RIGHT RESULT, WRONG REASON: WHY THE INTENT REQUIREMENT IN *FLORIDA V. JARDINES* TRESPASSES ON THE CLARITY OF THE FOURTH AMENDMENT

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I. INTRODUCTION

Somewhere in the United States a police officer walks up the front stoop of a home, his drug-sniffing dog in tow. He has no warrant to search the home, but suddenly the dog alerts that it has detected the odor of marijuana. Is the officer there to check for drugs, or is he merely there to solicit for this year's donation to the Police Benevolent Society? If it is the latter, then the

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officer is free to use that information to obtain a warrant to search the home.[1] If it is the former, on the other hand, the officer has just committed an illegal search.[2] This is the logic of *Florida v. Jardines*, where the United States Supreme Court found a dog sniff of a home to be a search and simultaneously inserted a subjective intent requirement into the Fourth Amendment search doctrine.[3]

Though this subjective intent requirement was penned in *Jardines*, it was made possible by the Court's opinion in *United States v. Jones*.[4] When *Jones* was decided, critics focused on the re-emergence of the trespass doctrine with regard to whether a search occurred under the Fourth Amendment.[5] But *Jones* did more than revive that doctrine; it also paved way for the Court to fashion a subjective intent requirement in Fourth Amendment search jurisprudence by way of *Jardines*, despite precedent to the contrary.[6] Although the results in both *Jones* and *Jardines* were ultimately correct, the Court relied on faulty reasoning and, as a result, upended Fourth Amendment jurisprudence, leaving scholars, attorneys, and police officers in a state of confusion.[7] A new context for the reasoning is essential from a public policy standpoint because future application of this subjective intent requirement could undermine the Fourth Amendment search doctrine for generations to come. Part II explores the background of the Fourth Amendment search doctrine and explains why the objective standard has been the status quo throughout history. Part III discusses the cases that lead up to *United States v. Jones* and *Florida v. Jardines*. Part IV then dives into those seminal cases. Part V analyzes why the *Jardines* approach to the search doctrine was wrong. Part VI offers other paths the Court could have taken to arrive at the same result but with different, and more sound, reasoning. This Article will offer alternative arguments for how the Court could have come to the same result and made it easier for law enforcement and courts to apply the Fourth Amendment.

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1. *See* Florida v. Jardines, 569 U.S. 1, 8–10 (2013).
2. *See id.*
3. *See id.*
4. United States v. Jones, 565 U.S. 400, 409 (2012); *see also Jardines*, 569 U.S. at 10–11 (using *Jones* to create a subjective intent requirement).
5. *See, e.g.*, Brittany Boatman, Comment, United States v. Jones*: The Foolish Revival of the "Trespass Doctrine" in Addressing GPS Technology and the Fourth Amendment*, 47 VAL. U. L. REV. 677 (2013) (criticizing *Jones*'s revival of the trespass doctrine).
6. *See Jones,* 565 U.S. at 405; Ashcroft v. al-Kidd, 563 U.S. 731, 736–37 (2011); Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Bond v. United States, 529 U.S. 334, 338 n.2 (2000); Whren v. United States, 517 U.S. 806, 813 (1996). *See generally Jardines*, 569 U.S. 1.
7. George M. Dery III, *Failing to Keep "Easy Cases Easy":* Florida v. Jardines *Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law by Instead Focusing on Physical Trespass*, 47 LOY. L.A. L. REV. 451, 471–74 (2014) (discussing likely confusion among criminal justice officials after *Jardines*).

II. A HISTORY OF THE OBJECTIVE STANDARD

At the outset, it is important to note that the Fourth Amendment protects citizens against "unreasonable searches and seizures . . . ."[8] As a result, when contemplating a Fourth Amendment case, the first question is whether there is a search, and the next question is whether the search is reasonable.[9] Although some scholars argue the Court originally intended to consider the subjective intent of law enforcement officers when making these determinations, there is little question that after *Mapp v. Ohio* and "the explosion of Fourth Amendment law," the Court has labored under the idea that an officer's subjective belief is not relevant to Fourth Amendment analysis.[10] This Part traces the background of this objective intent doctrine.

A. When I Say Pretext, You Say Whren

In *Whren v. United States*, the Supreme Court found that an officer's true motivation in pulling over a motorist had no bearing on whether the stop was an "unreasonable" seizure under the Fourth Amendment.[11] In *Whren*, law enforcement officers passed a truck with temporary tags in a "high drug area" of the District of Columbia.[12] Suspicious of the car, the officers continued watching the vehicle until the driver stopped at a stop sign for an unusually long time and then quickly sped away and made a turn without signaling.[13] The officers pulled the car over and spotted drugs in petitioner Whren's hands in plain view.[14] The petitioners were arrested.[15] At trial, they moved to suppress the drugs, claiming that the stop was not justified by either reasonable suspicion or probable cause that they were engaged in illegal drug activity.[16] As a result, according to them, the stop based on the lack of a signal

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8. U.S. CONST. amend. IV.

9. *See id.* This, of course, contemplates that the threshold question of whether a search has even occurred has been answered in the positive. *See* Katz v. United States, 389 U.S. 347, 352–54 (1967). If there is no search under the Fourth Amendment, then the question of whether the search is reasonable need not be answered. *Id.*

10. George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 378–88 (2006); *see* Mapp v. Ohio, 367 U.S. 643 (1961); *see also Whren*, 517 U.S. at 813 (discussing cases about the subjective intent requirement). "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990). The Court reiterated this belief in *Devenpeck v. Alford*. *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (citing *Horton*, 496 U.S. at 138).

11. *Whren*, 517 U.S. at 813.

12. *Id.* at 808.

13. *Id.*

14. *Id.* at 808–09.

15. *Id.* at 809.

16. *Id.*

was merely pre-textual.[17] The trial court denied the motion, and petitioners were convicted.[18]

On appeal, the Court was faced with the question of whether, despite the officers' true motivations, the traffic stop was reasonable under the Fourth Amendment.[19] Justice Scalia, writing for the majority, unequivocally concluded that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[20] In other words, because there was already an objective reason to pull the car over—the failure to signal—the Court should not consider the subjective intent of the officers.[21] As such, the Court essentially validated pre-textual stops under the Fourth Amendment.[22]

To be sure, this case is concerned only with the reasonableness of a stop under the Fourth Amendment, in contrast to the threshold requirement that will be discussed in Part IV.[23] At first glance, it makes sense not to consider the subjective intentions of an officer when there is already an objective reason to stop a vehicle. However, this reasoning has been carried over into other facets of the Fourth Amendment.[24]

B. Keep Brigham *It Home*

Ten years after *Whren*, the Court made it clear that it was serious about subjective intent being irrelevant for purposes of the Fourth Amendment.[25] In *Brigham City v. Stuart*, the Court confronted the question of whether the subjective intent of law enforcement was relevant in an exigent circumstances case.[26] The Court held that it was not.[27]

This case arose from a call in the middle of the night complaining about the noise coming from a home in Brigham City, Utah, where a loud party was occurring.[28] The officers responded to the scene and almost immediately

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17. *Id.*
18. *Id.*
19. *Id.*; *see also* U.S. CONST. amend. IV (unlawful search and seizure).
20. *Whren*, 517 U.S. at 813.
21. *Id.* at 811–13.
22. *Id.* at 813; *see also* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 578–80 (1997) (discussing the opinion of Justice Scalia in *Whren*). Although the Court did give a green light to pretextual stops under the Fourth Amendment, it clarified that "intentionally discriminatory application of laws" could still violate the Equal Protection Clause. *Whren*, 517 U.S. at 813.
23. *See infra* Part IV (relying, in part, on the trespass doctrine in *Katz*, rather than privacy grounds, to determine the threshold question of whether a search occurred).
24. *See infra* note 64 and accompanying text (discussing the Court's objective view of individualized suspicion).
25. *See generally* Brigham City v. Stuart, 547 U.S. 398 (2006).
26. *Id.* at 402.
27. *Id.* at 406–07.
28. *Id.* at 400–01.

heard shouting from inside the home.[29] They walked down the driveway and encountered two juveniles drinking alcohol.[30] From that vantage point, they could see into the home where "four adults were attempting, with some difficulty, to restrain a juvenile."[31] The officers saw the juvenile swing and hit one of the adults and watched the other adults press the juvenile up against the refrigerator with such force that the refrigerator moved across the floor.[32] At this point, the officers entered the home and the altercation ceased.[33] The officers arrested several of the adults and charged them with "contributing to the delinquency of a minor, disorderly conduct, and intoxication."[34]

The defendants moved to suppress all of the evidence discovered on the grounds that the officers entered the home illegally.[35] The city argued that the officers entered the home legally, either by way of the emergency aid doctrine or the exigent circumstances exception to the warrant requirement.[36] The Utah Supreme Court rejected that argument and found that the entry into the home was not justified by exigent circumstances.[37] The Supreme Court of the United States granted certiorari to clarify the "appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation."[38] In addition to exigent circumstances clarification, the Court also cleared up whether this standard should be viewed through an objective or subjective lens.[39]

According to the defendants in *Stuart*, the officers' entry into the home was unreasonable because the officers were "more interested in making arrests than quelling violence."[40] The defendants' argument seemed reasonable in light of the Utah Supreme Court's declaration that a search under the "emergency aid doctrine" must not be "primarily motivated by intent to arrest and seize evidence."[41] Nonetheless, the Supreme Court of the United States disagreed.[42] In so doing, the Supreme Court reiterated the idea that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[43] The Court went on to cite, and quote, several other Supreme Court opinions decided in the same vein—such as

29. *Id.* at 401.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 401–02.
38. *Id.* at 402.
39. *Id.* at 404.
40. *Id.*
41. Brigham City v. Stuart, 122 P.3d 506, 513 (Utah 2005), *rev'd*, 547 U.S. 398 (2006).
42. *Stuart*, 547 U.S. at 404.
43. *Id.* (alterations in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

Bond v. United States,[44] *Whren v. United States*,[45] and *Graham v. Connor*[46]—making it quite clear that the subjective intent of an officer has no bearing on reasonableness.[47]

C. Objective View Is King

In yet another case about exigent circumstances, the Court reiterated its stance on a subjective view of the Fourth Amendment.[48] In *Kentucky v. King*, the Court was grappling with the concept of what to do when police officers create an exigency and then try to claim the exigent circumstances exception.[49] Leading up to *King*, some courts—including the Kentucky Supreme Court—had begun using a bad faith test when the exigency was created by the police.[50] So, if officers "deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement," some courts would find that the exigent circumstances exception to the warrant requirement could not be applied.[51]

The Court rejected that approach in *King* after reciting the litany of cases, such as *Brigham City*, that held that the Fourth Amendment should be evaluated objectively.[52] More than that, however, the *King* majority explained the reasoning behind this objective approach:

> The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[53]

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44. Bond v. United States, 529 U.S. 334, 338 n.2 (2000). "The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment. . . . [T]he issue is not his state of mind, but the objective effect of his actions." *Id.* (citations omitted).

45. Whren v. United States, 517 U.S. 806, 813 (1996). "[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Id.*

46. Graham v. Connor, 490 U.S. 386, 397 (1989). "'[O]ur prior cases make clear' that 'the subjective motivations of the individual officers . . . ha[ve] no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment.'" *Stuart*, 547 U.S. at 404–05 (quoting *Graham*, 490 U.S. at 397) (alterations in original).

47. *Stuart*, 547 U.S. at 404–05.

48. *See* Kentucky v. King, 563 U.S. 452, 464 (2011).

49. *Id.* at 455.

50. *Id.* at 464.

51. *Id.* (quoting King v. Commonwealth, 302 S.W.3d 649, 656 (Ky. 2010), *rev'd*, *King*, 563 U.S. 452).

52. *King*, 563 U.S. at 463–64; *Stuart*, 547 U.S. at 404.

53. *King*, 563 U.S. at 464 (quoting Horton v. California, 496 U.S. 128, 138 (1990)). The Court quoted its opinion in *Horton v. California*, which dealt with the plain view exception. *Id.*; *Horton*, 496 U.S. 128. In *Horton*, the defendant claimed that the plain view exception could only be applied when an officer came upon an object inadvertently. *Horton*, 496 U.S. at 131. So, in other words, if officers knew

The Court ultimately held that the exigent circumstances rule applied to police-created exigencies, unless the police gained entry by "an actual or threatened violation of the Fourth Amendment."[54]

D. They Really Weren't Kidd*ing*

More recently, in *Ashcroft v. al-Kidd*, the Court doubled down on its view that subjective intent has no relevance to Fourth Amendment reasonableness.[55] In *al-Kidd*, the overall question was that of qualified immunity, but the Supreme Court had to address the constitutional concern under the first prong of the qualified immunity analysis.[56] The defendant, Abdullah al-Kidd, claimed his constitutional rights were denied by then-Attorney General John Ashcroft by authorizing a warrant that detained him as a material witness.[57] According to al-Kidd, the government was using this process of material-witness warrants as a way to detain terrorism suspects that the government otherwise lacked probable cause to detain.[58] Essentially, the government was using the material-witness warrant as a pretext.[59] In finding this pretextual detention constitutional, the Supreme Court reiterated that "Fourth Amendment reasonableness 'is predominantly an objective inquiry.'"[60] Therefore, it is appropriate to ask "whether 'the circumstances, viewed objectively, justify [the challenged] action.'"[61] If it does, then the action is considered reasonable regardless of "'the subjective intent' motivating the relevant officials."[62] In what has proven to be oft-quoted language, the Court went further by saying that "the Fourth Amendment regulates conduct rather than thoughts,"[63] and ignoring the subjective intent "promotes evenhanded, uniform enforcement of the law."[64]

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that there was a possibility an object could be in the place to be searched, they had to include it in the warrant. *Id.* at 138 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 469–71 (1971)). The Court rejected this notion. *Id.* at 138–41.

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

55. Ashcroft v. al-Kidd, 563 U.S. 731, 744 (2011).

56. *Id.* at 735. In order to defeat a federal or state official's claim of qualified immunity, a plaintiff has to prove "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

57. *Id.* at 734.

58. *Id.*

59. *Id.*

60. *Id.* at 736 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000)).

61. *Id.* (alteration in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

62. *Id.* (quoting Whren v. United States, 517 U.S. 806, 814 (1996)).

63. *Id.* (citing Bond v. United States*,* 529 U.S. 334, 338 n.2 (2000)).

64. *Id.* (citations omitted) (citing Devenpeck v. Alford*,* 543 U.S. 146, 153–54 (2004)). The Court ultimately held that the government did not violate the Fourth Amendment because, objectively, the warrant was based on "individualized suspicion," so the Attorney General "did not violate clearly established law," and was thus entitled to qualified immunity. *Id.* at 744 (citation omitted).

After synthesizing this series of cases, it is evident that the Supreme Court favors an objective lens when discussing Fourth Amendment reasonableness. But before examining the opinion in *Jardines*—which turns this idea on its head—it is important to reflect on the line of cases that allowed *Jardines* to come about, starting with the trespass cases of the ’50s and ’60s and culminating in *Jones*.[65]

III. THE PATH TO *JONES* AND *JARDINES*

Having discussed the history of the Fourth Amendment and the objective lens through which it is viewed, it is important to examine the evolution of what has been considered a search under the Amendment, including the use of a dog sniff. This Part starts with the trespass cases of the ’50s and ’60s and ends with the dog sniff cases—*United States v. Place* and *Illinois v. Caballes*—and discusses their relevance to the analysis of *Jardines*.

A. Don’t Tread onto My Olmstead

There is no doubt that before the decision in *Katz v. United States* in 1967, the Court primarily tied what-is-a-search jurisprudence to common law trespass.[66] That is, if the government trespassed, the action was considered a search.[67] If not, there was no search.[68] In *Olmstead v. United States*, for example, where the government tapped a phone through its wires on public streets, the Supreme Court found that the Fourth Amendment was not implicated—and, therefore, no search occurred—because law enforcement did not enter “the houses or offices of the defendants.”[69] Similarly, in *Goldman v. United States*, the Court determined there was no search merely by putting a detectaphone on an outer wall of a building.[70] On the other hand, in *Silverman v. United States*, where a “spike mike” was inserted into the wall of a home to listen in on conversations, the Court found a search did occur.[71]

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65. *See generally* Florida v. Jardines 569 U.S. 1 (2013). *See also* United States v. Jones, 565 U.S. 400 (2012) (bringing the trespass cases of the ’50s and ’60s to a head).

66. Katz v. United States, 389 U.S. 347 (1967) (citing Olmstead v. United States, 277 U.S. 438, 457 (1928), *overruled by Katz*, 389 U.S. at 352–53, *and* Berger v. New York, 388 U.S. 41, 63–64 (1967); Goldman v. United States, 316 U.S. 129, 134–36 (1942), *overruled by Katz*, 389 U.S. at 352–53).

67. *See, e.g.*, Amos v. United States, 255 U.S. 313, 317 (1921) (holding that a search occurred after the officers actually entered the defendant’s home without his permission).

68. *See, e.g.*, *Olmstead*, 277 U.S. at 466 (holding that no search occurred where there was no tangible intrusion by the officers).

69. *Id.* at 456–57, 464.

70. *See Goldman*, 316 U.S. at 135.

71. Silverman v. United States, 365 U.S. 505, 511–12 (1961). A “spike mike” is described by the Court as follows:

> The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under

Several years later, the Court was faced with a bookie in a phone booth, and the landscape of the search doctrine was changed forever.[72] In *Katz v. United States*, there was no physical penetration of a constitutionally protected area, such as in *Silverman*.[73] Instead, the government had placed an electronic device on the outside of a telephone booth to record and listen to the defendant's conversations.[74] Although this situation was quite similar to that in *Goldman*, the Court went a different way, thus overruling *Goldman*.[75] The parties focused much of their arguments on whether a phone booth was a constitutionally protected area but the Court found no merit in either side of that argument, instead proclaiming that "the Fourth Amendment protects people, not places."[76] The Court further opined that the bases on which *Goldman* and *Olmstead* had been founded had been "so eroded" by the Court's later decisions that "the 'trespass' doctrine" could "no longer be regarded as controlling."[77] As a result, "[t]he fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth [could] have no constitutional significance."[78]

The majority opinion gave no other guidance, however, about when a search would occur; instead, that was to be found in the concurring opinion of Justice Harlan.[79] Synthesizing what was percolating in the lower courts and in "prior decisions," Justice Harlan announced the test that would take hold in later opinions: the Fourth Amendment is implicated when "a person [has] exhibited an actual (subjective) expectation of privacy and, second, [when] that . . . expectation [is] one that society is prepared to recognize as 'reasonable.'"[80] Since that opinion, the subjective prong has become arguably irrelevant.[81] Accordingly, the test is really just that a person must exhibit an objective expectation of privacy in an object to implicate the Fourth

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> a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioners' convictions.

Id. at 506–07 (footnote omitted).

72. *See* Katz v. United States, 389 U.S. 347, 348–49 (1967).

73. *Id.* at 352–53; *see also Silverman*, 365 U.S. at 511–12 (holding there was a physical penetration of a constitutionally protected area).

74. *Katz*, 389 U.S. at 348–49.

75. *Compare id.* at 354–58 (holding an illegal search of a telephone booth occurred when agents failed to obtain a warrant), *with Goldman*, 316 U.S. at 134–36 (ruling that detectaphone use was not an illegal trespass).

76. *Katz*, 389 U.S. at 351.

77. *Id.* at 353.

78. *Id.*

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

80. *Id.*

81. Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 133 (2015).

Amendment.[82] To be sure, there has been much criticism of this seemingly broad test;[83] however, it has formed the touchstone for much of the Fourth Amendment jurisprudence over the last fifty years.[84]

B. Kyllo *and the Heat*

In addition to *Katz*, several other landmark cases have helped shape the landscape of the Fourth Amendment search doctrine.[85] In *Kyllo v. United States*, the government used a thermal imaging device to detect heat signatures coming from within a home.[86] The scan was performed from the officer's vehicle across the street from the home, and the question was whether this was a search under the Fourth Amendment.[87] The majority opinion held this action to be a search because "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use."[88] This "general public use" test is now used to determine if information gained by new technology is indeed a search.[89]

An interesting debate between Justice Scalia, author of the majority opinion, and Justice Stevens, the dissenting opinion author, focused on the idea of "off-the-wall" and "through-the-wall" technology.[90] Justice Stevens would not have found the use of the thermal imaging device to be a search because he claimed it was merely "off-the-wall" technology, as opposed to technology such as an X-ray scan, which would be considered

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82. *Id.* at 133–34.

83. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) ("The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable."); *see also* Jonathan Todd Laba, *If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment*, 84 CALIF. L. REV. 1437, 1444 (1996) (arguing that the *Katz* decision has "loosened" the Fourth Amendment guarantees).

84. California v. Ciraolo, 476 U.S. 207, 211 (1986); Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 842–43 (2009).

85. *See, e.g.*, *Kyllo*, 533 U.S. 27.

86. *Id.* at 29–30. As discussed later on, heat signatures alone are not per se illegal. *See infra* note 206–207 (discussing *Kyllo* and thermal imaging). They could indicate a concentration of heat from "grow lamps" for marijuana, or they could indicate a space that someone likes to keep really hot for perfectly legal reasons. *See Kyllo*, 533 U.S. at 29.

87. *Kyllo*, 533 U.S. at 29–30.

88. *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

89. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018); United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

90. *Compare Kyllo*, 533 U.S. at 35–36 (arguing the dissent's opinion is a distinction without a difference that the Court rejected in *Katz* because of its potential far-reaching implication to legalize many other types of searches), *with id.* at 42–46 (Stevens, J., dissenting) (arguing that thermal imaging's ability to not expose details of the contents inside a house would prevent it from being classified as a search).

"through-the-wall" technology in his opinion.[91] He argued the information gained from the thermal imaging device was no different than the information gained from snow melting or rainwater evaporating more quickly on one part of the home.[92] He said that "[h]eat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building."[93] As a result, according to Justice Stevens, it is not reasonable to expect that such aromas would be private.[94] The bottom line is that the thermal imaging device did not expose any details from inside the home, according to the dissent, and therefore, the use of the device should not have been considered a search.[95]

C. The Curious Case of Place

In any piece discussing *Jardines*, it is imperative to understand the starting point of all dog sniff cases, *United States v. Place*.[96] In *Place*, law enforcement authorities detained the defendant's luggage for the purpose of exposing the luggage to a drug sniffing dog.[97] Interestingly enough, the Court found that the detention of the luggage was illegal, despite coming to the conclusion that the actual dog sniff of the luggage was not a search under the Fourth Amendment.[98] The Court reasoned that the information obtained by a dog sniff is so limited, both by the way it is obtained—a mere sniff—and the content that is revealed—only information about the presence of illegal substances—that the Fourth Amendment is not implicated.[99]

When faced with the question of whether the dog sniff of a car is a search, the Court reached the same conclusion, finding it was not.[100] In *Illinois v. Caballes*, the Court found that when a dog alerts of drugs, it reveals no information other than the presence of contraband.[101] As an illegal substance, no individual has a right to possess contraband anyway.[102] Thus,

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91. *Id.* at 43 (Stevens, J., dissenting).

92. *Id.* at 42–43.

93. *Id.* at 43–44.

94. *Id.* at 44.

95. *Id.*

96. *See generally* United States v. Place, 462 U.S. 696 (1983).

97. *Id.* at 698–99.

98. *Id.* at 707, 710. The Court concluded that the detention of the luggage was a seizure and that the length of time the law enforcement officials detained the luggage exceeded the amount of time reasonable under a *Terry* stop. *Id.* at 707–10; *see also* Terry v. Ohio, 392 U.S. 1, 28–29 (1968) (explaining what constitutes a reasonable search).

99. *Place*, 462 U.S. at 707. It does appear that the Court found the fact that the luggage was located in a public place to be important. *Id.* Regardless, there is much criticism of this opinion, especially its inconsistency with *Kyllo*. *See, e.g.*, Dery, *supra* note 7, at 468; Sean K. Driscoll, *"The Lady of the House" vs. A Man With a Gun: Applying* Kyllo *to Gun-Scanning Technology*, 62 CATH. U. L. REV. 601, 614 (2013).

100. *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005).

101. *Id.*

102. *Id.* at 408–09.

the privacy interest is lessened.[103] The Court contrasted this with the activity in *Kyllo*, where the Court held a search existed because the thermal imaging device in *Kyllo* also detected lawful activity.[104] Therefore, since that was not the case in *Caballes*, the activity was not a search under the Fourth Amendment.[105]

If one were contemplating the trajectory of the Court after reading these cases, it might seem the Court was on a path to find that a dog sniff of a home that only detected illegal activity—i.e., contraband—would not implicate the Fourth Amendment. As discussed below, that would not be the case. But, before we get to *Jardines* and its holding, it is important to examine another case that made *Jardines* possible: *United States v. Jones*.[106]

IV. THOSE WHO TRESPASS AGAINST US—*JONES* AND *JARDINES*

For forty years, the *Katz* test remained the most common barometer to determine whether a search occurred under the Fourth Amendment.[107] To the surprise of many, the Supreme Court declined to use the *Katz* test in determining whether using a Global Positioning System (GPS) to track a car was a search.[108] As explained below, this change paved the way for the *Jardines* opinion to come later.[109] This Part will first analyze *Jones* and then *Jardines*.

A. Keeping up with the Jones*es*

The central question in *Jones* was whether attaching a GPS tracking device to the car of a suspected drug dealer was a search under the Fourth Amendment.[110] In *Jones*, the law enforcement officials applied for, and were granted, a warrant to place the tracking device on the car belonging to the defendant's wife.[111] The warrant required that the device be installed within ten days, but it was not installed until the eleventh day.[112] As such, the

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103. *See id.*

104. *Id.* at 409–10.

105. *Id.* at 408–09.

106. *See* United States v. Jones, 565 U.S. 400 (2012).

107. Andy Hagerman, Note, *Sniffing for Answers:* Florida v. Jardines*, Drug-Detecting Canines, and the Case for a Normative Approach to Fourth Amendment Activity for Sense-Enhancing Devices*, 55 U. LOUISVILLE L. REV. 203, 207 (2017).

108. *See* Richard Sobel et al., *The Fourth Amendment Beyond* Katz*,* Kyllo *and* Jones*: Reinstating Justifiable Reliance as a More Secure Constitutional Standard for Privacy*, 22 B.U. PUB. INT. L.J. 1, 17–18 (2013).

109. *See* Brian L. Owsley, *The Supreme Court Goes to the Dogs: Reconciling* Florida v. Harris *and* Florida v. Jardines, 77 ALB. L. REV. 349, 375 (2014).

110. *Jones*, 565 U.S. at 402.

111. *Id.* at 402–03.

112. *Id.*

surveillance of the car was done without a valid warrant.[113] Operating under the *Katz* test, the Government's argument was that the defendant had neither reasonable expectation of privacy in the area of the car where the device was installed nor a reasonable expectation of privacy in the locations on the public road where the car travelled.[114] In making this argument, the Government relied on what has been called the beeper cases.[115] In both of those cases, *United States v. Knotts* and *United States v. Karo*, the government tracked the movements of the defendants through use of a beeper.[116] In both cases, the beepers had been placed in containers that were surreptitiously given to the defendants.[117] In both cases, the Court held that no Fourth Amendment search occurred in the mere installation.[118] In so finding, the Court said that the defendants in *Knotts* and *Karo* did not have a reasonable expectation of privacy in the locations of their travels.[119]

The *Jones* Court distinguished the beeper cases by explaining that the officers in *Jones* actually physically trespassed onto the car when placing the GPS device and, therefore, that act meant they committed a Fourth Amendment search.[120] Since that occurred, according to the Court, there was no need to address the *Katz* test.[121] The purpose of *Katz* was not to supplant the original trespass test but to supplement it.[122] When *Katz* was decided, according to the *Jones* majority, the scope of the Fourth Amendment was not narrowed, but merely expanded, offering more paths for finding that a search had occurred.[123] To bolster its argument, the majority in *Jones* quotes Justice Brennan's concurring opinion from *Knotts*: "[W]hen the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means."[124]

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113. *Id.* at 404.

114. *Id.* at 406.

115. *Id.* at 408–09 (citing United States v. Knotts, 460 U.S. 276, 278 (1983); United States v. Karo, 468 U.S. 705, 712–13 (1984)).

116. *See Karo*, 468 U.S. at 708; *Knotts*, 460 U.S. at 278.

117. *Karo*, 468 U.S. at 708; *Knotts*, 460 U.S. at 278–79.

118. *Karo*, 468 U.S. at 713; *Knotts*, 460 U.S. at 284–85.

119. *Karo*, 468 U.S. at 712–13; *Knotts*, 460 U.S. at 284–85.

120. *Jones*, 565 U.S. at 409–10.

121. *See id.* at 406–08; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (addressing the purpose and reason for the *Katz* test).

122. *See Jones*, 565 U.S. at 406–08; *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

123. *See Jones*, 565 U.S. at 406–08; *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (discussing the protections given by the Fourth Amendment). The Court decided this despite the fact that no major case used the trespass doctrine between the time of the *Katz* decision and the *Jones* decision. *See generally Recent Landmark U.S. Supreme Court Rulings on 4th Amendment Issues*, L.A. TIMES (Nov. 7, 2011), https://articles.latimes.com/2011/nov/07/local/la-me-search-seizure-timeline-20111107.

124. *Knotts*, 460 U.S. at 286 (Brennan, J., concurring); *see Jones*, 565 U.S. at 407. It must be pointed out that the language Justice Scalia is quoting from Justice Brennan's concurring opinion is first, just that, a concurring opinion. *See Knotts*, 460 U.S. at 286 (Brennan, J., concurring). Secondly, the language quoted is preceded by a reference to *Silverman*, which was decided, of course, before *Katz*. *See id.* (citing

Justice Alito wrote a very thorough concurring opinion, criticizing the majority's resurrection of the trespass doctrine.[125] According to Justice Alito, the majority opinion "strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial."[126] Although Justice Alito agreed with the ultimate result in the case, he would have simply determined that the defendant did not have a reasonable expectation of privacy in the long-term monitoring of movements of the vehicle.[127] Using the trespass doctrine, according to Justice Alito, is going backwards.[128] He points to many instances where that doctrine was criticized, and he claims that *Katz* definitively did away with that line of thinking.[129] Further, he said that using the trespass doctrine in this day and age leads to "incongruous results."[130] Despite these arguments, and with the *Jones* revival of the trespass doctrine, the Court had a clear path to decide *Jardines*.[131]

B. Keep Your Paws Off My Jardines

An amalgamation of these decisions ultimately culminated in the somewhat surprising decision of *Florida v. Jardines*.[132] In *Jardines*, Miami-Dade police received a tip that marijuana was being grown inside the home of the defendant.[133] Before getting a warrant, two detectives and a drug-sniffing dog approached the home.[134] Before they reached the front porch, the dog alerted that he detected the smell of drugs.[135] One detective then used that information to obtain a warrant, and a subsequent search uncovered marijuana plants.[136] On appeal, the only question was "whether

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Silverman v. United States, 365 U.S. 505, 509–12 (1961)); *Katz*, 389 U.S. at 361 (Harlan, J., concurring). While Justice Brennan did not believe that *Katz* supplanted *Silverman*, many scholars did. *See generally* Michael L. Snyder, Katz*-ing Up and (Not) Losing* Place*: Tracking the Fourth Amendment Implications of* United States v. Jones *and Prolonged GPS Monitoring*, 58 S.D. L. Rev. 158, 190–92 (2013).

125. *Jones*, 565 U.S. at 418–31 (Alito, J., concurring).

126. *Id.* at 419.

127. *Id.* at 430–31.

128. *Id.* at 421.

129. *Id.* at 421–23.

130. *Id.* at 425. To illustrate the inconsistent results that could occur, Justice Alito said:

> If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

Id.; *see* Kyle Nelson, Comment, Florida v. Jardines*: A Shortsighted View of the Fourth Amendment*, 49 GONZ. L. REV. 415, 425 (2013-2014) ("*Jones* and *Jardines* are inadequate because they neither have the capacity for adaptation nor the ability to be a workable accommodation.").

131. *See generally Jones*, 565 U.S. 400.

132. Florida v. Jardines, 569 U.S. 1, 11–12 (2013).

133. *Id.* at 3.

134. *Id.* at 3–4.

135. *Id.*

136. *Id.* at 4.

the officers' behavior was a search within the meaning of the Fourth Amendment."[137]

Citing *Jones*, the Court came to the conclusion that the officers' actions in this case were a search.[138] It said that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[139] Justifying its revival of the trespass doctrine, the Court reiterated its assertion that *Katz* adds "to the baseline" of search doctrine and does not "subtract anything from the [Fourth] Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'"[140]

The Court easily found that the front porch of the home constituted curtilage and, therefore, should be considered a constitutionally protected area.[141] The more difficult question that had to be answered was whether the officers physically intruded into that constitutionally protected space.[142] Using a combination of traditional notions of tort and property law, the Court concluded that the officers did not have an implicit license to approach the front porch and front door of the home.[143] The Court conceded that, generally, a knocker on the front door of the home *does* imply a license for visitors to approach, knock, and be briefly received.[144] The Court even conceded that it has previously found that an officer may do exactly that.[145] However, according to the Court, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."[146] According to the Court, "[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."[147] And here is where the intent part comes in: The Court said that the "social norms" that allow a visitor to approach the front porch "do not invite him there to conduct a search."[148] Therefore, a license depends on the "specific purpose" the officer has.[149]

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137. *Id.* at 5.
138. *Id.* at 10–12.
139. *Id.* at 5 (quoting United States v. Jones, 565 U.S. 400, 406 n.3 (2012)).
140. *Id.* (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).
141. *Id.* at 6–7. The Court also recognized the heightened privacy interest in a home and repeated the idea that "the home is first among equals." *Id.*
142. *Id.* at 7.
143. *Id.* at 7–9.
144. *Id.* at 8.
145. *Id.* In *King*, the Court was faced with the question of whether police officers can claim the exigent circumstances exception when they themselves create the exigency. Kentucky v. King, 563 U.S. 452, 469–70 (2011); *see supra* Section II.C (explaining how the Court deals with officers that create exigent circumstances in bad faith but claim the exigent circumstances exception).
146. *Jardines*, 569 U.S. at 9.
147. *Id.*
148. *Id.*
149. *Id.*

The Court recognized that the State objected to this distinction because it would require the Court to consider the subjective intent of the officer.[150] The Court even cited to *al-Kidd* and *Whren*, discussed *supra*,[151] but the Court justified its decision by claiming that those cases merely hold that an already objectively reasonable search is not defeated when the officer's real motivation is something other than the "validating reason."[152] According to the Court, that is not the same question in *Jardines*.[153] Instead, according to the Court, the question there was "*whether* the officer's conduct was an objectively reasonable search."[154] And, according to the Court, "that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered."[155] In *Jardines*, according to the Court, the officers' behavior "objectively reveal[ed] a purpose to conduct a search . . . ."[156]

Justice Kagan wrote a concurring opinion that, if it had been the majority opinion, would have kept *Jardines* consistent.[157] Justice Kagan believed that this case need not be decided on property grounds, but could have easily been resolved on privacy grounds.[158] According to Justice Kagan, the detective violated the defendant's right to privacy by using a drug-detection dog that is a "specialized device for discovering objects not in plain view (or plain smell)."[159] Justice Kagan analogized the drug-detection dog to a stranger coming to the front door of your home using "super-high-powered binoculars" and peering into your windows.[160] Sure, this would be a trespass, according to Justice Kagan, but more importantly, it would also be a violation of your reasonable expectation of privacy.[161]

Justice Kagan further opined that if the Court had decided *Jardines* under the reasonable expectation of privacy rubric, the case could have easily been resolved using the *Kyllo* rule.[162] Essentially, the drug-sniffing dog

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150. *Id.* at 10.

151. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011); Whren v. United States, 517 U.S. 806, 813 (1996)); *see supra* Sections I.A, I.D (explaining pretextual stops under the Fourth Amendment).

152. *Jardines*, 569 U.S. at 10. According to the Court, "[T]he defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment." *Id.*

153. *Id.*

154. *Id.* This question is wrong, however, the question is really whether there was a search at all. *See* Katz v. United States, 389 U.S. 347, 352–54 (1967). That is an entirely different question from whether the search is reasonable. *See infra* note 173 (explaining how the Court in *Carpenter* recognized the confusion between whether a search has occurred and whether the search was reasonable).

155. *Jardines*, 569 U.S. at 10.

156. *Id.* This justification lacks merit. *See infra* Part V (discussing that the Court added a requirement to the threshold question, causing confusion).

157. *Jardines*, 569 U.S. at 12–16 (Kagan, J., concurring).

158. *Id.* at 14.

159. *Id.* at 13.

160. *Id.*

161. *Id.*

162. *Id.* at 14.

would be considered "a device that is not in general public use . . . ."[163] Therefore, using a drug-sniffing dog to "explore details of the home that would previously have been unknowable *without physical intrusion*" would be a search.[164]

Justice Alito, in a dissenting opinion joined by Chief Justice Roberts and Justices Kennedy and Breyer, disagreed with the use of the property rubric and the trespass doctrine, much as he did in *Jones*.[165] He went so far as to say that the majority "has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based."[166] Justice Alito disagreed with Justice Kagan, however, because he believed that no reasonable person could expect that the odor emanating from his home would not be picked up by a dog.[167]

V. Why the Property/Intent Theory Was the Wrong Way to Go

The *Jardines* Court all but conceded that it had inserted an intent element into the Fourth Amendment search doctrine.[168] However, the Court justified this rewriting of law by claiming that it was discussing "*whether* the officer's conduct was an objectively reasonable search" and, to determine that, the officer's purpose is relevant.[169] This view is short-sighted, however, and confuses the threshold question of whether there is a search with the separate question of whether the search is reasonable.[170] Reasonableness comes into play in the threshold question only in the form of asking whether a defendant has a reasonable expectation of privacy.[171] Once it has been determined that he or she does have an expectation of privacy, the Fourth Amendment is implicated and it is presumed that a search occurred.[172] Then—and only then—do we reach the question of whether the search is reasonable.[173] By combining these two concepts, however, the Court has

163. *Id.*; *see supra* Section III.B (discussing *Kyllo* and when information gathered by technology constitutes a search based on the general public use test).

164. *Jardines*, 569 U.S. at 14 (Kagan, J., concurring). Further, many lower courts used the *Kyllo* test to determine whether the use of a drug-sniffing dog was a search, and most found that it was. *See, e.g.*, United States v. Whitaker, 820 F.3d 849, 853–54 (7th Cir. 2016).

165. *Jardines*, 569 U.S. at 16–17 (Alito, J., dissenting).

166. *Id.* at 17.

167. *Id.* at 24. It is worthy to note that Justice Alito also believed that the police had a license to walk up to the front door, even if the "officers . . . wish to gather evidence against an occupant (by asking potentially incriminating questions)." *Id.* at 16.

168. *Id.* at 10 (majority opinion).

169. *Id.*

170. Carpenter v. United States, 138 S. Ct. 2206, 2215 n.2 (2018); *see also* Katz v. United States, 389 U.S. 347, 352–54, 356–57 (1967).

171. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). This, of course, is a two-prong test under *Katz*. *See id.*

172. *See id.*

173. *Carpenter*, 138 S. Ct. at 2215 n.2 (recognizing the confusion of how to apply the reasonable search analysis). In disputing Justice Kennedy's dissent, footnote 2 of the majority opinion stated that his

created confusion by inserting a requirement into the threshold question that it has worked years to divest from the Fourth Amendment search doctrine.[174]

This confusion is evidenced by the diverging applications by the lower courts, in particular with regard to an apartment.[175] By their very nature, apartment-dwelling citizens share more common space with each other, much more so than single family homes. This begs the question, does *Jardines* apply to the front stoop of an apartment? In other words, do the police commit a Fourth Amendment search when they walk a dog in front of an apartment door? The answer depends on the court that decides the case.

In *United States v. Whitaker*, officers walked a drug-sniffing dog down the hallway of the defendant's apartment building where the dog eventually alerted outside the defendant's apartment.[176] In finding that a search occurred, the Seventh Circuit chose to ignore the trespassing/intent test created in *Jardines* and, instead, applied the *Katz* reasonable expectation of privacy analysis and drew heavily from Justice Kagan's concurrence in *Jardines*.[177]

The Eighth Circuit, in *United States v. Hopkins*, also found that the area outside the front door of an apartment should be protected but did so using an analysis similar to the one in *Jardines*.[178] The *Hopkins* court found that the six to eight inches outside of an apartment door constituted curtilage and thus a constitutionally protected area.[179] Further, the *Hopkins* court concluded that, although an officer had an "implied invitation for a visitor to go up and knock on one or both of the two doors," the officer did not have a license to "approach with a trained police dog within inches of either of the doors" with the intent to discover incriminating evidence.[180]

On the opposite side of the coin, several courts have held that the area outside of an apartment is not within the curtilage of the home, similar to the analysis in *Jardines*. In *State v. Luhm*, for instance, the court thoroughly analyzed the factors from *United States v. Dunn* and held that the area outside the front door of the defendant's apartment was not within the curtilage, and, therefore, the officers did not trespass into a constitutionally protected area.[181]

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argument "conflates the threshold question whether a 'search' has occurred with the separate matter of whether the search was reasonable." *Id.* Furthermore, even despite his disdain for the *Katz* test, Justice Thomas recognizes this distinction in his dissent. *Id.* at 2243 (Thomas, J., dissenting). He says that "reasonableness determines the legality of a search, not 'whether a search . . . within the meaning of the Constitution has *occurred*.'" *Id.* (alteration in original) (quoting Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

174. *Id.* at 2215 n.2.

175. *Id.*

176. United States v. Whitaker, 820 F.3d 849, 851 (7th Cir. 2016).

177. *Id.* at 852. *See generally Katz*, 389 U.S. 347.

178. United States v. Hopkins, 824 F.3d 726, 732–33 (8th Cir.) (citing Florida v. Jardines, 569 U.S. 1 (2013)), *cert. denied*, 137 S. Ct. 522 (2016) (mem.).

179. *Id.* at 732.

180. *Id.* at 733 (citing *Jardines*, 569 U.S. at 9).

181. State v. Luhm, 880 N.W.2d 606, 617–18 (Minn. Ct. App. 2016) (citing United States v. Dunn, 480 U.S. 294, 300 (1987)). The *Dunn* factors are:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is

According to the court, "the common areas of a secured, multi-unit apartment building 'are used by postal carriers, custodians, and peddlers' such that '[t]he area outside one's door lacks anything like the privacy of the area inside.'"[182]

This dichotomy between homes and apartments sets up an Equal Protection disaster.[183] Generally, more wealthy members of society can afford single-family homes, while the less fortunate must live in apartments and multi-family dwellings.[184] If one must have a warrant to walk up to the front porch of a person's single-family home, but not an apartment, the underprivileged and indigent are receiving disparate treatment from the government.[185] This opinion is, without a doubt, giving more protection to those who can afford single family homes, who tend to be white, privileged Americans.[186]

In addition to the Equal Protection issue, this property-based approach now requires a defendant to prove that an officer intended to search before it will be considered a search.[187] Such a requirement is unduly burdensome on a defendant.[188] An officer can merely claim that he or she approached the front porch of the defendant's home to solicit for the police department's annual fundraiser, or something similar, and the action might not be considered a search. It is impossible to peer into the minds of officers to determine if they are telling the truth, which is one of the many reasons the objective view of the Fourth Amendment is preferred, and the *Jardines* property-based approach is untenable.[189]

> included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

Id. at 617 (citing *Dunn*, 480 U.S. at 301).

182. *Id.* at 618 (alteration in original) (quoting United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991)). Interestingly enough, this was also the State's argument in *Jardines*, and the Court rejected that. *Jardines*, 569 U.S. at 10–11. Why does the area outside of one's door in an apartment make it more accessible to postal workers, etc.? There is an argument that more people pass by the front of an apartment, so you have less of a reasonable expectation of privacy. However, the argument that it is less curtilage than a home and, therefore, less subject to protection raises an Equal Protection question, as stated by the *Whitaker* court. *See Whitaker*, 820 F.3d at 854. It seems patently unfair to afford more protection to a person who can afford a single-family home than to a person who lives in an apartment. *See id.*

183. *See* David C. Roth, Florida v. Jardines*: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 568 (2014).

184. *See Whitaker*, 820 F.3d at 854.

185. *See generally id.* Roth, *supra* note 183.

186. *Whitaker*, 820 F.3d at 854 (discussing that, in 2013, "67.8% of households composed solely of whites liv[ed] in one-unit detached houses").

187. *See infra* Section IV.B (discussing the decision in *Jardines*).

188. *See* Florida v. Jardines, 569 U.S. 1, 10 (2013).

189. *See* Whren v. United States, 517 U.S. 806, 813 (1996).

VI. HOW THE COURT COULD HAVE DECIDED THE CASES WITHOUT INSERTING A SUBJECTIVE INTENT REQUIREMENT

Despite the faulty reasoning in *Jardines* and the insertion of a subjective requirement, the actual result makes sense. Officers should not be allowed to randomly approach a home to see if a dog will alert to possible drug use. There is something inherently unfair in that scenario. However, the reasoning of *Jardines* is fundamentally wrong and unnecessary. The Court had several avenues it could have travelled to find that a search occurred without having to muddy the waters of the Fourth Amendment.[190] The following Part discusses those alternatives.

A. The Court Could Have Abandoned Place

First, and admittedly the most unlikely scenario, is that the Court could have simply stated that a dog sniff is a search; therefore, an officer must have a properly executed warrant, or an exception thereto, before using a dog to search. Admittedly, this scenario would have required the Court to overrule *United States v. Place*.[191] However, that case has come under criticism almost since it was decided,[192] and especially since the decision in *Kyllo v. United States*, which many scholars claim is inconsistent with *Place*.[193]

The interesting part of this scenario is that it could be argued the *Jardines* Court implicitly made this determination because it found that using the dog in this scenario was a search. Simply put, if a dog sniff is not a search, as scholars have interpreted the Court in *Place* to have held,[194] then how could walking into a constitutionally protected area with a dog constitute a search? There was no activity by the officer that actually implicated the Fourth Amendment other than entering onto the curtilage.[195] However, there is no case that says merely trespassing is enough to constitute a search; some information must be sought.[196] So, if a dog sniff is not actually considered seeking information, then how could a search have occurred at all?[197]

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190. *See infra* Section IV.B (discussing the concurring and dissenting opinions in *Jardines*).

191. *See supra* Section III.C (discussing the decision in *Place*).

192. *See* H. Paul Honsinger, Katz *and Dogs: Canine Sniff Inspections and the Fourth Amendment*, 44 LA. L. REV. 1093, 1102 (1984).

193. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001); Dery, *supra* note 7, at 468. *See generally* United States v. Place, 462 U.S. 696 (1983).

194. *See Place*, 462 U.S. at 707.

195. *See* Florida v. Jardines, 569 U.S. 1, 1 (2013).

196. *See* United States v. Jones, 565 U.S. 400, 407 (2012).

197. *See, e.g.*, *Place*, 462 U.S. at 707.

B. The Court Could Have Used the Kyllo *Analysis*

Another idea proposed by lower courts, and even by Justice Kagan in her concurring opinion in *Jardines*, is the idea of using the test first penned in *Kyllo v. United States* to decide the case.[198] That test, of course, is: "Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[199] According to Justice Kagan, drug-sniffing dogs should be treated as the "device[s] . . . not in general public use . . . ."[200] As drug-sniffing dogs are highly specialized and not something in the general public use, this theory seems reasonable.[201]

Using *Kyllo* could have also solved the inconsistency that scholars have pointed out between *Place* and *Kyllo*.[202] Professor George Dery argues that *Kyllo* is inconsistent with *Place* because *Place* assumes a dog sniff of luggage is not a Fourth Amendment search because there is no legitimate expectation of privacy in contraband.[203] Professor Dery believes it is impossible to reconcile this with *Kyllo*, which declared the right of a man to retreat into his castle and maintain privacy regardless of what was being searched for.[204]

As the *Jardines* opinion stands, it further complicates this inconsistency because if a canine sniff is so "surgically precise that it only obtain[s] information about contraband—something that should not be possessed in the first place," that appears to fall along the *Place* line of cases and should not constitute a search.[205] However, in *Kyllo*, the Court held the use of a heat-seeking device to be a search.[206] Would *Kyllo* have been different if the only information to be obtained had been whether contraband was present? That was the precise question in *Jardines*.[207] As Professor Dery points out, the Court missed its opportunity to reconcile these cases.[208] If it had used the *Kyllo* test, it could have shown that *Kyllo* was, in fact, distinguishable from

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198. *See supra* text accompanying notes 86–89 (discussing the general public use test developed in *Kyllo*).
199. Kyllo v. United States, 533 U.S. 27, 40 (2001).
200. *Jardines*, 569 U.S. at 14 (Kagan, J., concurring) (alteration in original).
201. *Id.* Justice Kagan is not alone in this theory. Many lower courts have determined this would be the best way to categorize drug-sniffing dogs in terms of the Fourth Amendment search doctrine. Of course, it is worth noting that Justice Alito, in dissent, said this theory is untenable because *Kyllo* makes sense only as contemplating new technology and its general public use. *See id.* at 25 (Alito, J., dissenting).
202. *See* Dery, *supra* note 7, at 468.
203. *Id.*
204. *Id.* at 470 (citing *Kyllo*, 533 U.S. at 40). In *Kyllo*, the thermal imaging device merely detected heat signatures rather than whether there was actual contraband in the home. *See Kyllo*, 533 U.S. at 31.
205. *See* Dery, *supra* note 7, at 470.
206. *Kyllo*, 533 U.S. at 40.
207. *See* Florida v. Jardines, 569 U.S. 1, 11–12 (2013).
208. Dery, *supra* note 7, at 468.

Place because it concerned a search of the home rather than mere luggage in *Place*.[209]

C. The Court Could Have Used Katz *and Come Out Like* Carpenter

A much easier path that the Court could have taken would have been to simply decide the case under a reasonable expectation of privacy analysis. The Court could have simply asked whether Mr. Jardines had a reasonable expectation of privacy in the porch of his home (subjective expectation) and whether society was prepared to accept that expectation as reasonable (objective expectation). Of course, the objective prong is the only true question left, according to most scholars,[210] and it is the most difficult. There is a credible argument that society would recognize a reasonable expectation of privacy on a porch, as it would against a drug-sniffing dog. As the Court has repeatedly declared, a home is a man's castle and it is reasonable to expect the utmost privacy there.[211] Furthermore, under a normative analysis, it just seems fundamentally unfair to allow officers to slink around the porches of unsuspecting would-be defendants.[212]

In the most recent Fourth Amendment search case, the Supreme Court proved that the *Katz* test was not entirely dead. In *Carpenter v. United States*, the government asked for and received historical cell phone records from a third party—the cell phone provider—without a warrant.[213] The question was whether their access was a search under the Fourth Amendment.[214] The government did not trespass on any property, so the Court could not hold as it did in *Jones*.[215] Instead, it had to face the question of whether this long term monitoring of a person's whereabouts could be considered a search under the *Katz* reasonable expectation of privacy test; the Court found that it did.[216] The Court recognized that with Justice Alito's concurring opinion in *Jones*, a majority of the Court believed that individuals have "a reasonable expectation of privacy in the whole of their physical movements."[217] Further, the Court found it important that historical cell-site records provide an even larger privacy concern than GPS monitoring because cell phone users almost

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209. *Kyllo*, 533 U.S. at 27; *see also* United States v. Place, 462 U.S. 696, 697–98 (1983).

210. Kerr, *supra* note 81, at 113.

211. *See* Silverman v. United States, 365 U.S. 505, 511 (1961).

212. Hagerman, *supra* note 107, at 223–24. On the other hand, is it really reasonable in today's world for anyone to actually expect privacy anywhere?

213. Carpenter v. United States, 138 S. Ct. 2206, 2212 (2018). Historical cell-site records show where a person's cell phone traveled by showing which cell phone tower it connected to. *Id.*

214. *Id.* It is important to note that the acquisition of this information lays "at the intersection of two lines of cases": the third-party records doctrine on one end and reasonable expectation of privacy on the other. *Id.* at 2214. This Article will only address the reasonable expectation of privacy line of cases because the third-party records doctrine is not applicable to the thesis here.

215. *See id.*; United States v. Jones, 565 U.S. 400 (2012).

216. *Carpenter*, 138 S. Ct. at 2219.

217. *Id.* at 2217 (citing *Jones*, 565 U.S. at 430 (Alito, J., concurring)).

always carry their phone with them, giving the government an even more accurate view of where the user is at all times.[218]

Using this normative view of the Fourth Amendment, it could easily have been found that one has a reasonable expectation of privacy on a porch. Though this quite possibly would have narrowed the original scope of the Fourth Amendment,[219] as Justice Thomas argues, it would not have put the objectivity of the Fourth Amendment up for debate. As it stands now, it is unclear whether an officer's subjective intent could be relevant.

VII. CONCLUSION

With the addition of *Carpenter* to the mix, it is more evident than ever that the Fourth Amendment search doctrine has become untenable and confusing. Chief Justice Roberts used the *Katz* reasonable expectation of privacy test to decide the case, but the decision was a tenuous 5–4 split.[220] Furthermore, all four dissenting Justices filed separate opinions.[221] Justice Kennedy's opinion was also joined by Justices Thomas and Alito, and its reasoning was based mostly on the third-party doctrine and the damage that the majority's holding would have on that.[222] Justice Thomas argued in his dissent that the *Katz* reasonable expectation of privacy test should be abandoned once and for all.[223] Justice Gorsuch agreed.[224]

If the abandonment of *Katz* is indeed where the Court is headed, it must be dissuaded from substituting it with the property-based approach promulgated in *Jardines*. In using this approach, the Court has not only affirmed the resurrection of the trespass doctrine from *Jones*[225] but also inserted a subjective intent requirement into the search doctrine—something that the Court has repeatedly tried to leave out of the Fourth Amendment. With the recent addition of Justice Kavanaugh to the Court, uncertainty is most assuredly the only certainty when it comes to the current Fourth Amendment search doctrine.

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218. *Id.*
219. *Id.* at 2246 (Thomas, J., dissenting).
220. *See id.* at 2219 (majority opinion).
221. *Id.* at 2223 (Kennedy, J., dissenting); *id.* at 2235 (Thomas, J., dissenting); *id.* at 2246 (Alito, J., dissenting); *id.* at 2261 (Gorsuch, J., dissenting).
222. *Id.* at 2223 (Kennedy, J., dissenting).
223. *Id.* at 2246 (Thomas, J., dissenting).
224. *Id.* at 2261 (Gorsuch, J., dissenting).
225. United States v. Jones, 565 U.S. 400 (2012).