

Arrested Development in Search Law: A Look at Disputed Consent Through the Lens of Trespass Law in a Post-Jones Fourth Amendment—Have We Arrived at Disputed Analysis?

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ABSTRACT

“Two roads diverged in a yellow wood, and sorry I could not travel both”

Much like the words of Robert Frost in “The Road Not Taken,” we have arrived at a point in the law of Fourth Amendment search analysis where two roads appear before us: privacy or property. Recently, there has been a development in the Supreme Court’s jurisprudence that requires a closer examination of the proper direction to take. Specifically, the issue of disputed consent and the appropriate search inquiry in these cases presents a crossroads for the Court. What road will it choose? Does it matter?

Beyond this, however, exists a greater problem: what happens when the two rules of search—Katz expectation of privacy and Jones trespass onto property—conflict? What happens when the Katz rule says yes to a situation involving what is determined as an unreasonable search and the Jones rule says no? Do we have a situation of disputed analysis in our disputed consent decisions of our Court? When considering the ambit of modern search law, further complicated by the resurgence of the trespass test by Justice Scalia, three crucial observations appear:

*(1) Prior to Jones, the key inquiry in cases of third-party consent was grounded in terms of expectations of privacy. In the particular situation of disputed consent by co-occupants, the rule was that a present objector to consent defeated the wishes of another co-occupant (no trumps yes). Since Jones, however, Justice Scalia has called for a reconsideration of this rule in light of trespass. Through his concurrence in *Fernandez v. California*, Justice Scalia declared that the police, with the consent of a co-occupant, are not liable under trespass when the police enter the home to search, irrespective of an objecting co-occupant. Much like the question of whether no trumps yes in disputed consent*

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cases, the new question for the post-Jones Court will be whether no trumps yes in cases of disputed search analysis.

(2) The utilization of the current test for a Fourth Amendment search under a property-based framework supports Justice Scalia’s assertion that a consent police search is reasonable. The police are granted a license to enter the property, through the consent of a co-occupant. In light of this determination, the police would stand in the shoes of the grantor of the license and are immune from trespass, despite the objections of another co-occupant.

(3) Because of this development, in disputed consent cases, it appears likely that the Court could arrive at a different conclusion depending upon which test for a search the Court chooses to use. Similar to the problem of disputed consent, where one co-occupant says yes and the other says no, we may very well have arrived at a place in our Fourth Amendment understanding where disputed analysis, trespass or privacy, threatens to cloud an already obscured view of search law. For now, we are marooned to fight over the directions.

- INTRODUCTION..... 3
- I. A BRIEF HISTORY OF TIME AND PRIVATE SPACE: THE LAW OF SEARCHES UNDER THE FOURTH AMENDMENT 5
 - A. In the Beginning, Trespass Was King..... 6
 - B. The King Is Dead! Long Live Privacy and the Katz Test..... 8
 - C. It’s Alive! Justice Scalia Resurrects Trespass Through Jones and Jardines..... 10
- II.THE PATH OF SEARCH LAW ARRIVES AT A FORK IN THE ROAD. DOES NO TRUMP YES?: THE CURIOUS CASE OF DISPUTED CONSENT AS GUIDE 16
 - A. Georgia v. Randolph (Pre-Jones): No Trumps Yes in Disputed Consent..... 18
 - B. Fernandez v. California (Post-Jones): Yes Trumps No When the Objector Is Arrested and Removed from the Scene 21
- III.ARRESTED DEVELOPMENT: HAS THE COURT ARRESTED OUR UNDERSTANDING OF SEARCH LAW BY ITS ADHERENCE TO THE DUAL TESTS FOR A SEARCH? 25
 - A. Justice Scalia’s View of Trespass: All You Need Is Yes? 27
 - B. It’s Not Just About You (or the Police), It’s About Me: Co-Occupants and the Right to Exclude Under Trespass..... 30
 - C. Are We There Yet? Some Final Thoughts on the

2015]	<i>ARRESTED DEVELOPMENT IN SEARCH LAW</i>	3
	Landscape of the Privacy/Trespass Dispute.....	36
IV.	CONCLUSION.....	40

INTRODUCTION

“Two roads diverged in a yellow wood, and sorry I could not travel both”¹

Much like the words of Robert Frost in “The Road Not Taken,”² we have arrived at a point in the law of Fourth Amendment search analysis where two roads appear before us: privacy or property. Recently, there has been a development in the Supreme Court’s jurisprudence that requires a closer examination of the proper direction to take. Specifically, the issue of disputed consent and the appropriate search inquiry in these cases presents a crossroads for the Court. What road will it choose? Does it matter?

When it comes to situations of disputed consent police searches of homes involving physically present co-occupants, the rule has been simple: no trumps yes.³ Yet, there have been some significant developments since the Supreme Court visited this issue in *Georgia v. Randolph*.⁴ Most notably, Justice Scalia in *United States v. Jones* has single-handedly resurrected the property-based trespass inquiry for searches.⁵ Given the resurgence of trespass analysis, would a majority of the Court decide a case like *Randolph* differently? Would the Court abandon this exception that was grounded upon the privacy-based scrutiny of “shared social expectations”⁶ in favor of adopting a trespass test for physical intrusions in the home?

Most recently, the Court in *Fernandez v. California* considered whether it would extend the *Randolph* rule to circumstances when the police arrest and remove the protesting co-occupant and return to seek consent from another occupant.⁷ While the Court resolves the issue by concluding that the rule in *Randolph* does not apply,⁸ what may be most

¹ ROBERT FROST, MOUNTAIN INTERVAL 9 (1921).

² FROST, *supra* note 1.

³ See *Georgia v. Randolph*, 547 U.S. 103 (2006).

⁴ See *id.*

⁵ 132 S. Ct. 945, 952 (2012) (“But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”). See also *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

⁶ *Randolph*, 547 U.S. at 111 (There is “great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”).

⁷ *Fernandez v. California*, 134 S. Ct. 1126, 1128 (2014).

⁸ *Id.* at 1130.

notable is the separate concurrence of Justice Scalia.⁹ Even in its brevity, we see a glimpse of his trespass-based influence on *Fernandez*. But perhaps more importantly, we see how this may have very well influenced a different decision in *Randolph*¹⁰—a decision that based upon trespass, an objecting co-occupant would not trump the wishes of another consenting occupant. If this is the case, does this mean, depending upon the path the Court chooses to follow, it may reach different conclusions where yes may trump no?

This Article will examine the decisions of *Randolph* and *Fernandez* from the perspective of the newly revitalized rule of trespass through the lens of its reviver, Justice Scalia. This Article will conclude that under the trespass-based search analysis, the police may validly search a home based upon the consent of a co-occupant, regardless of a physically present objecting co-occupant.¹¹ Therefore, this Article will conclude that *Randolph* may have been erroneously decided, given today's return to trespass law for Fourth Amendment search analysis. Beyond this, however, this Article presents a greater problem: what happens when the two rules of search—*Katz* expectation of privacy or *Jones* trespass onto property—conflict? What happens when the *Katz* rule says yes to a situation involving what is determined as an unreasonable search and the *Jones* rule says no? Much like the conflicting co-occupants scenario in both *Fernandez* and *Randolph*, does no trump yes to determine if there was an unreasonable search?

Part I of this Article provides a brief history of how the Fourth Amendment has defined a search. In it, we see the shift from a property-based analysis founded under physical trespass to a privacy-based analysis, heralded into existence by the decision in *Katz v. United States*.¹² Later, the Article examines the return to prominence of the trespass test to define a search in the Justice Scalia majority opinions of *Jones* and *Florida v. Jardines*.¹³ These developments to the law of search provide the impetus to revisit the issue raised in *Randolph*.

Part II presents the crossroads of search analysis through the cases

⁹ *Id.* at 1137–38 (Scalia, J., concurring).

¹⁰ *Id.* at 1137 (“I believe *Georgia v. Randolph* was wrongly decided.”) (citation omitted).

¹¹ There could be a variety of ways to describe the relationship between the parties and their interests to the property (co-tenant, tenant in common, etc.) as contemplated by the Court in this examination. I will use the term “occupant” or “co-occupant” throughout this Article to describe an individual who possesses “common authority” over the property. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

¹² 389 U.S. 347 (1967).

¹³ 133 S. Ct. 1409 (2013).

of disputed consent as a guide. It examines the decisions of *Randolph* (pre-*Jones*) and *Fernandez* (post-*Jones*) together and concludes that Justice Scalia's trespass analysis provides an alternate rationale to the decisions.

Part III of this Article proposes that if the trespass analysis is here to stay in Fourth Amendment jurisprudence, it could significantly alter the way we view search law and could threaten to further obscure our understanding of administrable rules under property or privacy. This part explains how the police may properly search a home based on consent over an objecting co-occupant. Using an understanding of property as the lens, an objecting co-tenant may not claim trespass against a person who is licensed by another co-tenant to enter the home. Finally, this Article suggests that because of the potential for opposing results, depending on the test used to access the meaning of a search, we may have reached a claim of disputed analysis that requires immediate resolution.

I. A BRIEF HISTORY OF TIME AND PRIVATE SPACE: THE LAW OF SEARCHES UNDER THE FOURTH AMENDMENT

*"Then took the other, as just as fair, and perhaps the better claim."*¹⁴

To attempt to plot the course of the Supreme Court's understanding of the law of searches is, in no small measure, a Herculean task. While the Fourth Amendment's text provides in plain terms "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"¹⁵ the journey towards defining what constitutes a search under the Fourth Amendment is fraught with twists and turns.¹⁶ Over time, three distinct paths emerged.

¹⁴ See FROST, *supra* note 1, at 9.

¹⁵ See U.S. CONST. amend IV.

¹⁶ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) ("Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course . . .").

A. *In the Beginning, Trespass Was King*¹⁷

Prior to *Katz*, the test for a Fourth Amendment search was a property-based question¹⁸: whether the government physically intruded into a constitutionally protected area.¹⁹ The origin of the test can be traced back to an understanding of the English law of trespass.²⁰ Often repeated in both pre-*Katz* cases, as well as in the Scalia version of trespass in *Jones*, is the English case of *Entick v. Carrington*.²¹ The Supreme Court in *Boyd v. United States*²² made clear that *Entick*'s "celebrated judgment,"²³ denouncing the practice of general warrant searches in private homes, was so monumental that "its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."²⁴ It was under this view that "every invasion of private property, be it ever so minute, is a trespass."²⁵

Despite this broad proclamation of constitutional protections under trespass, the Court has grappled with the contours of the meaning of an actionable invasion of private property, often producing rigid results. In what appeared to be two very similar factual scenarios of government monitoring of conversations taking place on private property, the Court held in *Goldman v. United States*²⁶ that the monitoring of an office was not a violation under the Fourth Amendment, but in *Silverman v. United States*²⁷ that the monitoring of a gambling establishment was actionable.

¹⁷ See Arnold H. Loewy, *United States v. Jones: Return to Trespass—Good News or Bad*, 82 MISS. L.J. 879, 879 (2013) ("For the first two-thirds of the twentieth century, trespass was king in regard to Fourth Amendment searches.").

¹⁸ But see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (2012) (discussing that "no trespass test was used in the pre-*Katz* era").

¹⁹ *Lanza v. New York*, 370 U.S. 139, 142 (1962) (determining whether a visitor's room of a jail qualifies as a "constitutionally protected area").

²⁰ *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)) ("By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, . . . which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.").

²¹ 19 How. St. Tr. at 1029.

²² Genealogical research by the author of this Article has not revealed a familial connection between the author and the claimant of the thirty-five cases of plate glass.

²³ *Boyd*, 116 U.S. at 627.

²⁴ *Id.* at 626–27.

²⁵ *Id.* at 627–28 (quoting *Entick*, 19 How. St. Tr. at 1029).

²⁶ 316 U.S. 129 (1942).

²⁷ 365 U.S. 505 (1961).

2015] *ARRESTED DEVELOPMENT IN SEARCH LAW* 7

In both cases, the government gathered incriminating information by listening to conversations coming from a private area.²⁸ The difference in these two contradictory outcomes was not the type of room that was monitored; rather, it was whether or not the government physically intruded into the area.²⁹ In the case of *Silverman*, it came down to a matter of inches.³⁰

Prior to *Silverman*, the Court ruled that the placement of a sound amplification listening device against a common wall in order to hear the private conversations of the suspects was not a search.³¹ In *Silverman*, however, the Court found a violation of the Fourth Amendment when the government inserted a listening device several inches into a common wall.³² A physical intrusion occurred when the device made contact with a heating duct belonging to the suspect's property.³³ While the Court considered in dicta the potential threats to privacy due to advances in eavesdropping technology,³⁴ it distinguished this case from *Goldman* because of the "reality of an actual intrusion into a constitutionally protected area."³⁵

This reality of an actual intrusion trespass test often produced absurd results. The Court continued to allow the government monitoring of private property, so long as there was no physical trespass. In *Olmstead v. United States*, the government did not seek a warrant and installed wiretaps into the telephone wires of at least four homes and an office of individuals suspected of conspiring to violate prohibition laws.³⁶ Despite the fact that the government listened in on the private calls from the homes for a period of many months, the *Olmstead* Court ruled that the government did not violate the Fourth Amendment.³⁷ Again, the rationale for this decision was that the government action did not amount to a trespass since the wiretaps were placed on telephone lines *outside* of the suspects' homes.³⁸ The Court, applying an unbending formalism to the view of searches,

²⁸ *Silverman*, 365 U.S. at 505; *Goldman*, 316 U.S. at 129.

²⁹ *Silverman*, 365 U.S. at 505; *Goldman*, 316 U.S. at 129.

³⁰ *Silverman*, 365 U.S. at 512.

³¹ *Goldman*, 316 U.S. at 131.

³² *Silverman*, 365 U.S. at 506.

³³ *Id.*

³⁴ *Id.* at 508–09.

³⁵ *Id.* at 512.

³⁶ 277 U.S. 438, 456 (1928).

³⁷ *Id.* at 466.

³⁸ *Id.* at 465 ("By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place.").

explained that the “language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant’s house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.”³⁹

While decisions like *Goldman* and *Olmstead* controlled the law of searches during this time, there would appear some signs along the way to suggest a possible change of direction. Justice Douglas, in his concurrence in *Silverman*, suggested that a fork in the road was on the horizon.⁴⁰ The wrong was not trespass. Instead, the wrong involved an invasion of privacy “when the intimacies of the home were tapped, recorded, or revealed.”⁴¹ We would not have to wait long before the Court embarked on this new heading.

B. The King Is Dead! Long Live Privacy and the Katz Test

With one swift blow, the *Katz* Court effectively eradicated the trespass test.⁴² Prior to the 1967 decision of *Katz*, it seemed that the rule limiting a search to a physical invasion into a constitutionally protected area would continue to control. In *Katz*, the government sought to intercept telephone communications by attaching a listening device to the outside of a public telephone booth.⁴³ Relying upon the precedent of *Olmstead* and *Goldman*, the government contended that a Fourth Amendment search was not implicated since the agents never physically penetrated the telephone booth.⁴⁴ Even the petitioner in *Katz* framed the issue before the Court as a question of trespass.⁴⁵

In a dramatic change of direction, the Court embraced a privacy-based test over the property-based trespass analysis as it proclaimed “the Fourth Amendment protects people, not places.”⁴⁶ In addressing the government’s contention that this case should be controlled by

³⁹ *Id.*

⁴⁰ *Silverman v. United States*, 365 U.S. 505, 513 (1961) (Douglas, J., concurring).

⁴¹ *Id.* (“Rather our sole concern should be with whether the privacy of the home was invaded.”).

⁴² *Katz v. United States*, 389 U.S. 347 (1967).

⁴³ *Id.* at 348.

⁴⁴ *Id.* at 352.

⁴⁵ *Id.* at 349–50 (declining to answer the questions presented to the Court of “[w]hether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth” and “[w]hether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution”).

⁴⁶ *Id.* at 351.

Olmstead and *Goldman*, the *Katz* Court responded that the “premise that property interests control the right of the Government to search and seize has been discredited.”⁴⁷ When the Court concluded that “the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling,”⁴⁸ it appeared as though the trespass test was dead.⁴⁹

Instead of focusing on whether the government intruded into a constitutionally protected *area*, the *Katz* search test inquired into whether an individual has a constitutionally protected *expectation of privacy*.⁵⁰ Justice Harlan’s concurrence in *Katz* provided the clearest explanation of the privacy-based inquiry: the Fourth Amendment is triggered when there is government action involving a defendant exhibiting both an actual (subjective) expectation of privacy and a reasonable (objective) expectation of privacy.⁵¹ Even though both requirements must be met, the landscape of search law post-*Katz* turned on whether there was a reasonable⁵² (or legitimate) expectation of privacy.⁵³ While it is clear *Katz* signaled a seismic shift in the law of searches, its full impact has yet to be completely realized,⁵⁴ particularly

⁴⁷ *Id.* at 353 (“[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any ‘technical trespass under . . . local property law.’”) (alteration in original) (citation omitted).

⁴⁸ *Katz*, 389 U.S. at 353.

⁴⁹ *But see* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004) (“While existing scholarship often interprets the shift as a wholesale rejection of property-based principles in Fourth Amendment law, it is better understood as a shift of degree from common law rules to the looser property-based approach that currently governs.”).

⁵⁰ *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

⁵¹ *Id.* at 361 (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

⁵² *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007) (concluding that “the reasonable expectation of privacy test is the central mystery of Fourth Amendment law”).

⁵³ *See, e.g.,* *Florida v. Riley*, 488 U.S. 445 (1989) (no reasonable expectation of privacy in police inspection of curtilage of home from a helicopter flying at 400 feet); *California v. Greenwood*, 486 U.S. 35 (1988) (no reasonable expectation of privacy in garbage left on street curb); *California v. Ciraolo*, 476 U.S. 207 (1986) (no reasonable expectation of privacy in police inspection of curtilage of home from a fixed-wing aircraft flying at 1000 feet); *Smith v. Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy in telephone numbers dialed); *United States v. White*, 401 U.S. 745 (1971) (no reasonable expectation of privacy in confiding in an informant who was carrying a radio transmitter).

⁵⁴ *See* James T. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 647 (1985) (“*Katz* merely

now that the trespass test has come back from the dead.

C. *It's Alive! Justice Scalia Resurrects Trespass Through Jones and Jardines*

Like any good horror movie involving a villain that will not die,⁵⁵ the law of trespass surprisingly comes back to life⁵⁶ to wreak havoc on the landscape of search jurisprudence. “This time it’s personal.”⁵⁷ It is personal because Justice Scalia is the person most responsible for breathing life back into the trespass test.⁵⁸ While the Court unanimously concluded that the government’s installation of a global positioning system (“GPS”) device to a suspect’s vehicle constituted a search under the Fourth Amendment, the 2012 *Jones* decision marked a considerable rift in how the Justices consider modern search law.⁵⁹

Prior to *Jones*, the installation and electronic monitoring of a vehicle on public roads through a GPS tracker was not a search under the Fourth Amendment.⁶⁰ The rationale behind the rule was based upon the Court’s use of the *Katz* reasonable expectation of privacy test in the pre-GPS technology beeper cases of *United States v. Knotts*⁶¹ and

began the revolution, presenting the challenge of understanding and defining fourth amendment privacy and developing workable doctrine.”).

⁵⁵ Jason Voorhees from *Friday the 13th* and Freddy Krueger from *A Nightmare on Elm Street* come to mind.

⁵⁶ See, e.g., Jace C. Gatewood, *It’s Raining Katz and Jones: The Implications of United States v. Jones—A Case of Sound and Fury*, 33 PACE L. REV. 683, 690 (2013) (“[M]any were left utterly shocked by the Court’s almost total rejection” of the Court’s decision in *Katz* and other authorities “in favor of a doctrine that most believed was dead—the ‘trespass doctrine.’”).

⁵⁷ See *JAWS: THE REVENGE* (Universal Pictures July 17, 1987) (promoting the film with the tagline, “this time it’s personal”); See also, *BACK TO THE FUTURE: PART II* (Universal Pictures Nov. 22, 1989) (involving a scene of a theater showing the fictitious film *Jaws 19* with the tagline, “this time it’s REALLY personal”).

⁵⁸ See *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012). See also *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

⁵⁹ See Nancy Forster, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudence*, 42 U. BALT. L. REV. 445, 446–47 (2013) (Justice Scalia’s insistence that property law concepts had never died “will no doubt come as a surprise to many in the legal community, including fellow Supreme Court justices, who thought the use of property law, and more specifically the doctrine of trespass, in the Fourth Amendment context had been overruled by the Court in *Katz v. United States*.”).

⁶⁰ See *United States v. Katzin*, 732 F.3d 187, 229 (3d Cir. 2013) (Van Antwerpen, J., concurring in part, dissenting in part) (Prior to *Jones* there was “a uniform consensus across the federal courts of appeals to address the issue that the installation and subsequent use of GPS or GPS-like devices was not a search or, at most, was as search but did not require a warrant.”).

⁶¹ 460 U.S. 276 (1983).

Unites States v. Karo.⁶² The *Knotts* Court equated the use of tracking the movements of a vehicle on the public highways by following the beeper signals to that of police visual surveillance and concluded that an individual does not have a reasonable expectation of privacy in his travels.⁶³

Much like the impact of the *Katz* decision that surprised the legal community over forty years ago, Justice Scalia changed the course of modern search law with his opinion in *Jones*.⁶⁴ Writing for the five-justice majority,⁶⁵ Justice Scalia concluded the government's installation of a GPS device underneath the defendant's Jeep while it was parked in a public parking lot and subsequent twenty-eight day monitoring of the vehicle's movements amounted to a search.⁶⁶ Instead of relying upon the reasonable expectation of privacy test in *Katz*, Justice Scalia directed the Court back to a property-based analysis.⁶⁷

With one swift blow, Justice Scalia introduced a "new" test under the Fourth Amendment: a search occurs when the government commits a trespass into a constitutionally protected area⁶⁸ for the purpose of obtaining information.⁶⁹ Citing previous property-based decisions of the Court such as *Entick*,⁷⁰ *Boyd*,⁷¹ and *Olmstead*,⁷² Justice Scalia concluded that the "*Katz* reasonable-expectation-of-privacy test

⁶² 468 U.S. 705 (1984).

⁶³ *Knotts*, 460 U.S. at 281 ("[A] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."). *But see Karo*, 468 U.S. at 714 (determining that the "monitoring of a beeper in a private residence, a location not open to visual surveillance" amounts to a search that an individual has a reasonable expectation of privacy).

⁶⁴ *See United States v. Jones*, 132 S. Ct. 945 (2012).

⁶⁵ *Id.* (Justice Sotomayor wrote a separate concurring opinion while Justice Alito, joined by Justices Ginsburg, Breyer and Kagan, wrote an opinion concurring in the judgment.).

⁶⁶ *Id.* at 948–49.

⁶⁷ *Id.* at 950 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding.") (footnote omitted).

⁶⁸ It would seem here that Justice Scalia did not necessarily embrace the full understanding of the English common law understanding from *Entick* that "every invasion of private property, be it ever so minute, is a trespass." Instead, Justice Scalia's view of the property interest (a constitutionally protected area) would include only those areas of property that touch on the enumerated commands of the Fourth Amendment ("persons, houses, papers, and effects"). *See id.* at 949.

⁶⁹ *Id.*

⁷⁰ *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765).

⁷¹ *Boyd v. United States*, 116 U.S. 616 (1886).

⁷² *Olmstead v. United States*, 277 U.S. 438 (1928).

has been *added to*, not *substituted for*, the common-law trespassory test.”⁷³ It seemed that Justice Scalia did not seek to create a new test. Instead, he sought to remind the Court of a time when the law of property⁷⁴ informed the understanding of the Fourth Amendment.⁷⁵

Not everyone on the Court shared Justice Scalia’s enthusiasm for the reintroduction of the trespass test. Writing a concurrence in the judgment only, and joined by three other Justices, Justice Alito scoffed at the trespass rationale presented by Justice Scalia and the majority.⁷⁶ Instead, Justice Alito rejected the attempt to couch the issue of search in property terms⁷⁷ and urged that the decision was properly decided under *Katz* “by asking whether respondent’s reasonable expectation of privacy rights were violated by the long-term monitoring of the vehicle he drove.”⁷⁸

While Justice Sotomayor joined with the Scalia majority rationale as the fifth vote, she penned a separate concurrence that accepted Justice Scalia’s trespass test to resolve the immediate issue in *Jones*.⁷⁹ At the same time, however, she expressed doubts about the utility of the trespass test in many situations involving the lack of physical invasion and reaffirmed that the *Katz* analysis will often be more appropriate in determining modern search law.⁸⁰ Justice Sotomayor went further, however, and expressed grave concerns over short-term GPS monitoring, in contrast to Justice Alito’s acceptance of the practice.⁸¹ Even more significantly, Justice Sotomayor called into question the notion that an individual has no reasonable expectation of privacy in

⁷³ *Jones*, 132 S. Ct. at 952.

⁷⁴ *Id.* at 949 (stating that “the text of the Fourth Amendment reflects its close connection to property” and that “our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century”).

⁷⁵ *But see* Brian Sawers, *Keeping Up with the Joneses: Making Sure Your History Is Just as Wrong as Everyone Else’s*, 111 MICH. L. REV. FIRST IMPRESSIONS 21, 26 (Feb. 2013) (“Both the majority and concurring opinions in *Jones* are wrong about the state of the law in 1791 [regarding trespass].”).

⁷⁶ *Jones*, 132 S. Ct. at 958 (Alito, J., concurring) (The *Jones* majority holding “strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.”).

⁷⁷ *Id.* at 960 (“The premise that property interests control the right of the Government to search and seizure has been discredited.”) (citations omitted).

⁷⁸ *Id.* at 958.

⁷⁹ *Id.* at 955 (Sotomayor, J., concurring).

⁸⁰ *Id.* (stating that “the majority opinion’s trespassory test may provide little guidance” in situations of electronic surveillance that do not involve a physical penetration and that these kind of situations would “remain subject to *Katz* analysis”).

⁸¹ *Id.* (addressing that due to the nature of the kind of information made available by GPS monitoring such as details about an individual’s “familial, political, professional, religious, and sexual associations,” the “*Katz* analysis will require particular attention”).

the information disclosed to third parties.⁸² In considering the “digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks,”⁸³ Justice Sotomayor did not simply re-affirm *Katz*. Instead, she may have suggested another “new” test to enhance privacy under *Katz*.⁸⁴

After *Jones*, the test for a search doubled in size and complexity. Many questions emerged from Justice Scalia’s salvo. Which test controls the law of search: *Katz*, *Jones*, or both? Is one test more appropriate depending upon the facts and circumstances presented in a given situation? Many wondered if the trespass test would fade back into history. It would take a mere fourteen months to learn from the Court’s opinion in *Jardines* that the trespass test is here to stay for the time being.

For the first time since the Court’s 1967 decision in *Katz*, there existed a real question as to what test for a search should control: property or privacy. Specifically, the *Jardines* Court wrestled with the issue of the government’s use of a drug-sniffing dog on the front porch of a home for the purpose of investigating a potential grow house.⁸⁵ The Court in a 5-4 decision held that the government’s actions did, in fact, constitute a search.⁸⁶ How the Court reached this decision, however, showed the marked divide between the Justices.

Relying on his most recent search decision in *Jones*, Justice Scalia’s majority opinion utilized the property-based test of trespass⁸⁷ and determined that the government committed a search when it physically intruded into a constitutionally protected area for the purpose of obtaining information.⁸⁸ In doing so, he reaffirmed the primacy of the home under the Fourth Amendment⁸⁹ and recognized the extension of the home’s protection to the curtilage.⁹⁰ Justice Scalia

⁸² *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

⁸³ *Id.*

⁸⁴ *Id.*; see also Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones*, 10 OHIO ST. J. CRIM. L. 325, 333–36 (2012) (arguing that Justice Sotomayor’s concurrence represents a “super-*Katz*” view).

⁸⁵ *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

⁸⁶ *Id.* at 1417–18 (“The government’s use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”).

⁸⁷ *But see* Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 879 (2014) (suggesting that the *Jardines* majority “shrink[s] from the use of the word ‘trespass’”).

⁸⁸ *Jardines*, 133 S. Ct. at 1414 (citing *Jones*, 132 S. Ct. at 949–50).

⁸⁹ *Id.* at 1414 (“[T]he home is first among equals.”).

⁹⁰ *Id.* (“[T]he area ‘immediately surrounding and associated with the home’—what our cases call the curtilage—as ‘part of the home itself for Fourth Amendment

concluded the government's investigation amounted to an "unlicensed physical intrusion" on the porch, which was within the constitutionally protected area of the curtilage.⁹¹ Consequently, the intrusion equated to a Fourth Amendment search.⁹²

While Justice Scalia acknowledged the existence of the *Katz* privacy test generally, he refused to apply it to the *Jardines* facts.⁹³ Instead, he announced a clear preference for the trespass test under the facts by stating that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."⁹⁴

Other Justices in the majority, however, were uncomfortable not giving *Katz* its due. Justice Kagan, joined by Justices Ginsburg and Sotomayor, wrote a separate concurrence to *Jardines*.⁹⁵ Rather than apply a single test for a search, Justice Kagan emphasized that *both* standards were satisfied.⁹⁶ She justified the use of both tests due to the closely aligned property and privacy interests in the case of a home search⁹⁷ and stated: "Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well."⁹⁸

Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, ridiculed both the majority and concurring opinions' application of the law of search, irrespective of the test chosen.⁹⁹ In his dissent, Justice Alito declared that the government's activity did not amount to a search under the Fourth Amendment.¹⁰⁰ While he criticized the majority Justices' *Katz* and *Jones* analysis to the facts, Justice Alito reserved his sharpest criticism for the trespass test when he declared that Justice Scalia's decision was "based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence."¹⁰¹

The trespass test for a search remains viable and was utilized as recently as this past term by the Court.¹⁰² In a *per curiam* decision, the

purposes.") (citation omitted).

⁹¹ *Id.* at 1415.

⁹² *Id.* at 1417–18.

⁹³ *Id.* at 1417.

⁹⁴ *Jardines*, 133 S. Ct. 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.").

⁹⁵ *Id.* at 1418 (Kagan, J., concurring).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1419 (citing *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)).

⁹⁸ *Id.* at 1418.

⁹⁹ *Id.* at 1420 (Alito, J., dissenting).

¹⁰⁰ *Jardines*, 133 S. Ct. at 1421.

¹⁰¹ *Id.* at 1420.

¹⁰² *See Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (*per curiam*).

Court in *Grady v. North Carolina* determined North Carolina's satellite-based monitoring of recidivist sex offenders constituted a search under the Fourth Amendment.¹⁰³ In reaching its decision, the Court reaffirmed the trespass test under *Jones* and *Jardines* and concluded "[i]n light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."¹⁰⁴ Without mention of the privacy test of *Katz*, the Court based its conclusion that the conduct in *Grady* amounted to a search solely on the trespass test where the government physically intruded upon a suspect's body for the purpose of obtaining information.¹⁰⁵

In light of the current state of search law, we have arrived at a crossroads. As the Court encounters the question of whether the government's activity implicates the Fourth Amendment, what path will it choose in future cases? Depending upon the particular factual circumstances, will the Court determine that one test is not applicable and apply a different test inevitably? For example, will the Court use exclusively the *Jones* test for physical invasions but use the *Katz* test to potential searches *not* involving a physical trespass?¹⁰⁶ Or will the Court apply both tests for a search, similar to the approach utilized by Justice Kagan's concurrence in *Jardines*? If the Court attempts to use both tests, what if the tests produce inconsistent results that require immediate resolution? If *Katz* says yes but *Jones* says no, what should be the result? Consider these questions through the lens of the disputed consent cases of *Randolph*¹⁰⁷ and *Fernandez*.¹⁰⁸ It seems that the view may be particularly murky.

¹⁰³ *Id.* at 1370.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1371. The Court, however, did not reach a decision as to whether the government committed an unreasonable search under the Fourth Amendment.

¹⁰⁶ *See id.*

¹⁰⁷ *Georgia v. Randolph*, 547 U.S. 103 (2006).

¹⁰⁸ *Fernandez v. California*, 134 S. Ct. 1126 (2014).

II. THE PATH OF SEARCH LAW ARRIVES AT A FORK IN THE ROAD. DOES NO TRUMP YES?: THE CURIOUS CASE OF DISPUTED CONSENT AS GUIDE

*“And both that morning equally lay in leaves no step had trodden black.”*¹⁰⁹

The text¹¹⁰ of the Fourth Amendment suggests,¹¹¹ and a number of leading decisions from the Court have determined,¹¹² that governmental searches and seizures require a warrant to pass constitutional scrutiny, “subject only to a few specifically established and well-delineated exceptions.”¹¹³ Over the years, the Court has grappled¹¹⁴ with the issue of whether warrants should be required in search cases or if the key inquiry is whether the government acted reasonably under the circumstances.¹¹⁵

Despite the debate, the reality is that the exceptions to obtaining a warrant are “neither few nor well-delineated.”¹¹⁶ One of the most

¹⁰⁹ See FROST, *supra* note 1, at 9.

¹¹⁰ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

¹¹¹ *But see* Amar, *supra* note 16, at 759 (“We need to read the Amendment’s words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.”).

¹¹² See, e.g., Katz v. United States, 389 U.S. 347, 357 (1967) (“‘Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . .”) (citations omitted) (first alteration in original).

¹¹³ *Id.*

¹¹⁴ See, e.g., California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (“[O]ur jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”); *id.* at 583 (“In my view, the path out of this confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”).

¹¹⁵ It seems that the reasonableness approach is the most often repeated justification for searches and seizures as seen in two of the most recent Fourth Amendment cases before the Court. See, e.g., Riley v. California, 134 S. Ct. 2473, 2482 (2014) (“As the text makes clear, ‘the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”) (citations omitted). See also Heien v. North Carolina, 135 S. Ct. 530, 536 (2014) (“To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’”) (citations omitted).

¹¹⁶ See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–75 (explaining that “[t]here are over twenty exceptions to the probable cause or the warrant requirement or both” and that “[t]he reason that all of these exceptions have grown up is simple: the clear rule that warrants are required is unworkable and to enforce it would lead to exclusion of evidence in many cases where the police activity

common exceptions to the warrant requirement, establishing that the police acted “reasonabl[y],” is consent.¹¹⁷ As the rules for consent have developed over time,¹¹⁸ the most often litigated situations occur in the context of “third-party” consent.¹¹⁹ In particular, though, the most intriguing cases have appeared within the framework of disputed consent between co-occupants, such as in the cases of *Randolph*¹²⁰ and *Fernandez*.¹²¹ In these two cases, the Court struggled to answer under the circumstances when one co-occupant says yes to a search, but another says no.

In all cases of third-party consent, the key inquiry, to date, has been grounded in terms of privacy.¹²² The Court has evolved in its view of privacy and the motivation supporting its holdings.¹²³ Through much of its history until *Fernandez*, the Court did not consider any other basis to support its views. To be sure, there has been some discussion of property in the cases of consent; however, it has been limited to a *Katz* understanding of the relationship between property and the Fourth Amendment.¹²⁴

Of course, prior to *Jones*, there was no reason to think any other way than in terms of privacy. Then came *Jones*. Has *Jones*, and Justice Scalia’s property-based analysis specifically, changed the way we should view the disputed consent cases of *Randolph* and *Fernandez*?

was essentially reasonable”).

¹¹⁷ See *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014) (“A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant.”); see also *Illinois v. Rodriguez*, 497 U.S. 177, 184–85 (1990).

¹¹⁸ See generally *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Davis v. United States*, 328 U.S. 582 (1946); *Zap v. United States*, 328 U.S. 624 (1946).

¹¹⁹ See *United States v. Matlock*, 415 U.S. 164, 170 (1974) (stating the authority “clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared”); see also *Rodriguez*, 497 U.S. at 186 (extending the consent rule in that the police may lawfully conduct a warrantless entry of a home based upon the consent of an individual whom the police “reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises”).

¹²⁰ *Georgia v. Randolph*, 547 U.S. 103 (2006).

¹²¹ 134 S. Ct. at 1126.

¹²² See, e.g., *Rodriguez*, 497 U.S. at 190.

¹²³ Compare *Matlock*, 415 U.S. at 170–71 (citing its decision of *Frazier v. Cupp*, 394 U.S. 731 (1969) and utilizing an “assumption of the risk” approach), with *Rodriguez*, 497 U.S. at 179, 188 (utilizing a “reasonableness” standard when the police reasonably believe an individual has “common authority” to consent) and *Randolph*, 547 U.S. at 111 (utilizing a “widely shared social expectations” approach).

¹²⁴ See *Randolph*, 547 U.S. at 110 (“Consistent with our prior understanding that Fourth Amendment rights are not limited by the law of property”) (citing *Katz v. United States*, 389 U.S. 347, 352–53 (1967) for comparison).

A. *Georgia v. Randolph (Pre-Jones): No Trumps Yes in Disputed Consent*

In 2006, the Court resolved the case of disputed consent to search a home in *Georgia v. Randolph*.¹²⁵ Prior to *Randolph*, however, several circuit courts had considered and determined that the consent of an individual was valid, despite a present protestor to consent.¹²⁶ In *Randolph*, the Court considered a case that began when the police responded to a marital dispute at the Randolph home.¹²⁷ Once the police arrived, the respondent's wife, Janet, complained that her husband was abusing cocaine and that she feared he would take their son away from her.¹²⁸ Soon, the respondent arrived and disputed Janet's allegations.¹²⁹ Instead, he offered that it was Janet who had a substance abuse problem.¹³⁰ Janet maintained her accusations against the respondent and told the police that there was evidence of respondent's drug use in the home.¹³¹

An officer first asked the respondent for consent to search the home.¹³² The respondent, an attorney, refused the request.¹³³ Next, the officer asked Janet for consent to search, and she responded affirmatively.¹³⁴ Once inside the home, Janet took the officer upstairs to the respondent's bedroom.¹³⁵ There, the officer observed a drinking straw containing traces of what appeared to be cocaine.¹³⁶ The officer seized the straw and later sought a search warrant to search the premises for further evidence.¹³⁷ As a result of the initial evidence obtained by the consent of Janet and the later search of the home pursuant to a valid warrant, the respondent was charged with drug

¹²⁵ *Id.* at 103.

¹²⁶ *See, e.g.*, *United States v. Rith*, 164 F.3d 1323 (10th Cir. 1999); *United States v. Morning*, 64 F.3d 531 (9th Cir. 1995); *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995); *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 882 (D.C. Cir. 1979) (per curiam); *United States v. Sumlin*, 567 F.2d 684 (6th Cir. 1977).

¹²⁷ *Randolph*, 547 U.S. at 107.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Randolph*, 547 U.S. at 107.

¹³⁴ *Id.*

¹³⁵ *Id.* Janet told the officer that she and her son had been staying away from the home for several weeks and that she had returned recently. In addition, she informed the officer the bedroom was the respondent's.

¹³⁶ *Id.*

¹³⁷ *Id.* Interestingly, Janet withdrew her consent shortly after the officer seized the drinking straw.

possession.¹³⁸

The precise issue before the *Randolph* Court was “whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit a search.”¹³⁹ Instead of following the wave of circuit court decisions supporting such a search, the Court held¹⁴⁰ that under the circumstances here “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to [respondent].”¹⁴¹

The basis of Justice Souter’s majority opinion appeared to be both a continuation and evolution of the Court’s prior third-party consent decisions,¹⁴² such as *United States v. Matlock*¹⁴³ and *Illinois v. Rodriguez*.¹⁴⁴ Justice Souter maintained that the proper analysis relied upon a consideration of what was reasonable under the Fourth Amendment by a view of what constitutes a reasonable expectation of privacy.¹⁴⁵ His opinion considered the relationship between property and privacy but concluded, much like the earlier *Katz* Court, that while property rights may be considered, they are not to serve as a limitation¹⁴⁶ to the broader implications of privacy.¹⁴⁷

The majority opinion, however, took the foundation of privacy law and built upon it a newly advanced theory of “widely shared social expectations.”¹⁴⁸ Citing the social guest case of *Minnesota v. Olson*¹⁴⁹ for

¹³⁸ *Id.*

¹³⁹ *Randolph*, 547 U.S. at 108.

¹⁴⁰ *Id.* at 105. The Court’s decision was divided 5-3, with Justice Souter writing the majority opinion, joined by Justices Stevens, Kennedy, Ginsburg and Breyer. Chief Justice Roberts, in his first term on the Court, filed his first dissent, which was joined by Justice Scalia. Additionally, Justices Scalia and Thomas filed separate dissents. Justice Alito assumed office on January 31, 2006, but did not participate in the opinion.

¹⁴¹ *Id.* at 106.

¹⁴² *Id.* at 109–10.

¹⁴³ 415 U.S. 164 (1974).

¹⁴⁴ 497 U.S. 177 (1990).

¹⁴⁵ *Randolph*, 547 U.S. at 110–11.

¹⁴⁶ *Id.* at 110 (Citing *Katz*, Justice Souter explained that “[c]onsistent with our prior understanding that Fourth Amendment rights are not limited by the law of property . . . the third party’s ‘common authority’ is not synonymous with a technical property interest . . .”).

¹⁴⁷ *Id.* (“The common authority that counts under the Fourth Amendment may thus be broader than the rights accorded by property law . . .”).

¹⁴⁸ *Id.* at 111 (“The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”).

¹⁴⁹ 495 U.S. 91 (1990).

the proposition that an overnight guest to a home has a reasonable expectation of privacy,¹⁵⁰ Justice Souter concluded that a “co-inhabitant naturally has an even stronger claim.”¹⁵¹ From this, Justice Souter theorized a variety of situations that would suggest a third-party could not be authorized to enter a home over the objections of a co-occupant.¹⁵²

Interestingly, Justice Breyer’s separate concurrence presented an alternative, yet opposite, conclusion of his fellow majority Justices. There, he suggested that if the Court was required to choose between “two bright-line rules,” one that always allowed for a search when one occupant consents and the other that never allowed for a search, he preferred the former.¹⁵³ He based his understanding upon the need for police to search in exigent circumstances as well as the diminution of an expectation of privacy between co-occupants.¹⁵⁴ Nevertheless, Justice Breyer supported the majority because the Fourth Amendment “does not insist upon bright-line rules.”¹⁵⁵

Chief Justice Roberts strenuously dissented.¹⁵⁶ He criticized the “widely shared social expectations” standard and accused the majority of providing Fourth Amendment protection “on a random and happenstance basis.”¹⁵⁷ In Chief Justice Roberts’s view, the majority’s “widely shared social expectations” understanding of privacy failed to provide a “promising foundation on which to ground a constitutional rule.”¹⁵⁸ Like the majority, Chief Justice Roberts positioned his analysis of disputed consent on privacy grounds;¹⁵⁹ however, he relied upon the Court’s earlier “assumption of the risk” justification¹⁶⁰ and declared

¹⁵⁰ In *Olson*, the police executed a warrantless entry into the home of another in order to arrest Olson. The opinion stated the police neither obtained consent to enter nor possessed an exigency to dispense with the warrant requirement. *See id.* at 93, 101.

¹⁵¹ *Randolph*, 547 U.S. at 113.

¹⁵² *Id.* (“[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out.’ Without some very good reason, no sensible person would go inside under those conditions.”).

¹⁵³ *Id.* at 125 (Breyer, J., concurring).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 127 (Roberts, C.J., dissenting).

¹⁵⁷ *Randolph*, 547 U.S. at 127 (Roberts, C.J., dissenting) (condemning the inconsistent application of the majority’s rule protection for “a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room”).

¹⁵⁸ *Id.* at 130.

¹⁵⁹ *But see id.* at 131 (“Whatever social expectation the majority seeks to protect, it is not one of privacy.”).

¹⁶⁰ *See United States v. White*, 401 U.S. 745, 752 (1971) (deciding there is no

“[i]f an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.”¹⁶¹

Justice Scalia joined the dissenters but also filed a brief dissent of his own.¹⁶² At the time of his dissent in *Randolph*, it is doubtful that many would have considered his remarks as instructive. Through hindsight, however, Justice Scalia’s dissent provided an opening volley to those that would later witness the resurrection of the property-based test for searches. Justice Scalia reminded the Court that “[f]rom the date of its ratification until well into the 20th century, violation of the [Fourth] Amendment was tied to common-law trespass.”¹⁶³ He maintained, “someone who had power to license the search of a house by a private party could authorize a police search.”¹⁶⁴ This signaled a potential for differing result in *Randolph*, depending on the test used to establish a Fourth Amendment search.

Perhaps the members of the Court, including Justice Scalia, could not have fully imagined the cloudy horizon ahead in light of *Jones* and its impact on the law of search. Unfortunately, *Fernandez v. California* provides further obscurity.

B. Fernandez v. California (Post-Jones): Yes Trumps No When the Objector Is Arrested and Removed from the Scene

Because of the *Randolph* decision, the rule involving consent of physically present co-occupants was clear: no trumped yes. By the time the police arrived at a Los Angeles apartment door in 2009, it was also clear to the occupant, Walter Fernandez, what the rule was when he exclaimed: “You don’t have any right to come in here. I know my rights.”¹⁶⁵ In the span of one hour, however, Fernandez was arrested and removed from the scene, and the police had returned to the apartment and obtained consent to search the home from another occupant.¹⁶⁶ How the police officers and Fernandez got to this moment requires explaining.

Fernandez was suspected of an earlier gang related robbery.¹⁶⁷

justifiable expectation of privacy in confiding in “false friends”—government agents or informants—who are recording their conversations).

¹⁶¹ *Randolph*, 547 U.S. at 128 (Roberts, C.J., dissenting).

¹⁶² *Id.* at 142 (Scalia, J., dissenting).

¹⁶³ *Id.* at 143.

¹⁶⁴ *Id.*

¹⁶⁵ *Fernandez v. California*, 134 S. Ct. 1126, 1130 (2014) (citation omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Later, officers were dispatched to investigate the crime, and an individual bystander indicated that a potential suspect was “in the apartment.”¹⁶⁸ While there, the officers noticed a man running toward the building identified by the witness as the respondent.¹⁶⁹ Moments later, the officers heard sounds that they associated with fighting and screaming coming from the direction of the apartment building.¹⁷⁰ The police approached the door to the apartment, where they thought they had heard the furor, and attempted to contact the occupants.¹⁷¹ A woman, identified as Roxanne Rojas, opened the door and spoke with the police.¹⁷²

The officers noticed that Rojas appeared to have been involved in a recent altercation and that she exhibited signs of physical injury.¹⁷³ The officers asked Rojas if there was anyone else in the residence, and she explained that no one else was there except for the baby in her arms and her four-year-old son.¹⁷⁴ Despite her claims, the police requested that Rojas come out of the apartment so that the police could conduct a “protective sweep”¹⁷⁵ of the apartment.¹⁷⁶ Before the police invaded the apartment, Fernandez emerged from the domicile and uttered his “rights” as detailed above.¹⁷⁷

Based upon the evidence obtained from the frightened bystander earlier and the officers’ personal observations of the injuries sustained by Rojas, the officers arrested Fernandez and transported him to the police station for processing.¹⁷⁸ One hour later, one of the officers returned to the apartment and sought consent from Rojas to search the home.¹⁷⁹ Rojas gave the officer both oral and written consent to search, and, as a result of the search, the officer obtained incriminating

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Fernandez*, 134 S. Ct. at 1130.

¹⁷² *Id.*

¹⁷³ Rojas explained to the police that she had been in a fight. In addition, the police observed that “[h]er face was red,” that “she had a large bump on her nose,” and that there was “blood on her shirt and hand.” *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See generally *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (“The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”).

¹⁷⁶ *Fernandez*, 134 S. Ct. at 1130.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

evidence of Fernandez's involvement in the robbery reported earlier.¹⁸⁰

Fernandez was charged with a number of offenses related to the seized evidence, and he moved to suppress the evidence obtained in the consent search.¹⁸¹ The trial court denied his motion, and the appellate court affirmed the trial court's ruling on the basis that Fernandez was not a physically present objector at the time of consent.¹⁸² Fernandez thought he knew his rights when he challenged the officers' request to search. At the Supreme Court, the Justices sought to clear up the dispute between what appeared to be two conflicting co-occupants. Does no trump yes here?

At first blush, the *Fernandez* case appeared to resolve an issue that was contemplated from dicta in *Randolph*; namely, whether the protections of disputed consent in *Randolph* should extend to a situation where the police removed an objecting co-occupant and later sought consent from a remaining co-occupant.¹⁸³ Instead, the Court refused to expand the "narrow exception"¹⁸⁴ of *Randolph* to the *Fernandez* facts.¹⁸⁵ Justice Alito, writing for the majority, held "that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."¹⁸⁶ The majority concluded that Fernandez was not present when Rojas gave consent, and, therefore, *Randolph* did not apply.¹⁸⁷

Justice Alito's majority opinion continued to apply the privacy test of "widely shared social expectations" that was first announced in *Randolph*.¹⁸⁸ In addressing Fernandez's contentions that he made an

¹⁸⁰ *Id.* at 1130–31.

¹⁸¹ *Id.* at 1131.

¹⁸² *Fernandez*, 134 S. Ct. at 1130.

¹⁸³ See *Georgia v. Randolph*, 547 U.S. 103, 121–22 (2006) (addressing the "fine line" drawn by the majority decision and noting that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it").

¹⁸⁴ *Fernandez*, 134 S. Ct. at 1133 (recognizing that *Randolph* provided a narrow exception to the rule that "consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search").

¹⁸⁵ See *id.* at 1134 (distinguishing that the dicta in *Randolph* "should not be read to suggest that improper motive may invalidate objectively justified removal").

¹⁸⁶ *Id.* The Court's decision was based upon a 6-3 vote, with Chief Justice Roberts, Justices Scalia, Kennedy, Thomas and Breyer joining Justice Alito's majority opinion. Justices Scalia and Thomas filed concurring opinions. Justice Ginsburg wrote a dissenting opinion, joined by Justices Sotomayor and Kagan.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 1135.

objection while physically present and that his objection should continue after his removal, Justice Alito relied upon social expectations of the “caller” in *Randolph*.¹⁸⁹ This rationale is derived from the idea that a “caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out.’”¹⁹⁰ Justice Alito distinguished the potential “caller” in *Randolph* from the one in *Fernandez* because the “objecting tenant was not standing at the door,” and “when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter.”¹⁹¹

Although Justice Alito steered the majority analysis in the case of disputed consent onto the well-worn path of privacy scrutiny, Justice Scalia, however, blazed a new trail away from *Randolph* toward a property-based understanding. In a brief concurrence, Justice Scalia disputed the claims, contained in the amicus brief of the National Association of Criminal Defense Lawyers, that *Fernandez* “had a right under property law to exclude the police.”¹⁹² And for at least the third time in the past two years of the decisional law of the Court, Justice Scalia ushered a trespass test into the fray: this time in cases of disputed consent. In his concurrence, he reiterated the property-based inquiry, born from his opinions of *Jones* and *Jardines*, and examined the issue of whether the police committed a trespass when they entered the apartment upon the consent of a co-occupant.¹⁹³

Justice Scalia contemplated the possibility of a disputed analysis in *Fernandez*: would the dual tests for a search account for opposite conclusions? On the one hand, he joined the majority’s “faithful application of *Randolph*.”¹⁹⁴ On the other hand, Justice Scalia identified the potential problem of disputed consent analysis and maintained that he “would therefore find this a *more difficult case* if it were established that property law did not give petitioner’s co[-]tenant the right to admit visitors over petitioner’s objection.”¹⁹⁵ While he acknowledged that there was “limited authority” for examination on

¹⁸⁹ *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 113 (2006)).

¹⁹⁰ *Fernandez*, 134 S. Ct. at 1135.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1137 (Scalia, J., concurring).

¹⁹³ *Id.* at 1137–38.

¹⁹⁴ *But see id.* at 1137 (stating that Justice Scalia believed *Randolph* “was wrongly decided”).

¹⁹⁵ *Id.* at 1137–38 (emphasis added).

this position, he explicated, “[t]hat difficulty does not arise, however, because the authorities cited by the *amicus* association fail to establish that a guest would commit a trespass if one of two joint tenants invited the guest to enter and the other tenant forbade the guest to do so.”¹⁹⁶

For Justice Scalia, his dilemma was solved in *Fernandez*. There was no crisis of disputed analysis in the context of disputed consent. Both paths of search law, privacy and property, came to the same destination: the police acted reasonably under the Fourth Amendment. While the other Justices failed to address the property concerns in their decisions and opinions,¹⁹⁷ the shadow of trespass still looms large. Given the current makeup of the Court, and given Justice Scalia’s restoration of the trespass test, have we arrived at an arrested development? Is there room for consistent application of both tests? If the answer is no, where do we go from here?

III. ARRESTED DEVELOPMENT: HAS THE COURT ARRESTED OUR UNDERSTANDING OF SEARCH LAW BY ITS ADHERENCE TO THE DUAL TESTS FOR A SEARCH?

*“Yet knowing how way leads on to way, I doubted if I should ever come back.”*¹⁹⁸

With the exception of Justice Scalia’s concurrence, there is little, if any, mention of the trespass test found in the written words of the Justices from *Fernandez*. Assuredly, however, the property-based test was not forgotten. Prior to oral arguments, the attorneys of record and the various *amici* struggled with how to apply both privacy and property rationales to their respective positions. In briefs filed to the Court from both sides, the attorneys sought to demonstrate that, no matter what standard the Court employed, their side would prevail.¹⁹⁹ Even at

¹⁹⁶ *Fernandez*, 134 S. Ct. at 1138 (Justice Scalia added “what limited authority there is on the subject points to the opposite conclusion.”).

¹⁹⁷ *Id.* at 1138–44 (Justice Thomas filed a separate concurrence, maintaining his objections over the *Randolph* decision. He urged the application of Chief Justice Roberts’s “assumption of the risk” dissent in *Randolph* as the proper rationale. Justice Ginsburg, joined by Justices Sotomayor and Kagan, filed a dissenting opinion, calling for “straightforward application of *Randolph*.”).

¹⁹⁸ See FROST, *supra* note 1, at 9.

¹⁹⁹ See, e.g., Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 17, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822), 2013 WL 4072519, at *17 (“Whether viewed through the lens of property law or common sense, the result is the same: The prior objection of one co-tenant renders a later invitation from another ineffective.”). See also Respondent’s Brief on the Merits at 29, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822), 2013 WL 5400266, at *29 (“[G]enerally accepted principles of property law

oral arguments, the Justices considered the import of property law upon their deliberations.²⁰⁰ Trespass is alive. Questions concerning the continuing vitality and prominence remain to be answered.

While it is clear that Justice Scalia is the chief originator of the resurgence of the property-based test for a search, he has had companions to join him, as seen through the decisions of *Jones* and *Jardines*.²⁰¹ His concurrence in *Fernandez* establishes an attempt to advance forward a property-based intrusion inquiry. Using the notion of a property interest in trespass as our guide, is Justice Scalia correct in stating the police may enter the home on the basis of consent of one co-occupant in spite of the objection of another co-occupant? If Justice Scalia is right, then is *Randolph* wrongly decided, at least in terms of a reasonable search under trespass? If Justice Scalia's reasoning creates the potential inconsistent application of search law, what does the legal landscape hold for future decisions?

As a starting point, Justice Kennedy may have been right when he stated at oral arguments: "There's just not a lot of help in property law."²⁰² This statement may be appropriate for at least three reasons. First, the Court has had a troubled history defining and specifically articulating how property relates, if at all, to a search inquiry. The Court has stated the Fourth Amendment is "not limited by the law of property"²⁰³ and property is "not the sole measure of Fourth Amendment violations."²⁰⁴ Of course the Court in *Katz* went so far as to proclaim that trespass is no longer applicable.²⁰⁵ Yet, the Court has also declared with equal force that the Fourth Amendment "reflects its

support Rojas's right to admit visitors of her choice in petitioner's absence; and the common law would preclude an action for trespass against such visitors.").

²⁰⁰ See, e.g., Transcript of Oral Argument at 48, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822), 2013 WL 6908199, at *48. Justice Kennedy questioned Joseph Palmore, attorney for the United States, as amicus curiae for respondent, about property law, and stated: "I think the property law cases that you cite, pages 24–25 of your brief, I had thought originally that this would be the principal focus of our decisions in these cases, but it's—it's marginally in your favor. It's not really very strong. I mean, you have an 1839 North Carolina case and the CJS case. There's just not a lot of help in property law." *Id.*

²⁰¹ See Benjamin J. Priester, *Five Answers and Three Questions After United States v. Jones (2012), the Fourth Amendment "GPS Case,"* 65 OKLA. L. REV. 491, 508–10 (2013) (detailing Justice Scalia's "inability to hold votes for his analysis" previously and questioning whether Justice Scalia can maintain support for the trespass analysis in *Jones*).

²⁰² Transcript of Oral Argument, *supra* note 200.

²⁰³ See *Georgia v. Randolph*, 547 U.S. 103, 110 (2006).

²⁰⁴ See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Soldal v. Cook Cnty.*, 506 U.S. 56, 64 (1992)).

²⁰⁵ See *Katz v. United States*, 389 U.S. 347, 353 (1967).

close connection to property”²⁰⁶ and that common law trespass analysis is the foundation that the “Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”²⁰⁷

Second, despite this undecided importance of trespass, even when it is considered, the Court does not precisely resolve how the rules of property (or tort, for that matter) are to be administered. Even if property law is utilized, how close will it follow prior Fourth Amendment understandings? Exactly what kind of trespass test is being exercised, and does it depend on the type of protected interest?²⁰⁸

Finally, in the context of the disputed consent cases, such as *Fernandez* and *Randolph*, there may not be a lot of help with property law, specifically as it relates to how property rights may affect consent to enter by a co-occupant over the express refusal of another co-occupant.²⁰⁹ In his concurrence in *Fernandez*, even Justice Scalia conceded that there is “limited authority” on the subject.²¹⁰ In light of this dearth of evidence, is it even possible to conclude whether or not the police committed trespass in a disputed consent case? What follows is but one attempt to respond to that question.

A. Justice Scalia’s View of Trespass: All You Need Is Yes?

Through the recent opinions of Justice Scalia, we get a picture of the winding path that leads to the law of trespass under the Fourth Amendment. What has evolved over time is a three-part inquiry. First, a governmental trespass, as understood by Justice Scalia, is established when there is a physical intrusion into a constitutionally protected

²⁰⁶ United States v. Jones, 132 S. Ct. 945, 949 (2012).

²⁰⁷ *Id.* at 952.

²⁰⁸ See Kerr, *supra* note 18, at 91 (suggesting that the *Jones* trespass test “tracks the common law doctrine most directly suited to each of the four constitutionally protected areas,” such as “trespass to land for acts concerning houses, trespass to chattels for acts concerning papers and effects, and trespass to the person for acts concerning persons”).

²⁰⁹ See *Fernandez v. California*, 134 S. Ct. 1126, 1138 (2014) (Scalia, J., concurring).

²¹⁰ See *id.* (Addressing the claims of an amicus brief that a guest would commit trespass in the case of disputed consent, Justice Scalia stated, “[i]ndeed, what limited authority there is on the subject points to the opposite conclusion.”). *But see* Brief of Petitioner, *supra* note 199, at *18. This amicus brief cited 2 HERBERT. THORNDIKE TIFFANY & BASIL JONES, THE LAW OF REAL PROPERTY § 457 (3d ed. 1939) for the proposition that “each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers.” That same authority recognized that “there is little authority” in this area.

area,²¹¹ enumerated under the Fourth Amendment²¹² (“persons, houses, papers, and effects”).²¹³ In the case of governmental intrusion, the house is considered as the single greatest zone of protection.²¹⁴ Trespass alone, however, is not actionable. Second, there must exist a trespass by the police, coupled with “an attempt to find something or to obtain information.”²¹⁵ Finally, a “search” is recognized when the government commits an “unlicensed”²¹⁶ physical intrusion into a constitutionally protected area for the purpose of gathering information.

Of course, the problem in determining whether there is a search in the disputed consent cases is whether the government committed an “unlicensed physical intrusion” when it entered the home over the objection of a physically present co-occupant. In answering this indispensable question, Justice Scalia provides little explication. In his opinion in *Jardines*, he suggested a “background social norms” framework established the creation of an implied license.²¹⁷ Specifically, Justice Scalia was concerned that the police were not licensed to walk up to the front porch of a house with a drug-detection dog for the purposes of obtaining evidence of illegality.²¹⁸ For Justice Scalia, “the background social norms that invite a visitor to the front door do not invite the visitor to conduct a search.”²¹⁹

In addition, while describing licenses as either express or implied, Justice Scalia demonstrated that the scope of a license “is limited not only to a particular area but also to a specific purpose.”²²⁰ Notwithstanding the facts of *Jardines* dealing with the question of an implied license, Justice Scalia considered the circumstances of consent

²¹¹ *But see* *Oliver v. United States*, 466 U.S. 170 (1984) (concluding that there was no search under the Fourth Amendment even though the government committed a common-law trespass on what has been called an “open field”).

²¹² Justice Scalia explained that the *Oliver* decision was correctly decided under trespass law because “an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment. *See* *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

²¹³ *See id.* at 950.

²¹⁴ *See* *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“[T]he home is first among equals.”).

²¹⁵ *See* *Jones*, 132 S. Ct. at 951.

²¹⁶ *See* *Jardines*, 133 S. Ct. at 1415.

²¹⁷ *Id.* (“‘A license may be implied from the habits of the country,’ notwithstanding the ‘strict rule of the English common law as to entry upon a close.’”) (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

²¹⁸ *Id.* at 1416.

²¹⁹ *Id.*

²²⁰ *Id.*

to explain in dicta the limitation of a license's scope.²²¹ Although Justice Scalia connected consent to that of an express license, he failed to offer any further clue as to its meaning or application.

The idea of consent as a license to trespass does not appear again until Scalia's *Fernandez* concurrence. There, instead of citing to the idea of "background social norms," Justice Scalia formulated his license argument upon a more traditional property foundation of creation and revocation of licenses between co-occupants. He proposed that the consent of a co-occupant created an express license.²²² While he acknowledged the scant amount of authority to address the situation before the Court, Justice Scalia quoted a portion of a provision from the secondary source, *Corpus Juris Secundum*, that seemed to address the issue precisely²²³:

It is ordinarily held that a tenant in common may properly license a third person to enter on the common property. The licensee, in making an entry in the exercise of his or her license, is *not liable in trespass to nonconsenting co[-]tenants*, particularly in the absence of excessive or negligent use of the right granted and in the absence of fraud in procuring the license.²²⁴

In spite of the fact that Justice Scalia mentioned conflicting secondary source authority, cited by an amicus brief that suggested an "opposite view" to his concurrence, he quickly dismissed it by noting that the source conceded "there is little authority" on the topic.²²⁵ What Justice Scalia lacked in analysis on this issue, he made up for in his unambiguous claim that "[t]here . . . is no basis for us to conclude that the police infringed on any property right of [Fernandez]'s when they entered the premises with his co[-]tenant's consent."²²⁶

If we were to take Justice Scalia at his word in the *Fernandez* concurrence, it would seem that, despite the objections of Fernandez, consent to police entry of the home by Rojas, the co-occupant, would amount to a reasonable search under the Fourth Amendment.

²²¹ Justice Scalia explored the hypothetical of the police receiving and obtaining the consent of an automobile driver to search the vehicle for evidence relating to an anonymous tip that there is a body in the trunk. He went on to say that the consent to search "does not permit the officer to rummage through the trunk for narcotics." *Id.*

²²² See *Fernandez v. California*, 134 S. Ct. 1126, 1138 (2014) (Scalia, J., concurring).

²²³ *Id.*

²²⁴ 86 C.J.S. *Tenancy in Common* § 144 (2006) (emphasis added) (citing *Dinsmore v. Renfro*, 225 P. 886 (Cal. Ct. App. 1924); *Williams v. Brunton*, 113 S.E. 319 (S.C. 1922); *Mason v. Postal Tel. Cable Co.*, 50 S.E. 782 (S.C. 1905)).

²²⁵ *Fernandez*, 134 S. Ct. at 1138 (Scalia, J., concurring).

²²⁶ *Id.*

Irrespective of the issue of whether a co-occupant was a physically present objector, the only concern is whether *any* co-occupant consented to a physical entry. In other words, under a trespass-based inquiry for a search in cases of disputed consent, yes will trump no.

If Justice Scalia is right about this rule, it would appear that the *Randolph* decision would reach in an inconsistent and divergent outcome if it were decided under the trespass test, as opposed to the privacy test of “shared social expectations.” Much like the question of whether no trumps yes in *disputed consent* cases, the new question for the post-*Jones* Court will be whether no trumps yes in cases of *disputed search analysis* (privacy vs. property).²²⁷ In other words, would the Court hold that a police search was reasonable with respect to one test, but unreasonable with respect to the other?

B. It's Not Just About You (or the Police), It's About Me: Co-Occupants and the Right to Exclude Under Trespass

There is, however, authority beyond Justice Scalia's concurrence in *Fernandez* to suggest that a co-occupant may, in fact, grant a license to enter over the objections of another co-occupant. Under existing property theory, a co-occupant may give consent (a license) to another for entry or use of the property of a shared dwelling, so long as the other co-occupant is not dispossessed of his rights in the property. The licensee would *not* be liable in trespass, because the licensee stands in the shoes of the consenting co-occupant. By the co-occupant's grant of the license, the licensee enjoys the same benefit to enter the property, similar to the co-occupant grantor. What follows below is an attempt to advance Justice Scalia's concurrence in *Fernandez*.

Initially, when considering the law of trespass, there are a variety of legal disciplines one could consider (property, tort, criminal law, etc.). While there is a convergence of ideas on the subject of trespass, the law of property has been consistently utilized by the Court to provide guidance on the topic of search law under the Fourth Amendment. When considering an individual's property rights, including the question of whether a co-occupant may refuse entry of a guest, careful consideration must be given to the origin and nature of

²²⁷ *But see* Kerr, *supra* note 18, at 97 (“*Jones* bifurcates the search inquiry, but it may do so without changing the results in many (or even any) cases.”).

property.²²⁸ What is property?²²⁹ What rights are conferred under it?

Although there are many ways to think about property, the Supreme Court has focused principally on the rights of exclusion, possession, use, and disposition to comprise the “bundle of sticks” that is property.²³⁰ Of these, the right to exclude has been characterized as the “*sine qua non*”²³¹ in defining property.²³² It would seem that the very existence of property is tied to the ability to exclude others.²³³ To the causal eye, if the right to exclude was understood simply in terms of denying an individual from the property, then it would suggest that an objecting co-occupant could refuse entry onto his property and that the rule in disputed consent cases should be that no trumps yes. Thus, the rule in *Randolph* would be reaffirmed under a property analysis.

The fallacy in that suggestion, however, ignores the proper context of how the right to exclude applies. This is particularly true as it relates to the conception of property between co-occupants, each holding sticks within their bundle. To be sure, the question should be framed in terms of an individual’s relationship to the property. In situations involving co-occupants similar to those in *Randolph* and *Fernandez*, however, there must be a careful examination of the conjunction between the individuals associated to *each other* by the property. Here, the paradigm shifts from looking solely at the *right* under the property to the *relationship* between the parties connected to the property. Focusing on the relationship between co-occupants of a property interest, and how their relationship affects their rights to property, demonstrates how the law of trespass operates concerning each co-occupant.

More importantly, though, it is this relationship between co-occupants that explains how their rights are affected when a non-owner third-party is involved with the property. Between individuals²³⁴

²²⁸ See Michael B. Kent & Lance McMillian, *The World of Deadwood: Property Rights and the Search for Human Identity*, 20 S. CAL. INTERDISCIPLINARY. L.J. 489, 505 (2011) (“Despite this seeming importance, property’s precise origins, along with its proper definition, have long been a subject matter of intense debate.”).

²²⁹ See generally Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

²³⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

²³¹ See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

²³² See *id.* at 740 (“[I]f one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property . . .”).

²³³ See *id.* at 730 (“Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.”).

²³⁴ I have used the term “occupant” or “co-occupant” throughout this Article to

who share an interest in property, the general rule is clear that a co-occupant may *not* maintain a trespass action against another co-occupant.²³⁵ The motivation supporting this rule is premised upon the understanding that the co-occupants are each entitled to the possession, entry, and use of the entire premises.²³⁶ Since both co-occupants have a present property interest that grants them the right to possess and use, the co-occupants stand on equal footing and may not exclude the other. Essentially, the co-tenant's relationship to the other, with respect to the property, precludes the right to exclude a co-tenant in trespass.

The only exception to the prohibition of a trespass action is when the balance of the relationship between co-occupants has been significantly altered, amounting to ouster. Ouster "is the wrongful dispossession or exclusion by one tenant of his co[-]tenant or co[-]tenants from the common property of which they are entitled to possession."²³⁷ In order to prove ouster, there must exist more than

describe the relationship between two individuals who possess "common authority" over the property. *See supra* note 11. In many of the cases and examples that follow, however, the various courts will use the terms such as "co-tenant," "tenant in common," "co-owner," etc. to describe the parties involved. For purposes of our analysis, the distinction between the interests is not determinative to our understanding under this section.

²³⁵ *See, e.g.*, *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1399 (7th Cir. 1991) ("Illinois does not permit tenants in common to sue each other for trespass.") (citations omitted); *Conklin v. Newman*, 115 N.E. 849, 851 (Ill. 1917) ("It is elementary that one tenant in common cannot be guilty of committing a trespass upon property which he owns in common with another."); *Davis v. Polard*, 66 A. 380, 382 (Me. 1906) ("It is a general rule of law that a tenant in common cannot maintain an action of trespass *quare clausum* against his co-tenant.") (citations omitted); *Mueller v. Allen*, 128 P.3d 18, 24 (Utah Ct. App. 2005) ("[T]respas cannot ordinarily be maintained by one co-owner of real property against another for such acts as merely entering the property, or the like.") (citation omitted).

²³⁶ *See, e.g.*, *Struzinski v. Struzinsky*, 52 A.2d 2, 4 (Conn. 1947) ("Ordinarily possession of one tenant in common is possession of all.") (citations omitted); *Jemzura v. Jemzura*, 330 N.E.2d 414, 419 (N.Y. 1975) ("[A] tenant in common has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he or she does not interfere with the right of a co[-]tenant to also occupy the premises.") (citations omitted); *Gillmor v. Gillmor*, 694 P.2d 1037, 1040 (Utah 1984) ("A tenant in common has the right to use and occupy the entire property held in co[-]tenancy without liability to other co[-]tenants."); *Mueller*, 128 P.3d at 24 ("[E]ach co[-]tenant has a legal right to enter upon and enjoy the common property . . .") (citation omitted). *See also* 2 HERBERT. THORNDIKE TIFFANY & BASIL JONES, *THE LAW OF REAL PROPERTY* § 426 (rev. 3d ed. Supp. 2012) ("Each co[-]tenant has a right to enter upon, explore and possess the entire premises, and to do so without the consent of his co[-]tenants, though he may not do so to the exclusion of his co[-]tenants to do likewise.") (citation omitted).

²³⁷ *See, e.g.*, *Zaslow v. Kroenert*, 176 P.2d 1, 5 (Cal. 1946). *See also* 86 C.J.S. *Tenancy in Common* § 108 (2006) (stating "an action for trespass may arise against a co[-]tenant who has actually ousted another.").

the mere exclusive use or possession by a co-occupant over another.²³⁸ Under ouster, a co-occupant attempts to unlawfully exercise his right to exclude a co-occupant that shares an interest in the property. In these situations, the excluded co-occupant may obtain an action for trespass.²³⁹

While it is clear that co-occupants may not be liable for trespass, what happens when a third-party, who maintains no property interest, attempts to enter the property? Ordinarily, a co-occupant may exclude the individual from the property.²⁴⁰ At the heart of the disputed consent cases of *Randolph* and *Fernandez*, however, is the question: what happens if one of the co-occupants invites the third-party to enter the property, over the objection of the other co-occupant? Can the objecting co-occupant exclude the third-party? Whose property rights control? In other words, can a co-occupant assert his right to exclude under trespass, despite another co-occupant's invitation to enter? As before, the question remains whether no will trump yes.

As a starting point, a co-occupant's right to exclude is nuanced and far from absolute.²⁴¹ Indeed, as Professor Merrill explained, there exists "a qualified complex of exclusion rights, in which owners exercise relatively full exclusion rights with respect to certain kinds of intrusion (e.g., by strangers) but highly qualified or even nonexistent exclusion rights with respect to other kinds of intrusions (e.g., low-level nuisances)."²⁴² One such "nonexistent exclusion right" exists in the context of a license.²⁴³ A license has been described as a "waiver of the

²³⁸ See *Gillmor*, 694 P.2d at 1040; see also *Willis v. Mann*, 386 S.E.2d 68, 71 (N.C. Ct. App. 1989) (Ouster "involves 'an entry or possession of one tenant in common that enables a co[-]tenant to bring ejectment against him[,]'") and the "entry or possession must be a clear, positive, and unequivocal act equivalent to an open denial of [the co[-]tenant's] right and to putting him out of the seizin.") (citations omitted).

²³⁹ See *Mueller*, 128 P.3d at 24 ("An action for trespass, however, 'may arise against a co[-]tenant who has actually ousted another.'") (citations omitted). See also *Harman v. Gartman*, 16 S.C.L. (Harp.) 430, 432 (1824) (Gantt, J., dissenting) ("It is admitted, that where there is an *ouster*, the converse of the rule holds good, that trespass may be maintained."); 86 C.J.S. *Tenancy in Common* § 108 (2006) (stating that a trespass action "may arise against a co[-]tenant who has actually ousted another").

²⁴⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

²⁴¹ See Merrill, *supra* note 231, at 753 (describing "a complex tapestry of property rights of different sorts (private, public, common) with different types and degrees of exclusion rights being exercised by different sorts of entities in different contexts").

²⁴² *Id.*

²⁴³ See BLACK'S LAW DICTIONARY 919–20 (6th ed. 1990) (defining a license as "[a] personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable").

right to exclude.”²⁴⁴ Specifically, a license is “an authority given to do some one act, or series of acts, on the land of another, without passing any estate in the land,”²⁴⁵ and may include permission to enter upon the property.²⁴⁶ When a co-occupant grants a license to a non-owner, the third-party may enter the property lawfully without fear of committing trespass.²⁴⁷

So how can it be that an objecting co-occupant, who has a present interest in the property, *cannot* exclude under trespass a mere licensee, who has no property interest? The answer pivots upon the relationship between those who have the property interest: the co-occupants. Just as the co-occupants may not assert a trespass claim, absent ouster, against one another, neither may the objecting co-occupant bring a trespass suit against the licensee. In essence, the licensee, by having permission to enter the property by one co-occupant, has the same protection as the licensor against exclusion from another co-occupant. The licensee “stands in the shoes” of the licensor and cannot be excluded under trespass.

This theory that the licensee stands in the shoes of the licensor is exemplified in the case of *Buchanan v. Jencks*.²⁴⁸ In *Buchanan*, the plaintiff, along with several other individuals as tenants in common, held a property interest in a five-acre wood lot.²⁴⁹ One of the other tenants sold his interest in the timber, and the buyer then conferred upon the defendant the right to cut and remove the wood.²⁵⁰ After the defendant entered the property and removed the timber from the lot, the plaintiffs (other co-tenants of the lot) brought an action against the defendant for trespass and the unlawful removal of the wood.²⁵¹ The Rhode Island Supreme Court stated the rule that a co-tenant may not commit trespass against another co-tenant, absent ouster.²⁵² The court went on to explain that the licensor, who was a tenant in common, had a right to enter the property without committing

²⁴⁴ See Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 884 (2014).

²⁴⁵ See *Cook v. Stearns*, 11 Mass. 533, 537–38 (1814) (stating that a license “amount[s] to nothing more than an excuse for the act, which would otherwise be a trespass”).

²⁴⁶ See *Causee v. Anders*, 20 N.C. (3 & 4 Dev. & Bat.) 388, 389 (1839). See also, 2 HERBERT. THORNDIKE TIFFANY & BASIL JONES, *THE LAW OF REAL PROPERTY* § 432 (3d ed. 1939).

²⁴⁷ See *Wiseman v. Lucksinger*, 84 N.Y. 31, 42 (1881) (explaining that a license “only makes an action lawful, which, without it, had been unlawful”).

²⁴⁸ 96 A. 307 (R.I. 1916).

²⁴⁹ *Id.* at 308.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 309.

trespass.²⁵³ When it described the rights of the defendant licensee, the court declared:

We see no reason why a *co[-]tenant* in the enjoyment of his rights as such cannot *authorize another* to do *whatever he might lawfully do himself*. A contrary view, if followed to its logical conclusion, would restrict a *co[-]tenant's* enjoyments of the common property to the sphere of his own personal activities and would deprive him of the aid of others whom he might desire or need to employ.²⁵⁴

The rationale that a licensee may “do whatever [the licensor] might lawfully do himself” was reiterated later in the *Buchanan* opinion, when the court described the licensee as “*standing in the place of a co[-]tenant*.”²⁵⁵ The court went on to hold that the defendant licensee could not be liable in trespass to the other co-tenants.²⁵⁶ In addition, other cases have reinforced the reasoning of “standing in the place” from *Buchanan*.²⁵⁷

Based upon the relationships of co-occupants and the rights relating to property of a shared domicile, there is evidence to conclude that a licensee, like that of the police officers in *Randolph* and *Fernandez*, would have the same rights of entry into the home as the co-occupant licensor. If that is the case, then the objecting co-occupant may *not* allege that the police committed a trespass. In fact, the

²⁵³ *Id.*

²⁵⁴ *Buchanan*, 96 A. at 309. (emphasis added).

²⁵⁵ *Id.* at 309–10 (emphasis added).

²⁵⁶ *Id.* at 310–11 (“But a *co[-]tenant* cannot be said to be guilty of a trespass *quare clausum fregit* for the reason that he has, in common with his *co[-]tenants*, a right to enter upon the premises, and such entry does not constitute a trespass. Neither could the defendant be guilty of trespass in entering the close because he entered upon the authority of Thayer who was a *co[-]tenant* with the plaintiffs.”).

²⁵⁷ In *Causee v. Anders*, the defendant, a tenant in common, assaulted the plaintiff (who had no property interest), knocking out three teeth, when the plaintiff and another tenant in common entered the property. The plaintiff asserted the defendant could not “treat [plaintiff] in the manner proven” since the plaintiff “was there under the authority” of another tenant in common. The defendant argued there was a “distinction between the tenant in common and one who, like the plaintiff, was there by the authority of his co-tenant.” The trial court determined that defendant’s position was “not supported by law” and the appellate court subsequently affirmed the result. See 20 N.C. (3 & 4 Dev. & Bat.) 388, 388–89 (1839). See also *Dinsmore v. Renfroe*, 225 P. 886, 889 (Cal. Ct. App. 1924) (explaining that a tenant in common may by license “confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor . . . himself might have used or occupied it”); *Williams v. Bruton*, 113 S.E. 319, 325 (S.C. 1922) (“[W]here one tenant in common has granted a permit or license to a public service corporation to enter and construct its line, there is no foundation for an action of trespass in the absence of evidence of excessive or negligent use of the right granted.”). See also 86 C.J.S. *Tenancy in Common* § 144 (2006).

objecting co-occupant may no more charge trespass against a licensee than he could accuse the other co-occupant of trespass. While any person with an interest in the property may have the right to exclude, that right is not applicable to other individuals who have an interest in the possession and use of the property. Put another way, a licensee may not be excluded since he stands in the shoes of the licensor cotenant. Therefore, using Justice Scalia's test for a search under the property-based analysis, the police committed a licensed physical intrusion that amounted to a reasonable search under the Fourth Amendment. In the cases of *Randolph* and *Fernandez*, the consent of the co-occupant granted the police a license to enter, over the protests of another co-occupant. Therefore, under property conceptions, the rule in *Randolph* is turned on its head: yes now trumps no.

Notwithstanding the importance of the right to exclude, there has been some recent discussion among scholars that the *right to include* must be regarded as important in defining the nature of property.²⁵⁸ Within the framework of a co-occupant granting a third-party a license to enter, the grantor waives his right to exclude and, instead, gives the individual "a 'permission slip' from the owner to a non-owner."²⁵⁹ If the right to include is related to property, it would seem this would be yet another reason why a co-occupant may validly license another to enter his property. Under those facts, a dissenting co-occupant should not be able to thwart another co-occupant's consent to waive the right to exclude. Permission is given, and any refusal to honor the right to include should be denied. Again, the rule from property is that yes trumps no.

C. *Are We There Yet? Some Final Thoughts on the Landscape of the Privacy/Trespass Dispute*

It is hard to say exactly where the Court will go in search law generally or in disputed consent situations specifically in the post-*Jones* era. While many questions remain unanswered, at least three concerns are worth noting at the present. First, how will the Justices treat the twin tests for search? In other words, should the Court treat the separate tests of property and privacy in the disjunctive (either/or) for each dispute? Or will the Court look to a single test in distinct situations?²⁶⁰

²⁵⁸ See Kelly, *supra* note 244, at 869 (discussing Penner's analogy of a property owner as a gatekeeper that "can include as well as exclude"). See also JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* 74 (1997).

²⁵⁹ See Kelly, *supra* note 244, at 884.

²⁶⁰ See *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam)

There exists evidence for both approaches in the current language of the opinions. Specifically looking at Justice Scalia's language in *Jones* implies that both inquiries are complementary, in that the privacy test "has been *added to*, not *substituted for*" a property-based understanding.²⁶¹ Later in the opinion, however, Justice Scalia declared that trespass should be the exclusive test in cases, like *Jones*, which involve actual physical invasion.²⁶² Justice Scalia noted what he called "particularly vexing problems" with the exclusivity of the *Katz* expectations test and concluded that, "we may have to grapple with these 'vexing problems' in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here."²⁶³ Based upon his conclusions in *Jones*, it appears that Justice Scalia would utilize the *Katz* privacy-based inquiry only in "situations involving merely the transmission of electronic signals without trespass."²⁶⁴

Although Justice Scalia has established a preference²⁶⁵ for the trespass test to the exclusion of the privacy test in the physical invasion factual scenarios, other members of the Court have suggested that the search may be analyzed under either test. Justice Kagan, through her concurrence in *Jardines*, exemplifies this view when she stated, "[t]he Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to *Jardines*'[s] privacy interests."²⁶⁶ Of course, some members of the Court disagree with the current utilization of the trespass test to resolve issues of search.²⁶⁷

In light of this ambiguity, created by the reintroduction of the trespass test, the current problem before the Court is the lack of guidance essential to help predict readily administrable search rules for a given factual scenario. Which test controls, and when, if ever, should the other test be viewed? Of course, the greater problem, as explained above, is what happens if the two standards create

(concluding that the satellite-based monitoring of recidivist sex offenders by the government is a search "since it [obtains information] by physically intruding on a subject's body").

²⁶¹ United States v. *Jones*, 132 S. Ct. 945, 952 (2012).

²⁶² *Id.* at 953–54.

²⁶³ *Id.* at 954.

²⁶⁴ *Id.* at 953 (explaining that cases without trespass "would *remain* subject to *Katz* analysis").

²⁶⁵ See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) ("One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy.").

²⁶⁶ *Id.* at 1418 (Kagan, J., concurring).

²⁶⁷ See *Jones*, 132 S. Ct. at 958 (Alito, J., concurring).

diametrically opposing results?

A second unanswered question to be considered is what type of trespass test has Justice Scalia created from *Jones* and *Jardines*? In particular, Justice Scalia's opinion from *Jardines* joined notions of trespass with those of "background social norms."²⁶⁸ Justice Ginsburg, in her *Fernandez* dissent, loosely linked Justice Scalia's "background social norms" language to the conception of the pre-*Jones* "shared societal expectations" rationale from the *Randolph* decision.²⁶⁹ The use of "background social norms" in Justice Scalia's reasoning could be viewed as a retreat from a staunch physical intrusion trespass examination. Is Justice Scalia reading a societal expectations requirement into his trespass test? To put it another way, is he morphing his analysis into a privacy/property blend? While this may not be the case, it nonetheless underscores the shifting sand the Court stands upon in its case-by-case decisional law under the Fourth Amendment.

Finally, it bears discussing the significant impact the issue of domestic violence plays in the disputed consent cases of *Randolph* and *Fernandez*. The *Randolph* majority drew considerable fire for its rule that no trumps yes for consent to police searches, in part due to fear that the rule operated to prevent the police from assisting potential victims of domestic abuse.²⁷⁰ The *Randolph* majority, however, rebuked the allegations and offered that the police could, in fact, lawfully enter over the objections of a co-occupant in established exigent circumstances, such as a domestic violence situation.²⁷¹ In *Fernandez*, however, the Court encountered the very situation contemplated in *Randolph*: the present plight of domestic violence, involving an objector suspected of committing the crime.²⁷²

Rather than address the concerns raised by both majority and dissenting opinions in *Randolph*, the *Fernandez* Court refused to apply the rule in *Randolph*.²⁷³ Instead of attempting to faithfully adhere to the physically present objector rule (no trumps yes in disputed consent), the Court determined *Fernandez* was a "very different

²⁶⁸ See *Jardines*, 133 S. Ct. at 1416–17.

²⁶⁹ See *Fernandez v. California*, 134 S. Ct. 1126, 1140–41 (2014) (Ginsburg, J., dissenting).

²⁷⁰ See *Georgia v. Randolph*, 547 U.S. 103, 139 (2006) (Roberts, C.J., dissenting) ("The majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.").

²⁷¹ *Id.* at 118 (majority opinion).

²⁷² *Fernandez*, 134 S. Ct. at 1130.

²⁷³ *Id.*

situation.”²⁷⁴ And while there appears to be no doubt as to the officers’ determination that there was sufficient probable cause to arrest Fernandez on suspicion of domestic abuse, the majority opinion’s endeavor to create an exception under these facts represents a slight of hand. Fernandez was present at the home at the time of the police officers’ first encounter, and he strenuously refused consent to search.²⁷⁵ Is the Court allowing the image of the bloody and bruised victim of domestic violence to cloud its prior decision from *Randolph*? To put it another way, are the unsightly facts present in *Fernandez* contributing to a poorly decided rationale?

Alternatively, could it be that *Randolph* was erroneously decided? Is it possible *Randolph* is wrong, both in terms of the property- and privacy-based standards? In that case, there is no discord. There is no disputed analysis. Of course, that is not the current state of the law, but how could the Court get there?

Under a *Jones* trespass analysis as presented in Parts II, III.A, and III.B above, the Court could determine that Janet Randolph effectively gave the police, by her consent to the officers, a license to enter the home. As a result of her granting of the license to enter, the police could not be found liable in trespass, despite the objections of a co-occupant. In essence, the police would stand in the shoes of the grantor, Janet Randolph, and would be entitled to protection. Because the officers are not trespassers, the search of the home on the basis of her consent would be reasonable under the Fourth Amendment. In the context of the current state of the law, it appears that the property-based inquiry most effectively addresses the domestic violence concerns raised by the *Randolph* and *Fernandez* decisions. Additionally, resolving the case under trespass prevents the Court from contorting its reasoning under the privacy-based test, similar to what it did in *Fernandez*.

Even under privacy-based concerns, the Court could reach a similar holding that the search was reasonable by utilizing a *Katz* reasonable expectation of privacy query. Instead of relying on “shared social expectations,” which often reduce our Court to argue to impasse over whether it is acceptable or not for the “hypothetical caller” to come in, the Court should return to earlier traditions that hold that when an individual shares information or a living space, he assumes

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1141 (Ginsburg, J., dissenting) (“Does an occupant’s refusal to consent lose force as soon as she absents herself from the doorstep, even if only for a moment? Are the police free to enter the instant after the objector leaves the door to retire for a nap, answer the phone, use the bathroom, or speak to another officer outside?”).

the risk of a diminished expectation of privacy.²⁷⁶ But, that is not currently the law in the context of disputed consent. For now, *Randolph* controls, except when the Court says it does not, as it did in *Fernandez*.

IV. CONCLUSION

*“Two roads diverged in a wood, and I—I took the one less traveled by, and that has made all the difference.”*²⁷⁷

The current reality is deadlock. The path to understanding modern search law is in dispute. Many have discussed whether we should have two tests for a search or whether one test is better than another. Undeniably, each test (privacy or property) has its strengths and weaknesses. When it comes to the *Katz* reasonable expectation of privacy standard, a chief complaint is that “[i]t involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person.”²⁷⁸ At the same time, the test has been praised for its flexibility to handle a variety of situations requiring protection²⁷⁹ as well as its durability over the course of history.²⁸⁰

So was the re-introduction of a property-based understanding a better solution to search law? Ostensibly, the trespass standard is attractive in that creates a seemingly bright-line test that “keeps easy cases easy.”²⁸¹ Similar to the *Katz* test, though, the trespass test has been denounced as being “no less circular than the problematic privacy analysis.”²⁸² Most importantly is whether the trespass test anachronistic

²⁷⁶ See *Randolph*, 547 U.S. at 128 (Roberts, C.J., dissenting) (“If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.”).

²⁷⁷ See FROST, *supra* note 1, at 9.

²⁷⁸ See *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring).

²⁷⁹ See Kerr, *supra* note 52, at 507–08 (explaining that the reasonable expectation of privacy standard is not a single test but can be broken down into “four relatively distinct categories of argument used to justify whether a reasonable expectation of privacy exists”).

²⁸⁰ See Kerr, *supra* note 18 at 94–95 (“The open-ended nature of the *Katz* test allows the Court to pick models based on which best identifies the kinds of troublesome law enforcement practices that are in need of regulation.”).

²⁸¹ See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

²⁸² See David Steinberg, *Florida v. Jardines: Privacy, Trespass, and the Fourth Amendment*, 23 TEMP. POL. & CIV. RTS. L. REV. 91, 109–10 (2013) (stating that the “trespass doctrine does not seem like an improvement over the dominant privacy analysis” and that it “would seem to make Fourth Amendment decisions turn on fine and trivial factual details”).

given the current technological and digital age, where the government has the potential to monitor and gather information without ever committing a physical intrusion, amounts to an unlawful trespass.

So how did we arrive at this destination? In the case of its Fourth Amendment pronouncements, the Supreme Court often acts as a common-law court, enlarging and contracting the “rule” as it sees fit, given the current controversy presented. Professor Bradley eloquently summed up this point in explaining the Court’s difficulties in its Exclusionary Rule precedents:

The result is that the Court strives to justify such police behavior by stretching existing doctrine to accommodate it. Herein lies the inherent contradiction, and source of confusion, in fourth amendment law: The Court tries on the one hand to lay down clear rules for the police to follow in every situation while also trying to respond flexibly, or “reasonably,” to each case because a hard-line approach would lead to exclusion of evidence. Since the rules are not clear and since, even if they were, it is virtually impossible to lay down a rule that anticipates all potential cases, the police engage in behavior that does not conform to the rules but that strikes the Court as having been essentially reasonable. Given the Court’s predilection for clear-cut rules, however, simply declaring such conduct “reasonable” and leaving it at that is not enough. Instead, the Court offers a detailed explanation as to how the police behavior really did conform to the old rule (and in so doing, changes the contours of the old rule), or creates a new rule to justify the behavior. Naturally, such a holding spawns new litigation, which leads to a new opinion, which leads to a new rule, etc.²⁸³

Much like the problem of disputed consent, where one co-occupant says yes and the other says no, we may very well have arrived at a place in our Fourth Amendment understanding where disputed analysis, trespass or privacy, threatens to cloud an already obscured view of search law. Similar to the contentious and combative couples in *Randolph* and *Fernandez*, supporters, as well as critics, of the current jurisprudence find themselves mired in conflict. Indeed, we can see that “two roads diverged in a wood.”²⁸⁴ It remains unknown, however, which road we should follow and will it make “all the difference.” For now, we are marooned to fight over the directions.

²⁸³ See Bradley, *supra* note 116, at 1470 (footnote omitted).

²⁸⁴ See FROST, *supra* note 1, at 9.