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## **United States v. Sweeney**

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MELISSA TOBACK

*United States v. Sweeney*

63 N.Y.L. SCH. L. REV. 345 (2018–2019)

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If the Fourth Amendment protects people, not places,<sup>1</sup> why shouldn't the resident of an apartment building enjoy the same expectation of privacy as the resident of a single-family home?<sup>2</sup> Our Founding Fathers "believed that freedom from government intrusion into one's home was a natural right . . . and fundamental to liberty."<sup>3</sup> When the Bill of Rights was drafted, there were no government-run police forces; rather, policing was the responsibility of the citizenry.<sup>4</sup> Accordingly, policing in the eighteenth and early nineteenth century did not give rise to the unreasonable government search and seizure concerns we have today.<sup>5</sup>

Modern applications of the Fourth Amendment would perplex those who drafted it.<sup>6</sup> Indeed, Fourth Amendment jurisprudence has morphed into a doctrine far beyond the purview of the Framers.<sup>7</sup> Privacy protections are antiquated, lagging behind as our world becomes increasingly non-private, and our judiciary remains reluctant to keep up with the times.<sup>8</sup> Fourth Amendment jurisprudence requires a flexible, evolving approach with the capacity to adapt,<sup>9</sup> yet courts have declined to account for modern living arrangements, undermining the individual privacy rights that the Fourth Amendment was designed to protect.

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1. *Katz v. United States*, 389 U.S. 347, 351 (1967). The Fourth Amendment provides:  

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

U.S. CONST. amend. IV.
  2. See Curtis H. Seal, Comment, *United States v. Mathews: Does a Dog Sniff in Common Areas of an Apartment Building Constitute a Search Subject to the Fourth Amendment?*, 39 AM. J. TRIAL ADVOC. 397, 417 (2015) ("The majority [of circuit courts] afford[] homeowners Fourth Amendment protection in areas immediately surrounding the home but do[] not afford the same protection to individuals whose homes are apartments.").
  3. Jason Swindle, *The History Behind the Fourth Amendment*, SWINDLE L. GROUP, P.C. (Mar. 21, 2013), <http://www.swindlelaw.com/2013/03/the-history-behind-the-4th-amendment>.
  4. Barry Friedman & Orin Kerr, *The Fourth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> (last visited Mar. 30, 2019).
  5. See *id.*
  6. *Id.*
  7. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 770 (2009).
  8. Stephen H. Sachs, *The Supreme Court's Privacy Precedent Is Outdated*, WASH. POST (Nov. 26, 2017), [https://www.washingtonpost.com/opinions/the-supreme-courts-privacy-precedent-is-outdated/2017/11/26/fe9d1dd0-cfb2-11e7-81bc-c55a220c8cbe\\_story.html?utm\\_term=.cd51d0cbcd7b](https://www.washingtonpost.com/opinions/the-supreme-courts-privacy-precedent-is-outdated/2017/11/26/fe9d1dd0-cfb2-11e7-81bc-c55a220c8cbe_story.html?utm_term=.cd51d0cbcd7b). But see *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (finding a reasonable expectation of privacy in historical cell-site location data).
  9. See *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) ("Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."); Sachs, *supra* note 8.

As of 2017, approximately thirty-six percent of U.S. households were renter-occupied, and sixty-one percent of those renters lived in multi-unit housing.<sup>10</sup> With apartment building construction at an all-time high, more Americans are expected to live in apartment buildings well into the foreseeable future.<sup>11</sup> In some areas, a lack of affordable housing has led to conditions of overcrowding, particularly among working-class and immigrant populations.<sup>12</sup> Yet courts have largely refused to afford apartment dwellers the right to remain entirely secure in their homes, free from illegal government searches and seizures, to the same extent as homeowners and single-family home renters.<sup>13</sup> While the U.S. Supreme Court has recognized that “the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,”<sup>14</sup> courts have nonetheless continued to treat apartment dwellers as less entitled to Fourth Amendment privacy protections.

In *United States v. Sweeney*, the United States Court of Appeals for the Seventh Circuit considered whether a warrantless intrusion and search of an apartment building’s common area violated the defendant’s Fourth Amendment rights.<sup>15</sup> In its analysis, the court recognized two different approaches for identifying unconstitutional government searches: the property-based approach, which determines whether the government has “physically occupied private property for the purpose of obtaining information”<sup>16</sup> without a warrant, and the privacy-based approach, which focuses on “whether the person challenging the [warrantless] search had a reasonable expectation

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10. See *Physical Housing Characteristics for Occupied Housing Units*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_17\\_1YR\\_S2504&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S2504&prodType=table) [<https://perma.cc/H6LH-EUZS?type=image>] (last visited Mar. 31, 2019). Approximately 34.5% of renter-occupied households resided in single-unit homes, 17.6% in homes with two to four units, 43.5% in dwellings with five units or more, and 4.5% in “mobile home[s] or other type of housing.” See *id.*
  11. See Justin Fox, *The Northeast Is Becoming Apartment Country*, BLOOMBERG (Mar. 29, 2019), <https://www.bloomberg.com/opinion/articles/2019-03-29/apartment-construction-is-booming-in-the-northeast> (stating that the U.S. has seen its biggest wave of apartment construction since the 1980s); Sam Frizell, *The New American Dream Is Living in a City, Not Owning a House in the Suburbs*, TIME (Apr. 25, 2014), <http://time.com/72281/american-housing> (“Americans are abandoning their white-picket fences, two-car garages and neighborhood cookouts in favor of a penthouse view downtown and shorter walk to work.”).
  12. Kirk Semple, *When the Kitchen Is Also a Bedroom: Overcrowding Worsens in New York*, N.Y. TIMES (Feb. 29, 2016), <http://www.nytimes.com/2016/03/01/nyregion/overcrowding-worsens-in-new-york-as-working-families-double-up.html>.
  13. See Megan Gordon, Note, *The Dog Days Should Be Over: The Inequality Between the Privacy Rights of Apartment Dwellers and Those of Homeowners with Respect to Drug Detection Dogs*, 92 N.D. L. REV. 661, 671 (2017) (“The protection of the Fourth Amendment varies depending on an individual’s living situation. Per case law, homeowners have been given more constitutional protection than their apartment dwelling counterparts concerning the area outside their door.”); Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. U. L. REV. ONLINE 64, 64 (2013) (noting the inconsistency created by the U.S. Supreme Court’s *Jardines* decision with respect to homes of all types).
  14. *United States v. Ross*, 456 U.S. 798, 822 (1982).
  15. 821 F.3d 893, 897 (7th Cir. 2016).
  16. *Id.* at 899 (quoting *United States v. Jones*, 565 U.S. 400, 404 (2012)).

of privacy in the location that was searched.”<sup>17</sup> The court ultimately found that neither approach gave rise to a Fourth Amendment violation: The defendant had neither a property interest nor exclusive possession of the area searched.<sup>18</sup>

This Case Comment contends that the *Sweeney* court erred when it ignored precedential case law that more appropriately addressed the Fourth Amendment’s underpinnings. First, the court improperly analyzed the defendant’s reasonable expectation of privacy by fixating on one element as dispositive, rather than considering the totality of the circumstances. Second, the court misclassified the common area as a public place, running afoul of Supreme Court and Seventh Circuit precedents. Finally, the court’s decision drastically diminishes apartment dwellers’ constitutional rights, opening the door—both literally and figuratively—for the government to unconstitutionally encroach on apartment dwellers’ privacy.

On December 23, 2013, Flannery’s Pub in Milwaukee, Wisconsin was robbed.<sup>19</sup> During its investigation, the Milwaukee Police Department interviewed the pub manager, who identified the robber as former employee Eugene Sweeney and provided the police with his address.<sup>20</sup> The court described Sweeney’s residence as follows:

The building contains six apartments, two on each of three floors. Sweeney’s apartment was on the second floor. The building has exterior doors at the front and rear that are usually closed and locked. In the back of the building is a common rear staircase that can be entered from the back of each apartment. Those stairs lead down to the first floor and on down to the basement.

At the bottom of the basement stairs to the left is an opening to a common area. Water heaters are lined up against the wall that runs along the staircase. Past those is a small crawl space underneath the stairs. To the right of the stairs is a shared laundry facility for the building tenants.<sup>21</sup>

That afternoon, the police went to Sweeney’s building. A detective and an officer proceeded through the front door, which was propped open, while another officer covered the back door, which was locked.<sup>22</sup> The detective and officer in the front went up to Sweeney’s second-floor apartment; Sweeney’s girlfriend answered and consented to a warrantless search.<sup>23</sup> Before the search could begin, the officer covering the back door radioed the others that he had spotted Sweeney and had taken him into custody.<sup>24</sup>

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17. *Id.* (citing *Florida v. Jardines*, 569 U.S. 1, 12–16 (2013) (Kagan, J., concurring)).

18. *Id.* at 900–03.

19. *Id.* at 897.

20. *Id.*

21. *Id.*

22. *United States v. Sweeney*, No. 14-CR-20, 2014 WL 2514926, at \*1 (E.D. Wis. June 4, 2014).

23. *Sweeney*, 821 F.3d at 897–98. Warrantless searches are per se unreasonable unless an exception to the warrant requirement applies. 68 AM. JUR. 2D *Searches and Seizures* § 14 (2017). Exceptions include: searches and seizures incident to the arrest, probable cause, exigent circumstances, consent, items in plain view, and special needs. *Id.*

24. *Sweeney*, 821 F.3d at 897–98.

While the detective then searched the apartment, the other officer went out its back door and down the rear staircase to the basement.<sup>25</sup> After turning left, the officer passed the series of water heaters and came upon the small crawl space under the stairs.<sup>26</sup> There, the officer recovered a black bag; when he opened it, he discovered a gun, magazine, and ammunition.<sup>27</sup>

In a pre-trial hearing, the magistrate judge, relying on recent Supreme Court decisions that breathed life into the Fourth Amendment's property-based approach, recommended suppression of the items discovered in the basement crawl space.<sup>28</sup> Noting that the basement crawl space was akin to curtilage,<sup>29</sup> a constitutionally protected area, the magistrate judge found that the police had trespassed when they searched the area without a warrant.<sup>30</sup> The government objected to the magistrate judge's recommendation, arguing that Sweeney lacked a reasonable expectation of privacy in the basement common area, and that even if he had an expectation of privacy, exigent circumstances justified the warrantless search.<sup>31</sup>

On review, the district court departed from the magistrate judge's recommendation, accepting the government's argument that the warrantless search of the basement crawl space did not violate Sweeney's Fourth Amendment rights.<sup>32</sup> The court reasoned that there is generally "no reasonable expectation of privacy in shared and common areas in multiple-dwelling residential buildings."<sup>33</sup> At trial, Sweeney was convicted and sentenced as an armed career criminal.<sup>34</sup>

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25. *Id.* at 898.

26. *Id.*

27. *Id.* The government initially argued during pre-trial motions that the girlfriend's consent to search the apartment extended to the basement, but it later abandoned this claim. *Sweeney*, 2014 WL 2514926, at \*2.

28. *Sweeney*, 2014 WL 2514926, at \*4, \*22. A magistrate judge is assigned to conduct hearings, after which she must enter a recommended disposition, and if appropriate, proposed findings of fact. FED. R. CIV. P. § 72(b)(1). "Within 14 days of being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." *Id.* § 72(b)(2). The district judge then determines if any part of the magistrate judge's disposition was properly objected to, and accepts, rejects, or modifies the recommended disposition. *Id.* § 72(b)(3).

29. Curtilage is "[t]he land or yard adjoining a house, usu[ally] within an enclosure. Under the Fourth Amendment, the curtilage is an area usu[ally] protected from warrantless searches." *Curtilage*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. *Sweeney*, 2014 WL 2514926, at \*20. The magistrate judge's recommendation applied the property-based theory and not the reasonable expectation of privacy theory, because once a Fourth Amendment violation has been identified under the property-based approach, "the defendant need not additionally demonstrate a reasonable expectation of privacy in the area." *Id.* at \*4.

31. *Id.* at \*2. The magistrate judge determined that the government had not met its burden to demonstrate exigent circumstances because it failed "to establish any emergency situation requiring the officers to immediately enter and search the basement area." *Id.* at \*6.

32. *See Sweeney*, 821 F.3d at 898.

33. *See id.* at 902 (citing *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012)).

34. *Id.* at 896. Sweeney was convicted of armed robbery under the Hobbs Act, brandishing a firearm during a crime of violence, and possessing a firearm as a felon. *Id.* The Hobbs Act prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce. 18 U.S.C. § 1951 (2017). Designation as

Sweeney appealed his convictions and sentence to the Seventh Circuit, contending that the district court erred when it denied his motion to suppress the firearm, which was key to all three convictions.<sup>35</sup> The court acknowledged that the application of the Fourth Amendment to apartment building common spaces has sparked much controversy in a post-*Jardines* world.<sup>36</sup> Nonetheless, the Seventh Circuit affirmed the district court's denial of the motion to suppress the firearm, allowing Sweeney's conviction to stand.<sup>37</sup>

The court first found no basis for a Fourth Amendment violation under the property-based theory.<sup>38</sup> Next, the court considered whether Sweeney had a reasonable expectation of privacy in the basement crawl space. Although the court acknowledged recent decisions that have found a reasonable expectation of privacy in apartment building common areas when the police intrude into the privacy of apartment interiors, it nonetheless distinguished Sweeney's case, contending that the search did not pose a "danger of intrusion into the protected privacy of an apartment interior," but rather into a common space shared by all tenants.<sup>39</sup> Thus, the court's holding turned on Sweeney's inability to exclude all others from the area searched.<sup>40</sup>

This Case Comment contends that the *Sweeney* court erred in finding that Sweeney did not have a reasonable expectation of privacy in the basement crawl space of his apartment building. First, the court failed to consider the totality of the circumstances when addressing the reasonable expectation of privacy inquiry, thus departing from binding precedent. Second, the court erred by effectively categorizing the basement crawl space as a public place, contrary to Supreme Court and Seventh Circuit precedent. Finally, the court's decision to place apartment building common

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an armed career criminal carries a mandatory minimum sentence of fifteen years. *Sweeney*, 821 F.3d at 904; see also § 924(e)(1).

35. *Sweeney*, 821 F.3d at 896–97.

36. *Id.* at 898. In *Jardines*, the Supreme Court found that the use of a narcotics dog to detect drugs from the porch outside a suspect's home without a warrant constituted a physical trespass, thus violating the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). The *Sweeney* court explained that prior to *Jardines*, it had upheld "warrantless police intrusions into shared spaces in apartment buildings," but after *Jardines* it has "held that bringing a police dog to sniff for drugs outside an apartment door" without a warrant violated tenants' Fourth Amendment rights. *Sweeney*, 821 F.3d at 898–99; see also Kyle Nelson, Comment, *Florida v. Jardines: A Shortsighted View of the Fourth Amendment*, 49 GONZ. L. REV. 415, 416 (2014) (arguing that the Court enforced a confusing Fourth Amendment jurisprudential standard by "using the older property-based conception of a search while leaving open the option to hold on privacy grounds when there is no physical intrusion").

37. *Sweeney*, 821 F.3d at 897.

38. *Id.* at 900–02. The court analyzed the relevant definitions of trespass and came to the conclusion that "to prove a claim of trespass, one must have possession of the property in question and the ability to exclude others from entrance onto or interference with that property." *Id.* at 899–900. The court further concluded that the basement was not within the curtilage of Sweeney's apartment, and thus did not give rise to the property-based theory as a basis for Fourth Amendment protection. *Id.* at 902. This Case Comment does not contest the court's application of the trespass or curtilage tests.

39. *Id.* at 902–03.

40. See *id.*

areas outside the scope of Fourth Amendment protection unduly dilutes the constitutionally afforded right to privacy of those who do not live in single-family homes.

First, the *Sweeney* court failed to employ a totality of the circumstances analysis to determine whether Sweeney demonstrated a reasonable expectation of privacy. Instead, the court treated as dispositive the fact that other tenants could enter and use the basement crawl space. Specifically, the court failed to consider how behavioral and social norms, as well as physical characteristics of the apartment building and common area, bear on the reasonable expectation of privacy inquiry.

In *Katz v. United States*, the Supreme Court made clear that the Fourth Amendment protects people, not places.<sup>41</sup> Justice Harlan's concurring opinion in *Katz* gave rise to the reasonable expectation of privacy test used today: (1) whether the individual exhibited a subjective expectation of privacy that (2) society is prepared to recognize as reasonable.<sup>42</sup> The Court has since maintained that no single factor controls the inquiry; rather, equal weight must be afforded to several factors, including "the uses to which the individual has put a location, and our societal understanding" that particular areas, like the home, deserve special, meticulous protection from government intrusion.<sup>43</sup>

In the Seventh Circuit's *Wilson v. Health & Hospital Corp.*, a landlord alleged a Fourth Amendment violation after a health inspector walked through the landlord's premises and obtained a visual of the basement and an unoccupied apartment, resulting in several health code violations.<sup>44</sup> The court found that despite the doors to both rooms being open and unlocked, the open and unsecured nature of a particular area does not operate as a categorical bar against finding a reasonable expectation of privacy.<sup>45</sup> The court further noted that it was objectively reasonable for "an individual to maintain an expectation of privacy in unoccupied, open, and unsecured portions of multi-family dwellings . . . ."<sup>46</sup> In so doing, the court

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41. 389 U.S. 347, 351 (1967). The Supreme Court held that no physical invasion was necessary to find that the wire-tapping of a public phone booth violated the Fourth Amendment because when Katz shut the phone booth door, he had a justified expectation that the conversation would be private, even though the phone booth was open for public use and Katz was visible to the public while inside. *Id.* at 351–52.

42. *Id.* at 361 (Harlan, J., concurring). Although the test is composed of two prongs, courts have effectively deemed the first prong "irrelevant" when analyzing a claim of a Fourth Amendment violation. Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 115 (2015).

43. *Oliver v. United States*, 466 U.S. 170, 177–78 (1984) (citing *Jones v. United States*, 362 U.S. 257, 265 (1960)); see also *Bond v. United States*, 529 U.S. 334, 338 (2000) (examining whether the government's intrusion infringed upon the personal and societal values protected by the Fourth Amendment); *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (finding a reasonable expectation of privacy in an office desk and file cabinets, although others had access to the office); *Payton v. New York*, 445 U.S. 573, 589 (1980) (noting that "the zone of privacy" is most clearly defined "when bounded by the unambiguous physical dimensions of an individual's home").

44. 620 F.2d 1201, 1207 (7th Cir. 1980).

45. *Id.* at 1212.

46. *Id.* at 1209. The court also noted that while it was relevant that the searched areas were unoccupied, this fact was not determinative of whether the landlord had a legitimate expectation of privacy in the areas.



determined that the proper inquiry, premised upon no single factor alone, was whether the search occurred in an area that the individual sought to preserve as private, even if the areas were open, unsecured, and accessible to other tenants.<sup>47</sup>

The Seventh Circuit has also found that behavioral and social norms bear heavily on the reasonable expectation of privacy inquiry. In 2016 in *United States v. Whitaker*, the court found that a tenant's reasonable expectation of privacy protected him against police activity in a common area that was inconsistent with behavioral and social norms.<sup>48</sup> After receiving a tip that drugs were being sold inside an apartment, the police obtained permission from the property manager and brought a narcotics-detecting dog to the shared hallway of the apartment building.<sup>49</sup> The court held that although the tenant lacked a complete expectation of privacy in the common hallway, police actions inconsistent with norms guaranteeing partial privacy violate the Fourth Amendment.<sup>50</sup>

Courts in other circuits have also acknowledged that the physical attributes of an apartment building and its common areas inevitably impact the reasonableness of an apartment dweller's privacy expectations. Specifically, the Fifth and Sixth Circuits have recognized that the more isolated a common area is from other areas, the less frequently it will be accessed by anyone other than co-tenants and the landlord, thus weighing in favor of a reasonable expectation of privacy.<sup>51</sup> Likewise, occupants of small apartment buildings may have a greater expectation of privacy than those of large apartment buildings.<sup>52</sup>

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*Id.* at 1213.

47. *See id.* Indeed, courts interpreting *Wilson* have noted that the fact that parts of an area may have been visible to others does not mean that a defendant “threw open the interior . . . to general public scrutiny.” *People v. Pitman*, 813 N.E.2d 93, 106 (Ill. 2004). The *Pitman* court further explained that “[a] defendant simply must outwardly behave as a typical occupant of the space in which the defendant claims an interest, avoiding anything that might publicly undermine his or her privacy expectation.” *Id.* (citation omitted); *see also* *United States v. Werra*, 638 F.3d 326, 336 (1st Cir. 2011) (finding a reasonable expectation of privacy in the entirety of a shared house because cohabitants’ “unilateral decisions [to invite friends] do not convert the hallway or entrance . . . into a public space,” and because there was no evidence that nonresidents “routinely entered without the consent of a resident”).
48. 820 F.3d 849, 853–54 (7th Cir. 2016).
49. *Id.* at 851.
50. *See id.* at 853 (noting that while residents of the apartment building could walk their dogs down the hallway, they could not “set up chairs and have a party in the hallway right outside the door”); *see also* *Florida v. Jardines*, 569 U.S. 1, 9 (2013) (“Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.”). Notably, the *Whitaker* court dismissed any distinction between split-level duplexes, garden apartments, and larger multi-unit buildings, arguing that such distinctions would “apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity.” *Whitaker*, 820 F.3d at 854.
51. *See* *United States v. King*, 227 F.3d 732, 748–50 (6th Cir. 2000) (finding a reasonable expectation of privacy in an unpartitioned basement of a duplex open only to residents); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (finding that the backyard area of a four-unit apartment building was sufficiently removed and private in character such that the defendant could reasonably expect privacy).
52. *See* *United States v. Fluker*, 543 F.2d 709, 715–16 (9th Cir. 1976) (tenants in small apartment buildings have a “greater reasonable expectation of privacy than would be true of occupants of large apartment

Had the *Sweeney* court followed its own precedent and applied the totality of the circumstances analysis to the area in question—consistent with Supreme Court precedent<sup>53</sup>—it would have found that Sweeney had a reasonable expectation of privacy. While evidence that the searched area was open and unsecured may properly be considered as one part of the inquiry, it should not have rendered Sweeney's expectation of privacy unreasonable. Like *Wilson*, the basement crawl space was not open to the public, but only to the five other tenants, their invited guests, and the landlord.<sup>54</sup> Additionally, the *Sweeney* court erroneously departed from *Whitaker* by failing to consider that it is inconsistent with social and behavioral norms for a non-resident to enter or use an apartment building's basement crawl space. While other tenants could have theoretically allowed guests to access certain common areas, visitors do not and “cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.”<sup>55</sup> Thus, Sweeney may not have had a complete expectation of privacy against his co-tenants, yet could still reasonably expect the police would not search his apartment building's basement crawl space without a warrant.

Moreover, the physical characteristics of the basement crawl space provide ample support for Sweeney having a reasonable expectation of privacy. The basement crawl space was isolated and removed from other common spaces such that it would be uncustomary and invasive, as the magistrate judge noted, for “visitors, mail-carriers, delivery-persons, or police” to explore without permission.<sup>56</sup> Because the basement crawl space was remotely located in an area dedicated to utilities,<sup>57</sup> the court should have found that the limited accessibility warranted a heightened expectation of privacy. Indeed, the police gained access by venturing through Sweeney's residence, which implies an even greater expectation of privacy because the basement was accessed from inside the apartment itself.<sup>58</sup>

Second, the *Sweeney* court erred by effectively categorizing the basement crawl space as a public, rather than a private place. While the Supreme Court has remained silent as to whether a reasonable expectation of privacy exists in apartment building

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buildings”); *see, e.g., King*, 227 F.3d at 750 (concerning a duplex); *Fixel* 492 F.2d at 484 (concerning a four-unit apartment building).

53. *See, e.g., Bond v. United States*, 529 U.S. 334, 338 (2000); *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987); *Oliver v. United States*, 466 U.S. 170, 177 (1984); *Rakas v. Illinois*, 439 U.S. 128, 149 (1978); *Mancusi v. DeForte*, 392 U.S. 364, 368–69 (1968); *Katz v. United States*, 389 U.S. 347, 351, 359 (1967).

54. *See United States v. Sweeney*, 821 F.3d 893, 897–98 (7th Cir. 2016).

55. *Jardines*, 569 U.S. at 19 (Alito, J., dissenting); *see also United States v. Wells*, 648 F.3d 671, 678 (8th Cir. 2011) (finding that the police exceeded the scope of their implied invitation when they bypassed the front door and proceeded directly to the backyard).

56. *United States v. Sweeney*, No. 14-CR-20, 2014 WL 2514926, at \*19 (E.D. Wis. June 4, 2014).

57. *See Sweeney*, 821 F.3d at 897.

58. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 213 (1986) (recognizing that privacy expectations are heightened in areas intimately linked to the home); *Dow Chem. Co. v. United States*, 476 U.S. 227, 237–38 (1986) (declining to recognize a privacy interest where the area was not immediately adjacent to a private home, where privacy expectations are at their peak).

common areas,<sup>59</sup> it has distinguished public areas from those areas that are not generally exposed to the public and from which the individual has a right to exclude (at least some) others.<sup>60</sup> In *United States v. Santana*<sup>61</sup> in 1976, the Supreme Court demonstrated how the distinction between a public and private place affects a Fourth Amendment analysis. There, a suspect was spotted by police while standing in the doorway of her home and subsequently arrested.<sup>62</sup> The Court reasoned that the defendant “was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house,” thus justifying the warrantless arrest.<sup>63</sup> The Court further indicated that had the defendant been inside the physical parameters of her home at the time the police sought to arrest her, she would have been in a private place and a warrant would have been required.<sup>64</sup>

The Court has also found that an area may be sufficiently private despite being accessed by others. In 1987’s *O’Connor v. Ortega*, the Court recognized that a government employee has a legitimate privacy expectation in his office, despite the fact that “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.”<sup>65</sup> Notwithstanding this accessibility to others, the Court treated the office as a private place “based upon societal expectations that have deep roots in the history of the [Fourth] Amendment.”<sup>66</sup> Thus, the ability to exclude some but not all does not convert an area searched into a public place for Fourth Amendment purposes.

Similarly, prior to *Sweeney*, the Seventh Circuit regarded the privacy expectations in a common area as akin to those in a private place. By recognizing that tenants have at least a partial expectation of privacy in common areas, the *Whitaker* court implied that a common area is not a public place under the Fourth Amendment.<sup>67</sup> Although the defendant lacked “complete privacy” in the apartment building hallway, the court recognized that he nonetheless retained a “reasonable expectation of privacy

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59. See generally Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273 (2002).

60. Steven G. Davison, *Warrantless Investigative Seizures of Real and Tangible Personal Property by Law Enforcement Officers*, 25 AM. CRIM. L. REV. 577, 603 (1988).

61. 427 U.S. 38 (1976).

62. *Id.* at 40–42.

63. *Id.* at 42 (citing *Hester v. United States*, 265 U.S. 57, 59 (1924)).

64. *Id.*

65. 480 U.S. 709, 717–18 (1987) (plurality opinion); see also *Chapman v. United States*, 365 U.S. 610, 615–16 (1961) (finding the government search of a rented house violated the tenants’ privacy rights although the landlord had the right to enter for some purposes).

66. *O’Connor*, 480 U.S. at 716 (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)); see also *Mancusi v. DeForte*, 392 U.S. 364, 369–71 (1968) (finding that an office shared by several employees did not negate a reasonable expectation of privacy).

67. See *United States v. Whitaker*, 820 F.3d 849, 852–53 (7th Cir. 2016).

againsts persons in the hallway snooping” in order to gather information from inside his apartment.<sup>68</sup>

Sweeney’s basement crawl space stands in stark contrast to what the Supreme Court has defined as a public place. Unlike the doorway vestibule in *Santana*, the basement crawl space was not exposed to all others in the area. Indeed, in order to access it, one must venture through a private apartment unit, out its back door, down the rear staircase, past a series of water heaters, and affirmatively peer under the stairs.<sup>69</sup> Moreover, the evidence obtained from the basement crawl space was neither visible to the public, nor exposed to public speech, hearing, or touch.<sup>70</sup>

Although a shared basement in an apartment building may be categorized as a common area, only a limited pool of individuals—the tenants of the building, their invited guests, and the landlord—have access to the space; it should therefore be deemed sufficiently private to warrant Fourth Amendment protection. Like the *O’Connor* court, the *Sweeney* court should have treated the basement crawl space as private because “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.”<sup>71</sup> Because only those with a legitimate right had access to the area, and such access is encompassed within our societal understanding of apartment common spaces, that access should not render the basement crawl space a public place.

Further, the court failed to consider Sweeney’s partial reasonable expectation of privacy. It improperly distinguished the case from *Whitaker* on the basis that the police in *Whitaker* posed a danger of intruding into the defendant’s apartment interior, whereas the police in *Sweeney* did not.<sup>72</sup> However, this distinction conflates the *Jardines* property-based rationale with the privacy-based rationale that *Whitaker* employed. The dispositive question should not have been whether the police’s search of the basement crawl space resulted in an intrusion into the interior of Sweeney’s apartment, but rather whether the police’s presence in the basement crawl space afforded the police insight otherwise unavailable to the public. The court’s failure to consider the characteristics of the basement crawl space and common area—including that it was not open to the public and that Sweeney retained a right to exclude others—prevented it from classifying the area as a private place, a classification that is more often protected under the Fourth Amendment.

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68. *Id.* at 853.

69. *See* United States v. Sweeney, 821 F.3d 893, 897 (7th Cir. 2016).

70. *Cf.* United States v. Whaley, 779 F.2d 585, 590–92 (11th Cir. 1986) (finding that the defendant, who manufactured cocaine in the basement of his home situated on three acres of land, did not have a reasonable expectation of privacy in his basement because, among other reasons, he engaged in incriminating activity for over a three-month period in a lighted basement behind uncurtained windows, and was visible to the naked eye from neighboring property).

71. *See* Lewis, *supra* note 59, at 290.

72. *See* Sweeney, 821 F.3d at 903.

Finally, by affording residents of apartment buildings weaker Fourth Amendment protection than residents of single-family homes, the *Sweeney* court has abridged our basic democratic values by inequitably apportioning constitutional rights. Despite the Supreme Court's recognition that a home is one's castle no matter its character,<sup>73</sup> the Seventh Circuit joins the majority of federal circuit courts to have denied residents of apartment buildings equal Fourth Amendment protection.<sup>74</sup>

Today, renters make up nearly two-thirds of American households, yet a mere thirty-five percent of those renters live in single-family homes.<sup>75</sup> Moreover, a disproportionate share of apartment building tenants is composed of low-income families and under-represented minorities.<sup>76</sup> In short, because some courts refuse to extend equal Fourth Amendment protections to single-family home dwellers and multi-unit dwellers alike, apartment dwellers are not quite equal to their private-home neighbors.

The *Sweeney* court failed to recognize a reasonable expectation of privacy in the common areas of apartment buildings because it did not properly evaluate the criteria necessary to determine whether a reasonable expectation of privacy existed. By sidestepping the analysis of all relevant factors and instead fixating on the lack of a complete right to exclude, the court reached the wrong conclusion and incorrectly treated the basement crawl space as a public place. As a result, *Sweeney* has contributed to the corrosion of Fourth Amendment protections and the creation of an exception to the warrant requirement for apartment building residents that the Framers never contemplated. Had the *Sweeney* court actively engaged with the case law and considered the societal impact of its decision, it likely would have fulfilled its obligation to interpret the Fourth Amendment in a way the Framers might recognize.

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73. *Miller v. United States*, 357 U.S. 301, 313–14 (1958) (extending “the ancient adage that a man’s house is his castle” to protect an apartment dweller’s Fourth Amendment rights at his unit door); *see also* Seal, *supra* note 2, at 403.

74. *See* Seal, *supra* note 2, at 398 n.8 (collecting cases from the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits). Prior to Seal’s article, the Seventh Circuit stated that “[a]bsent certain particular facts . . . there is no reasonable expectation of privacy in common areas of multiple dwelling buildings.” *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012). However, the Seventh Circuit subsequently reversed course in *Whitaker* by recognizing a partial expectation of privacy in an apartment building hallway. *See United States v. Whitaker*, 820 F.3d 849, 853–54 (7th Cir. 2016).

75. *See Physical Housing Characteristics for Occupied Housing Units*, *supra* note 10.

76. *See Whitaker*, 820 F.3d at 854 (“[A]ccording to the Census’s American Housing Survey for 2013, 67.8% of households composed solely of whites live in one-unit detached houses. For households solely composed of blacks, that number dropped to 47.2%. And for Hispanic households, that number was 52.1%. The percentage of households that live in single-unit, detached houses consistently rises with income.”); *see also* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 12 (2013), [https://www.jchs.harvard.edu/sites/default/files/jchs\\_america's\\_rental\\_housing\\_2013\\_1\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/jchs_america's_rental_housing_2013_1_0.pdf) (“While households of all incomes rent their homes, it is nonetheless true that a disproportionate share of renters have low incomes.”). *See generally* MARGARET C. SIMMS ET AL., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES 1 (2009).