1-1-2014

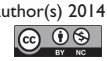
Rights of Passage: On Doors, Technology, and the Fourth Amendment

Irus Braverman
University at Buffalo School of Law

LAW, CULTURE AND THE HUMANITIES

Article

Law, Culture and the Humanities
2018, Vol. 12(3) 669–692


Reprints and permissions:
sagepub.co.uk/journalsPermissions.nav
DOI: 10.1177/1743872114520893
lch.sagepub.com


Rights of Passage: On Doors, Technology, and the Fourth Amendment

Irus Braverman
SUNY Buffalo Law School, USA

Abstract

The importance of the door for human civilization cannot be overstated. In various cultures, the door has been a central technology for negotiating the distinction between inside and outside, private and public, and profane and sacred. By tracing the material and symbolic significance of the door in American Fourth Amendment case law, this article illuminates the vitality of matter for law's everyday practices. In particular, it highlights how various door configurations affect the level of constitutional protections granted to those situated on the inside of the door and the important role of vision for establishing legal expectations of privacy. Eventually, I suggest that we might be witnessing the twilight of the "physical door" era and the beginning of a "virtual door" era in Fourth Amendment jurisprudence. As recent physical and technological changes present increasingly sophisticated challenges to the distinctions between inside and outside, private and public, and prohibited and accepted visions, the Supreme Court will need to carefully articulate what is worth protecting on the other side of the door.

Keywords

Doors, Fourth Amendment, criminal procedure, liminality, technologies of seeing, law and vision, police powers

Corresponding author:
Irus Braverman, SUNY Buffalo Law School, The State University of New York, 625 O'Brian Hall, Buffalo, NY 14260, USA.
Email: irusb@buffalo.edu

> The gate to the law stands open, as always.
>
> —Franz Kafka, "Before the Law"[1]

I. Introduction

The importance of the door for human civilization cannot be overstated. Across various times and cultures, the door has been a central technology for facilitating the distinction between inside and outside, individuals and society, private and public, and profane and sacred. According to some, the door was the medium that initially turned the hunter into a shepherd, thereby distinguishing man from animal.[2] In his essay "Where are the Missing Masses,"[3] Bruno Latour traces the genealogy of door design. In his words: "Walls are a nice invention, but if there were no holes in them there would be no way to get in or out – they would be mausoleums or tombs … So architects invented this hybrid: a wall hole, often called a *door*, which although common enough has always struck me as a miracle of technology."[4]

The "thingness" of the door is intimately tied to that of the threshold: the liminal space that "belongs neither to the inside nor the outside and is thus an extremely dangerous space."[5] According to anthropologist Arnold van Gennep: "To cross the threshold is to unite oneself with a new world. It is thus an important act in marriage, adoption, ordination, and funeral ceremonies."[6] Drawing on van Gennep, Victor Turner coined the term liminality, which refers to the marginal (or "limen") stage of transition whereby the subject of the passage ritual is invisible. In Turner's words, "As members of society, most of us see only what we expect to see, and what we expect to see is what we are conditioned to see when we have learned the definitions and classifications of our culture."[7] Along similar lines, sociologist Pierre Bourdieu says about the door of the traditional Berber house that:

> During the summer the door of the house must remain open all day long so that the fertilizing light of the sun may enter, and with it prosperity. A closed door means penury and sterility: to sit down upon the threshold means, by obstructing it, to close the passage to happiness and plenitude. When one wishes prosperity to someone one says: "May your door remain open."[8]

1. Franz Kafka, "Before the Law," in Nahum N. Glatzer, ed., Willa and Edwin Muir trans., *Franz Kafka: The Complete Stories and Parables* (Quality Paperback Book Club, 1971), pp. 3–4.
2. Bernhard Siegert, "Doors: On the Materiality of the Symbolic," *Grey Room* 47 (2012), 8.
3. Bruno Latour, "Where are the Missing Masses? The Sociology of a Few Mundane Artifacts," in Woebe Bijker and John Law, eds., *Shaping Technology / Building Society: Studies in Sociotechnical Change* (Cambridge, MA: MIT Press, 1992), pp. 151–80.
4. Latour, "Where are the Missing Masses?," p. 154.
5. Siegert, "Doors: On the Materiality of the Symbolic," 10.
6. Arnold van Gennep, *The Rites of Passage* (New York, NY: Routledge, 2004).
7. Victor W. Turner, "Betwixed and Between: The Liminal Period in 'Rites de Passage'," in *The Proceedings of the American Ethnological Society, Symposium on New Approaches to the Study of Religion* (1964), p. 47.
8. Pierre Bourdieu, "The Berber house or the world reversed," *Social Science Information* 9 (1970), 162.

Although in contemporary western cultures doors have seemingly been relieved of such rituals of passage and reduced to their straightforward materiality, the symbolic and even spiritual meanings assigned to the liminal space between "in" and "out" are still acutely relevant. The space of the door is, quite literally, a liminal space. Looking at how American courts have construed this space may thus help us understand how they conceive liminality more broadly. Furthermore, studying the legal geography of doors may contribute to a deeper understanding of other legal thresholds.

Despite its benign appearance, the door is never a neutral technology. Latour points out the various ways in which doors discriminate. The heavy hydraulic door, for example, discriminates against the very little and very old, as well as "against furniture removers and in general everyone with packages, which usually means, in our late capitalist society, working- or lower-middle-class employees."[9] Hence, doors are not only an architectural medium; they are also "operators of symbolic, epistemic, and social processes that, with help from the difference between inside and outside, generate spheres of law, secrecy, and privacy and thereby articulate space in such a way that it becomes a carrier of cultural codes."[10]

Drawing on the insights of Science and Technology Studies (STS), this article will explore how the door matters in American Fourth Amendment jurisprudence. I will begin with a brief account of the importance of the home – into which the door provides both visual access (similar to a window) and an opportunity for bodily entry – in American criminal procedure. Next, I will discuss the spatiolegal rituals performed by the police, and the case law established by American courts, with regard to the door. In particular, I will focus on police searches and seizures that illuminate the door's liminal legal geography. Finally, I will highlight law's focus on vision, mainly in the context of the home but also with respect to cars.

In light of recent technological advancements that enhance the ability to literally see through walls, we might be witnessing the end of the *physical* door era and the beginning of a *virtual* door era. Currently, the courts seem to be operating as if the door still blocks view, but this may change as the technology presents increasingly sophisticated challenges to the distinctions between in and out, private and public, and legal and illegal visions. This is therefore an important moment for reflecting on what U.S. courts and American society at large believe is worthy of protection on the inside of the residential door.

Throughout the article I revisit Latour's realization that, "To balance our accounts of society, we simply have to turn our exclusive attention from humans and look also at nonhumans."[11] My analysis here will show that the door's meanings and materialities are, in fact, inseparable. The door, in other words, is both a symbol of sacred domesticity *and* a technology that possesses material agency. The door also provides an allegorical entry into a bizarre constitutional discourse whereby doors both embody and represent the relationship between the Government, on one side of the door, and the People, on the door's other side.

9. Latour, "Where are the Missing Masses?," p. 159.
10. Siegert, "Doors: On the Materiality of the Symbolic," 9.
11. Latour, "Where are the Missing Masses?," pp. 152–3.

II. The Home as One's Castle

> Law makes and unmakes the home.
>
> —Jeannie Suk, "Taking the Home"[12]

The home is conventionally described in legal discourse as a refuge or sanctuary, a fortress or castle, and a haven in a heartless world.[13] Even the "poorest man['s] ruined tenement"[14] is afforded the same protections, including the ability to exclude the king from entering with impunity.[15] A man's home is his "castle and fortress."[16] The sanctity of the home is not a unique invention of American, or even English, law: it has been the nexus of certain protections as far back as the Code of Hammurabi[17] and descends from "the sentiments of ancient Rome."[18] The direct antecedent to the American protections of the home are the protections afforded to eighteenth-century British landowners. Indeed, "The British state … existed to preserve the property and, incidentally, the lives and liberties, of the propertied."[19]

The home assumes a unique significance in modern liberal societies, where it provides a nest for individuality, family, privacy, security, and liberty.[20] In the words of David Delaney: "In our world, it's fair to say, the modern home is more specifically registered as the liberal home . . . Hence the interpretive and affective salience of the public/private distinction; hence the valorization of privacy, security, protection, and self-expression; hence the expression of these in the idioms of rights."[21] The physical

12. Jeannie Suk, "Taking the Home," *Law and Literature* 20 (2008), 309.
13. Linda McClain, "Inviolability and Privacy: The Castle, the Sanctuary, and the Body," *Yale J.L. & Human.* 7 (1995), 195. For a review of the dominant and recurring ideas about home represented in relevant theoretical and empirical literature see Shelly Mallett, "Understanding home: a critical review of the literature," *The Sociological Review* 52 (2004), 71.
14. Daniel T. Pesciotta, "I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century," *Case W. Res. L. Rev.* 63 (2012), n. 182 (quoting William Pitt, and citing John M. Roberts and Thomas Gregor, "Privacy: A Cultural View," in J. Roland Pennock and John W. Chapman, eds., *Privacy* (New York, NY: Atherton Press, 1971), pp. 199–200, 203).
15. Pesciotta, "I'm Not Dead Yet," n. 182. See also *Semayne's Case, supra*.
16. *Semayne's Case*, 5 Coke Rep. 91; 77 Eng. Rep. 195 (1604). See also, 5 William Blackstone, Commentaries *223. The "castle" language is used routinely. See e.g., *Payton v. New York*, 445 U.S. 573 (1980), p. 598; *Minnesota v. Carter*, 525 U.S. 83 (1998), p. 94; *Wilson v. Arkansas*, 514 U.S. 927 (1995), p. 931.
17. Pesciotta, "I'm Not Dead Yet," n. 182 (citing Code of Hammurabi art. 21 (Robert Francis Harper ed. & trans., 2d ed. 1904) (ca. 1750 B.C.E.)).
18. William Blackstone, *Commentaries on the Laws of England: Of Public Wrongs*, Vol. 4253 (Beacon Press 1962).
19. Amelia L. Diedrich, "Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment," *Hastings Const. L.Q.* 39 (2011), 299.
20. B. D. Benjamin Barros, "Home as a Legal Concept," *Santa Clara L. Rev.* 46 (2006), 257, 271.
21. David Delaney, "Home as Nomic Setting: Seeing How the Legal Happens," *Eng. Language Notes* 48 (2010), 70. But see the perhaps alternative and very influential Hegelian interpretation of the home provided by Margaret Jane Radin, "Property and Personhood," *Stan. L. Rev.* 34 (1982), 957.

manifestation of the home as "the house" in particular occupies a central place in American legal traditions. Houses are mentioned explicitly in both the Third and Fourth Amendments[22] and implicitly in the First Amendment,[23] indicating a clear concern for this space by the framers of the U.S. Constitution.[24] The protections and importance of the house/home are recognized, additionally, in many other areas of the law.[25]

My central concern in this article is the hybrid legal geography of wall and hole ("door") that serves as the "obligatory passage point"[26] to the home and how this hybrid spatiolegal entity is interpreted in the context of Fourth Amendment protections. The Fourth Amendment establishes:

> 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.[27]

The federal courts have been acutely sensitive to one's reasonable expectation of privacy in the home.[28] Until the monumental 1967 Supreme Court decision of *Katz* that

22. U.S. Const. amend. III; U.S. Const. amend. IV.
23. Baylen J. Linnekin, "'Tavern Talk' and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to its Roots in Colonial Taverns," *Hastings Const. L.Q.* 39 (Spring 2012), n.176. (describing the implicit and explicit "situs" of rights in the Bill of Rights); see also *Stanley v. Georgia*, 394 U.S., 557 (1969), p. 565 (stating that "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone *in his own house*, what books he may read or what films he may watch.") (emphasis added).
24. Tracey Maclin, "Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged," *B.U. L. Rev.* 82 (2002), 961 (describing the Townshend Act and general warrants for searches of homes as the impetus for the Fourth Amendment); see also Barros, "Home as a Legal Concept," 265–6 (describing homes as given extra attention compared to other types of property in revolutionary rhetoric and early federal legislation; citing Thomas Y. Davies, "Rediscovering the Original Fourth Amendment," *Mich. L. Rev.* 98 (1999), 642, n.259).
25. Barros, "Home as a Legal Concept," 265–6 (search and seizure, tax law, bankruptcy, family law, "other examples abound"); Pesciotta, "I'm Not Dead Yet," 219–20 (zoning law, tort law); Mary Pennisi, "A Herculean Leap For The Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(B) After Modesto," *Fordham Urb. L.J.* 37 (2010), 1083 (housing law, civil rights); but see Barros, *supra*, at 295–300 (describing the lack of discussion of the home in eminent domain analysis in *Kelo v. City of New London*, 545 U.S. 469 (2005)).
26. Latour, "Where are the Missing Masses?," p. 158 ("No matter what you feel, think, or do, you have to leave a bit of your energy, literally, at the door. This is as clever as a toll booth").
27. U.S. Const. Amend. IV.
28. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 565, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection"); *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976) ("less rigorous warrant requirements govern

incorporated the concept of privacy into the juridical analysis,[29] the Court's interpretation of the Fourth Amendment was concerned primarily with its tangible geographies, which it based on a finite list in the Constitution. The main threat to the house was, in other words, its *physical* invasion[30] and the protected right was the "indefeasible right . . . of private property."[31] Subsequent developments in Fourth Amendment jurisprudence maintain the same underlying logic of protecting the home from invasion.[32] Yet whereas some cases are concerned with physical bodily invasion by the state into the intimacies of the home – namely, with the function of the door as a technology that enables and disables *a full bodily entry* – other cases focus on the permissibility of governmental gazes into the home through the door – namely the door's function as a *window*. Finally, the invention of technologies that enable seeing through walls without the use of doors (in their function as either door or window) has resulted in the configuration of doors in recent cases as symbolic matters, as indicators of an illegal invasion into the privacy of one's home.

Despite the recent challenges to the physical invasion approach of the Fourth Amendment, the Supreme Court has clarified that the trespass test still applies in this

---

[automobile searches] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office" (footnote omitted)); *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972), p. 313 ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . ."); *Warden v. Hayden*, 387 U.S. 294 (1967), p. 301 (the Fourth Amendment is intended to protect "the sanctities of a man's home and the privacies of life"), quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (1958) (government entry into house "invades the precious interest of privacy"); *McDonald v. United States*, 335 U.S. 451, 453, 456, 69 S.Ct. 191, 192, 93 L.Ed. 153 (1948) (the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization . . . [T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacies of the home"); *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed.2d 436 (1948) ("The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security"); *Dorman v. United States*, 140 U.S.App.D.C.313, 317, 435 F.2d 385, 389 (1970) ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment"); *Commonwealth v. Forde*, 329 N.E.2d 717, 722 (Mass. 1975) ("The right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy. It was just this sort of intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of a judicial determination of probable cause"); Sir Edward Coke, Third Institute of the Laws of England 162 (1644) ("a man's house is his castle").

29. *Katz v. United States*, 389 U.S. 347 (1967).
30. *Olmstead v. United States*, 277 U.S. 438 (1928).
31. *Olmstead v. United States*, 277 U.S. 438 (1928), pp. 474–5 (Brandeis, J. dissenting).
32. Pesciotta, "I'm Not Dead Yet," 196, citing Russell L. Weaver, "The Fourth Amendment, Privacy and Advancing Technology," *Miss. L.J.* 80 (2011), 1150.

context.[33] "At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," the Supreme Court Justices re-emphasized in their 2013 decision *Florida v. Jardines*.[34] In another decision, the Justices clarified their position that: "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined that when bounded by the unambiguous physical dimensions of an individual's home."[35] In spite of the technological developments, then these and other cases characterize the protection of the home as a longstanding tradition and as a "monument of English freedom."[36] Perhaps the most far-reaching protection in this regard is the government's lack of power to prosecute certain crimes when they occur exclusively within the home, including obscenity and sodomy.[37]

The various constitutional protections against invasion are not limited to governmental actions. In addition to the property right to exclude others, the Supreme Court has stated that there is no duty to retreat from attack "on [one's] premises,"[38] and many states[39] have laws that afford defenses to citizens who use otherwise unacceptable force to defend the "sanctity of their homes."[40] This, again, is based on the assumption that a "man's home is his castle" and that its dweller has a right to defend it against intrusion.[41] A similar logic is applied to protect a "man in his castle" from the exercise of First Amendment rights by others.[42] It is important to note in this context that feminist critiques of homes as virtual traps for victims of intimate violence have led to government

33. *United States v. Jones*, 132 S.Ct. 945 (2012), p. 952.
34. *Florida v. Jardines*, 569 U.S. ____ , 4 (slip op.) (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion") (internal quotations and citations omitted).
35. *Payton v. New York*, 445 U.S. 573 (1980), p. 589.
36. *United States v. Jones*, 132 S. Ct., 945 (2012), p. 949 (referring to *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B.) 817 (1765); citing *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); quoting *Boyd v. United States*, 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886)).
37. Adam Benforado, "The Geography of Criminal Law," *Cardozo L. Rev.* 31 (2010), 882–4 (discussing *United States v. Orito*, 413 U.S. 139 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969) (obscenity); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sodomy)). Notably, these crimes involve other issues, including First Amendment and privacy protections.
38. *Beard v. United States*, 158 U.S. 550, 555–6 (1895).
39. Benforado, "The Geography of Criminal Law," 883–4.
40. *State v. Anderson*, 972 P.2d 32, 36 (Okla. Crim. App. 1998) ("When one intrudes into the dwelling of another, the harm is the violation of the sanctity of the dwelling itself, not merely to a particular person's property interest").
41. Benforado, "The Geography of Criminal Law," n.294 (citing *Weiand v. State*, 732 So.2d 1044 (Fla. 1999) (quoting *Jones v. State*, 76 Ala. 8, 16 (1884)), *United States v. Peterson*, 483 F.2d 1222, (D.C. Cir. 1973), *People v. Eatman*, 91 N.E.2d 387 (Ill. 1950)).
42. Mark Cordes, "Property and the First Amendment," *U. Rich. L. Rev.* 31 (1997), 42–9 (discussing the home in relation to various First Amendment rights).

entry into the home in the form of protection orders[43] and, more recently, to feminist critiques of such orders.[44]

III. Delineating the Fourth Amendment Threshold

The critical importance of the home in American jurisprudence manifests in the designation of heightened protections to privacy, property, and liberty when those are exercised within the home. In the Fourth Amendment context, such enhanced protections against governmental (mostly police) intrusions have translated into the requirement that absent limited and pre-defined emergency situations ("exigency"), the police must obtain a warrant to legally enter a home. The warrant is a judicially reviewed authorization granted to governmental officials to search or seize; it must be supported by an affidavit from the relevant governmental official that outlines the specific facts and scope of the search and that establishes probable cause to believe that a crime has been, is being, or will be committed. Generally, a police invasion of the home without obtaining a valid warrant based on probable cause will render the seized evidence inadmissible in court. At least on the face of things, then, administrative obstacles inherently linked to the *geography* of police practices impose heightened scrutiny on such practices when they occur within the home. Demarcating where the outside ends and where the home begins is thus crucial for ascertaining the legal rights applicable in each case. The stakes of this demarcation are incredibly high: they determine the course of human lives, impelling them toward either freedom or incarceration.

The Supreme Court has long declared its intentions to come up with "bright line rules" in criminal procedure cases. In *Payton v. New York* (1980),[45] the Supreme Court

43. Delaney, "Home as Nomic Setting: Seeing How the Legal Happens," 64: "The development of Civil Protection Orders has empowered some abused women to expel and exclude from their homes those who torment them, or to avail themselves of the *threat* of arrest in order to augment bargaining power *in* their homes." See also Beverly Balos, "The Legal Response to Domestic Violence: Problems and Possibilities: A Man's Home is his Castle: How the Law Shelters Domestic Violence and Sexual Harassment," *St. Louis U. Pub. L. Rev.* 23 (2004), 77–105; Catherine Carpenter, "Of the Enemy Within, the Castle Doctrine, and Self Defense," *Marq. L. Rev.* 86 (2003), 653–700; Riva Siegal, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale L. J.* 105 (1996), 2117–208.

44. Civil protection orders have recently been replaced by criminal protection orders. Some feminist legal scholars and advocates see this re-signification as having effectively empowered prosecutors at the expense of women insofar as women no longer control the terms of arrests and prosecutions (see Delaney, "Home as Nomic Setting"). In the words of Jeannie Suk:

> If the rhetoric of privacy has worked in our history to justify nonintervention in the home, the new regime relies on a rhetoric of publicness to envision the home as in need of public control, like the streets. The home, the archetype of private space, becomes a site of intense public investment . . . [I]n this regime, the home is a space in which criminal law deliberately and coercively reorders and controls . . . relationships . . . not as an incident of prosecution, but as its goal.
>
> Jeannie Suk, "Criminal Law Comes Home," *Yale L. J.*, 116 (2006), 2–71.

45. *Payton v. New York*, 445 U.S. 573 (1980).

situated the bright line at the door to the house. The Court also acknowledged that this line could be thin or thick, depending on the circumstances. To accommodate this variability, the Court adopted the common law doctrine of the curtilage, which expands the house's protections to the area immediately surrounding it. The Court, in other words, effectively expanded the house's protections to the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"[46]

United States v. Dunn (1987) provided additional guidance on how to determine the existence and boundaries of the curtilage. The Court instructed that: "curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."[47] Through the curtilage doctrine, the door's physical liminality and its function as an obligatory passage point has expanded to become one of an obligatory passage *zone* between outside (i.e., public, less protected) and inside (i.e., private, more protected) spaces. In Fourth Amendment jurisprudence, then, the threshold is not limited to its quintessential form – the door – but includes proximate spaces that have acquired the door's liminal quality. Although not situated inside the house, these spaces still receive similarly heightened legal protections.

Alongside its acknowledgement that the bright line is not really a line but rather a zone that encompasses the curtilage, the Supreme Court also warned against case-by-case solutions that depend on "all sorts of ifs, ands, and buts" and that require "the drawing of subtle nuances and hairline distinctions."[48] Accordingly, in *Oliver v. United States*,[49] the Court declared that "for most homes, the boundaries of the curtilage will be clearly marked"[50] and that the curtilage concept is "a familiar one easily understood from our daily experience."[51]

Despite the Court's aspiration for clear demarcations, however, in many cases the line between the private home and public space has turned out to be "blurred and fluid."[52] The Seventh Circuit observed, for example, that: "The lines are not so clear, however, because exactly where outside ends and where the home begins is not a point

46. *Oliver v. United States*, 466 U.S. 170 (1984), p. 180 (quoting *Boyd v. United States*, 116 U.S. 616 (1886), p. 630).
47. *United States v. Dunn*, 480 U.S. 294 (1987).
48. *Oliver v. United States*, 466 U.S. 170 (1984), p. 181 (citing *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, p. 142).
49. *Oliver v. United States*, 466 U.S. 170 (1984).
50. *Oliver v. United States*, 466 U.S. 170 (1984), p. 182 n.12.
51. *United States v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998).
52. Brendan Peters, "Fourth Amendment Yard Work: Curtilage's Mow-Line Rule," *Stan. L. Rev.* 56 (2004), p. 944 (citing Maggie Jackson, *What's Happening to Home?: Balancing Work, Life, and Refuge in the Information Age* (Notre Dame, IN: Sorin Books, 2002), p. 39 and quoting Terence Riley, Chief Curator of the Museum of Modern Art's Department of Architecture and Design, discussing Museum's exhibition The Un-Private House (1999).

immediately obvious."[53] To complicate matters further, in *Payton* and *Santana* the Supreme Court has provided inconsistent guidance regarding the pragmatic applications of its door-centered jurisprudence.

Payton is a consolidation of two cases, both dealing with a New York statute that allows a warrantless entry into a home to make a felony arrest.[54] In this decision, the Supreme Court struck down this New York statute, stating: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[55]

Four years before its protective *Payton* decision, the Supreme Court issued *United States v. Santana*.[56] In that case, the officers drove to Santana's residence armed with probable cause, but lacking a warrant. Upon arrival, they saw Santana "standing in the doorway of the house."[57] One of the officers testified that "one step forward would have put her outside, one step backward would have put her in the vestibule of her residence."[58] The officers got out, shouted "police," displayed their identification and approached Santana, who retreated into the house. The officers pursued, catching her in the vestibule. The Court upheld the arrest and subsequent search.[59] Justice Rehnquist, writing for the majority, explained that:

> While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."[60]

Although it observed that when standing at her door Santana was within the private property of her home, the Court nonetheless decided that she did not have an expectation of privacy because she willingly exposed herself to public view. This lack of expectation then attached to Santana as she fled into the confines of her home.[61] The Court relied on *Katz v. United States*[62] and cited *Hester v. United States*[63] for the proposition that because Santana "was not merely visible to the public, but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house," she was

53. *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 689 (7th Cir. 2001).
54. *Payton v. New York*, 445 U.S. 573, p. 574.
55. *Payton v. New York*, 445 U.S. 573, p. 590.
56. *United States v. Santana*, 427 U.S. 38 (1976).
57. *United States v. Santana*, 427 U.S. 38 (1976), p. 40.
58. *United States v. Santana*, 427 U.S. 38 (1976), p. 40 n.1.
59. *United States v. Santana*, 427 U.S. 38 (1976).
60. *United States v. Santana*, 427 U.S. 38 (1976), p. 42 (citation omitted).
61. *United States v. Santana*, 427 U.S. 38 (1976), p. 42.
62. *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, *even in his own house* or office, is not a subject of Fourth Amendment protection") (emphasis added).
63. *Hester v. United States*, 265 U.S. 57, 265 U.S. 59 (1924).

able to be pursued into the house to be arrested and searched.[64] The importance of vision (in this quote with a nod toward other sensorial properties) as the prime means for determining privacy rights cannot be overstated, raising the question: what will happen when physical matters such as doors no longer impede state vision? Until this happens, however, the door, with its substantive thingness and its symbolic powers, is the center of a ritualistic legal dance: one step forward, two steps back – with the suspect's fate, toward either freedom or incarceration, hanging in the balance.

Applying *Santana*, the Fifth,[65] Eighth,[66] Ninth,[67] and Tenth[68] Circuits have all held that Fourth Amendment protections should not be afforded to that which the individual exposes to the public through an open door. The protective power of the door has thus largely been limited to its closed position. Nonetheless, this limitation has been complicated both by the circumstances that precede the act of crossing the threshold and by the intentions of the actors on the two sides of the door. For example, while the courts have clarified that when a person stands at the door through her own agency she loses her protections, they have complicated the inquiry when a searched person is forced to the door or led to the door by ruse. The next section will discuss some of the complicating factors of the Open Door's bright line approach.

IV. Door Configurations: A Jurisprudence of Vision

Circuit courts have varied in their application of the Supreme Court's threshold and curtilage rules, with the result being far removed from the Supreme Court's aspiration for a bright-line rule. In *United States v. Gori*,[69] for example, the police accompanied a delivery woman as she knocked on an apartment door, and when one of the occupants opened the door wide, the police displayed their badge and ordered everyone present, including the defendant, out of the apartment at gunpoint.[70] The Second Circuit ruled that this was not a violation of *Payton* because "what a person chooses voluntarily to expose to public view thereby loses its Fourth Amendment protection." The critical facts for the majority were that the door was *voluntarily* opened to an *invitee*. At that moment, they stated,

64. *United States v. Santana*, 427 U.S. 38 (1976), p. 42.
65. *United States v. Carrion*, 809 F.2d 1120 (5th Cir. 1987).
66. *United States v. Peters*, 912 F.2d 208, 210 (8th Cir. 1990) but see *Duncan v. Storie*, 869 F.2d 1100, at 1103 (8th Cir. 1989):

    > Duncan, however, asserts that he had simply opened the door and remained in the home. * * * Duncan stepped farther back into the house and attempted to close the door. It was at that time that Duncan claims he was pulled from his home by the officers. * * * Under this version it would be impossible to hold as a matter of law that he voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home.

67. *United States v. Vaneaton*, 49 F3d 1423 (9th Cir. 1995).
68. *McKinnon v. Carr*, 103 F.3d 934 (10th Cir. 1996).
69. *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000).
70. *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000), pp. 53–4.

what was inside was exposed to public view. "[W]here blinds are raised, police are entitled to peer through back window of home," the court explained.[71]

Sonia Sotomayor (while serving on this court) dissented, arguing that per the majority opinion, the opening of the door transforms the entire home into a public place. In her words: "an open door translates into an 'open season' on the individual inside."[72] Sotomayor vigorously objected to this result,[73] noting that "if police cannot seize objects in plain view without probable cause when they are already legitimately standing inside an individual's home, it is unclear why the Fourth Amendment would permit them both to enter the home from outside and to seize the object or person without probable cause, as the majority holds in this case."[74] Seventh Circuit Judge Richard Posner[75] also criticized *Gori*, claiming that since few people would refuse to open the door to the police, "the effect of the rule of [*Gori*] is to undermine, for no good reason that we can see, the principle that a warrant is required for entry into the home [excluding specific exceptions]."[76] Posner opposed *Gori* for tacitly taking advantage of typical door behavior – namely, that most people will automatically respond to a knock by opening their door.

The Tenth Circuit approached matters differently than the majority in *Gori*. In *United States v. Flowers*,[77] the defendant was selling liquor illegally from his home through a small panel, revealing only his hand, a portion of his arm, and his voice in the process.[78] After the police conducted business with Flowers, they approached the front door. Flowers voluntarily opened it, and the police entered the home and arrested him there. The District Court said that Flowers "knowingly exposed too much of himself to the public"[79] to claim his Fourth Amendment rights were violated and that Flowers had no legitimate expectation of privacy because he was in a "sufficiently public" place.[80] The Tenth Circuit Court of Appeals reversed, finding that Flowers demonstrated "a conscious intention" to protect his rights by using the hole in the wall and therefore affirming his rights.[81] In the words of the court:

> In contrast [to *Santana* and *McKinnon*], here the suspect was not visible to the public and his doorway was not open to public view. Rather only Flowers' hand and arm were visible and he used a hole in the wall so that he would not have to open his door and neither he nor the interior

71. *Gori*, 230 F.3d 44 at 50 (quoting another Second Circuit decision).
72. *Gori*, 230 F.3d 44 at 58 (Sotomayor, J. dissenting).
73. Mark R. Kravitz and Daniel J. Klau, "Developments in the Second Circuit," *Conn. L. Rev.* 34 (2000–2001), 903.
74. *Gori*, 230 F.3d at 58–62 (Sotomayor, J., dissenting).
75. *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004).
76. *Hadley*, 368 F.3d, p. 750.
77. *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003).
78. *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), p. 1224.
79. *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), p. 1225.
80. *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), p. 1225.
81. Interestingly, the court did not rely on the fact that Flowers was inside his home at the time of arrest to show that there was a *Payton* violation, although the court does mention in a footnote that Flowers was clearly inside the home. See *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), p. 1227, n.3.

> of his house would be open to public view. Unlike the situations in *Santana* and *McKinnon*, Flowers was not as exposed to public view, speech, hearing, and touch as if he had been standing completely outside his house.[82]

In determining the legal relationship between the larger hole in the wall (the door) and the smaller hole in the wall (the panel), the court's decision again illuminates the importance of vision to legal practices and pronunciations.[83] Whereas the small hole afforded no views of the home's interior and in fact exposed only Flowers' hand and arm, an open door (and, similarly, a window) would have enabled such an interior view of the home, thereby triggering the argument that Flowers voluntarily exposed his home to public view. "A room with a view" – from the outside in, that is – thus frustrates reasonable expectations of privacy. The door in these instances becomes important not only in its function as enabling the movement of human bodies in and out, but also in its function as a large window that enables the public's gaze into one's abode. And in this case: because the front door to his home was closed during the liquor exchange, Flowers' rights were deemed worth protecting.[84] The material relationship between a hole in the wall that is designed for full bodily entry (and that also enables significant viewing) and a lesser hole in the wall that performs functions other than entry and vision is thus an essential component of the particular legal relationship in this case.

The legal distinction between open and closed doors, and its subsequent triggering of full or zero constitutional protections, is further complicated in cases with more than one door, especially when these doors are in different states of openness. When a second door is opaque and closed, for example, the location of the bright line at the front of the home changes, depending on whether the first door is open or closed, again emphasizing the role of vision in assigning constitutional protections. In *United States v. Arellano-Ochoa*,[85] for example, the Ninth Circuit condemned the police's opening of a screen door without a warrant or other justifications, but stated that opening a screen door backed by a closed solid door does not violate reasonable expectations of privacy.[86] In *United States v. Sheridan Walker*,[87] the Tenth Circuit held that after knocking on a screen door, the defendant's expectation of privacy was not violated when the police opened the screen

82. *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003), p. 1228.
83. For a fuller discussion of the role of vision and seeing in law see Irus Braverman, "Hidden in Plain View: Legal Geography from a Visual Perspective," *Journal of Law, Culture and the Humanities* 7 (2011), 173–86.
84. See *Flowers*, 336 F.3d, p. 1227, n.4.
85. *United States v. Arellano-Ochoa*, 461 F.3d 1142 (9th Cir. 2006) (operating on the theory of privacy from undesired intrusion, not sensory privacy). Compare Frederick C. Moss, "Beyond the Fringe: Apocryphal Rules of Evidence in Texas," *Baylor L. Rev.* 43 (1991), 730–31 (attorney argues that screen door between victim and defendant negated self-defense argument) with *Asten v. City of Boulder*, 2009 WL 2766723 (D. Colo. Aug. 26, 2009) (after being denied entry, police cut a hole in a screen door to use Taser (stun gun) on occupant).
86. *Arellano*, 461 F.3d, p. 1145. See also *State v. Conner*, 241 N.W.2d 447 (Iowa 1976) (breaking element of burglary met when outer door on spring opened, as inner door was already open).
87. *United States v. Sheridan Walker*, No. 05-2287 January 31, 2007 (10th Circ.).

door to knock on the interior door.[88] The court based this reasoning on the conclusion that most visitors would do the same.[89]

Finally, the motives and actions of humans on both sides of the door have also factored into the juridical analysis. The Seventh Circuit clarified, for example, that:

> there is a significant difference between a person who for no reason voluntarily decides to stand in his open doorway, and a person who merely answers a knock on his door. The person who answers the knock and stays within the house is not voluntarily exposing himself 'to public view… as if [he is] standing completely outside [his] house.'[90]

The Eighth Circuit drew a similar distinction,[91] describing the doorway as a public place when a suspect is voluntarily standing there, but not when the suspect is compelled – for instance, through the police knocking at the door.[92] Courts have similarly invalidated arrests where the police have attempted to circumvent *Payton* by summoning a suspect to the doorway so that the arrest could occur in a public place.[93] Clearly, the bright line rule shifts depending on who stands where, when, and why in relation to the door. Some courts have held that the legal protections disappear once one opens the door,[94] other courts found otherwise,[95] and some have voiced emotional objections in dissent.[96] Fourth Amendment rights and protections therefore hinge upon the myriad material properties of the door. Open doors,[97] partially open doors,[98] and being on the wrong side of the

88. *United States v. Sheridan Walker*, No. 05-2287 January 31, 2007 (10th Circ.).
89. And there may be a bit of truth to this, see Marion G. Crain, "Managing Identity: Buying into the Brand at Work," *Iowa L. Rev.* 95 (2009), n.180 (discussing an insurance salesperson manual suggesting opening outer door while waiting for resident to answer as part of process to make potential customer feel more comfortable).
90. *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), p. 1388.
91. *Duncan v. Storie*, 869 F.2d 1100 (8th Cir. 1989).
92. *Duncan v. Storie*, 869 F.2d 1100 (8th Cir. 1989), p. 1102.
93. *United States v. Herrold*, 772 F. Supp. 1483, 1489–90 (M.D. Pa. 1991); *United States v. George*, 883 F.2d 1407, 1414 n.4 (9th Cir. 1989).
94. See *inter alia United States v. Ostin*, 858 F.Supp. 1075 (1994), *U.S. v. Cruz Jimenez*, 894 F.2d 1 (1st Cir. 1990).
95. E.g. *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), p. 1388; *Duncan v. Storie*, 869 F.2d 1102 (8th Cir. 1989); *Robertson v. State*, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000) (holding that defendant is still "in a part of his dwelling" when arrested "two or three steps outside of his apartment").
96. *State v. Santiago*, 619 A.2d 1132 (Conn. 1993) (Borden, J. dissenting).
97. *Vale v. Louisiana*, 399 U.S. 30 (1970) (open door used as a basis for an extended sweep) but see *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996) (wanting more than possibility to justify sweep when defendant and girlfriend subdued outside of dwelling).
98. See e.g. *Adkisson v. State* 728 N.E.2d 175, 178–9 (Ind. Ct. App. 2000) (officer keeps door open by placing foot in doorway until he gains consent to enter); *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993) (defendant tricked into opening door, officer held door open until defendant consented to entry); *U.S. v. Salter*, 815 F.2d 1150 (7th Cir. 1987) (after defendant partially opened the door, officer placed his foot in the doorway and thereby prevented the

door[99] – have all factored into the judicial calculations of a person's rights vis-à-vis the police.

The juridical test, however, has not been strictly material and geographical. In fact, some courts have pointed out that an application of an exclusively geographical test would lead to undesirable results. Whereas Justice Powell declared that "physical entry into the home is the chief evil against which the fourth amendment is directed,"[100] he also asserted that a physical entry is not necessary because the Amendment's "broader spirit now shields private speech from unreasonable surveillance." He further explains that: "Our decision in Katz refused to lock the Fourth Amendment into instances of actual physical trespass." Rather, the Amendment governs "not only the seizure of tangible items, but extends as well to the recording of oral statements . . . without any 'technical trespass under . . . local property law.'"[101] Delivering the opinion of the Court, Justice Powell relied on the important *Katz* decision in holding that electronic surveillance necessitates the application of Fourth Amendment safeguards. Various courts have also extended the physical test when there was "constructive entry" by the police,[102] including entry by voice,[103] telephone call,[104] or show of force.[105] These decisions explain that denying legal protections in such cases would problematically enable the police to comply with *Payton* so long as they do not cross the line of the threshold – namely, walk through the door.[106]

Alongside the door jurisprudence that has developed around bodily entry, courts have also struggled to define the protections afforded to the *images* observed though the door.

---

door from closing. Although the defendant was induced to unlocking and opening the door by officer's ruse, the officer's entry is "entry through an open door" and therefore not an intrusion); But see *United States v. McCraw*, 920 F.2d 224 (4th Cir. 1990), pp. 229–30 (six agents knocked on the door of defendant's hotel room without announcing themselves. The defendant opened the door about halfway while standing inside his room. When he saw the officers, he attempted to close the door, but several officers with weapons drawn forced their way inside and arrested him. The court ruled: "We hold that a person does not surrender his expectation of privacy nor consent to the officers' entry by [opening his door halfway] and that his arrest inside his room under such circumstances is contrary to the fourth amendment and the United States Supreme Court's decision in *Payton v. New York*.").

99. In addition to all of the above contexts, a *Payton* violation does not require suppression of statements made to police if such statements are made after the arrestee is hauled from his dwelling. *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640 (1990), pp. 1644–5.
100. *United States v. United States District Court*, 407 U.S. 297 (1972), p. 313.
101. *United States v. United States District Court*, 407 U.S. 297 (1972), p. 313.
102. *United States v. Thomas*, 430 F.3d 274, 276 (6th Cir. 2005).
103. W.R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(c), 575 (4th ed. 2004) (stating that it is a *Payton* violation to tell a suspect across the threshold that s/he is under arrest if the officer does not have a warrant).
104. *Sharrar v. Felsing*, 128 F.3d 810 (3d Cir. 1997) (abrogated on other grounds in *Curley v. Klem*, 499 F.3d 199 (2007)).
105. E.g. *United States v. Thomas*, 430 F.3d 274; *New York v. Harris*, 495 U.S. 14 (1990), p. 20.
106. The Washington courts have taken a different approach to door cases, finding the crucial fact to be where the arrestee stood upon her arrest. See, e.g., *State v. Holman*, 693 P.2d 89 (Wash. 1985), p. 91.

Transparent doors are particularly interesting in this context. On the one hand, such doors separate inside from outside in terms of bodily entry, thereby functioning like closed doors; on the other hand, they function like open doors in that they enable parties to see both in and out. While transparent and open doors allow the police to see into the dwelling, they also enable those within the dwelling to observe the police outside the door. For this reason, the government has allowed such situations as grounds for exigency claims, namely that the occupant may be more likely to destroy or get rid of evidence[107] or as a basis for arguments mooting the knock and announce requirement.[108] Such circumstances could additionally serve as proof of consent, as offered in dicta by Justice Black in his dissent in *Bumper*.[109] There, the relevant issue was whether the suspect's consent was valid when the police stated that they had a warrant although they did not.[110] Black noted that the conversation between the police officer and the defendant's grandmother, who consented for the police search of the home, took place through a screen door.[111] He bolstered the argument for consent by pointing out that the defendant's grandmother was able to see the officer through the door, that he did not appear to have a warrant with him, and that she nonetheless allowed him in.

Acts of *locking* or *unlocking* one's door have also factored into Fourth Amendment decisions. In certain instances, the police arrested suspects for obstruction when they *locked* a door to prevent police entry, though generally not when they failed to *unlock* a door.[112] The courts have, additionally, interpreted various door-*slamming* actions. In *Wong Sun*[113] and in *Miller v. United States*[114] the Court interpreted the suspect's slamming and subsequent flight from the door down the hallway as signifying "a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion."[115] The dissent finds this interpretation "incredible in the light of the record," stating that "the officer's showing of his badge and announcement that he was a narcotics agent immediately put [the suspect] in flight behind the slamming door. To conclude otherwise takes all prizes as a *non sequitur*."[116] Finally, in *Parra v. City of Chino*,[117] the police spoke to Vivian Parra through the screen door, asking to see her husband, Manuel.[118] She told the police that Manuel would be right out, and then closed and apparently locked the screen door before proceeding to fetch him. The police inferred

107. *Santana*, 427 U.S. 38, p. 43 (stating: "[o]nce Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence"). See also *United States v. Jones*, 239 F.3d 716 (5th Cir. 2001).
108. *State v. Richards*, 962 P.2d 118 (Wash. 1998).
109. *Bumper v. North Carolina*, 391 U.S. 543, p. 556 (Black, J., dissenting).
110. *Bumper v. North Carolina*, 391 U.S. 548.
111. *Bumper v. North Carolina*, 391 U.S. 548, p. 556 (Black, J., dissenting).
112. See Note, "Types of Activity Encompassed by the Offense of Obstructing a Public Officer," *U. Pa. L. Rev.* 108 (1960), pp. 399–400.
113. *Wong Sun v. United States*, 371 U.S. 471 (1963).
114. *Miller v. United States*, 357 U.S. 301 (1958).
115. *Wong Sun*, 371 U.S., p. 483–4.
116. *Wong Sun*, 371 U.S., p. 501 (Clark, J., Harlan, J., Stewart, J. and White, J. dissenting).
117. *Parra v. City of Chino*, 141 F.3d 1178 (Cal. 1998).
118. *Parra v. City of Chino*, 141 F.3d 1178 (Cal. 1998).

from her locking the door and from previous experience with this suspect that Manuel presented a flight risk, and barged in.[119] The court decided that because the officers knew that the suspect had previously fled from police, they had reason to believe that the suspect would resist arrest again. Based on these facts, the court determined that the officers satisfied the knock and announce requirement (as detailed below).[120]

While the Fourth Amendment has been the primary domain for door-related jurisprudence, the courts have addressed threshold problems through other legal arenas as well.[121] For example, in *Sabbath v. United States*,[122] the Supreme Court described in a footnote[123] the useful analogy of burglary to the US Code's knock and announce rule,[124] quoting from commentators that: "What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house, – even a closed screen door . . . is a breaking."[125] Here and there, such nuanced features and states of the burglarized door were deemed relevant in determining Fourth Amendment issues. Features that have factored in the analysis include whether a door is locked, latched,[126] on a spring,[127] wide-open,[128] and whether a screen door exists[129] – indeed, almost all possible features of the

119. *Parra v. City of Chino*, 141 F.3d, p. *1179 (Cal. 1998).
120. *Parra v. City of Chino*, 141 F.3d, p. *1179 (Cal. 1998).
121. For example, the distinguishing element between arson and malicious mischief where a door is burned is whether the door was permanently connected to the dwelling. See *State v. Spiegel*, 83 N.W. 722 (Iowa 1900); *Crow v. State*, 189 S.W. 687 (Tenn. 1916); *State v. Pisano*, 141 A. 660 (Conn. 1928) (treating threshold and exterior screen door as part of dwelling).
122. *Sabbath v. United States*, 391 U.S. 585 (1968).
123. *Sabbath v. United States*, 391 U.S. 585 (1968), p. 591 n. 5.
124. 18 U.S.C.A. § 3109: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."
125. *Sabbath*, 391 U.S., p. 591 n. 5 citing Wilgus, "Arrest Without a Warrant," *Mich. L. Rev.* 22 (1924), p. 806; see e.g. *State v. Ricks*, 428 So. 2d 794 (La. 1983).
126. *Sabbath*, 391 U.S., p. 591 n. 5 citing Wilgus, "Arrest Without a Warrant," *Mich. L. Rev.* 22 (1924), p. 806.
127. *People v. Rosales*, 68 Cal.2d 299 (Cal. 1968). In the words of C.J. Traynor: "The Attorney General contends that since the officers did no more than open an unlocked screen door and walk in, no 'breaking' within the meaning of the statute occurred. We do not agree with this contention. Although the common law rule was first articulated to regulate entry by force, it is not limited to entries effected by physical violence . . . At the very least, it covers unannounced entries that would be considered breaking as that term is used in defining common law burglary," at 303.
128. E.g. *State v. Sakellson*, 379 N.W.2d 779 (N.D. 1985) ("Entry through an open doorway is sufficiently similar [to opening a closed door or using a passkey to] warrant equivalent treatment").
129. *U.S. v. Villegas*, 495 F.3d 761 (7th Cir. 2007); *U.S. v. Morris*, 436 F.3d 1045 (8th Cir. 2006); Jack E. Call, "The Constitutionality of Warrantless Door Arrests," 19 *Miss. C. L. Rev.* (1999) 333 (speculating that it could be legal for police to open an unlocked screen door to nab somebody).

burglarized door have been considered.[130] Whereas the state practices discretion in its decision whether to record a crime as a burglary or not based on these factors,[131] the courts are unlikely to hold police officers and burglars to the same standards.

V. The Door's Spatio-Temporality: *Knock, Knock, Knocking* on Suspect's Door

Until now, I have mostly focused on the police's physical crossing of the door's threshold without warrant or exigency. Even when equipped with a warrant, however, the police are typically required to perform what is called a knock and announce procedure before entering the home. Such a procedure requires that the police knock on the door, identify themselves as police, and explain their purpose for seeking entry.[132] Only after their entry has been refused, or after a specified length of time has passed, may the police use force to enter.[133] The Supreme Court has ruled that the amount of wait required in any given case

130. For example: in *Flowers, supra*, the court mentions in passing that the door opens "into" the living room. It is conceivable that courts could distinguish between a door that opens into a certain space and one that opens out to merely allow further access. See also *People v. Sine*, 98 N.Y.S.2d 588, 277 A.D. 908 (1950). In *Sine*, the question was whether the breaking element of burglary was satisfied when the defendant opened the door to a business that was open to the public and exited through the same door. The appellate court held that: "Neither the entry by the defendant nor his exit was against the will of the occupant, but, on the contrary, was with its express consent. The door, while actually closed, was constructively open to appellant on both occasions," at 908.

131. Sam Bass Warner, "Crimes Known to the Police – An Index of Crime?," *Harv. L. Rev*. 45 (1931), 307–34. "With regard to variations in burglary reports . . . cities which are truthful and accurate in the compilation of their statistics, are suffering by comparison with other cities which are building up records that look well in print . . . [I]n some Ohio cities where a screen door would be opened by slitting the screen, . . . some departments are not counting that as either a burglary or house-breaking, but record it as a larceny if something was stolen and again if a door was partially closed and force was necessary on the part of the thief to open the door sufficiently wide to admit his person, . . . some are classifying that as a larceny and that a great many of the cities do not make records at all where porch furniture and other articles left out in the open, are stolen. However, this is not true in Columbus, for we make an absolutely truthful record of every complaint received and while perhaps I have no just basis for the conclusion, I believe we might reasonably infer that a good many of the police departments are building records apparently disclosing an efficiency which does not actually exist and I may further state that whether our record is good or bad, we have at least told the truth about ourselves," at n.26.

132. The knock and announce requirement derives from common law. See *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603). Most states have statutes that require the police to knock and announce, typically modeled after 18 U.S.C. Section 3109. Those states with no statutes on point have recognized the doctrine through judicial opinion. See also Marc Miller and Ron Wright, *Criminal Procedures: The Police*, 3rd ed. (Aspen Publishers, 2007), p. 203.

133. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Supreme Court held that the common law knock and announce principle is one focus of the reasonableness inquiry and subsequently decided that although the standard generally requires the police to announce their intent

depends on the nature of the evidence, the size of the dwelling, the time of day, and other factors. Hence, in *United States v. Banks* (2003), the Court approved a forceful entry by officers after they had knocked, announced, and waited for 15 to 20 seconds,[134] taking into account the risk of drug evidence disposal in evaluating the reasonableness of the waiting time.[135] Still, the Court reasoned that most people keep their doors locked, and hence "entering without knocking will normally do some damage."[136]

A few years later, in *Hudson v. Michigan* (2006) the police arrived to execute a warrant, announced their presence, but waited for only three to five seconds before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress the inculpatory evidence they found there, arguing that the premature entry violated his Fourth Amendment rights.[137] "How many seconds' wait are too few?" asked Justice Scalia, concluding that: "Happily, these issues do not confront us here." Indeed, although there was no disagreement that the knock and announce rule was violated in this case, the majority held that the exclusionary rule does not apply.

Justice Scalia wrote the majority opinion. He first noted that: "Until a valid warrant has issued, citizens are entitled to shield their persons, houses, papers, and effects, from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement." However,

> The interests protected by the knock-and-announce requirement are quite different – and do not include the shielding of potential evidence from the government's eyes. One of those interests

---

to search before entering closed premises, "the obligation gives way when officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence" (*Richards v. Wisconsin*, 520 U.S. 385 (1997), p. 394).

134. *United States v. Banks*, 540 U.S. 31 (2003).

135. *Banks* was adopted in many Court of Appeal decisions. See, e.g., *United States v. Goodson*, 165 F.3d 610, 612, 614 (CA8 1999) (holding a 20-second wait after a loud announcement at a one-story ranch reasonable); *United States v. Spikes*, 158 F.3d 913, 925–927 (CA6 1998) (holding a 15-to-30 second wait in midmorning after a loud announcement reasonable); *United States v. Spriggs*, 996 F.2d 320, 322–323 (D.C. Cir. 1993) (holding a 15-second wait after a reasonably audible announcement at 7:45 a.m. on a weekday reasonable); *United States v. Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding a 10-second wait after a loud announcement reasonable); *United States v. Jones*, 133 F.3d 358, 361–362 (5th Cir. 1998) (relying specifically on the concept of exigency, holding a 15-to-20 second wait reasonable). See also *United States v. Chavez-Miranda*, 306 F.3d 973, 981–982, n. 7 (Cal. 2002) (Banks appears to be a departure from our prior decisions. . . .[W]e have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement); *United States v. Jenkins*, 175 F.3d 1208, 1215 (10th Cir. 1999) (holding a 14-to-20 second wait at 10 a.m. reasonable); *United States v. Markling* 7 F.3d 1309, 1318–1319 (7th Cir. 1993) (holding a 7-second wait at a small motel room reasonable when officers acted on a specific tip that the suspect was likely to dispose of the drugs).

136. *United States v. Banks*, 540 U.S. 31 (2003), p. 36.

137. *Hudson v. Michigan*, 547 U.S. 586 (2006).

> is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . ." And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance . . . The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.[138]

Scalia clarifies, finally, that "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."[139]

Despite the waning of the knock and announce rule, the police are still required to perform the physical, temporal, and legal ritual of knocking, waiting, and announcing their presence at the door of a home–all part of the reasonableness requirement. Such a multi-sensory procedure that involves rapping, pausing, and using voice reinforces the significance of the door as a technology that separates the outside from the inside, effectively construing distinct spatiolegal categories. How will the knock and announce rule change when doors are no longer made of wood that can produce the sound of a knock, or when human police officers are replaced by dogs or machines? I will return to these questions in the conclusion.

VI. Mobile Doors

In *South Dakota v. Opperman* (1976),[140] the Supreme Court elaborated on the privacy rights users have in cars. There, the Court held that the car operator has the power to exclude others by locking the doors and rolling up the windows (akin to home dwellers).[141] One year later, this heightened protection was functionally eviscerated in *Pennsylvania v. Mimms* (1977), where the Court determined that the police may order a suspect out of her car or demand that she open her door.[142] Once the door is open, the courts have generally held that the police may look inside.[143] The police have often taken

138. *Hudson v. Michigan*, 547 U.S. 586 (2006), p. 594 (citations omitted).
139. *Hudson v. Michigan*, 547 U.S. 586 (2006), p. 594.
140. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).
141. *Opperman*, 428 U.S. at 379 (Powell, J. concurring).
142. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
143. However, they may not invade the vehicle dwellers' privacy by viewing sex through the car windows. See e.g. *People v. Onofre*, 51 N.Y.2d 476 (1980) (consolidated case that struck down a New York statute that convicted a man for having sex with his 17-year-old male lover in his home; two adults for engaging in oral sex in an automobile parked in downtown Buffalo; and a woman for having oral sex with a man in a parked truck, also in Buffalo). See also: William N. Eskridge Jr. and Nan D. Hunter, *Sexuality, Gender, and the Law: Abridged* (Foundation Press, 2006), pp. 54–7.

advantage of this opportunity for obtaining evidence to search or arrest suspects.[144] Moreover, unlike the home, the car is not encircled by a protective curtilage zone and, hence, the police may stand just outside the car and peer into its interior through the windows, negating any minimal protections that the door may have afforded to this relatively small space.[145]

Three Supreme Court cases discussed police invasion into the protected space of the car through its door – and in all three cases the Court found that they acted properly. In the first case, *New York v. Class*,[146] the defendant was stopped for speeding. The officer opened the car door to find the VIN number, which he believed was located in the doorjamb of this particular model of car.[147] When he did not find it, the officer proceeded to look in the next most likely spot, which was obscured by a few papers.[148] When moving the papers, the officer found a gun.[149] The Court decided that the defendant's rights were not violated both because there was no privacy interest in the VIN number and because the search was "sufficiently unintrusive."[150] In the words of the Court: "He did not even intrude into the interior at all until after he had checked the doorjamb for the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to move the offending papers."[151]

The second Supreme Court case, *Adams v. Williams*[152] raised a similar dilemma. There, the officer requested that the defendant open his car door based on a reliable informant's tip that the defendant had narcotics and a gun tucked in his waistband.[153] Instead of opening the door, the defendant rolled down the window, and the officer reached in and grabbed the otherwise non-visible handgun.[154] The Court applied *Terry*,[155]

144. See *inter alia Arkansas v. Sullivan*, 532 U.S. 769 (2001) (observation of hatchet was used as basis to search); *Robbins v. California*, 453 U.S. 420 (smelling marijuana only once door was opened at police request); *Minnesota v. Carter*, 525 U.S. 83 (police officer opens door to let suspect out, sees a gun); *O'Cady v. Dombrowski*, 413 U.S. 433 (1973); *United States v. Hensley*, 469 U.S. 221 (1985).
145. *Colorado v. Bannister*, 449 U.S. 1 (1980) (police observed items matching stolen property through car door window while attempting to issue speeding ticket); *United States v. Stanfield*, 109 F.3d 976 (4th Cir. 1997) (bright-line rule that stopping vehicle and opening door to visually inspect interior is reasonable when officers are unable to view interior of vehicle because of heavily tinted windows).
146. *New York v. Class*, 475 U.S. 106 (1986).
147. *New York v. Class*, 475 U.S. 106 (1986), p. 108.
148. *New York v. Class*, 475 U.S. 106 (1986), p. 108.
149. *New York v. Class*, 475 U.S. 106 (1986), p. 108.
150. *New York v. Class*, 475 U.S. 106 (1986), p. 119.
151. Oddly, the court notes that the officer could have ordered the suspect to move the papers, which would have been less intrusive, but does not address this alternative further.
152. *Adams v. Williams*, 407 U.S. 143 (1972).
153. *Adams v. Williams*, 407 U.S. 143 (1972), pp. 147–8.
154. *Adams v. Williams*, 407 U.S. 143 (1972), pp. 147–8.
155. *Terry v. Ohio*, 392 U.S. 1 (1968).

finding the officer's behavior reasonable.[156] In this case, the defendant's not opening the vehicle door was part of the officer's justification to conduct the search. The Court stated:

> Sgt. Connolly had ample reason to fear for his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial.[157]

Finally, in *Massachusetts v. Podgurski* the Supreme Court dealt with a slightly different type of threshold problem.[158] In that case, the officer stuck his head through a van door that was partially open, and observed contraband.[159] Rehnquist felt that this intrusion was minimal because it was the functional equivalent of standing just outside of the threshold.[160]

The end result of these three cases appears to be that the car door is not a very effective spatiolegal technology for excluding the police.[161] Quite the contrary, the very existence of the door – and the perceived risk and danger of what lies beyond it – has at times provided the police with the required justification for carrying out searches and seizures. In *Ornelas v. United States*, for example, an officer observed a loose panel in the door, using this observation, among others, to constitute probable cause for a search.[162]

VII. Conclusion: The Door as a Matter of Freedom

> I blew out the light,
> I tip-toed the floor,
> And raised both hands,
> In prayer to the door.
>
> —Robert Frost, "The Lockless Door"[163]

156. *Class*, 475 U.S. at 147–8.
157. *Adams*, at 147–8 (citing *Terry v. Ohio*, 392 U.S. 1, 30).
158. *Massachusetts v. Podgurski*, 459 U.S. 1222 (Rehnquist J., dissenting from denial of certiorari).
159. *Massachusetts v. Podgurski*, 459 U.S. 1222 (Rehnquist J., dissenting from denial of certiorari), p. 1223.
160. *Massachusetts v. Podgurski*, 459 U.S. 1222 (Rehnquist J., dissenting from denial of certiorari), p. 1225.
161. Not only may you not exclude the police, but the door may be the mechanism the police have to restrict your ability to move. In *Mimms, supra*, the court mentions in a footnote a police vehicle stops manual which suggests that officers push car doors closed if the person inside attempts to exit the vehicle.
162. *Ornelas v. United States*, 517 U.S. 690 (1996), p. 694 ("reasonable suspicion became probable cause when Deputy Luedke found the loose panel").
163. Robert Frost, "The Lockless Door," in *A Miscellany of American Poetry* (Harcourt, Brace and Howe, 1920).

To prevent incursions to the home "by even a fraction of an inch,"[164] U.S. courts have attempted a concrete and concise delineation of the home's threshold. Simultaneously, the courts have declared that "we need not pull out our rulers"[165] for "splitting fractions of an inch can be a very treacherous endeavor, producing arbitrary results."[166] The details of where exactly one stands in relation to the door may be better left "descriptive,"[167] the courts have said, since such "metaphysical subtleties"[168] are ineffective and dangerous ways to discuss Fourth Amendment concerns.[169] In the words of Judge Borden: "By opening the door . . . and standing there briefly so that our feet are on the threshold rather than just inside it, we do not abandon our heightened expectation of privacy in our homes and place ourselves in a public place."[170]

The door is not only a technological miracle, as Latour has observed, but also a legal one. Once the threshold is crossed, a transformation occurs. Tracing the material and symbolic importance of the door for establishing Fourth Amendment protections, this article has attempted to illuminate the importance of matter – both physical and symbolic – in juridical discourse. In particular, I have highlighted how various door conditions affect the level of protection granted to those situated inside the door and the importance of vision for establishing legally accepted expectations of privacy. Finally, I have shown that the courts have interpreted doors differently in the context of cars. A comparison of car to house doors has highlighted that beyond their shared liminality across spaces, the sacredness of the home in American jurisprudence is what grants certain doors but not others heightened legal protections.

I have also pointed out that we may be witnessing the twilight of the physical door era – at least as we currently know it – and the beginning of a new, virtual door era in Fourth Amendment jurisprudence. Indeed, advanced technologies – such as highly trained police dogs, Global Positioning Systems, and infrared thermal devices – are already alerting to, and thereby bringing to view, both things and information that previously resided behind firmly closed doors. As is becoming apparent from a growing number of Fourth Amendment cases – including *Karo*,[171] *Kyllo*,[172] *Jones*,[173] and *Jardines*[174] – the Supreme Court has been attempting to preserve the familiar physical invasion test of the physical door era. At the same time, the Court has also been responding to the

164. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 2045, 150 L.Ed.2d 94 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)).
165. *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 689 (7th Cir. 2001).
166. *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 689 (7th Cir. 2001).
167. *Gori*, 230 F.3d, p. 54.
168. *Gori*, 230 F.3d, p. 54 (citing *Frazier v. Cupp*, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969)).
169. *Gori*, 230 F.3d, p. 54.
170. *State v. Santiago*, 619 A.2d 1132 (Conn. 1993) (Borden, J., dissenting).
171. *United States v. Karo*, 468 U.S. 705 (1984).
172. *Kyllo v. United States*, 533 U.S. 27 (2001).
173. *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945 (2012).
174. *Florida v. Jardines*, 569 U.S. ___ (2013).

contemporary realities of "seeing through walls" and "cyber doors," which increasingly call into question the continued legal primacy of physical doors. As the alterations of physical and technological matter present increasingly sophisticated challenges to the distinctions between inside and outside, private and public, and prohibited and accepted visions, the Supreme Court will need to carefully articulate what it deems is worth protecting on the other side of the door.

Acknowledgements

I would like to express my gratitude to Daniel Geyer for his excellent research and to David Delaney and Nicolas Howe for their helpful comments. I would also like to acknowledge the help of my three-year-old daughter, Tamar, in illuminating many hidden properties of doors.

Funding

Research for this article was funded by the American Council of Learned Societies' Charles A. Ryskamp Research Fellowship.