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THE FOURTH AMENDMENT'S DE FACTO
PHYSICAL BARRIER REQUIREMENT: A
MOVEMENT TOWARD A TRUE TOTALITY OF
THE CIRCUMSTANCES TEST AFTER *UNITED
STATES V. CARLOSS**

INTRODUCTION

The phrase “no trespassing” conveys a simple message: one may not enter someone else’s property without an invitation or the legal authority to do so. Homeowners often use no trespassing signs to signal that visitors are unwelcome on their property. In circumstances involving police, however, most courts have held that no trespassing signs alone are ineffective in revoking the customary license police are presumed to have.¹ Instead, the most important consideration for most courts is the existence of a barrier physically preventing police from entering the premises.² In essence, most courts have created a de facto requirement that a barrier exist between the homeowner and the police to maintain the homeowner’s Fourth Amendment rights.³ This de facto requirement leads courts to apply a more stringent standard than is constitutionally required for homeowners.⁴ Consequently, courts have made it more difficult for homeowners to keep police away from their homes.⁵

The facts of a recent Tenth Circuit case are illustrative of a scenario in which a sign alone was found to be ineffective in revoking

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1. *See, e.g.,* *United States v. Bearden*, 780 F.3d 887, 893–94 (8th Cir. 2015) (upholding knock and talk despite no trespassing sign on the driveway gate); *United States v. Holmes*, 143 F. Supp. 3d 1252, 1265 (M.D. Fla. 2015) (“[I]n the absence of another barrier (such as a fence and gate), ‘No Trespassing’ signs do not, in and of themselves, withdraw the implied consent to conduct a knock and talk.”); *United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229, at *9 (W.D. Va. Aug. 30, 2013) (holding that “the existence and volume of ‘No Trespassing’ signs” neither revoked the officers’ implied license to approach the house, nor expanded the defendant’s rights under the Fourth Amendment); *United States v. Schultz*, No. 13-20023, 2013 WL 2352742, at *5 (E.D. Mich. May 29, 2013) (reasoning that the officers had a lawful right to enter onto the defendant’s property, despite the presence of no trespassing signs, to “engage in investigation-related conversation”).

2. *See Holmes*, 143 F. Supp. 3d at 1265.

3. *See infra* Section II.C.

4. *See infra* Section II.C.

5. *See infra* Section II.C.

a law enforcement officer's license to be on an individual's property. In *United States v. Carloss*,⁶ agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF) were investigating Ralph Carloss for violations of weapons and drug laws.⁷ In an attempt to talk to Carloss, the agents approached his residence and knocked on the door.⁸ This practice, often depicted in popular culture and crime dramas, is known as a "knock and talk."⁹ As they approached the home, the ATF agents bypassed multiple no trespassing signs that lined the property.¹⁰ Additionally, there was a no trespassing sign posted on the front door of the house.¹¹ Carloss came out of the house, briefly talked to the agents, and started to return to the house.¹² The agents then asked if they could accompany him inside, to which Carloss agreed.¹³ In the house, the officers saw drug paraphernalia and drug residue in plain view.¹⁴ After leaving the house without searching, the officers used their observations to obtain a search warrant and search the house.¹⁵ They found multiple meth labs and a loaded shotgun, among other items, leading to the prosecution of Carloss for weapons and drug offenses.¹⁶

This example—as satisfying as it may be for law enforcement—is troubling for commentators and academics concerned with the preservation of civil liberties. In order to conduct a knock and talk, police rely on a customary license, often referred to as an implied license, for visitors to approach a home.¹⁷ The Supreme Court has held that police do not have special powers to approach homes; instead, officers are treated as ordinary members of the public in this respect.¹⁸ However, courts have not strictly adhered to this holding, effectively requiring the presence of a physical barrier to revoke this

6. 818 F.3d 988 (10th Cir. 2016).

7. *Id.* at 990.

8. *Id.*

9. *Florida v. Jardines*, 133 S. Ct. 1409, 1423 (2013) (Alito, J., dissenting).

10. *Carloss*, 818 F.3d at 990 (noting that these signs stated "Private Property No Trespassing").

11. *Id.* (noting that this sign stated "Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted").

12. *Id.* at 991.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Florida v. Jardines*, 133 S. Ct. 1409, 1415–17 (2013).

18. *Kentucky v. King*, 563 U.S. 452, 469 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

license for law enforcement officers.¹⁹ In the above example, the homeowner sought to revoke this license by placing several no trespassing signs conspicuously around the property, thus attempting to prevent the police from using the implied license to enter the curtilage. Consequently, the homeowner could argue that the police were trespassing when they obtained the justification for the subsequent search.

Most courts, however, would disagree with the homeowner. Since the Supreme Court's 2013 decision in *Florida v. Jardines*,²⁰ courts have made it more difficult to revoke an officer's implied license.²¹ As briefly noted above, courts have essentially established a de facto requirement that there be some sort of physical barrier between the homeowner and the police. This de facto barrier requirement renders signage virtually useless in the absence of such a barrier.

Historically, physical barriers have not been required to revoke the customary license.²² Instead, the concept of actual notice—manifested through physical barriers, posted signs, or actions from the homeowner—had been the primary consideration.²³ Though physical barriers, such as walls and fences, are perhaps the clearest evidence that the customary license has been revoked, they have not historically been dispositive for establishing a common law trespass.²⁴

Moreover, the focus on actual barriers can create bad policy outcomes. Citizens with few means to erect barriers may be disadvantaged relative to wealthier citizens.²⁵ Without fences or walls,

19. See, e.g., *Carloss*, 818 F.3d at 1000 (noting that a fence and gate would likely have been sufficient to revoke the license); *State v. Smith*, __ N.C. App. __, __, 783 S.E.2d 504, 510 (2016) (“Courts in other jurisdictions have ruled that the implied invitation to approach was revoked by homeowners who sought refuge behind a large, imposing fence and made clear by either verbal or posted instructions that visitors were not welcome.”); *State v. Christensen*, 517 S.W.3d 60, 77 (Tenn. 2017) (“[W]hile a fence and a closed gate that physically block access to the front door of a house, in some instances, may be sufficient to revoke the implied license to enter the curtilage of a residence, mere ambiguous signage and unkemptness are not.”).

20. 133 S. Ct. 1409 (2013).

21. See *infra* notes 128–40 and accompanying text.

22. See *infra* notes 128–40 and accompanying text.

23. See *infra* notes 128–32 and accompanying text.

24. See *infra* notes 128–32 and accompanying text.

25. See William J. Stuntz, *Privacy in the Criminal Context: The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (1999) (“[P]rivacy can be bought, so that people who have money have more of it than people who don’t. It follows that people who have money have more Fourth Amendment protection than people who don’t.”). Though this article was written in a *Katz*-only world, see *infra* text accompanying

low-income homeowners may be subject to more police interactions on their property, which can result in invasive, full-fledged searches.²⁶ Though this inequity is not foreign to Fourth Amendment doctrine,²⁷ it can be remedied by applying a true totality of the circumstances test in analyzing the revocation of implied licenses.

It remains to be seen, however, whether courts will be receptive to such an adjustment. Most notably, in 2016, the Tenth Circuit kept the door open for courts to shift away from the de facto barrier requirement. In its decision in *Carloss*, the majority allowed for the possibility that signage alone could, under the right circumstances, revoke the customary license.²⁸ Though the Tenth Circuit ultimately ruled against the defendant,²⁹ the court's decision—and

note 55, the basic point remains applicable: wealthier individuals have more tools at their disposal to create privacy than less wealthy individuals.

26. See Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 26 (2014) (arguing that knock and talks allow police officers to “circumvent the warrant requirement”); *infra* text accompanying notes 103–04.

27. The *Katz* reasonable expectations test, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), has been criticized by some academics as favoring those with more resources. See Kami C. Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 247–52 (2014) (“Low-wage workers and the poor generally enjoy reduced privacy expectations because of the structures where they reside . . .”).

28. Though the majority indicated that a single “no trespassing” sign would not revoke the implied license, it kept open the possibility that, under different circumstances, a sign might “convey to an objective officer, or member of the public, that he cannot go to the front door and knock.” See *United States v. Carloss*, 818 F.3d 988, 995 (10th Cir. 2016). Then-Judge Gorsuch’s dissent fairly characterizes the majority opinion:

The sole controlling opinion in this case doesn’t suggest that No Trespassing signs are categorically insufficient to revoke the implied license but suggests only that homeowners should be more punctilious with their choice and placement of signs than the homeowner here. Indeed, I understand the majority opinion as strongly implying that No Trespassing signs *will* do their job so long as they (1) are placed visibly on the curtilage itself and (2) don’t contain surplus language about hunting and trapping.

Id. at 1014 (Gorsuch, J., dissenting). It stands to reason that in different circumstances, perhaps with more specificity from the signage, revocation would be effective. Interestingly, two professors have begun selling more specific signage in an attempt to allow homeowners to effectively revoke the license. See Andrew Guthrie Ferguson & Stephen E. Henderson, *LAWn Signs: A Fourth Amendment for Constitutional Curmudgeons*, 13 OH. ST. J. CRIM. L. 487, 491–95 (2016).

29. *Carloss*, 818 F.3d at 999. By ruling against the defendant, the Tenth Circuit extended the impressive winning-streak for the government in cases in which the homeowner does not have a barrier. The Tenth Circuit’s decision offers hope for a refocusing of the test, but that remains to be seen. See *infra* notes 179–85 and accompanying text. The concurrence in *Carloss* strongly suggested that the de facto barrier requirement should apply. *Carloss*, 818 F.3d at 1002 (Tymkovich, J., concurring).

accompanying dissent—could allow other courts to more faithfully consider the totality of the circumstances.

Perhaps equally important, *Carloss* also produced a potentially influential dissenting opinion. Then-circuit Judge, and now-Supreme Court Justice, Gorsuch wrote a lengthy opinion in which he reasoned that signage alone could revoke the customary license.³⁰ He argued that the notion of a barrier requirement was not faithful to the application of common law trespass doctrine.³¹ Then-Judge Gorsuch's dissent provides lower courts with ammunition to shift the inquiry away from physical barriers and toward a true totality of the circumstances test.³²

Through the lens of the Tenth Circuit's decision, this Recent Development proceeds in four parts. Part I introduces the facts of *Carloss*, discusses the foundation of the implied license analysis, and examines the power the government wields through investigative visits by law enforcement officers. Part II highlights the real-world implications of the dynamic between investigative visits and the revocation of the implied license. Finally, Part III argues that courts should give more weight to signage, while forecasting the influence that *Carloss* could have over lower courts and providing a potential solution.

I. IMPLIED LICENSE FOUNDATIONS

A. *The Protection of Curtilage as a Basis for Implied Licenses*

At its core, the Fourth Amendment protects “persons, houses, papers, and effects” from unreasonable searches and seizures.³³ Most importantly for this analysis, the term “houses” is specifically listed as

30. *See id.* at 1003–14 (Gorsuch, J., dissenting).

31. *Id.* at 1011 (“[T]he common law rule of decision at the time of the founding and its many applications, then and now, suggest[ed] that posted notice can suffice to warn off ‘reasonable’ visitors. The Fourth Amendment is, after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be.”).

32. Though the majority opinion in *Carloss* is controlling in the Tenth Circuit, other circuits may be influenced by then-Judge Gorsuch's opinion. As one scholar notes, dissenting opinions can provide a clue as to where the law will go in the future. *See* Michael Boudin, *Friendly, J., Dissenting*, 61 DUKE L.J. 881, 897 (2012) (“[T]he dissents regarded as great are often deemed so in part because they were prophetic and ultimately prevailed in later cases. The roll-call is familiar—from Justice Curtis in *Dred Scott*, to the first Justice Harlan in *Plessy*, to Justice Holmes in *Gitlow* and *Lochner*, to Justice Brandeis in *Olmstead*, to Justice Jackson in *Korematsu*.”).

33. U.S. CONST. amend. IV.

a protected space.³⁴ Consequently, the home is afforded the fullest protection of the Fourth Amendment. Indeed, Justice Scalia noted that in the context of the Fourth Amendment, “the home is first among equals”³⁵ and that “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”³⁶

The Fourth Amendment protections afforded to the home also apply to a limited area outside of the actual house. This area, known as curtilage, is the area “immediately surrounding and associated with the home.”³⁷ As Justice Scalia noted in *Jardines*, the “principle [of curtilage] has ancient and durable roots.”³⁸ Indeed, William Blackstone recognized that all the “branches and appurtenants” of a home are protected if “within the curtilage or homestall.”³⁹ This view largely rests on the principle set forth in the historic English case *Entick v. Carrington*,⁴⁰ which stated that “our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave.”⁴¹

In the United States, the Supreme Court has largely adopted Blackstone’s traditional view.⁴² Though the Supreme Court has limited the type of land qualifying as curtilage,⁴³ it has recognized that

34. In *Florida v. Jardines*, Justice Scalia suggested it is significant that the Fourth Amendment does not enumerate “real property” generally, but instead merely lists “houses.” 133 S. Ct. 1409, 1414 (2013). This line of thought echoes the rationale set forth in *Oliver v. United States*, 466 U.S. 170 (1984) that “the term ‘effects’ is less inclusive than ‘property’ and cannot be said to encompass open fields.” *Id.* at 177

35. *Jardines*, 133 S. Ct. at 1414.

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

37. *Oliver*, 466 U.S. at 180. In order to determine if an area can be considered curtilage, courts conduct a very fact-specific inquiry. In *United States v. Dunn*, 480 U.S. 301 (1987), the Supreme Court enumerated several factors which may aid this determination. *Id.* at 301. These factors, commonly referred to as the *Dunn* factors, are: (1) “the proximity of the area claimed to be curtilage to the home”; (2) “whether the area is included within an enclosure surrounding the home”; (3) “the nature of the uses to which the area is put”; and (4) “the steps taken by the resident to protect the area from observation by people passing by.” *Id.* The *Dunn* factors are not designed to be applied mechanically but instead to be “useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration.” *Id.*

38. *Jardines*, 133 S. Ct. at 1414.

39. 4 WILLIAM BLACKSTONE, COMMENTARIES *225.

40. (1765) 95 Eng. Rep. 807 (KB).

41. *Id.* at 817.

42. See *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986) (“The history and genesis of the curtilage doctrine are instructive.”); *Oliver*, 466 U.S. at 180–81 (relying on Blackstone’s definition of curtilage).

43. See *United States v. Dunn*, 480 U.S. 294, 300–01, 301 n.4 (1987) (“[T]he primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.”).

curtilage is afforded robust protection.⁴⁴ Decisions throughout the twentieth century consistently recognized that curtilage is protected to the fullest extent of the Fourth Amendment.⁴⁵ It is viewed as a “constitutionally protected extension” of the home⁴⁶ and is considered “part of the home itself for Fourth Amendment purposes.”⁴⁷

This robust Fourth Amendment protection for curtilage stems from its close connection to the home. The Supreme Court has recognized the area immediately surrounding the house to be “intimately linked” to the home.⁴⁸ By invading the curtilage of a homeowner, law enforcement officers disturb “intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’”⁴⁹

This protection ensures that a homeowner’s curtilage is free from unreasonable searches and seizures.⁵⁰ Generally, law enforcement

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

45. The 1928 landmark opinion in *Olmstead v. United States*, 277 U.S. 438 (1928)—which has since been replaced by *Katz* and *Jardines*—explicitly referenced curtilage; in the context of a home, only “an actual physical invasion of [a] house or curtilage” may constitute a violation of the Fourth Amendment. *Id.* at 466. Subsequent cases have reinforced the notion that the curtilage is protected to the fullest extent of the Fourth Amendment. See, e.g., *Dunn*, 480 U.S. at 300–01; *Ciraolo*, 476 U.S. at 213; *Oliver*, 466 U.S. at 180.

46. *Jardines*, 133 S. Ct. at 1415.

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

48. *Ciraolo*, 476 U.S. at 213 (noting this linkage is due to both the land’s physical proximity to the house as well as widespread societal notions of privacy around the home).

49. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

50. Protections for curtilage can be contrasted with the level of protection afforded to other areas of a homeowner’s property. Areas of the property that are not immediately surrounding the home—or are otherwise not found to satisfy the legal definition of curtilage—are typically considered to be “open fields.” See *Dunn*, 480 U.S. at 304–05. This determination is the result of a very fact-intensive inquiry and application of the *Dunn* framework. See *supra* note 37. Open fields need neither be open nor be an actual field; they “may include any unoccupied or undeveloped area outside of the curtilage.” See *Oliver*, 466 U.S. at 180 n.11. Since this area is not intimately associated with the home—or anything else covered by the Fourth Amendment—courts have found that open fields are not constitutionally protected areas. See *United States v. Jones*, 565 U.S. 400, 411 (2012) (“Quite simply, an open field, unlike the curtilage of a home . . . is not one of those protected areas enumerated in the Fourth Amendment.”); *Oliver*, 466 U.S. at 176–77 (“[T]he government’s intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.”). In other words, police officers generally do not need a warrant to search an open field. A homeowner may still assert that the police committed a Fourth Amendment violation; however in that instance, homeowners must rely on the *Katz* reasonable expectation of privacy test. *Infra* text accompanying note 55.

officers may not conduct a search of the curtilage without a warrant.⁵¹ Although a thorough summary of Fourth Amendment jurisprudence is too involved for this Recent Development, an abbreviated (and simplified) overview is helpful to understand the broad landscape. Law enforcement officers may invade a homeowner's curtilage to conduct a warrantless search in limited circumstances. For example, a homeowner or occupant may consent to a search by law enforcement, which eliminates the need for a search warrant.⁵² Absent a warrant or an exception to the warrant requirement, the Fourth Amendment proscribes searches of the curtilage by law enforcement officers.⁵³

For constitutionally protected areas—including curtilage—the Supreme Court relies on two different analyses to determine whether a Fourth Amendment violation has occurred. First, the test established in *Katz v. United States*,⁵⁴ depends on whether police have violated expectations of privacy. The *Katz* test requires that “a person have exhibited an actual (subjective) expectation of privacy, and . . . that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁵⁵ Neither property rights nor physical intrusions have direct bearing on this analysis.⁵⁶ Instead, the analysis turns on these expectations.

From the adoption of the *Katz* test in the 1960s until recently, courts have held that—for Fourth Amendment purposes—no trespassing signs, alone, are insufficient to preclude police intrusion as a “search.”⁵⁷ These decisions were made despite the fact that the signs

51. See *Oliver*, 466 U.S. at 180 (“[C]urtilage . . . warrants the Fourth Amendment protections that attach to the home.”).

52. See, e.g., 2 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 3.10(a) (4th ed. 2004) (“[A]n effort is [usually] made to obtain consent where probable cause is lacking and no warrant could be obtained.”).

53. If a violation occurs, suppression of evidence in a criminal prosecution may be an appropriate remedy. A victim of a Fourth Amendment violation may also bring a civil action. 42 U.S.C. § 1983 (2012). It is also important to note that law enforcement officers may observe curtilage without a warrant in some circumstances. For example, in *Ciraolo*, the Supreme Court found that unaided observation of curtilage from an altitude of 1,000 feet was reasonable and therefore was not prohibited by the Fourth Amendment. 476 U.S. at 215.

54. 389 U.S. 347 (1967).

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

56. Of course, property rights in regards to one's home and curtilage do indirectly affect the analysis. See 1 DAVID S. RUDSTEIN ET AL., *CRIMINAL CONSTITUTIONAL LAW* § 2.03(a) (2013) (ebook) (“Although the existence of a property right is relevant in determining whether an expectation of privacy is ‘legitimate,’ it is not always sufficient. For example, the law of trespass does not necessarily define the limits of the Fourth Amendment.”).

57. *Jones v. State*, 943 A.2d 1, 12 (Md. Ct. Spec. App. 2007) (“[W]e note that courts have been very consistent in concluding that no trespassing signs, in and of themselves, do

clearly manifested a subjective expectation of privacy by the homeowner. However, in most circumstances, courts were not persuaded that this expectation was “reasonable.”⁵⁸ In effect, posting a no trespassing sign could not ward off the police.

In contrast to the *Katz* analysis, Justice Scalia articulated a property-based analysis in *United States v. Jones*,⁵⁹ focusing on property rights and physical intrusions. In *Jones*, the Supreme Court held that a search has occurred when evidence is obtained while physically intruding upon property protected by the Fourth Amendment property.⁶⁰ This test is known by some scholars as the “trespass test.”⁶¹

The trespass analysis is triggered when a physical intrusion takes place.⁶² The facts in *Jones* illustrate this point quite well. Without a warrant, law enforcement officers installed a GPS tracking device to the undercarriage of Mr. Jones’s vehicle, which was parked in a public parking lot.⁶³ Justice Scalia, writing for the majority, held that this was a violation of the Fourth Amendment.⁶⁴ Applying the trespass test, Justice Scalia held that “[b]y attaching the device to the [vehicle],

not make a police officer’s entry on property unlawful. The presence of no trespassing signs may be considered as part of the totality of the circumstances, however.”).

58. See Vanessa Rownaghi, Comment, *Driving into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 1165, 1184–85 (2003) (“[M]ost courts refuse to accept the presence of these signs as indicative of intent.”).

59. 565 U.S. 400 (2012).

60. See *id.* at 404 (holding that the officers’ installation of a GPS tracking device on the defendant’s vehicle, an effect, constituted a search in violation of the Fourth Amendment). The Court emphasized the historical importance of property rights in search and seizure analysis. See *id.* at 404–05 (“It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”). Similarly, Justice Scalia reasoned in *Jardines* that the Court need not decide whether the police investigation violated a reasonable expectation of privacy under *Katz*, stating “[t]hat the officers learned what they learned only by physically intruding on *Jardines*’ property to gather evidence is enough to establish that a search occurred.” *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

61. See, e.g., Orin Kerr, *What is the State of the Jones Trespass Test After Florida v. Jardines?*, VOLOKH CONSPIRACY (Mar. 27, 2013, 2:56 AM), <http://volokh.com/2013/03/27/what-is-the-state-of-the-jones-trespass-test-after-florida-v-jardines/> [<https://perma.cc/NQ9N-DVBX>] (examining the “trespass test” applied in *Jones*).

62. See *Jones*, 565 U.S. at 411 (“Situations . . . without trespass would remain subject to *Katz* analysis.”). The *Katz* and trespass tests are not mutually exclusive. *Id.* at 409 (“[T]he *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”).

63. *Id.* at 403.

64. *Id.* at 404, 413.

officers encroached on a protected area.”⁶⁵ This trespass upon a constitutionally protected “effect” constituted a warrantless search.⁶⁶

When triggered, the trespass test takes precedence over the *Katz* test. In *Jones*, for example, an inquiry into the reasonableness of Jones’s expectations of privacy—the essential part of the *Katz* test—was considered unnecessary because a physical intrusion of a constitutionally protected space occurred.⁶⁷ Since the facts in implied-license cases involve physical intrusions, the trespass analysis is the relevant inquiry. Thus, in at least that instance, it has effectively replaced the *Katz* test,⁶⁸ despite Justice Scalia’s protestations that *Katz* merely “added to, not substituted for” the trespass test.⁶⁹ Indeed, the Supreme Court has explicitly stated that the *Katz* test “is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.”⁷⁰

Consequently, the outcome in *Carloss*, as well as most other implied license cases, turned on whether the police officers were trespassing on the homeowner’s curtilage.⁷¹ Pursuant to the trespass analysis, if the officers did not have a warrant and were indeed trespassing, any information or evidence obtained while trespassing would be the fruits of a “search” under the Fourth Amendment.⁷² Thus, the evidence could not be the basis for a later search with a warrant and would likely be subject to suppression via the exclusionary rule.⁷³ If the officers had an implied license to approach the house, however, the Fourth Amendment would not be violated and any evidence obtained would be admissible.⁷⁴ In order to conduct

65. *Id.* at 410.

66. *See id.* at 404, 410–11 (stating that in a previous case, the Supreme Court held that “an officer’s momentary reaching into the interior of a vehicle did constitute a search” (citing *New York v. Class*, 475 U.S. 106, 114–15 (1986))). Additionally, the Court in *Jones* noted that the physical intrusion into the car, an “effect” as enumerated in the Fourth Amendment, was significant. *See id.* at 411.

67. *Id.* at 406–07.

68. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

69. *Jones*, 565 U.S. at 409.

70. *Jardines*, 133 S. Ct. at 1417 (citing *Jones*, 565 U.S. at 406).

71. *United States v. Carloss*, 818 F.3d 988, 992 (10th Cir. 2016).

72. *See Jardines*, 133 S. Ct. at 1413, 1417–18 (“That the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence is enough to establish that a search occurred.”).

73. *See id.* (affirming the Florida Supreme Court’s holding which invalidated a search warrant because it was based on information obtained during a previous search that was improperly conducted without a warrant).

74. *See id.* at 1416 (explaining that police officers “may approach a home and knock” pursuant to an implied license, but that “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence” exceeds the scope of an implied license).

an informed trespass analysis, it is first important to understand the mechanics of the implied license.

B. The Implied License as an Analysis of Social Norms

Despite stringent Fourth Amendment protection, law enforcement officers are sometimes able to collect evidence from an individual's property without it constituting a "search" under the Fourth Amendment.⁷⁵ As demonstrated in *Carloss*, when a homeowner explicitly allows officers onto the curtilage or into the home, the homeowner has granted the law enforcement officers an express license.⁷⁶ Citizens may revoke this license by either telling officers to leave the property or by otherwise unambiguously manifesting their intent to revoke the license.⁷⁷ Accordingly, an express license, once given to law enforcement, is relatively simple to revoke.

However, a license can be granted without the express consent of a homeowner. Courts have been willing to recognize "implied licenses"—notwithstanding the lack of express consent—when the context clearly favors doing so.⁷⁸ An implied license in the real property context allows for visitors to approach a home without prior express consent from the homeowner.⁷⁹ In *Jardines*—the most recent Supreme Court case on point—the Court referred to the implied license as an invitation based on custom.⁸⁰ The Court has similarly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry . . . by solicitors [and other

75. See 4 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b)–(f) (4th ed. 2004) (discussing instances wherein law enforcement may collect evidence without implicating the Fourth Amendment).

76. See Isaac Rank, Recent Development, *The Uninvited Guest: The Unexpected Damage to Privacy from the Expansion of Implied Licenses*, 94 N.C. L. REV. 1354, 1357 (2016) ("If an [sic] person is invited onto private property, she has an express license to enter the property—the same holds true for an officer, who would be permitted to enter even without a warrant.").

77. See Charles E. Clark, *Licenses in Real Property Law*, 21 COLUM. L. REV. 757, 765 (1921) ("The mere privilege [of a license] may be extinguished—the license revoked—by any manifestation by the licensor of his will to that effect."); see also *Kentucky v. King*, 563 U.S. 452, 469–70 (2011) (noting that, without a warrant, police officers are to be treated the same as private citizens).

78. *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013).

79. See *id.* at 1415 (discussing the scope of implied licenses).

80. See *id.* at 1421–22 ("[M]embers of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so.").

visitors].”⁸¹ Based on this implied invitation, visitors and guests may approach homes without fear of prosecution for trespass.

The implied license to enter the premises, though, is not absolute. In *Jardines*, the Supreme Court recognized the limits of an implied license.⁸² In that case, officers without a warrant approached a home with a drug-sniffing dog to investigate an unverified tip that marijuana was being grown in the home.⁸³ While on the front porch, the dog indicated that there were drugs in the house, which the officers then used as the basis for obtaining a search warrant.⁸⁴ Since *Jardines* never manifested any intent to revoke the customary license, the issue of signage or barriers was never addressed. Instead, the case turned on the scope of the implied license and what is “customary.”⁸⁵

Justice Scalia, writing for the majority, held that use of the drug-sniffing dog on the homeowner’s front porch constituted a search under the Fourth Amendment.⁸⁶ Using the trespass analysis he articulated in *Jones*, Justice Scalia reasoned that the employment of a specialized dog exceeded the scope of a visitor’s customary invitation to enter the premises.⁸⁷ Importantly, he noted that “[t]he scope of a license—express or implied—is limited to a particular area.”⁸⁸ Based on the “customary” nature of the invitation, visitors—including police performing knock and talk investigations—generally may not deviate from the front path or main routes of entry to a home.⁸⁹

Notably, Justice Scalia’s opinion offered some guidance as to extent of the license. He explained that the “implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”⁹⁰ Without the homeowner revoking the license in advance, even unwanted visitors, such as door-to-door salesmen or

81. *Id.* at 1415 (quoting *Breard v. City of Alexandria*, 341 U.S. 622, 626 (1951)).

82. *See id.* at 1416–17.

83. *Id.* at 1413.

84. *Id.*

85. *See id.* at 1416 (explaining that “the background social norms that invite a visitor to the front door do not invite him there to conduct a search” and thus concluding that “[t]here is not customary invitation” to search around a house with a drug-sniffing dog).

86. *Id.* at 1417 (“That the officers learned what they learned only by physically intruding on *Jardines*’ property to gather evidence is enough to establish that a search occurred.”). The decision was largely based on the police officers “purpose to conduct a search,” as well as the violation of the scope of the implied license. *Id.*

87. *Id.* at 1416.

88. *Id.*

89. *See id.* at 1416 (“[A visitor] marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.”).

90. *Id.* at 1415.

missionaries, are allowed to enter a homeowner's curtilage—provided they abide by the limits recognized by the Court.⁹¹

Routine and custom also limit the actions that visitors may take on the curtilage, even if they are on the front path or an otherwise permissible location. The actions of a visitor must be within the bounds of what is “routine” or consistent with “background social norms.”⁹² Thus, the Court has recognized that the scope of an implied license is also “limited . . . to a specific purpose.”⁹³ Accordingly, a visitor may not explore the front path with a metal detector or drug-sniffing dog, or by any other method falling outside the bounds of societal norms.⁹⁴

II. KNOCK AND TALKS AND REVOKING THE LICENSE

A. *The Potency of Knock and Talks*

The implied license to enter a homeowner's curtilage applies to all visitors to a property—wanted and unwanted alike.⁹⁵ Door-to-door salesmen rely on the license to make a living, Girl Scouts use it to sell cookies, and police officers use it to conduct investigations. This practice, generally referred to as a knock and talk, is commonly used across the nation.⁹⁶

In theory, the execution of a knock and talk is quite simple. Law enforcement officers—without a warrant—approach a home along the front path.⁹⁷ They knock or ring the doorbell in an attempt to engage with the homeowner or occupant and may “wait briefly.”⁹⁸ The officers may request to question or engage in a conversation with the individual.⁹⁹ The individual is under no obligation to speak with the officers and may tell them to leave at any point.¹⁰⁰ Absent an invitation to linger, the officers must leave promptly.¹⁰¹ The essential

91. *See id.* (“Complying with the terms of that traditional invitation . . . is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.”).

92. *Id.* at 1416.

93. *Id.*

94. *See id.*

95. *See id.*

96. *United States v. Carlross*, 818 F.3d 988, 994 n.4 (10th Cir. 2016). (“There does not appear to be any circuit that has concluded, after *Jardines*, that a knock-and-talk is invalid.”).

97. *See Jardines*, 133 S. Ct. at 1413; *Kentucky v. King* 563 U.S. 452, 469 (2011).

98. *Jardines*, 133 S. Ct. at 1415.

99. *King*, 563 U.S. at 469–70.

100. *Id.*

101. *Jardines*, 133 S. Ct. at 1415.

principle, as stated by the Supreme Court, is that “[w]hen law enforcement officers who are not armed with a warrant knock on a door, they [may] do no more than any private citizen might do.”¹⁰²

For this analysis, it is important to appreciate that a knock and talk is an easy and important tool for law enforcement to use, as it is a cheap and effective way to get information. No warrant is required and there are minimal judicial mechanisms for oversight to prevent targeting.¹⁰³ However, knock and talks can have significant negative ramifications for homeowners, even if they are not engaged in criminal conduct. Commentators have noted that the practice often leads to a full-fledged search, either through obtaining probable cause, the existence of exigent circumstances, or express consent to move beyond the scope of the implied license.¹⁰⁴ This dynamic is not intrinsically bad, as police officers may obtain evidence that prevents many others from harm. However, the inherent pressure of police interactions with homeowners—especially in the consent context—may lead to abuses of civil liberties or the targeting of certain individuals or groups.

There is thus considerable concern for citizens who consent to searches based on their interactions with police during a knock and talk. Evidence suggests that police often “perform ‘knock and talks’ for the purpose of getting consent to search.”¹⁰⁵ One commentator has even gone so far as to say that “it stands to reason that the overwhelming majority of ‘consensual’ residential searches are preceded by a knock-and-talk,”¹⁰⁶ illustrating that knock and talks consistently result in consent searches.¹⁰⁷ These consent searches are very difficult to challenge as courts are very reluctant to invalidate these searches, even when coercion is involved.¹⁰⁸ Rather, it takes

102. *King*, 563 U.S. at 469.

103. See Drake, *supra* note 26, at 26 (arguing that knock and talks allow police officers to “circumvent the warrant requirement” and that defendants have been unsuccessful in challenging this practice).

104. *Id.*

105. Craig M. Bradley, “Knock and Talk” and the Fourth Amendment, 84 IND. L.J. 1099, 1111 (2009).

106. Drake, *supra* note 26, at 37.

107. *Id.* at 37–38. “[I]n Michigan, a knock-and-talk ends in a consensual search eight to ninety percent of the time.” *Id.* Arkansas has a similar rate and anecdotal evidence from Missouri conforms to this view. *Id.* at 38.

108. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2002); see also *United States v. Barnett*, 989 F.2d 546, 556 (1st Cir. 1993) (noting that the “unnerving effect of having numerous officers arrive at one’s door with guns drawn” was not sufficient to invalidate the defendant’s consent).

“some extreme degree of coercion” in order for a court to invalidate a consent search.¹⁰⁹

Recognizing this dynamic, police have increasingly relied upon consent to conduct searches when the officers do not have probable cause.¹¹⁰ This is concerning, as homeowners may underestimate the invasiveness and consequences of a consent search, perhaps agreeing to the search in an effort to seem cooperative.¹¹¹ Further, many citizens do not understand that they can refuse when an officer asks for consent.¹¹² In this context, knock and talks can be particularly troubling. Though officers are “encouraged” to identify themselves as police, they are not required to inform homeowners about the limits of a knock and talk visit.¹¹³ Many residents may be unaware that the police, without a warrant, are merely visitors to the home and only rely upon the same implied license as the general public.¹¹⁴ Thus, police may conduct knock and talks in a targeted manner in the hope that the interactions may lead to full-fledged searches. Homeowners—especially those not knowing that they do not have to interact with police—may feel pressured to appease officers at the door. This dynamic erodes the Fourth Amendment’s warrant requirement, as it cuts out a level of judicial oversight and ultimately adds to the danger of knock and talks to homeowners.¹¹⁵ Ultimately, this doctrine permits police to utilize knock and talks against persons they suspect of wrongdoing, without the objective level of suspicion otherwise required by the Fourth Amendment, in the hope of

109. Strauss, *supra* note 108, at 212.

110. See Drake, *supra* note 26, at 37 (“The overwhelming majority of police searches are justified by the consent exception to the warrant requirement . . .”); see also 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2, at 67–68 (5th ed. 2012) (“The police certainly understand that [consent searches are unlikely to be deemed invalid], and thus have increasingly come to rely upon purported ‘consents’ as the basis upon which wholesale searches are undertaken without probable cause and upon no or minimal suspicion.”).

111. See, e.g., United States v. Carloss, 818 F.3d 988, 991 (10th Cir. 2016) (Noting that Carloss allowed the officers inside, despite his knowledge that incriminating evidence was in the house).

112. See Kentucky v. King, 563 U.S. 452, 470 (2011).

113. *Id.* at 468.

114. See Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013) (“[A] police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’” (quoting *King*, 563 U.S. at 469)).

115. See Drake, *supra* note 26, at 37 (arguing that “police would rather test their powers of persuasion on an average citizen than on a neutral and detached magistrate”).

obtaining consent—in effect conducting an end-run around the warrant requirement.¹¹⁶

B. Revocation of the Implied License to Protect Against the Overuse of Knock and Talks

Concerns regarding consent notwithstanding, knock and talks have consistently been upheld by courts as constitutional.¹¹⁷ As previously noted, warrantless knock and talks are predicated on an implied license theory.¹¹⁸ As Justice Scalia notes, “a police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’”¹¹⁹ This is an important point: for the purposes of implied license, police are in the same position as private citizens.¹²⁰ The badge and gun do not permit officers to go where they are not invited. Citizens can therefore protect themselves from police intrusion onto their curtilage by revoking the license to enter the premises.¹²¹ This can be easily accomplished if the homeowner is present and willing to engage with the officers—he or she can simply tell the officers that they may not enter the curtilage.¹²²

The more difficult scenario is when a homeowner is unable, unwilling, or not present to tell the officers that they may not enter the curtilage. However, courts have held that it is possible to rescind an implied license without express revocation.¹²³ According to the Tenth Circuit in *Carloss*, revocation is possible when the actions taken by a homeowner convey that an officer or member of the public

116. See *id.* at 26 (describing knock and talks as “law enforcement officers approach[ing] a targeted residence with a predetermined plan to circumvent the warrant requirement”).

117. See Bradley, *supra* note 105, at 1104 (“Only when police have employed ‘overbearing tactics,’ such as ‘drawn weapons, raised voices, or coercive demands,’ have their actions been faulted.” (quoting *United States v. Thomas*, 430 F.3d 274, 277–78 (6th Cir. 2005))); see also *United States v. Weston*, 443 F.3d 661, 666–67 (8th Cir. 2006); *United States v. Carter*, 360 F.3d 1235, 1238–39 (10th Cir. 2004); *Rogers v. Pendleton*, 249 F.3d 279, 289–90 (4th Cir. 2001); *State v. Cochran*, 115 S.W.3d 513, 522 (Tenn. Crim. App. 2003).

118. See *supra* Part I

119. *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

120. See *King*, 563 U.S. at 469–70.

121. *Id.* at 470.

122. *Id.*

123. See *United States v. Carloss*, 818 F.3d 988, 994–95 (10th Cir. 2016); *State v. Smith*, ___ N.C. App. ___, ___, 783 S.E.2d 504, 509 (2016); *State v. Christensen*, No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at *8 (Tenn. Crim. App. May 14, 2015), *aff’d*, 517 S.W.3d 61 (Tenn. 2017), *petition for cert. filed*, No. 17-321 (U.S. Aug. 31, 2017).

“could not go to the front door and knock.”¹²⁴ Another jurisdiction noted that revocation “must be obvious to the casual visitor.”¹²⁵ Put simply, as long as the “homeowner displays ‘clear demonstrations’ of his intent [that officers may not enter the curtilage], the license to approach the home may be limited or rescinded entirely.”¹²⁶

But exactly how is a homeowner supposed to effectively revoke the license? Since the Supreme Court’s 2013 decision in *Jardines*, courts have struggled to articulate what the exact requirements are. The courts that have tackled the issue of revocation have been reluctant to adopt a bright line rule, instead favoring analyses which provide more flexibility for courts to weigh individual circumstances.¹²⁷

Historically, notice has been the key to revoking a license. In *Jones*, the majority suggested that common law at the time of the founding informs the trespass conception of the Fourth Amendment.¹²⁸ In *Carloss*, then-Judge Gorsuch seems to suggest that the trespass test put forth by Justice Scalia is informed by the common law at the time of the founding.¹²⁹ Consequently, the works of English common law scholars are informative. For example, Blackstone notes that “every entry, therefore, thereon without the owner’s leave, and especially if contrary to his express order, is a

124. *Carloss*, 818 F.3d at 994–95 (“Whether [an implied license has been revoked] depends on the context in which a member of the public, or an officer seeking to conduct a knock-and-talk, encountered the signs and the message that those signs would have conveyed to an objective officer, or member of the public, under the circumstances.”).

125. *Christensen*, 2015 WL 2330185, at *8.

126. *Smith*, 783 S.E.2d at 509 (citing *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015)).

127. See *Christensen*, 2015 WL 2330185, at *8. In addition to the existence of a physical barrier and signs, courts sometimes take into account the general accessibility of the property, as well as the set-up of the property and extent of the curtilage. See *State v. Christensen*, 517 S.W.3d 60, 76–77 (Tenn. 2017).

128. See *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (“We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted [O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until at least the latter half of the 20th century.”). Some scholars have pushed back against the notion that the trespass test was revived by Justice Scalia. See Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, S. CT. REV. 67, 68–69, 97 (2012) (arguing that there never was a “historical trespass era” and that the test is a newer creation).

129. *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting) (“First, as a matter of law, [the concurrence’s reasoning] disregards the common law rule of decision at the time of the founding and its many applications, then and now, suggesting that posted notice *can* suffice to warn off ‘reasonable’ visitors. The Fourth Amendment is, after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be.”).

trespass or transgression.”¹³⁰ According to Blackstone, notice was sufficient to revoke the license—there was no requirement of a physical barrier to prevent entry.¹³¹ Other evidence further supports this notion; for example, one source specifically references warning signs, stating that “[n]otice by a board would be sufficient, if it could be proved that the defendant had read it.”¹³²

Despite the historical notion that notice is the key to revocation, there is an emerging consensus among the lower courts that the placement of a no trespassing sign alone is not enough to effectively revoke this license. The Tenth Circuit held in *Carlross* that “just the presence of a ‘No Trespassing’ sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock.”¹³³ As then-Judge Gorsuch put it, no trespassing signs have “become little more than lawn art.”¹³⁴ This notion is supported by decisions from federal district courts in Wisconsin¹³⁵ and Virginia,¹³⁶ as well as state court decisions from Nebraska¹³⁷ and Tennessee.¹³⁸ Recently, the North Carolina Court of Appeals echoed the Tenth Circuit, noting that “the sign alone . . . was

130. 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

131. *See id.* at *209–10, *214 (“Every trespass is willful where the defendant has notice, and is especially forewarned not to come on the land.”).

132. EDWARD CHRISTIAN, A TREATISE ON THE GAME LAWS: IN WHICH IT IS FULLY PROVED, THAT, EXCEPT IN PARTICULAR CASES, GAME IS NOW, AND HAS ALWAYS BEEN, BY THE LAW OF ENGLAND, THE PROPERTY OF THE OCCUPIER OF THE LAND UPON WHICH IT IS FOUND AND TAKEN: WITH ALTERATIONS SUGGESTED FOR THE IMPROVEMENT OF THE SYSTEM 96 (1821).

133. *Carlross*, 818 F.3d at 995.

134. *Id.* at 1011 (Gorsuch, J., dissenting).

135. *See Davis v. City of Milwaukee*, No. 13-CV-982-JPS, 2015 WL 5010459, at *13 (E.D. Wis. Aug. 21, 2015) (noting that “signs stating ‘Private Property’ or ‘No Trespassing’ do not, by themselves, create an impenetrable privacy zone”).

136. *See United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229, at *9 (W.D. Va. Aug. 30, 2013) (holding that “the existence and volume of ‘No Trespassing’ signs is not dispositive”).

137. *See City of Beatrice v. Meints*, 856 N.W.2d 410, 421 (Neb. 2014) (noting, in a slightly different context than a knock and talk, that the defendant “could not reasonably expect that tacking a ‘no trespassing’ sign to a tree would prevent others from viewing or walking on his land”).

138. *See State v. Christensen*, No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at *8 (Tenn. Crim. App. May 14, 2015) (finding that because “the [no trespassing] sign in this case would not have prevented the casual visitor or the reasonably respectful citizen from approaching [the defendant’s] residence” the defendant did not revoke the implied license).

insufficient to revoke the implied license to approach.”¹³⁹ The trend among decisions seems to favor this view.¹⁴⁰

C. *The Current Totality of the Circumstances Approach*

When determining whether or not a homeowner has revoked an implied license, most courts purport to apply a totality of the circumstances analysis.¹⁴¹ As noted in *Carloss*, this standard is generally based on reasonableness.¹⁴² A license is revoked when an objective officer or member of the public would, in light of all the circumstances, reasonably understand that the license has been revoked.¹⁴³ Put another way, “the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property.”¹⁴⁴ At face value, it seems that under certain circumstances, a no trespassing sign could suffice to revoke the license.

But there is another, unspoken requirement. For effective revocation, there generally must be a physical barrier between the homeowner and the public—even if the court purports to apply a totality of the circumstances test.¹⁴⁵ As one judge puts it, there must

139. *State v. Smith*, __ N.C. App. __, __, 783 S.E.2d 504, 509 (2016).

140. Still, it is important to note that a few courts have pushed back on this conclusion. The Tennessee Court of Criminal Appeals has been a relative hotbed in support of the effectiveness of no trespassing signs. Three cases in that court suggested that no trespassing signs revoke the implied invitation to approach. The impact of these cases is limited though, because the opinions are unpublished. Further, in two of these cases, the discussion of the no trespassing signs came in dicta. *See State v. Draper*, No. E2011-01047-CCA-R3-CD, 2012 WL 1895869, at *6 (Tenn. Crim. App. May 24, 2012); *State v. Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010); *State v. Henry*, No. W2005-02890-CCA-R3-CD, 2007 WL 1094146, at *5 (Tenn. Crim. App. Apr. 11, 2007). However, a recent Tennessee Supreme Court case has limited the applicability of these cases, as it has directly addressed the matter. *See State v. Christensen*, 517 S.W.3d 60, 75 (Tenn. 2017).

141. *See, e.g., United States v. Carloss*, 818 F.3d 988, 994 (10th Cir. 2016) (“Whether that is so depends on the context in which a member of the public, or an officer seeking to conduct a knock-and-talk, encountered the signs and the message that those signs would have conveyed to an objective officer, or member of the public, under the circumstances.”); *Christensen*, 517 S.W.3d at 76.

142. *See Carloss*, 818 F.3d at 994.

143. *See id.*

144. *Christensen*, 2015 WL 2330185, at *8.

145. Generally, even multiple, conspicuously-located signs do not revoke licenses. *See, e.g., Carloss*, 818 F.3d at 996–97; *United States v. Bearden*, 780 F.3d 887, 893 (8th Cir. 2015); *United States v. Holmes*, 143 F. Supp. 3d 1253, 1263–65 (M.D. Fla. 2015); *Davis v. City of Milwaukee*, No. 13-CV-982-JPS, 2015 WL 5010459, at *10 (E.D. Wis. Aug. 21, 2015); *United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229, at *5, *9 (W.D. Va. Aug. 30, 2013); *United States v. Schultz*, No. 13-20023, 2013 WL 2352742, at *5 (E.D. Mich. May 29, 2013).

be “special facts” which erase any ambiguity about revocation.¹⁴⁶ There appear to be no published cases¹⁴⁷ in which a homeowner who was unwilling or unable to explicitly revoke this privilege successfully argued that it was implicitly revoked without some sort of physical barrier on the curtilage.¹⁴⁸ Moreover, fencing that surrounds curtilage, along with locked gates and no trespassing signs, is virtually always effective.¹⁴⁹

Though courts do not designate it as an explicit requirement,¹⁵⁰ generally, knock and talks have been invalidated only when a barrier is present.¹⁵¹ In effect, courts have created a de facto requirement that a home must have a barrier in order to revoke the implied license. Thus, the test applied by courts is not a true totality of the circumstances analysis. In practice, homeowners will fail the test if they do not have a barrier, regardless of other circumstances.¹⁵² This de facto barrier requirement renders the concept of notice—and thus signage—virtually useless.

It seems likely that the de facto barrier requirement is a holdover from the *Katz* era. Before Justice Scalia developed the trespass

146. Carloss, 818 F.3d at 1000 (Tymkovich, J., concurring).

147. There are a few cases which do state that it is possible for a sign to revoke the license, but those cases either state that proposition in dicta or questionably rely on state trespass statutes to evaluate Fourth Amendment claims. See *United States v. Clarkson*, No. 1:13-cr-44, 2015 WL 328350, at *4 (E.D. Tenn. Jan. 26, 2015); *Powell v. State*, 120 So. 3d 577, 584 (Fla. Dist. Ct. App. 2013).

148. Unless, of course, the homeowner is present. This analysis operates under the assumption that the homeowner is unable or unwilling to engage with the police.

149. See Carloss, 818 F.3d at 1000 (Tymkovich, J., concurring) (“[A] closed or locked gate, especially in the residential context, imparts more information to the reasonable observer.”); *Brown v. State*, 152 So. 3d 619, 623–24 (Fla. Dist. Ct. App. 2014); *Bainter v. State*, 135 So. 3d 517, 520 (Fla. Dist. Ct. App. 2014). By contrast, open gates, with or without no trespassing signs, are usually not sufficient to revoke the implied license. See, e.g., *Bearden*, 780 F.3d at 894 (citing *United States v. Robbins*, 682 F.3d 1111, 1115 (8th Cir. 2012)).

150. One dissenting judge on the Tennessee Supreme Court referenced this requirement, noting that signage is not enough to “protect our constitutional rights against a warrantless search and that it may take ‘a fence and a closed gate that physically block access to the front door of a house’ to revoke the implied license to enter the land around a residence.” *State v. Christensen*, 517 S.W.3d 60, 79 (Tenn. 2017) (Lee, J., dissenting.) (quoting majority opinion).

151. See *United States v. Holmes*, 143 F. Supp. 3d 1252, 1262 (M.D. Fla. 2015) (“When it comes to knock and talk jurisprudence, courts consider the effectiveness of all the barriers to entry to determine whether they serve to revoke the implied license.”); *Brown*, 152 So. 3d 623–24; *Bainter*, 135 So. 3d at 520.

152. See *Christensen*, 2015 WL 2330185, at *8 (holding that actions by homeowner were not sufficient to revoke); *United States v. Denim*, No. 2:13-CR-63, 2013 WL 4591469, at *2, *5–6 (E.D. Tenn. 2013) (noting that even six no trespassing signs, among other things, do not revoke the implied license).

analysis in *United States v. Jones*, *Katz*'s reasonable expectations test applied to situations when officers entered a homeowner's curtilage.¹⁵³ Under *Katz*, signage alone generally could not create an expectation of privacy that society was prepared to recognize as reasonable.¹⁵⁴ Courts generally required a barrier to create a legitimate expectation of privacy.¹⁵⁵

The de facto barrier requirement is not faithful to the historical conception of revocation of an implied license. As noted above, the historical key to revoking an implied license is notice.¹⁵⁶ The de facto barrier requirement distracts from this key principle and artificially raises the burden to revoke a license. Recently, then-Judge Gorsuch noted that the common law suggested that "posted notice *can* suffice to warn off 'reasonable' visitors."¹⁵⁷

Modern law also suggests that the barrier requirement does not conform to ordinary trespass principles. No trespassing signs have been held by some state courts to revoke consent in tort law contexts.¹⁵⁸ For example, in a non-curtilage context, an "adequately placed" warning sign can trigger a tort claim for trespassing when an unwelcome visitor thereafter enters the property.¹⁵⁹ If a warning sign can trigger a trespassing claim in a non-curtilage context, it stands to reason that curtilage would be afforded at least similar, if not more,

153. See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

154. Michael A. Rosenhouse, Annotation, *Validity of Search and Reasonable Expectation of Privacy as Affected by No Trespassing or Similar Signage*, 45 A.L.R. 6th 643, 658 (2009) ("In most cases involving signs without any other physical object—such as a fence or gate—signaling a desire for privacy or exclusion, a 'no trespassing' or similar sign has been held insufficient to support a protectable privacy interest in both rural and suburban and urban environments, and courts have often explained themselves on the basis that rights protected by the Fourth Amendment are not coterminous with the private property interests embodied in the concept of trespass.").

155. See *id.*; see also 68 AM. JUR. 2D *Searches and Seizures* § 65 (2017).

156. See *supra* notes 128–32 and accompanying text.

157. *United States v. Carloss*, 818 F.3d 988, 1011 (10th Cir. 2016) (Gorsuch, J., dissenting). Then-Judge Gorsuch had previously noted that "despite the relatively low literacy rates in mid-18th century England and early America, there appears to be considerable authority suggesting that posted signs or other types of published notice could suffice as a matter of law to ward off unwanted visitors." *Id.* at 1009.

158. See *Bonney v. Canadian Nat'l R.R. Co.*, 613 F. Supp. 997, 1001–02 (D. Me. 1985) (noting that due to no trespassing signs members of the public "could not have reasonably believed that the railroad consented to such use"); *Murphy v. Muskegon Cty.*, 413 N.W.2d 73, 77 (Mich. Ct. App. 1987) ("[T]here was a visible 'Road Closed' sign, a 'Dead-end Road' sign, and a large yellow 'No Trespassing' sign . . . [T]he jury could infer that the driving of the motorcycle down this roadway constituted a trespass.").

159. Douglas Hale Gross, Annotation, *Liability in Connection with Injury Allegedly Caused by Defective Condition of Private Road or Driveway*, 44 A.L.R. 3d 355, 376 (1972) (noting that "one may not be a trespasser until after he passes an adequately placed warning sign" with no mention of a physical barrier requirement).

protection due to the enhanced constitutional protection afforded to curtilage under the Fourth Amendment.

By creating the physical barrier requirement, courts have strayed from the principles limiting the powers of police in *Kentucky v. King*¹⁶⁰ and *Florida v. Jardines*. In those cases, the Supreme Court emphasized that while conducting a warrantless knock and talk, police are in the same position as a private citizen vis-à-vis the home.¹⁶¹ It thus stands to reason that—under the current regime, for better or worse—if a no trespassing sign can revoke an implied license for a private citizen, it should do the same for police.

III. FORMULATING A SOLUTION

The present acceptance of both *Katz* and *Jones* in the context of knock and talks leaves police officers and citizens in a difficult position, as neither possesses a true bright-line rule by which to evaluate their rights. This ambiguity in the law must be resolved to promote both civil liberties and effective policing. Any changes to the circumstances in which a license can be revoked will have a major impact on police practice, with the practice of knock and talks being most affected. In that vein, it is important to note that numerous appellate court decisions upholding the practice post-*Jardines* demonstrate that it is still a relevant and valid tool.¹⁶² *Jardines*, with its recognition that the scope of an implied license is limited,¹⁶³ should provide a deterrent for unscrupulous officers who use knock and talks as a front to conduct a search. Banning the practice altogether, though, may hamstring investigators who would be unable to approach the homes of witnesses or neighbors without prior express consent, a warrant based on probable cause, or an exigent circumstance.

On the other end of the spectrum, it has been suggested that police officers should “enjoy an irrevocable right to enter a home’s curtilage to conduct a knock and talk.”¹⁶⁴ This argument, though, opens up potential constitutional issues. Then-Judge Gorsuch’s

160. 563 U.S. 452 (2011).

161. See *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013); *King*, 563 U.S. 452, 469 (2011).

162. See, e.g., *United States v. Carloss*, 818 F.3d 988, 992 (10th Cir. 2016) (citing *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006)).

163. See *Jardines*, 133 S. Ct. at 1416.

164. *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting) (citing Brief of Plaintiff/Appellee at 17, *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016) (No. 13-7082), 2014 WL 1269852, at *17).

dissent in *Carloss* criticizes this assertion by characterizing it as a “sort of permanent easement [for law enforcement officers]—whatever the homeowner may say or do about it.”¹⁶⁵ He went on to state that “[n]o trace of some sort of permanent easement belonging to the state (and the state alone) can be found in the common law at the founders’ time.”¹⁶⁶ In other words, this potential solution cannot be reconciled with the Fourth Amendment in then-Judge Gorsuch’s view.¹⁶⁷

Instead, the optimal rule regarding implied licenses must be faithful to the historical requirement of revocation: notice.¹⁶⁸ To achieve this, courts should apply an actual totality of the circumstances test, considering the objective notice of revocation provided by the homeowner. This solution can be easily incorporated into contemporary jurisprudence, as courts already purport to employ a version of the totality of the circumstances test, asking whether law enforcement officers were reasonably put on notice that a homeowner had revoked the implied license.¹⁶⁹ The application of this test is flawed, however, due to the de facto barrier requirement, which fails to consider the centrality of notice. While the creation of a barrier should certainly be considered, it should not be a prerequisite to pass this test. Courts should instead refocus their inquiry into what steps the homeowner has taken specifically to revoke the license and put objective visitors on notice that they may not approach the home without an express invitation. Accordingly, courts must remain focused on the key principle: whether the actions taken by the homeowner convey revocation of the license.

Interestingly, a substantial number of state legislatures have agreed that signage alone is sufficient to revoke an implied license in

165. *Id.* at 1005. In the government’s brief to the Tenth Circuit, the government did not cite any sources of authority for this proposition, simply stating “society would likely recognize the ‘no trespassing’ signs here as prohibiting drunks, vagrants and the like from wandering on the property and loitering. However, society would not endorse the proposition that ‘no trespassing’ signs would prohibit postal carriers, FedEx couriers, flower delivery persons, the paperboy or the police from approaching the home and making contact with the occupant to fulfill the duties of their respective jobs.” Brief of Plaintiff/Appellee at 19, *United States v. Carloss*, 818 F.3d 988, 992 (10th Cir. 2016) (No. 13-7082), 2014 WL 1269852, at *19.

166. *Carloss*, 818 F.3d at 1006 (Gorsuch, J., dissenting). The dissent also noted that there appeared to be “no colorable authority” in support of this theory. *Id.* at 1007.

167. Despite being the main theory upon which the prosecution’s theory rested, the Tenth Circuit did not discuss it at all. The lone dissenter, then-Judge Gorsuch, noted that “neither of my colleagues’ opinions even dignifies it with discussion.” *Id.* at 1007. In this vein, then-Judge Gorsuch seems to echo the viewpoint of Justice Scalia.

168. See *supra* notes 128–32 and accompanying text.

169. See *supra* Section II.C.

other contexts.¹⁷⁰ Numerous criminal trespass statutes, which do not necessarily have a bearing on a court's Fourth Amendment analysis, explicitly recognize that signage can revoke a license.¹⁷¹ Some statutes regulate the size or positioning of such signage.¹⁷² Others simply note that the signs must be posted "in a manner reasonably likely to come to the attention of intruders."¹⁷³ Additionally, some states do not even require warning signs—a mere colored mark is sufficient to provide notice.¹⁷⁴ These statutes suggest that courts may not be faithfully applying trespass law in the knock-and-talk context.¹⁷⁵

This refocusing does not mean that signage would be sufficient to revoke an implied license in all circumstances. For example, the posting of a small, generic no trespassing sign may not indicate to an objective officer or casual visitor a clear intent to revoke the license. Placement and size of the sign should be taken into consideration, as should the content of the sign.¹⁷⁶ The number of signs posted is also a

170. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 402 (West, Westlaw through 2017 First Reg. Sess. of 128th Legis.) ("A person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so . . . [e]nters any place . . . that is posted . . . in a manner reasonably likely to come to the attention of intruders."); N.J. STAT. ANN. § 2C:18-3 (West, Westlaw through L.2017, c. 240 & J.R. No. 19) ("A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by . . . [p]osting in a manner prescribed by law or reasonably likely to come to the attention of intruders."); N.M. STAT. ANN. § 30-4-1 (West, Westlaw through First Reg. and Special Sess. of 53rd Legis. (2017)) ("Notice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts . . .").

171. See, e.g., CAL. PENAL CODE § 602(1) (West, Westlaw through 2017 Reg. Sess.) (stating that "[e]ntering . . . unenclosed lands where signs forbidding trespass are displayed at intervals" constitutes misdemeanor trespass).

172. See, e.g., WIS. STAT. ANN. § 943.13(2)(am)(1) (West, Westlaw through 2017 Act 118) ("Land is considered to be posted . . . [i]f a sign at least 11 inches square is placed in at least 2 conspicuous places for every 40 acres to be protected.").

173. See N.C. GEN. STAT. § 14-159.13 (2015).

174. See TEX. PENAL CODE ANN. § 30.05(b)(2)(D) (West, Westlaw through 2017 Reg. and First Called Sess. of 85th Legis.) (noting that a homeowner may give notice that an entry is forbidden by placing vertical purple marks on trees that are "readily visible to any person approaching the property"); VA. CODE ANN. § 18.2-119, 134.1 (West, Westlaw through 2017 Reg. Sess.); WIS. STAT. ANN. §§ 943.13-943.15 (West, Westlaw through 2017 Act 118) (noting that "markings [must be] at least one foot long, including in a contrasting color the phrase 'private land' and the name of the owner, are made in at least 2 conspicuous places for every 40 acres to be protected").

175. It is important to note, however, that a violation of state trespass statutes likely does not have a direct effect on the Fourth Amendment analysis. See *Virginia v. Moore*, 553 U.S. 164, 176 (2008) ("[S]tate restrictions do not alter the Fourth Amendment protections."). In other words, even if the police violate a state criminal trespass statute, the Fourth Amendment analysis is not necessarily affected because Fourth Amendment protections are not linked to state law. See *id.*

176. "No trespassing" conveys a different message than "private property" or "no visitors for any reason."

factor that could be considered. A large, conspicuous sign with unambiguous language would likely satisfy the totality of the circumstances test in most cases.¹⁷⁷

A revitalized totality of the circumstances test is also more faithful to common law principles and state statutes. By refocusing on the concept of notice by the true totality of circumstances, courts can more faithfully scrutinize knock and talk interactions. Further, the test would more closely parallel the framework adopted by many state legislatures.¹⁷⁸

The recent Tenth Circuit decision in *Carloss* leaves the door open for a refocusing of the test.¹⁷⁹ Perhaps most notably, then-Judge Gorsuch's lengthy dissent argues in favor of a less-burdensome revocation regime—one that gives more weight to signage and the expressions of the homeowner.¹⁸⁰ He highlighted the historical angle, noting that “[n]othing in [the] common law rule of decision required both notice by word (a sign) and notice by deed (a fence).”¹⁸¹ Still, Gorsuch recognized that no trespassing signs alone may not always do the trick.¹⁸²

Even so, as applied to the facts of *Carloss*, he pointed out that the multiple no trespassing signs, despite being small and generic, should have given the officers reasonable notice that they were not allowed to enter the homeowner's curtilage.¹⁸³

Moreover, the majority opinion in *Carloss* holds open the possibility that signage alone can revoke an implied license. The majority opinion largely focuses on the ambiguity of the signage on

177. A faithful application of the “clear demonstrations” test, *State v. Smith*, __ N.C. App __, __, 783 S.E.2d 504, 510 (2016), should find that a sign can revoke, provided it is conspicuous and specific enough. Similarly, if the sign—and its message—is obvious to the casual visitor, it should revoke the implied license.

178. *See supra* notes 170–74 and accompanying text.

179. Though the door is open, it may be only cracked, as the most recent decision (as of this publication) regarding implied license cites *Carloss* for the proposition that police are impliedly invited to the premises “even in the face of signage prohibiting trespassing.” *Malone v. City of Wynnewood*, No. CIV-17-0527-HE, 2017 WL 3671170, at *3 (W.D. Okla. Aug. 24, 2017).

180. *See United States v. Carloss*, 818 F.3d 988, 1008–09 (10th Cir. 2016) (Gorsuch, J., dissenting).

181. *Id.* at 1009.

182. *See id.* at 1011 (“No one suggests that posting a No Trespassing sign ‘begins and ends’ the Fourth Amendment inquiry or that a sign will succeed in revoking the implied license ‘in every instance.’ I do not doubt, for example, that often enough a No Trespassing sign—perhaps because of its distant or obscure placement—will fail to provide notice that the implied license to knock on the front door has been revoked.”).

183. *Id.* at 1009.

the property, not the lack of a physical barrier.¹⁸⁴ Though ultimately ruling in favor of the government, the focus of the majority's opinion is essentially the correct one. Indeed, even then-Judge Gorsuch noted that the majority is "strongly implying that No Trespassing signs *will* do their job so long as they (1) are placed visibly on the curtilage itself and (2) don't contain surplus language."¹⁸⁵ Consequently, it is possible that lower courts will use *Carloss* as an opportunity to shift away from the de facto barrier requirement and towards a true totality of the circumstances test.

Recently, the Tennessee Supreme Court addressed this issue.¹⁸⁶ In a three-to-one decision, the court applied the totality of the circumstances analysis taken from *Carloss*.¹⁸⁷ Despite multiple no trespassing signs, the Tennessee Supreme Court found that the homeowner did not revoke the implied license to enter the curtilage of the home.¹⁸⁸ According to the court, "under the totality of the circumstances, the Defendant's 'No Trespassing' signs . . . were not sufficient to revoke the implied license."¹⁸⁹ By applying this test, one scholar noted, the Tennessee Supreme Court clearly does not place much stock in no trespassing signs.¹⁹⁰

The lone dissenter on the Tennessee Supreme Court largely echoed the concerns raised by then-Judge Gorsuch. Though less pointed than Gorsuch's dissent in *Carloss*, Justice Sharon Lee forcefully argued that signage alone should be sufficient to revoke an

184. The concurrence seemed to apply the de facto barrier requirement, noting that "[n]o special facts—like a fence or other physical obstacle—clarified to the reasonable visitor that these signs revoked the license." *Id.* at 1000 (Tymkovich, J., concurring).

185. *Id.* at 1014 (Gorsuch, J., dissenting).

186. *See* *State v. Christensen*, 517 S.W.3d 60, 63–64 (Tenn. 2017).

187. *See id.* at 75 ("[U]nder the totality of the circumstances, would an objectively reasonable person conclude that entry onto the Defendant's driveway was categorically barred?").

188. *Id.* at 76–77. The majority also hinted at the existence of the barrier requirement, noting that "while a fence and a closed gate that physically block access to the front door of a house, in some instances, may be sufficient to revoke the implied license to enter the curtilage of a residence, mere ambiguous signage and unkemptness are not." *Id.* Indeed the lone dissenter also hinted at the barrier requirement's existence, arguing that the result in *Christensen* is that "only citizens wealthy enough and situated in an area where they can 'convert the areas around their homes into the modern equivalent of a medieval fortress' may protect themselves from governmental intrusion and invasion of privacy." *Id.* at 84 (Lee, J., dissenting) (citing *State v. Christensen*, 953 P.2d 583, 587 (Idaho 1998)).

189. *Id.* at 77 (majority opinion).

190. *See* Orin Kerr, *The Fourth Amendment and "No Trespassing" Signs*, WASH. POST. (Apr. 12, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/12/the-fourth-amendment-and-no-trespassing-signs/?utm_term=.00421a99ad10 [http://perma.cc/S8HS-W9JA].

implied license.¹⁹¹ In her argument, she referenced both the Tennessee statute regarding criminal trespass, as well as the specific text of the defendant's signage.¹⁹² Ultimately, however, the other justices on the court were not convinced and the totality of the circumstances test prevailed.¹⁹³ It remains to be seen whether future courts will take hold of the dissents by then-Judge Gorsuch and Tennessee Justice Lee, or whether the totality of the circumstances test will apply going forward.

CONCLUSION

Revoking an implied license has become very difficult. Homeowners are often forced to deal with police approaching their home as part of a knock and talk. This practice, while an effective tool for law enforcement, can have serious ramifications for homeowners. Often, knock and talks can result in invasive searches, either by homeowner consent or by probable cause as a result of the interaction.

Citizens wishing to avoid a knock and talk can attempt to revoke the basis on which the practice is based—the implied license. Courts, however, essentially require a homeowner to construct a physical barrier that keeps police and visitors off the premises. Importantly, mere signage—no matter how obvious or clear—is not sufficient to revoke the license. This de facto barrier requirement distracts and detracts from the historical requirement for revocation: notice.

Courts should carefully consider then-Judge Gorsuch's dissent in *United States v. Carlross* and move away from the de facto barrier requirement. Courts should return to a true totality of the circumstances test. While it should remain an important consideration in the analysis, the existence of a barrier should not be effectively dispositive on the outcome of a case.

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191. See *Christensen*, 517 S.W.3d at 84 (Lee, J., dissenting) (“The Court’s decision that multiple ‘No Trespassing’ signs are not sufficient to revoke the implied license for entry denies ordinary citizens the protections of the United States and the Tennessee Constitutions against warrantless searches.”).

192. *Id.* at 82.

193. *Id.* at 78–79 (majority opinion).

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