BISHOP, J., dissenting. Although I agree with my colleagues in the majority that once the police took the defendant, Kevin Robinson, into custody, they had the right to search him as they did, I do not believe that the police had probable cause to arrest the defendant for criminal trespass in the third degree in violation of General Statutes § 53a-109 (a) (1). Because, in my view, the police were not entitled to take the defendant into custody, I believe that the motion to suppress should have been granted, and, accordingly, I would reverse the judgment of the trial court.

Generally, trespass statutes implicate the intersection of two fundamental rights: the right to freedom of movement and the right to the private enjoyment of one's own property. In describing the fundamental freedom to move about, the United States Court of Appeals for the Second Circuit has opined: "[I]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *King* v. *New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir.), cert. denied, 404 U.S. 863, 92 S. Ct. 113, 30 L. Ed. 2d 107 (1971); see also *Ramos* v. *Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (holding that because curfew laws impinge on a minor's freedom of movement, they are subject to intermediate scrutiny). Although the United States Supreme Court has not directly addressed this issue, in speaking of the right of interstate travel, the highest court has stated: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Smith* v. *Turner*, 48 U.S. 283, 492, 12 L. Ed. 702 (1849). The right of intrastate travel has similarly been characterized as fundamental. Recently, the Ohio Supreme Court recognized this right in a case involving a municipal ordinance that limited access to a certain area of town known for drug trafficking. The court commented: "[T]he right of intrastate travel we contemplate is the right to travel locally through public spaces and roadways of this state. Historically, it is beyond contention that being able to travel innocently throughout the country has been an aspect of our national freedom. Likewise, the right to travel within a state is no less fundamental than the right to travel between the states. Every citizen of this state much like the citizens of this Nation, enjoys the freedom of mobility not only to cross our borders into our sister states, but also to roam about innocently in the wide-open spaces of our state parks or through the streets and sidewalks of our most

populous cities." *State* v. *Burnett*, 93 Ohio St. 3d 419, 428, 755 N.E.2d 857 (2001).

This right to travel, or freedom of movement, however, does not trump a property owner's right to the private use of his or her property. The right to exclude others has been held to constitute a fundamental element of private property ownership. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). "One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." (Citation omitted; internal quotation marks omitted.) *State* v. *Hill*, 237 Conn. 81, 94 n.19, 675 A.2d 866 (1996). Thus, there is no constitutionally protected freedom of movement on private property. See *State* v. *Steinmann*, 20 Conn. App. 599, 569 A.2d 557, cert. denied, 214 Conn. 806, 573 A.2d 319 (1990).

Our statutory scheme regarding trespass appears to recognize this intersection of rights. Criminal trespass statutes in Connecticut permit a property owner to deny public access either by words, signs or physical configuration, and for one to be guilty of any form of trespass one must knowingly be a trespasser. None of our trespass statutes imposes strict liability; that is, an unknowing intruder is not a trespasser. Thus, in order to be found guilty of criminal trespass in the first degree in violation of General Statutes § 53a-107,[1] criminal trespass in the second degree in violation of General Statutes § 53a-108,[2] criminal trespass in the third degree in violation of § 53a-109[3] or simple trespass in violation of General Statutes § 53a-110a,[4] a defendant must be found to have been on another's property with the knowledge that he or she is not licensed or privileged to do so. The varying degrees of culpability set forth in the criminal trespass statutes are dependent on three factors: guilty knowledge of the intruder, the type of property on or in which the trespass occurs and the extent to which the property owner has made plain his or her desire to exclude the uninvited from his or her property. Accordingly, in order to be guilty of criminal trespass in the first degree, one must not only be in a building or on premises where one knows he or she is not licensed or privileged to be, but one must also be explicitly told not to be on the premises. Thus, the property owner may shape the degree of an intruder's culpability by his or her action in ordering the trespasser to leave or not to enter the property. Because the trespasser has been explicitly informed of his or her lack of license to be on the property, the criminal culpability is at its highest. The next level of culpability, criminal trespass in the second degree requires proof that one enters or remains in a building or public land that one knows he or she has no right to enter. A step lower in culpability, criminal trespass in the third degree is

committed by one who, knowing that he or she is not licensed or privileged to do so, enters or remains in premises that have been "posted in a manner prescribed by law or reasonably likely to come to the attention of intruders or are fenced or otherwise enclosed in a manner designed to exclude intruders, or which belong to the state and are appurtenant to any state institution . . . ." General Statutes § 53a-109 (a). To be culpable under this statute, an intruder must not only have guilty knowledge regarding his or her presence on the property, but the property owner must have taken certain measures to exclude intruders either by the posting of appropriate signage or by enclosing the property. Finally, in accord with the simple trespass statute, the least culpable intruder is one who goes or remains on private property knowing he or she is not permitted to do so. It is noteworthy that even this mildest of trespasses requires guilty knowledge.

The present case requires an examination of § 53a-109, criminal trespass in the third degree. It is undisputed that the subject premises were not posted in a manner reasonably likely to come to the attention of intruders. Thus, in order for there to be criminal liability pursuant to § 53a-109, the premises must have been "fenced or otherwise enclosed in a manner designed to exclude intruders." It is in the interpretation of this statute that I part company with the majority.

It is well to remember that because § 53a-109 is a penal statute, it is to be strictly construed. "[C]riminal statutes are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . [U]nless a contrary interpretation would frustrate an evident legislative intent, criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state." (Internal quotation marks omitted.) *State* v. *Strich*, 99 Conn. App. 611, 633, 915 A.2d 891, cert. denied, 282 Conn. 907, 920 A.2d 310 (2007).

I recognize, as well, that in strictly construing a statute we do not discard common sense. This means that "[i]n the interpretation of statutory provisions . . . the application of common sense to the language is not to be excluded. . . . Thus, [e]ven applying the view that a penal statute should be strictly construed, the words of a statute are to be construed with common sense and according to the commonly approved usage of the language." (Internal quotation marks omitted.) *State* v. *Sandoval*, 263 Conn. 524, 551–52, 821 A.2d 247 (2003).

Contrary to the opinion of my colleagues, I believe that the language of § 53a-109 is clear and unambiguous, and the strict application of its terms does not defy common sense. Because the word "enclosed" is not defined statutorily, we turn to General Statutes § 1-1 (a), which provides in relevant part: "In the construction

of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . .'' To ascertain that usage, we look to the dictionary definition of the term. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 498, 923 A.2d 657 (2007). ''Enclose'' is defined as: ''To surround or encompass; to fence or hem in on *all* sides.'' (Emphasis added.) Black's Law Dictionary (8th Ed. 2004). The terms ''exclude'' and ''intruder'' also have readily defined plain meanings. The term ''exclude'' means ''to shut out: restrain or hinder the admission of . . . .'' Webster's Third New International Dictionary. Finally, the term ''intruder'' is defined as one who ''enters, remains on, uses, or touches land or chattels in another's possession without the possessor's consent.'' Black's Law Dictionary, supra.

As noted by the majority, the facts found by the trial court in this regard are that 75 South Main Street in Norwalk consists of a parcel on which is located a multifamily residence fronted by a courtyard and backed by a parking lot. Looking at the premises from the South Main Street vantage point, there is a stone wall approximately four feet in height that runs between the courtyard and the street. In the approximate middle of this wall, there is a break, which is the entryway for persons entering and departing the property from South Main Street. This entryway is not gated. On both sides of the property and approximately perpendicular to the stone wall are chain-link fences that run to the rear of the property. It is unclear from the record whether the chain-link fences are joined by a fence running along the rear of the property, but in any case, there is no evidence that entrance to the property via the parking lot by vehicles or pedestrians is limited by a gate or any other means of exclusion. In my view, the property is not enclosed; it is partially enclosed. To the extent that it is partially enclosed, it is not enclosed in a manner designed to exclude intruders because the partial closures affect those who live on the premises to the same extent as those who do not live there.

My colleagues in the majority conclude that the arrest was proper because the defendant clearly knew that he did not belong on the premises. The majority reaches that conclusion on the basis of the defendant's behavior as well as the physical characteristics of the property. The defendant was first seen by the police standing in the front courtyard with a woman. The police recognized the defendant as a street level drug dealer and the woman as a prostitute. As the defendant saw the police, he bent down behind the stone wall and placed his hand toward the rear of his pants. When asked by the police whether he lived on the premises or was visiting a resident, he responded in the negative. On this basis, the police arrested the defendant for the crime of attempt to commit trespass in the third degree and took him into custody. Although this may have

been sufficient to impute knowledge to the defendant that he did not have license to be on the premises, this conclusion relates only to the guilty knowledge portion of § 53a-109 and not to that portion of the statute that relates to actions the property owner is entitled to take to protect against intrusion.

The majority concludes that the property was enclosed in a manner designed to exclude intruders. By doing so, it imports into the word "enclose" the notion of a partial or incomplete enclosure. It contends that reading the statute to require complete enclosure would be hypertechnical and would mandate that property owners would have to enclose their property completely in order to give fair notice to intruders that they are unwelcome. Respectfully, I believe that the statute does, by its plain language, require property owners to enclose their property, or, in the alternative, to place signage in a manner reasonably likely to come to the attention of intruders. It is precisely these requirements—that the property owner either place signage or enclose the property—that determine the level of culpability of a knowing trespasser.

In sum, although I agree that the partial enclosure of the property in question may serve to indicate to members of the public that the property is private, to interpret the phrase "fenced or otherwise enclosed in a manner designed to exclude intruders" as requiring only a partial enclosure denies the language of the statute its common meaning. Furthermore, I do not believe that a strict reading of the language of the statute renders it unworkable or absurd in requiring a property owner to completely enclose property to exclude others physically. This can readily be accomplished by the installation of a gate with a mechanical or electronic locking device making the property accessible only to residents of the property and their guests.

In the factual scenario at hand, even if I were to accept the notion that the partial girding of the premises with a broken wall and incomplete fence represents an enclosure, the open access to the courtyard and to the parking lot cannot be said to represent an enclosure designed to exclude intruders. In fact, these openings have no greater impact on residents than on nonresidents and serve only to funnel traffic to two points of entry and departure. Therefore, because both residents and nonresidents have equal access through the entryway into the parking lot and to the stairs leading to an open courtyard in front of the building facing South Main Street, and because the wall and fencing are obstacles equally to residents of the multifamily dwelling and to members of the public, it cannot be said that any enclosure of the premises is designed to exclude intruders.

If we assume arguendo that the police had probable cause to believe that the defendant knew that he did

not belong in the courtyard, the police may have had a basis to issue a citation to the defendant for the infraction of simple trespass in violation of § 53a-110a. Because the police are prohibited, however, from taking into custody one who is cited only for an infraction,[5] and because the incriminating evidence in this case was seized as a result of a custodial search undertaken after the defendant was improperly taken into custody, I believe that the motion to suppress should have been granted and the judgment should be reversed. Accordingly, I respectfully dissent.

[1] General Statutes § 53a-107 (a) provides: "A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person; or (2) such person enters or remains in a building or any other premises in violation of a restraining order issued pursuant to section 46b-15 or a protective order issued pursuant to section 46b-38c, 54-1k or 54-82r by the Superior Court; or (3) such person enters or remains in a building or any other premises in violation of a foreign order of protection, as defined in section 46b-15a, that has been issued against such person in a case involving the use, attempted use or threatened use of physical force against another person; or (4) knowing that such person is not licensed or privileged to do so, such person enters or remains on public land after an order to leave or not to enter personally communicated to such person by an authorized official of the state or a municipality, as the case may be."

[2] General Statutes § 53a-108 (a) provides: "A person is guilty of criminal trespass in the second degree when, knowing that such person is not licensed or privileged to do so, (1) such person enters or remains in a building, or (2) such person enters or remains on public land."

[3] General Statutes § 53a-109 (a) provides: "A person is guilty of criminal trespass in the third degree when, knowing that such person is not licensed or privileged to do so: (1) Such person enters or remains in premises which are posted in a manner prescribed by law or reasonably likely to come to the attention of intruders or are fenced or otherwise enclosed in a manner designed to exclude intruders, or which belong to the state and are appurtenant to any state institution; or (2) such person enters or remains in any premises for the purpose of hunting, trapping or fishing; or (3) such person enters or remains on public land which is posted in a manner prescribed by law or reasonably likely to come to the attention of intruders or is fenced or otherwise enclosed in a manner designed to exclude intruders."

[4] General Statutes § 53a-110a (a) provides: "A person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property."

[5] Practice Book § 44-23 (b) provides: "Any resident of the state of Connecticut who is charged with an infraction or violation payable by mail pursuant to statute, and any resident of a state that is a signatory with Connecticut of a no-bail compact who is charged with an infraction involving a motor vehicle or with a violation of General Statutes § 14-219 (e), shall not be taken into custody, but shall be issued a summons and complaint and follow the procedure set forth in Sections 44-25 through 44-27."