that Justice Jackson's concurrence in *McDonald* should govern the current controversy. Section II.B argues that the Supreme Court's commitment to protecting privacy interests in and around the home calls for an interpretation of the Fourth Amendment that pro-

130. *Id.* (citing *United States v. McGrane*, 746 F.2d 632, 634 (8th Cir. 1984), *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977)); *see also supra* notes 97-125 and accompanying text (discussing *McGrane* and *Eisler*).

131. *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976); *see also supra* notes 23-34 and accompanying text (discussing *Carriger*).

132. *Nohara*, 3 F.3d at 1242.

133. *Id.* (citing *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977), as its exclusive authority on this point).

134. 543 F.2d 709 (9th Cir. 1976).

135. *Fluker*, 543 F.2d at 716 (finding a reasonable expectation of privacy because "the entry way was one to which access was clearly limited as a matter of right to the occupants of the two basement apartments, and it is undisputed that the outer doorway was always locked and that only the occupants of the two apartments and the landlord had keys thereto").

136. *Nohara*, 3 F.3d at 1242 (declining to extend *Fluker* because the *Fluker* Court limited that case to its facts).

fects tenants from unauthorized, warrantless searches by government agents in locked common areas.

A. *McDonald v. United States Should Govern the Current Controversy*

The best reading of *McDonald*¹³⁷ reveals that a tenant does have a constitutionally protected privacy interest within the locked common areas of his apartment building. At issue in that case was whether police officers violated the defendant's right to be secure from unreasonable search and seizure when they entered the locked common area of his rooming house without a search warrant.¹³⁸ Police officers peered into the defendant's room from the locked common areas of the rooming house, which they entered by prying open a window.¹³⁹ The officers arrested the defendant and searched his room after observing, from their position within the hallway, the defendant engaged in illegal activity within his room.¹⁴⁰ The Court found for the defendant, stating, "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police."¹⁴¹ As the police claimed no emergency in this case, the Court concluded that faithful adherence to constitutional principles would not tolerate the absence of a search warrant.¹⁴²

There are three possible interpretations of the Court's holding in this case.¹⁴³ First, *McDonald* can be seen as a condemnation of the officers' presence in the locked common area as a violation of the defendant's Fourth Amendment right to privacy. Second, looking only to the language of the Court's opinion, *McDonald* can be seen as merely condemning the government's failure to secure a warrant given the circumstances of the case.¹⁴⁴ Finally, *McDonald* can be seen as a condemnation of the officers' violent entry into a locked building.¹⁴⁵

137. *McDonald v. United States*, 335 U.S. 451 (1948).

138. *Id.* at 453.

139. *Id.*; *id.* at 457-58, 460-61 (Jackson, J., concurring).

140. *Id.*

141. *Id.* at 455 (Douglas, J., for the Court).

142. *Id.* at 456.

143. See WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 9.1(b) (3d ed. 2000) ("[A] majority of the Court never responded specifically to the government's argument that *McDonald* could not complain of the police intrusion into his landlady's portion of the premises . . .").

144. The following passage is illustrative:

We will not assume that where a defendant has been under surveillance for months, no search warrant could have been obtained . . . Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers heard the adding machine and, at the latest, when they saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant.

Justice Jackson explained the Court's holding in this first manner in his concurring opinion.¹⁴⁶ His opinion constitutes the best reading of this case because it explains the Court's holding in a way that makes it both internally consistent and harmonious with the Supreme Court's Fourth Amendment jurisprudence. Consequently, the Supreme Court should recognize Justice Jackson's concurrence as authoritative and should recognize a tenant's expectation of privacy within the locked common areas of an apartment building as legitimate.

Justice Jackson saw the case before the Court as raising the issue of whether police officers violated the defendant's Fourth Amendment right to privacy and security when they entered the locked hallway from which they observed the defendant's illegal activity.¹⁴⁷ He concluded that "each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry."¹⁴⁸ Justice Jackson explained that a tenant's constitutionally protected interests should not vanish merely because the unlawful breaking and entering comes at the hands of government agents.¹⁴⁹ This rationale applies with equal force in the setting of the locked common areas of apartment buildings. The only difference between the facts presented in *McDonald* and the controversy under discussion here is that one setting was a rooming house while the other is an apartment building.¹⁵⁰ As such, courts should recognize tenants' expectations of privacy within the locked common areas of their apartment buildings.

An alternative reading of *McDonald* views that case as merely condemning the government agents' failure to secure a warrant where it was practical for them to do so. This reading is unsatisfactory, however, because it does not comport with the Supreme Court's holdings

McDonald, 335 U.S. at 454-55.

145. See, e.g., *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966) (distinguishing *McDonald* on the basis that the police officers' entry in that case was violent, whereas the entry in the case at bar was peaceful).

146. *McDonald*, 335 U.S. at 458 (Jackson, J., concurring).

147. *Id.* at 458-59 (Jackson, J., concurring) (focusing on the defendant's privacy interests in the hallway and not solely within the four corners of his room).

148. *Id.* at 458; see also *id.* at 459 (noting that the police "were guilty of breaking and entering — a felony in law and a crime far more serious than the one they were engaged in suppressing").

149. See *id.* at 458-59.

150. See *infra* Section II.B (arguing that the Fourth Amendment is violated regardless of whether police officers conduct a search or seizure within the locked common area of an apartment building, as in *United States v. Barrios-Moriera*, 872 F.2d 12 (2d Cir. 1989), or eavesdrop on conversations taking place within an apartment, as in *United States v. Eister*, 567 F.2d 814 (8th Cir. 1977)).

in other Fourth Amendment cases. In *McDonald*, the Court declined to expressly consider whether the police officers' entry into the locked common areas of the rooming house violated the defendant's right to privacy.¹⁵¹ Instead, the Court rested its opinion on the absence of a search warrant, but it failed to state where the search went wrong.¹⁵² This approach begs the question of whether government agents violated the defendant's rights by their presence in the hallway. If, as the government contended, the agents violated only the landlady's Fourth Amendment rights by entering the locked building,¹⁵³ and if the hallway is to be considered a public place from a tenant's perspective,¹⁵⁴ then *McDonald* should have had no standing to raise a constitutional complaint.

The Fourth Amendment has never required a law enforcement officer to avert his eyes when passing by a home.¹⁵⁵ This principle has been interpreted broadly, so that even when government agents pass by a home in an unusual manner, so long as there is a public right to be there, no constitutional complaint will be heard.¹⁵⁶ There is no question that, in this case, the officers in the hallway observed the defendant engaged in illegal activity.¹⁵⁷ Furthermore, it is well settled that an officer has the right to arrest a person without a warrant for a crime committed in his presence.¹⁵⁸ If the officers did not violate the defendant's Fourth Amendment rights by their presence in the hallway, then their subsequent seizure of the defendant's gambling materials should have been justified under the plain view doctrine,¹⁵⁹ as the

151. *McDonald*, 335 U.S. at 454.

152. *Id.* at 457 (Jackson, J., concurring).

153. *McDonald*, 335 U.S. at 454.

154. *See, e.g.*, *United States v. Penco*, 612 F.2d 19, 25 (2d Cir. 1979); *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968).

155. The Court's approach here is clear:

The Fourth Amendment . . . has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

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

156. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445 (1989) (holding that police observation of a greenhouse from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that police observation of a backyard from an airplane flying at an altitude of 1,000 feet did not violate the defendant's reasonable expectation of privacy).

157. *McDonald*, 335 U.S. at 453.

158. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 592 (1980); *United States v. Watson*, 423 U.S. 411, 440 (1976) (Marshall, J., dissenting); *Draper v. United States*, 358 U.S. 307, 316 (1959) (Douglas, J., dissenting); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925).

cash, adding machines, and gambling slips were clearly visible in the room.¹⁶⁰

The language of the opinion also seems to indicate that had the landlady independently admitted the officers, the defendant would have had no valid constitutional complaint.¹⁶¹ This conclusion seems inconsistent with the lack of a warrant as the sole basis for the Court's opinion; even if the officers had obtained permission, they still would have failed to obtain a warrant where it was practical for them to do so. A narrow reading of *McDonald* is further undermined in light of the Supreme Court's declaration that "the reasonableness of a search does not depend upon the practicability of obtaining a search warrant."¹⁶² Taken together, these factors indicate that the holding in *McDonald* must be seen as embracing more than a condemnation of the government's failure to obtain a warrant in this particular case.

Other courts agree that *McDonald* is broader than a mere condemnation of the government's failure to get a warrant, but they seek to limit that case to a condemnation of violent police entry into the locked common areas of apartment buildings or rooming houses.¹⁶³ A distinction on this basis, however, is improper. If government agents violated *McDonald*'s constitutionally protected expectation of privacy and security by violently entering the locked common areas, it is unclear why these same interests would not be violated if the officers enter through guile as in *Carriger*. Likewise, if a tenant relies upon the privacy and security offered by a locked door, it is hard to imagine that he will be concerned about whether police officers breach these interests by blowing a hole in the door or by sneaking through it when no one is looking. It is the *presence* of a trespassing government agent that is of concern here, and not the manner in which the agent came to be on the premises. This logic is especially clear when one considers that even the law of criminal trespass and burglary does not require force or violence; rather all that is required is unlawful entry by any

159. See *Horton v. California*, 496 U.S. 128, 135-36 (1990) ("[A]n object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion") (internal citations and quotations omitted).

160. *McDonald*, 335 U.S. at 453.

161. *Id.* at 454.

162. *Chimel v. California*, 395 U.S. 752, 771 (1969) (citing *United States v. Rabinowitz*, 339 U.S. 56 (1950)).

163. See, e.g., *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966) (distinguishing *McDonald* from police entry into locked common areas of apartment complexes by claiming that the basis for the *McDonald* holding was that the police officers did not enter in a peaceful manner).

means.¹⁶⁴ Consequently, the argument for drawing a constitutional distinction based upon whether the government agents breached a locked door through violence or through guile should be rejected.

It is no answer to respond that the law already draws a distinction based on a government agent's manner of entry. While it is well settled that no Fourth Amendment interest is implicated if police officers are admitted to the common areas at the invitation of the landlord or another tenant,¹⁶⁵ the issue of illegal police entry is quite different. This distinction is justified both in terms of a tenant's subjective expectation of privacy and the reasonableness of that expectation.¹⁶⁶ A tenant must expect that other tenants or the landlord can and will admit other people into the common areas of his apartment building.¹⁶⁷ The same cannot be said for a tenant's expectation that police officers will break and enter into the common areas of his apartment building.¹⁶⁸ With regard to expectations that society is prepared to recognize as reasonable,¹⁶⁹ the Supreme Court has stated that persons who share areas with others "assume the risk" that the others may permit police officers to look inside.¹⁷⁰ This limitation seems eminently reasonable. On the other hand, society should be prepared to recognize as reasonable a tenant's expectation that government agents are not working surreptitiously to circumvent their security systems.

B. *The Supreme Court's Commitment to Protecting Privacy Near the Home*

The Supreme Court's commitment to protecting privacy interests in and around the home calls for an interpretation of the Fourth Amendment that protects tenants within the locked common areas of their apartment buildings from unauthorized, warrantless searches. The Court has, for instance, read the Fourth Amendment to protect

164. See, e.g., DEL. CODE ANN. tit. 11, § 829(e) (2001) ("A person 'enters' upon premises when the person introduces any body part or any part of any instrument, by whatever means, into or upon the premises.").

165. See, e.g., *United States v. Matlock*, 415 U.S. 164, 171 (1974) ("[Our] cases at least make it clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over . . . the premises . . ."); *United States v. Taylor*, 248 F.3d 506, 512 (6th Cir. 2001) (making clear that there is no Fourth Amendment violation where police gain entry to locked common areas through the invitation of another tenant).

166. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

167. See, e.g., *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring).

168. *Id.*

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

170. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

individuals' privacy interests within the curtilage¹⁷¹ of their private homes.¹⁷² In fact, the curtilage has been considered "part of home itself for Fourth Amendment purposes."¹⁷³ Consequently, the Fourth Amendment protects individuals' privacy expectations within the curtilage itself.¹⁷⁴ There are, of course, exceptions, so that there is no violation where a police officer comes "upon the land in the same way that any member of the public could be expected to do, as by taking the normal route of access along a walkway or driveway or onto a porch."¹⁷⁵ The case is different where an exclusionary fence protects the curtilage and officers breach this fence to conduct surveillance of persons entering and leaving a house.¹⁷⁶

The Court's curtilage doctrine is helpful in the locked common area context for three reasons. First, it underscores the Supreme Court's special commitment to protecting privacy interests in close proximity to the home. Second, it demonstrates that the Fourth Amendment's protection of the area surrounding the home is not limited to preventing officers from peering into the home; rather it is aimed at protecting "the intimate activity associated with the sanctity of a man's home and the privacies of life."¹⁷⁷ Third, it highlights the inequities of the majority approach. Those who happen to live in private houses, surrounded by private property that falls within the curtilage of these houses, enjoy the Fourth Amendment's protection of their privacy.¹⁷⁸ Those who live in multi-unit apartment buildings, on the other hand, are stripped of their Fourth Amendment rights by virtue of the style of housing they have chosen, or have been forced, to

171. "Curtilage" is defined as "the land immediately surrounding and associated with the home," in *Oliver v. United States*, 466 U.S. 170, 180 (1984), and as "[t]he land or yard adjoining a house, usu. within an enclosure," in BLACK'S LAW DICTIONARY 389 (deluxe 7th ed. 1999).

172. *Oliver*, 466 U.S. at 180. In *California v. Ciraolo*, 476 U.S. 207, 213 (1986), the Supreme Court noted that while the curtilage was within the Fourth Amendment's protection, all government observation of that area is not necessarily barred by the Fourth Amendment. Rather, "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* In this case, observation from an airplane was likened to passing by a home on a public thoroughfare. *Id.*

173. *Oliver*, 466 U.S. at 180 ("Thus, courts have extended Fourth Amendment protection to the curtilage.").

174. See LAFAVE ET AL., *supra* note 143, § 3.2(c) (pointing out that even "entry of [a hallway in the interior of a single family dwelling] is a search"). The resulting syllogism is straightforward: The curtilage is considered part of the home. Entry into a part of the home constitutes a search for purposes of the Fourth Amendment. Therefore, entry into the curtilage is also a search for purposes of the Fourth Amendment.

175. *Id.*

176. See, e.g., *United States v. Van Dyke*, 643 F.2d 992, 994-95 (4th Cir. 1981).

177. *Oliver*, 466 U.S. at 180 (internal citations and quotations omitted).

178. *Id.*

adopt.¹⁷⁹ That is, government agents may not, without a warrant, enter the area “immediately surrounding and associated with the home”¹⁸⁰ if that home is a single-unit residence, but the majority of circuits permit them to enter the area “immediately surrounding and associated with the home” if that home is located within a locked apartment building.¹⁸¹

The reasoning of one of the Court’s latest significant Fourth Amendment cases, *Kyllo v. United States*,¹⁸² also carries great weight here. At issue in this case was whether governmental use of a thermal-imaging device to detect relative amounts of heat within a private home amounted to a search for purposes of the Fourth Amendment.¹⁸³ The Court held that the use of such a device without a warrant violated the Fourth Amendment and refused to allow government technology to intrude upon citizens’ privacy interests.¹⁸⁴ This holding “assure[d] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted” and interposed a neutral and detached magistrate between citizens and the desires of the police.¹⁸⁵

Although the Court framed its holding as imposing limitations on governmental use of technology that is not in common public use,¹⁸⁶ the *Kyllo* opinion must be seen as embracing more. The Court took “the long view, from the original meaning of the Fourth Amendment forward,”¹⁸⁷ stepping in to eliminate a significant threat to the privacy of the home posed by advancing technology. In the majority of circuits that have addressed the locked common area question, this privacy interest is threatened to an even greater extent by another feature of

179. See, e.g., *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (holding that “the common halls and lobbies of multi-tenant buildings are not within an individual tenant’s zone of privacy even though they are guarded by locked doors”).

180. *Oliver*, 466 U.S. at 180.

181. See, e.g., *Holland*, 755 F.2d at 255.

182. 533 U.S. 27 (2001).

183. *Kyllo*, 533 U.S. at 29 (holding that “the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment”). In this case, government agents, suspicious that marijuana was being grown in the defendant’s home, used a thermal imaging device to scan the home to determine whether the heat emanating from the home was consistent with the use of high intensity lamps typically used to grow marijuana indoors. *Id.* at 29. On the basis of this scan, the agents obtained a search warrant for the defendant’s home, and, upon executing this warrant, they found over 100 marijuana plants. *Id.* at 30. The defendant moved to suppress this evidence, claiming that the agents violated his Fourth Amendment rights when they scanned his home. *Id.*

184. *Id.* at 40.

185. *Id.* at 34.

186. *Id.* at 40.

187. *Id.*

American society — large, multi-unit apartment complexes subject to discretionary searches by police officers. In these types of cases, government officers do not just passively scan residences from a public street; instead, they physically trespass¹⁸⁸ within private, limited-access buildings in hopes of finding contraband or other evidence of wrongdoing.¹⁸⁹ Tenants must worry, not that an officer is scanning their homes from across the street,¹⁹⁰ but that an officer may be eavesdropping outside their doors or working to circumvent their security systems.¹⁹¹

Taken together, these factors weigh heavily in favor of recognizing tenants' expectations of privacy within the locked common areas of their apartment buildings. The privacy and security interests an individual has in those areas close to the home do not vanish merely because that person lives in an apartment complex.¹⁹² Consequently, courts should make room in their Fourth Amendment jurisprudence to protect these interests where tenants have taken precaution to exclude unauthorized persons from the common areas of their apartment buildings.

III. A BROAD INTERPRETATION OF THE FOURTH AMENDMENT IS MOST CONSISTENT WITH THE AMENDMENT'S HISTORY AND THE FRAMERS' INTENTIONS

Interpreting the Fourth Amendment in light of the intent of its Framers and with an eye toward the history surrounding its adoption demands that the protections embodied within the Amendment be extended to cover the locked common areas of apartment buildings. The Framers designed the provisions of the Fourth Amendment to safeguard privacy and limit the discretion of the police,¹⁹³ but the rule

188. See, e.g., *McDonald v. United States*, 335 U.S. 451, 454 (1948) (noting government acknowledgment that its officers' actions constituted trespass); *United States v. Conti*, 361 F.2d 153, 157 (2d Cir. 1966) (observing that even peaceful entry into locked common areas constitutes a technical trespass) (citing several cases for this proposition).

189. See, e.g., *United States v. Barrios-Moriera*, 872 F.2d 12, 13-14 (2d Cir. 1989).

190. See *Kyllo*, 533 U.S. at 30.

191. See, e.g., *United States v. Carriger*, 541 F.2d 545, 548 (6th Cir. 1976).

192. See, e.g., *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) (“[E]ach tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.”); *State v. Di Bartolo*, 276 So. 2d 291, 294 (La. 1973) (“The fact that the location where the arrest took place was a hallway, not an integral part of the apartment which the defendant was visiting, does not vitiate the defendant’s right to reasonably expect privacy from government intrusion.”).

193. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 580, 601 (1999); see also Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1726 (1996) (“[T]he historical record suggests that objections

adopted by the majority of circuits is inconsistent with the history of the Fourth Amendment and the Framers' intent.¹⁹⁴

Although there is little agreement about how much weight should be given to the Framers' intentions, most scholars agree that it should play at least some role in constitutional interpretation.¹⁹⁵ The Supreme Court has offered some guidance as to the role history and intent are to play in the interpretation of the Fourth Amendment, stating that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted."¹⁹⁶

An examination of the Framers' primary concerns underlying their opposition to general warrants helps to inform this inquiry. The protections embodied in the Fourth Amendment were crafted, in large part, in response to the Framers' distasteful experience with writs of assistance,¹⁹⁷ a Colonial term for broad and vaguely worded general warrants authorizing, for example, the search of "suspected places."¹⁹⁸ These writs allowed government officials to search any private place at

to general warrants and general searches alike rested upon broad concerns about protecting privacy, property, and liberty from unwarranted and unlimited intrusions.").

194. See *supra* Section I.B (discussing the rule set out by a majority of the circuits that permits police officers to search locked common areas without a warrant).

195. Davies, *supra* note 193, at 734. The second Justice Harlan expressed this view well:

Even assuming ambiguity as to the intent of the Framers, it is common sense and not merely the blessing of the Framers that explains this Court's frequent reminders that: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

Williams v. Florida, 399 U.S. 78, 123-24 (1970) (Harlan, J., dissenting) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)); see also, Richard B. Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 Nw. U. L. REV. 1435, 1453 n.86 (1984) (noting that most jurists who dismiss the importance of the Framers' intentions retain "some conception of the framers' intent plays a role in [their] general approach to constitutional interpretation"); William A. Aniskovich, Note, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1312, 1322 (1989) (arguing that the Supreme Court's reliance on, and deference to, the Framers' intent suggests that intent must play at least some role in interpreting the Bill of Rights). But see Davies, *supra* note 193, at 747 ("The reality of deep change since the framing means that the original meaning generally cannot directly speak to modern issues.").

196. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

197. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-78 (1937); see also Mark R. Killenbeck, *Legal History: The Qualities of Completeness: More? or Less?*, 97 MICH. L. REV. 1629, 1637 (1999) (reviewing *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS* (Neil H. Cogan ed. 1997)) ("The Court has stressed, for example, that '[t]he writs of assistance . . . were the principle grievance against which the fourth amendment was directed.'").

198. Davies, *supra* note 193, at 558, 561 (noting that "general warrants" also referred to warrants issued without sworn complaints or to those issued without an adequate showing of cause).

will,¹⁹⁹ which often resulted in the “abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people’s personal belongings without warrants issued by magistrates.”²⁰⁰ Opponents vigorously protested these writs as illegal,²⁰¹ and denounced them as “the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book,”²⁰² because they placed “the liberty of every man in the hands of every petty officer.”²⁰³ The colonists did not react well to this encroachment on their liberty, and protests, riots, and refusals to comply with the writs followed with regularity.²⁰⁴ The reaction against these writs of assistance was so strong, and the opposition to them so great, that the Framers found it necessary to outlaw them by direct constitutional prohibition.²⁰⁵

A constitutional ban on general warrants is not unique to the United States Constitution. Rather, the Fourth Amendment’s prohibitions, like most of the first eight amendments, were recasts of provisions already existing within state constitutions.²⁰⁶ One such example was the Pennsylvania Constitution, whose search and seizure provision was itself a restatement of the common law, prudently inscribed in the supreme legal document of the state as “a solemn veto against this powerful engine of despotism.”²⁰⁷ The Framers acted similarly on the national level, entering a solemn veto against unreasonable searches and seizures in the United States Constitution.²⁰⁸ Their decision to place this veto in the Constitution is significant because the notion of a constitution is colored with systemic presumptions of permanence and continuity.²⁰⁹

199. LASSON, *supra* note 197, at 53.

200. *Katz v. United States*, 389 U.S. 347, 367 (1967) (Black, J., concurring).

201. LASSON, *supra* note 197, at 58-59; *see also* Davies, *supra* note 193, at 588 (“[A] general warrant was clearly deemed illegal by the framing era . . .”).

202. LASSON, *supra* note 197, at 59 (quoting James Otis).

203. *Id.* at 60.

204. *Id.* at 65-77.

205. *See* Davies, *supra* note 193, at 609-11, 613; Killenbeck, *supra* note 197, at 1637 (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1988)).

206. *Minnesota v. Carter*, 525 U.S. 83, 93 (1998) (Scalia, J., concurring); *see also* Davies, *supra* note 193, at 693 (“The historical record of the framing of the Fourth Amendment shows that it was essentially a replay of the framing of the state provisions.”).

207. Davies, *supra* note 193, at 613:

The whole [search and seizure provision] was nothing more than an affirmation of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions *against them* only of modern date . . . it was thought prudent to enter a *solemn veto* against this powerful engine of despotism. (quoting *Wakely v. Hart*, 6 Binn. 315, 318 (Pa. 1814)).

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

209. Davies, *supra* note 193, at 734.

The rule adopted by the majority of the circuits is inconsistent with this veto and flies in the face of one of the major concerns motivating the Framers to ban general warrants — the desire to protect the sanctity of homes and secure them against government search.²¹⁰ The prohibition on search and seizure was an affirmation of the common law²¹¹ and must be viewed in light of the special status accorded to the home at common law.²¹² The Supreme Court recognizes this fact²¹³ and holds that privacy expectations are at their highest in those areas close to private homes.²¹⁴ The locked common areas of an apartment building are immediately adjacent to private homes and are unavailable to the general public. As such, tenants' privacy expectations within these areas merit recognition as legitimate interests that deserve a high level of constitutional protection.²¹⁵

It is important to note that the argument for recognizing constitutionally protected privacy interests within locked common areas does not depend upon viewing common hallways as part of tenants' homes.²¹⁶ Rather, it depends upon a consideration of the privacy interests the Framers sought to protect, viewed in the context of modern living conditions and in light of the privacy interests of tenants in those areas in close proximity to their homes. The Massachusetts' Court of Appeals considered the scope of a person's right to privacy and security in those areas surrounding the home and concluded that there is no reason why those rights should not apply in the common hallways

210. *Id.* at 601; Cloud, *supra* note 193, at 1726.

211. *See supra* notes 206-207.

212. *See Davies, supra* note 193, at 603 (stating that at common law the house had a unique status and was a sacrosanct interest tied to the entitlement to be left alone).

213. In the oft-quoted words of William Pitt:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!

Miller v. United States, 357 U.S. 301, 307 (1958) (quoting William Pitt, Earl of Chatham) (noting the importance of the home at common law).

214. *See, e.g., Dow Chem. Co. v. United States*, 476 U.S. 227, 237 n.4 (1986) (declining to recognize a privacy interest in an industrial area in part because "this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened"); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (noting that privacy expectations are most heightened in those areas intimately linked to the home).

215. *See, e.g., State v. Di Bartolo*, 276 So. 2d 291, 294 (La. 1973) (recognizing a tenant's Fourth Amendment "right to reasonably expect privacy from government intrusion" within the hallways of his apartment building); *Commonwealth v. Goldoff*, 510 N.E.2d 277, 280 (Mass. App. Ct. 1987).

216. *But cf. United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) (suggesting that tenants have no legitimate privacy interest in locked common areas of apartment buildings because the Supreme Court has not given the status of "home" to common areas).

of apartment buildings that tenants “have collectively secured from the general public by a locked door.”²¹⁷

Indeed, it is difficult to come up with a good reason for depriving tenants of their privacy and security interests. Tenants in a multi-unit apartment building have an expectation of security and privacy from trespassers,²¹⁸ and to contend otherwise is to ignore the reality of a locked door guarding the common areas. Furthermore, the Supreme Court has recognized apartments as “homes” for Fourth Amendment purposes,²¹⁹ and the locked common areas of apartment buildings, regardless of their quality or location, are not public thoroughfares.²²⁰ They are, instead, private property reasonably secured against the entry of unauthorized individuals. The Framers would, no doubt, have been shocked at the suggestion that the Fourth Amendment permits police officers to trespass into the locked entryway of a private, single family house,²²¹ and yet a majority of the circuits hold that similar police action loses all significance as soon as another family or tenant is

217. In *Goldoff*, the issue before the court was whether an assault that occurred within the common hallway of the victim’s apartment building took place within his “dwelling house.” *Goldoff*, 510 N.E.2d at 278. In reaching its conclusion, the court noted that the purpose of burglary statutes was “to prohibit that conduct which violates a person’s right of security in a place universally associated with refuge and safety, the dwelling house.” *Id.* at 280. The court stated:

When this historical [common law] right to security in one’s place of habitation is considered in the context of contemporary multi-unit residential structures, we can think of no reason why that right should not apply to tenants who reach their apartment units by a common hallway which they have collectively secured from the general public by a locked door This reasoning applies with equal or greater force when the common areas of an apartment building (or condominium complex) are concerned.

Id. (internal citations and quotations omitted). While the holding in *Goldoff* pertained to a state burglary statute, the court’s reasoning as to a tenant’s privacy and security interests within the locked common areas of an apartment building is strongly probative here.

218. See *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring). While this expectation is not absolute, it is still of significant value. See *infra* notes 233-238 and accompanying text.

219. See, e.g., *Segura v. United States*, 468 U.S. 796, 810-13 (1984) (considering the defendant’s apartment to be his home for purposes of the Fourth Amendment).

220. *Perkins v. United States*, 432 F.2d 612, 615 (D.C. Cir. 1970) (Bazelon, J., dissenting) (“[T]he Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction.”); see also *LAFAYETTE ET AL.*, *supra* note 143, § 3.2(c) (pointing out that “entry of [a hallway in the interior of a single family dwelling] is a search”).

221. See *Wilson v. Layne*, 526 U.S. 603, 625 (1999) (describing protection of the home as the core of the Fourth Amendment); *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”); *Weeks v. United States*, 232 U.S. 383, 394 (1914) (“[T]he Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction.”); see also *LAFAYETTE ET AL.*, *supra* note 143, § 3.2(c) (pointing out that “entry of [a hallway in the interior of a single family dwelling] is a search”).

involved.²²² The respect due the home and the area surrounding it demands more protection than this.

The rule adopted by the majority of the circuits is also at odds with another major factor motivating a constitutional ban on general warrants — the Framers' hostility to conferring discretionary search authority on common police officers.²²³ The Framers were concerned about the use of general warrants, especially as used and abused by customs officials.²²⁴ Consequently, they sought to interpose a neutral magistrate between the zealous police officer and the citizen to ensure that the citizen's privacy was disturbed only when the police officer's suspicions were supported by probable cause.²²⁵ They did so because "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted."²²⁶ The Supreme Court recognizes this fact and has been firm in maintaining that the Fourth Amendment is more than a mere formality and that the presence of a search warrant in the hands of the police serves an important purpose.²²⁷ Nevertheless, the majority of circuits have dismissed this high function where locked apartment buildings are concerned and have vested warrantless officers with discretionary authority to search the locked common areas of apartment complexes at will.²²⁸ The Supreme Court should reject this narrow interpretation of the Fourth Amendment and, in its place, adopt a construction that is consistent with the aims of the Framers and the history of the Amendment.

IV. SOUND PUBLIC POLICY IN THE LOCKED COMMON AREA CONTEXT

Extending the protections of the Fourth Amendment to cover the locked common areas of apartment buildings is also desirable as a matter of public policy. A broad interpretation is needed to protect tenants' legitimate privacy interests and is necessitated by a respect for

222. See, e.g., *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999); *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. Holland*, 755 F.2d 253, 255-56 (2d Cir. 1985).

223. *Davies*, *supra* note 193, at 580, 583 (noting a "historical condemnation[] of officers exercising discretionary authority").

224. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-71 (1995) (O'Connor, J., dissenting) (discussing the Framers' concerns).

225. See *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (discussing the motivations behind the Fourth Amendment).

226. *Id.*

227. *Id.*

228. See *supra* Section I.B.

the rule of law. Furthermore, broad protections provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.²²⁹ Justice Harlan urged the Court not to “merely recite . . . risks without examining the desirability of saddling them upon society . . . without at least the protection of a warrant requirement.”²³⁰ Taking this counsel into consideration, it is undesirable for government officers, governed by nothing but their own discretion, to enter locked common areas through trickery, trespass, or other disingenuous means, to peer down hallways, peek under doors, and eavesdrop outside tenants’ apartments.

Extending the protections of the Fourth Amendment to the locked common areas of apartment buildings is needed to protect the legitimate privacy interests of tenants in multi-unit apartment buildings. Many courts disagree with this assertion, however, finding the idea of a reasonable expectation of privacy within the common areas of a building to be counterintuitive.²³¹ From this perspective, “[a]n expectation of privacy necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions.”²³² As no single tenant has an absolute right to exclude others from the common areas, these courts see little reason for drawing artificial lines that only serve to keep police officers out.

Courts should not, however, immediately dismiss tenants’ privacy interests because they are not absolute.²³³ In fact, arguing that locked common areas, open to use by other tenants and their guests, offer no real shield of privacy or protection ignores reality.²³⁴ The facts of the cases cited in this Note reveal that tenants do, in fact, rely on the privacy and security of locked common doors and, consequently, are apt to leave their doors ajar,²³⁵ to deposit various private items in desig-

229. It is also arguable that this construction of the Fourth Amendment is needed to ensure that both rich and poor are equally protected by the Amendment. Poor tenants, especially minorities, are much more likely to live in neighborhoods subject to close police scrutiny and are, therefore, more likely to feel the sting of unbridled police discretion. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 678 (1994).

230. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

231. See, e.g., *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (“[I]t is odd to think of an expectation of ‘privacy’ in the entrances to a building.”).

232. *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977).

233. See *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) (“[E]ach tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.”); see also *supra* notes 102-122 and accompanying text.

234. See, e.g., *Eisler*, 567 F.2d at 816 (“The locks on the doors to the entrances of the apartment complex were to provide security to the occupants, not privacy in common hallways.”).

235. See, e.g., *United States v. Carriger*, 541 F.2d 545, 547-48 (6th Cir. 1976).

nated storage areas,²³⁶ or to leave items stored at the end of hallways or stairwells.²³⁷ Courts should recognize that many Americans do not live in single-family homes²³⁸ and should interpret the Constitution to protect these individuals' privacy interests against uninvited or unwarranted intrusions.

In addition to a concern for protecting tenants' legitimate expectations of privacy, a due respect for the rule of law demands that the Court recognize tenants' privacy interests within the locked common areas of their apartment buildings. Since the inception of this nation, Americans have taken pride in the fact that the American system of government embodies the rule of law, and not of men.²³⁹ This principle is jeopardized, however, when courts conclude that, in the interest of efficient law enforcement, police officers may violate the law to secure arrests and convictions.²⁴⁰ In fact, Justice Brandeis cautioned that the very existence of ordered government is endangered when the government fails to adhere faithfully to its own laws.²⁴¹ He further warned that when "the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."²⁴²

For too long, courts have, in the name of safety and efficiency, permitted police officers to enter and search the locked common areas of apartment complexes without the protection of a warrant. They reason that permitting police to conduct discretionary searches of locked common areas strikes the optimal balance, for it gives tenants beneficial police protection within these areas, while at the same time preserving the privacy of their actual homes, that is, their apart-

236. See, e.g., *United States v. Hawkins*, 139 F.3d 29, 31 (1st Cir. 1998).

237. See, e.g., *United States v. McCaster*, 193 F.3d 930, 932 (8th Cir. 1999).

238. See, e.g., Judy Stark, *Old Favorite, New Location*, ST. PETERSBURG TIMES, Sept. 7, 2002, at 1F ("One-third of all Americans rent their housing, and 15 percent of all households live in apartments, the National Multi Housing Council says.").

239. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

240. See *supra* notes 54, 188 (noting that even courts that uphold warrantless searches of locked common areas acknowledge that the police officers' actions are illegal).

241. In Justice Brandeis's words:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

242. *Id.* ("To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.").

ments.²⁴³ It is indeed laudable that courts have stopped short of stripping tenants of all their privacy interests, but this rationale alone cannot be seen as a justification for stripping tenants of their privacy and security interests within the locked common areas of their apartment buildings.²⁴⁴ It is no answer to a constitutional complaint to respond that a particular government action results in greater police protection for society. Justice Douglas warned that this kind of compromise is detrimental to the privacy interests protected by the Fourth Amendment and stated that a strict construction of the Fourth Amendment is needed to protect citizens from the onslaught of a government concerned predominately with efficiency and order.²⁴⁵ A meaningful application of the Fourth Amendment reveals that tenants do have an expectation of privacy that society should recognize as reasonable.²⁴⁶ The Supreme Court should heed Justice Douglas' warning and remain vigilant in jealously protecting citizens' Fourth Amendment rights.

Finally, interpreting the Fourth Amendment to protect tenants' privacy interests is compatible with the Supreme Court's concern with providing "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment."²⁴⁷ Extending the scope of the Fourth Amendment to cover the locked common hallways of an apartment complex is not unduly restrictive because officers remain free to enter and search the locked common areas of apartment complexes with authorization from a tenant, landlord, or magistrate.²⁴⁸ Requiring police officers to obtain permission

243. *United States v. Holland*, 755 F.2d 253, 256 (2d Cir. 1985).

244. In any question of constitutional interpretation in light of countervailing social interests, it is essential to remember that "grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

245. In Justice Douglas's words:

[T]he concepts of privacy . . . enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on. That is why a 'strict construction' of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored.

United States v. White, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting).

246. See, e.g., *McDonald v United States*, 335 U.S. 451, 458-59 (1948) (Jackson, J., concurring); *United States v. Carriger*, 541 F.2d 545, 549-52 (6th Cir. 1976); see also *supra* Parts II, III.

247. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

248. Some assert that the warrant requirement serves little purpose because judges usually just rubber stamp search warrant applications. See, e.g., David B. Kopel & Paul H. Blackman, *The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment*, 18 *HAMLIN J. PUB. L. & POL'Y* 1, 42 (1996) (internal citations omit-

before passing through a locked door cannot be seen as any more unreasonable than the warrant requirement of the Fourth Amendment itself. Law enforcement needs are adequately served because police remain unaffected in "hot pursuit" cases²⁴⁹ and in other exigent circumstances.²⁵⁰

This rule is preferable to that adopted by a majority of the circuits because it lays down a clearly defined boundary line while at the same time protecting tenants' privacy interests. While other circuits boast that their rule is desirable because it is easy for officers to understand and apply,²⁵¹ it is unclear why a more protective rule would not be just as easy for police officers to comprehend. In fact, the rule to the contrary is quite simple. If a door is locked, a police officer must obtain permission or a warrant before he or she goes inside. Any officer in the field can comprehend this rule,²⁵² and its application would impede law enforcement efforts only where those efforts unreasonably interfered with constitutionally protected interests.

In short, society should not, as a matter of constitutional law and public policy, declare that tenants who choose to live in multi-unit apartment complexes, with the inherent loss of privacy that results from a mutual toleration of other tenants and their guests, consequently forfeit all legitimate claims to privacy in these common areas. The protections of the Fourth Amendment are stronger than that,²⁵³ and the Court ought not allow the constitutional protections that safeguard an individual's privacy and security to be overcome so easily.²⁵⁴

ted). The Supreme Court, however, has pointed out that the presence of a search warrant in the hands of the police serves an important purpose. *See McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

249. *See, e.g., United States v. Santana*, 427 U.S. 38, 42-43 (1976).

250. *See, e.g., United States v. Heath*, 259 F.3d 522, 533-34 (6th Cir. 2001) (holding that police officers' entry into the locked common areas of an apartment building without a warrant, permission or exigency violated the defendant's Fourth Amendment rights).

251. *See, for example, United States v. Holland*:

This rule . . . lays down a clearly-defined boundary line for constitutionally permissible police action, which is readily apparent to an officer in the field, without a need for counting apartments, analyzing common-hallway traffic patterns or interpreting the mental processes of a suspect relating to an area used in common with others.

755 F.2d 253, 256 (2d Cir. 1985) (internal citations omitted).

252. *Cf. Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). If police officers can understand this rule, there is no reason why they cannot understand the rule advocated for in this Note.

253. *See Katz v. United States*, 389 U.S. 347, 359 (1967) ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

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

CONCLUSION

This Note examines the various approaches taken by circuit courts in determining whether a tenant has a constitutionally protected privacy interest within the locked common areas of an apartment building and demonstrates that the resolution of this issue by the majority of circuits is unsatisfactory. It argues that while states undoubtedly have a legitimate interest in preserving order and ensuring safety within the locked common areas of apartment buildings, courts should not permit the government to accomplish these objectives by running roughshod over the Fourth Amendment.

This Note argues for a resolution of the deep circuit split in this area through the adoption of broad constitutional protections. It argues that Supreme Court precedent, the history of the Fourth Amendment, the intent of the Framers, and considerations of sound public policy all necessitate the recognition of a constitutionally protected privacy interest within the locked common areas of an apartment building. Finally, this Note argues that the manner of resolution advocated herein is superior to the approach taken by the majority of the circuits because it lays down clearly defined boundary lines to guide police behavior, while at the same time protecting tenants' legitimate privacy interests.