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A Huff and a Puff is no Longer Enough: How the Supreme Court Built a House of Bricks with its Decision in Florida v. Jardines

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NOTE

A HUFF AND A PUFF IS NO LONGER ENOUGH: HOW THE SUPREME COURT BUILT *A HOUSE OF BRICKS* WITH ITS DECISION IN *FLORIDA V. JARDINES*

Charles L. W. Helm[†]

ABSTRACT

Everyone loves firefighters but what the public seldom sees is that when firefighters are in trouble they call the police, and when the police are in trouble, they call the K-9 Unit. Police have a difficult, dangerous, and thankless job; they go where others will not and deal with what others cannot. Instead of helping the police and equipping them with more tools for their constant uphill battle against crime, the Supreme Court of the United States—in Florida v. Jardines—recently took a step that could prove to cut one of their strongest legs out from under them: the detection dog.

Every person is endowed with certain rights from our Creator. Some rights are expressly protected, as delineated in the Constitution, against infringement by government agents. One such right is the right to be free from unreasonable searches and seizures; this ensures people's privacy in their persons, houses, papers, and effects. This right is intended to keep a person's private life—private. However, it was never intended to allow criminals to breathe easy in their hopes of evading detection, until now. With some jumps to conclusions and a less than accurate idea of a canine's role in law enforcement, the Court, for the first time, extended the definition of "searches" to include smelling air in the vicinity of a protected private space. In the process, the Court opened a door that could severely restrict not only the future use of detection dogs but also the extent to which police can even approach a private residence without consent or a warrant.

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This Note will give an analysis of the Supreme Court's decision in Florida v. Jardines from a viewpoint that many are overlooking. As a prior canine handler, the author will provide a unique perspective into what appears to be a misunderstanding by the Court regarding what a canine is capable of, how their unique skills allow them to find contraband without violating privacy, and exactly how to treat this very specialized type of police officer, i.e., the dog. Not only will this Note provide an in-depth look at canine history, science, and case law, it will also show how the Supreme Court ultimately deviated from the consistency of stare decisis when it characterized the situation, the canine, and the precedent concerning Jardines. Ultimately, it appears that the Court may not have considered all facts and hurried through some analysis concerning all the relevant factors that have been laid out in prior Fourth Amendment cases. This Note will walk the reader though the analytical approach that should have been taken to determine whether the officer's conduct in Jardines was lawful. By the conclusion, it will be clear that Justice Alito's dissent was the approach better suited to analyzing the law-enforcement actions taken in Jardines in light of the truth about the law and the law-man's best friend.

I. INTRODUCTION

"Little pig, little pig, let me come in. . . . Then I'll *huff*, and I'll *puff*, and I'll blow your house in."[1] The story of the "Three Little Pigs," uttered many times to a countless number of children, coincidentally paints an accurate illustration of the state of criminal procedure as it pertains to the use of detection canines at someone's front door, provided the characters change sides. That is, of course, until the Supreme Court built *the house of bricks*[2]

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1. JAMES ORCHARD HALLIWELL, *The Story of The Three Little Pigs*, *in* THE NURSERY RHYMES OF ENGLAND 33, 33 (Fredrick Warne & Co., 5th ed. 1886) (emphasis added).

2. *Id.* (emphasis added). Even though the pigs had a reasonable expectation of privacy inside their homes made of straw and sticks, the wolf—armed with articulable facts making it reasonable to believe that what it sought was inside—was able to make entry after huffing and puffing at the front door; this was not so when he came to the house made of bricks. *Id.* Prior to *Florida v. Jardines*, a trained detection canine could, in some circumstances, "huff and puff" by conducting a sniff of someone's residence that could lead to probable cause for a search warrant if the canine alerted to the presence of an illicit substance coming from the building. *See* United States v. Shuck, 713 F.3d 563, 569 (10th Cir. 2013) (an officer without a canine smelled marijuana coming from a pipe that protruded from the defendant's house; the court analogized this to a canine sniff); United States v. Hayes, 551 F.3d 138, 145 (2d Cir. 2008) (holding that a canine sniff of an area "closely surrounding [defendant's] home" was not a search and allowing in evidence recovered as a result of the canine sniff); United States

with its recent decision in *Florida v. Jardines*.[3] Expanding the understanding of a physical intrusion as used in *Katz v. United States*,[4] the Court ruled that a canine sniff at the front door of a residence—even when accompanied by articulable reasonable suspicion—is a physical intrusion, and thus, a search under the Fourth Amendment that requires a probable cause warrant.[5] Prior to this case, most jurisdictions allowed a positive canine alert on a residence to be at least part of the probable cause necessary to obtain a search warrant.[6] *Jardines* makes the already difficult and dangerous job of law enforcement officers even harder by severely limiting the usefulness of one of their most reliable tools, while doing nothing to promote the preservation of the rights of law-abiding citizens.

The Court's decision in *Jardines*, although not yet fully felt, presents a real and present danger to the future of law enforcement in the United States. The Court essentially declared a police canine sniff to be a search under the right circumstances.[7] This opens the door to extending this precedent to other areas, specifically concerning encounters such as traffic stops, where canine sniffs have historically *always* been allowed.[8] Not to mention the fact that requiring a warrant for utilizing a canine defeats the purpose of this less intrusive means of detecting only items of contraband. The Court also, in a roundabout way, declared a police "knock and talk" to be a trespassory invasion of a resident's property.[9] This has the potential to extend to all forms of police investigation, to some degree, unless they are given express consent from a resident whose property the police may need to enter. This could open police departments up to liability for trespass, or

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v. Reed, 144 F.3d 644, 650 (6th Cir. 1998) (holding that the location the canine sniff takes place does not make it any more or less intrusive; as long as the canine is lawfully present, then the sniff is valid).

3. Florida v. Jardines, 133 S. Ct. 1409 (2013).

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

5. *Jardines*, 133 S. Ct. at 1417-18;

6. *See, e.g.*, *Shuck*, 713 F.3d at 570; *Hayes*, 551 F.3d at 145; *Reed*, 144 F.3d at 650.

7. *Jardines*, 133 S. Ct. at 1417.

8. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 410 (2005).

9. *Jardines*, 133 S. Ct. at 1417. A "knock and talk" is a common term used by police when approaching the front door of a residence. *Id.* at 1423 (Alito, J., dissenting). The term usually refers to an attempt to contact the resident. Kentucky v. King, 131 S. Ct. 1849, 1862 (2011). Although the term may sound as though it only includes knocking and talking, there are many reasons that are considered lawful for which the police may want to approach someone's front door and remain for a minor amount of time. *Id.* Insomuch, there could be situations of a "knock and talk" that involve neither "knocking" nor "talking." *Id.*

more, during even the simplest of police service calls, such as a welfare check, and will undoubtedly present even more problems for calls where one party in contact with the police may not want them there, such as 911 hang-ups or domestic disturbances.

This Note will begin by delving into the story behind *Jardines*[10] and the procedural course this case took through the courts.[11] Next, this Note will take a look at the progression of the use of canines from community helpers, to secret military weapons, and finally, to certified law enforcement officers.[12]

Part II will provide the background of canines as a whole, and the background of how they were treated in the law enforcement community and by the courts. This will show the domestication of the canine and how they became man's best friend, and will get into some of the science behind how the canines can do what they do. Additionally, this Note will outline some of the prior court cases dealing with canines leading up to the *Jardines* decision. This section will be chalked with information that is important to understanding the analysis and the breakdown of why the court came down on the wrong side of this case.

Part III will, in light of a better understanding of the history, precedent, science, and facts of this case, integrate all these sections and apply a more thorough understanding of detection canines to *Jardines* to show how the Court's analysis should have looked.[13]

Part IV will provide a look at the future of canine jurisprudence in light of this new *brick house* built by the Supreme Court here in *Jardines*.[14] This Note will show that the position taken by Justice Alito in the dissent of *Jardines*[15] more accurately illustrates the proper application and assessment of detection canines as they relate to the protections of the Fourth Amendment.

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10. *See* discussion *infra* Part II.A.1.

11. *See* discussion *infra* Part II.A.2.

12. Canine officers are sworn in, receive department identification numbers and cards, and are protected by statutory penalty enhancements if someone victimizes them just like their partners. They are considered actual law enforcement officers in almost every capacity except for—now in light of *Jardines*—the plain "sight" exception. The author participated in the swearing in ceremony for his own canine partner, Melano.

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Part IV.

15. Florida v. Jardines, 133 S. Ct. 1409, 1420 (2013) (Alito, J., dissenting).

II. BACKGROUND

Throughout the background section of this Note, the reader will see a reaffirmation of the deeply rooted history and tradition that the use of canines has in many vocational areas. It will spend some time going into the science of how canines really work,[16] which is particularly important in light of more recent court opinions that analogize a canine's nose to advanced and intrusive technology.[17] The science will show that a trained canine is no more invasive than their handlers; they are just better at using some senses than people. The truth about dogs is important to understand in overcoming the standard of a "physical intrusion" as referred to in *Jardines*[18] and discussed in *Katz v. United States*.[19] This part will also show how the courts have previously treated the use of canines for law enforcement detection purposes leading up to *Jardines*.[20] This will go to show how the Court, through its reasoning in *Jardines*, deviated from long standing precedent, and how this shift has opened the door to many other rulings that could be devastating to the landscape of law enforcement.

A. *The Story of Jardines*

1. The Investigation

Joelis Jardines became the subject of a narcotics investigation after a citizen's tips and complaints drew the attention of both local and federal authorities who then began to suspect Jardines might be cultivating marijuana inside his residence.[21] Under the watchful eye of a surveillance team comprised of agents from the Drug Enforcement Administration ("DEA"), Miami-Dade Police K-9 Officer Douglas Bartelt and his K-9 partner, Franky,[22] approached Jardines's home in hopes of speaking with

16. *See* discussion *infra* Part II.C.

17. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 48 (2001); State v. Rabb, 920 So. 2d 1175, 1184 (Fla. Dist. Ct. App. 2006); Stabler v. State, 990 So. 2d 1258, 1261 (Fla. Dist. Ct. App. 2008).

18. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

19. Katz v. United States, 389 U.S. 347, 354 (1967).

20. *See* discussion *infra* Part II.D.

21. *Jardines*, 133 S. Ct. at 1413.

22. *Id.* Franky is a certified narcotics detection canine with the Miami-Dade Sheriff's Office. State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 2008) (containing details from the probable cause statement used to acquire the warrant for Jardines's home).

Jardines and attempting to obtain consent to search his residence.[23] While approaching Jardines's front door, Franky began to alert.[24] This indicated that he detected the presence of a substance that he had been trained to locate.[25] While Officer Bartelt was still approaching the home in an attempt to contact a resident, Franky gave his final response[26] at the base of the front door, indicating the location that the detected illicit odor was the strongest.[27] After no response at the front door, the officers returned to their vehicle without any further investigation at that time.[28] Officer Bartelt notified Detective Pedraja of his partner's positive alert.[29] Detective Pedraja then went to the front door in another attempt to contact a resident.[30] Once at the front door, Detective Pedraja could smell the distinct odor of live marijuana plants coming from inside the residence.[31] Detective Pedraja then used the positive alert by Franky, along with his own observations, coupled with his inferences through training and experience, to apply for a probable cause search warrant for the residence.[32] The police served the warrant on Jardines's home later that same day and apprehended Jardines as he attempted to flee.[33] Once inside the home, officers found a marijuana-growing operation with multiple plants and ultimately charged Jardines with trafficking in cannabis.[34]

2. The Progression of the Case Through the Courts

The state trial court granted a motion to suppress all the evidence discovered as a result of the warrant.[35] In granting the motion, the court agreed with Jardines and ruled that the sniff at the front door was a search;

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23. *Jardines*, 9 So. 3d at 3.

24. *Jardines*, 133 S. Ct. at 1413. An alert is a combination of a natural change in a dog's behavior coupled with an artificially trained behavior or final response, i.e., sitting or scratching. *See* STEPHEN A. MACKENZIE, POLICE OFFICER'S GUIDE TO K-9 SEARCHES 50 (2009).

25. *Jardines*, 133 S. Ct. at 1413.

26. *See supra* text accompanying note 24.

27. *Jardines*, 133 S. Ct. at 1413.

28. *Id.*

29. *Id.*

30. Jardines v. State, 73 So. 3d 34, 37 (Fla. 2011).

31. State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 2008).

32. *Id.*; *Jardines*, 133 S. Ct. at 1413.

33. *Jardines*, 133 S. Ct. at 1413.

34. *Jardines*, 9 So. 3d 1, 3-4.

35. *Id.* at 4.

thus the officers needed a warrant even before the canine sniff, and as such, they were not permitted to use the sniff to get a warrant for a more thorough search.[36] In doing so, the trial court relied primarily on *State v. Rabb*,[37] which had some analogous facts, but *Rabb* ignored other long-standing precedent that reaffirmed canine sniffs are not searches.[38]

The case proceeded to the Florida Court of Appeals, which reversed the trial court's decision.[39] In doing so, the appeals court recognized the faulty reasoning in *Rabb*,[40] which likened a canine sniff to the use of a "thermal-imaging device" in *Kyllo v. United States*.[41] The key distinction according to the court—regarding the device that was at issue in *Kyllo*, and in this case, a police canine—was that the canine "does not indiscriminately detect *legal* activity."[42] A canine sniff "reveals no information other than the location of a substance that no individual has any right to possess."[43] Nevertheless, the court in *Rabb* did not grant *carte blanche* to K-9 officers to roam through neighborhoods and sniff any home for the presence of illicit substances; instead, it determined that at least reasonable suspicion would be required for a residential canine sniff.[44]

The Florida Supreme Court took up the case and ultimately reversed the decision of the appellate court, ruling once again that a canine sniff at someone's front door, even when accompanied by reasonable suspicion, is a

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36. *Id.*

37. State v. Rabb, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006). A citizen complaint led police to a traffic stop where they uncovered books about growing marijuana. *Id.* at 1178. This led police to the defendant's home where they used a canine in an attempt to obtain a warrant. *Id.* at 1179. The court in *Rabb* relied on *Kyllo v. United States* to make its decision. *Id.* at 1182-83 (citing Kyllo v. United States, 533 U.S. 27 (2001)).

38. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 410 (2005) (concluding that a technique, which will reveal only the presence of an item that no one has a legal right to possess anyway, does not violate the Fourth Amendment); United States v. Jacobsen, 466 U.S. 109, 110 (1984) (holding that government conduct that only reveals contraband and "no other arguably 'private' fact," compromises no legitimate privacy interest); United States v. Place, 462 U.S. 696 (1983) (holding that a canine sniff is not a search under Fourth Amendment jurisprudence).

39. *Jardines*, 9 So. 3d at 4.

40. *Rabb*, 920 So. 2d at 1182-83.

41. *Kyllo*, 533 U.S. at 29.

42. *Jardines*, 9 So. 3d at 5 (emphasis added).

43. *Id.* (quoting *Caballes*, 543 U.S. at 409-10).

44. *Jardines*, 9 So. 3d at 15.

search under the Fourth Amendment.[45] Like the trial court, the Florida Supreme Court compared a canine's sniff ability to other devices that offer an *intrusive* means to determine what is going on inside an individual's home, as opposed to merely detecting that which is allowed to flow out.[46] In several places, the court quotes *Katz v. United States*[47] reiterating that when a person has a reasonable "expectation of privacy" that person should be free from unreasonable government intrusion.[48]

The Florida Supreme Court denied the State's motion for a new hearing,[49] so the case went to the Supreme Court of the United States for review, which granted certiorari.[50] The Court ultimately split in a five-to-four decision that sided with the state trial court and concluded that a warrant was required prior to the police canine sniff conducted at the front door of Jardines's home.[51] The majority followed the reasoning of the trial court in comparing a canine's ability to *intrusive* means of investigation.[52] The majority also went to great lengths to characterize the actions taken by the officers—in approaching Jardines's house—as trespassing, despite the fact they spent no more time at the door than a reasonable person would have spent in an attempt to contact the resident.[53] In a concurring opinion, Justice Kagan displays the Court's misunderstanding of the canine's scent ability when she presents an allegory of a man standing on the front porch and using binoculars to peer into someone's house.[54] Justice Kagan concludes that a canine sniff is intruding into the privacy of someone's home, despite two very important facts: 1) a canine can only detect something no one should lawfully have; and, 2) it can only detect the

45. Jardines v. State, 73 So. 3d 34, 55-56 (Fla. 2011).

46. *Id.* at 43. More specifically, like the trial court, the Florida Supreme Court also compared a canine sniff of the exterior of a residence to the thermal-imaging device at issue in *Kyllo*, which, as opposed to a canine sniff, is indiscriminate as to what can be discovered when utilized. *See id.* (citing Katz v. United States, 389 U.S. 347 (1967) (determining a reasonable expectation of privacy based on what is recognized as such by society)).

47. *Katz*, 389 U.S. at 347.

48. *Id.* at 351 (Harlan, J., concurring).

49. Jardines v. State, 2011 Fla. LEXIS 1564 (Fla. July 7, 2011).

50. Florida v. Jardines, 132 S. Ct. 995 (2012).

51. Florida v. Jardines, 133 S. Ct. 1409, 1417-18 (2013).

52. *See id.* at 1417; *see also* Kyllo v. United States, 533 U.S. 27 (2001).

53. *See Jardines*, 133 S. Ct. at 1413, 1415-16.

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

contraband if someone allows the odor to actually emanate from their home.[55]

Justice Alito presents the Court's voice of reason in this case when he recognizes and applies the two plain rules at work here. First, the law universally recognizes a public "license to use a walkway to approach the front door of a house and remain there for a brief time."[56] Second, there is no reasonable expectation of privacy for "odors emanating from a house" because it is reasonable that they could be detected from locations that are "open to the public."[57] Justice Alito then uses these rules to discredit the comparison of the present case to *Kyllo*.[58] He states that the rules pertaining to the physical intrusion of constitutionally protected areas do not apply to a canine that alerts to a building while the canine and handler are lawfully present.[59] Justice Alito could find no grounds or reason by which to "hamper[] legitimate law enforcement" the way the majority has now done with its decision.[60]

B. From Best Friend to Partner

Dogs are reliable, always ready, eager-to-please, and selfless; it is no surprise that dogs have been employed to accomplish a wide variety of tasks and have assisted professionals in many different vocations. Dogs do not need vacation time, sick time, or overtime; they do not complain, and they will do the difficult or dangerous jobs without a thought. Dogs also have

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55. *Id.* at 1418-19. *Compare* Illinois v. Caballes, 543 U.S. 405 (2005) (distinguishing a canine's scent ability from other devices on the grounds that it will only reveal the presence of a substance that no one has the right to possess anyway), *with* Kyllo v. United States, 533 U.S. 27 (2001) (declaring a device that can *indiscriminately* intrude into a person's private home violates the person's reasonable expectation of privacy).

56. *Jardines*, 133 S. Ct. at 1420, 1422 (Alito, J., dissenting); *see* Kentucky v. King, 131 S. Ct. 1849, 1854 (2011) (police are not conducting a search by walking up to a front door in an attempt to contact a resident); Breard v. Alexandria, 341 U.S. 622, 626 (1951) (recognizing the grant of a customary license to proceed from the road to the front door of a residence along a walkway), *abrogated in part by* Vill. of Schaumburg v. Citizens for a Better Env't, 100 S. Ct. 826 (1980).

57. *Jardines*, 133 S. Ct. at 1421; *see* United States v. Shuck, 713 F.3d 563, 568 (10th Cir. 2013) (holding that the smell of marijuana emanating from the house through a pipe was not a search); United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974) (holding that there is no "reasonable expectation of privacy from drug agents with inquisitive nostrils.").

58. *Jardines*, 133 S. Ct. at 1426.

59. *Id.*

60. *Id.*

abilities beyond those of the people that enable them—with the help of their counterparts—to perform work that would be impossible, or at the very least, much more costly and time-consuming for a person to do on their own.

1. History of Canine Use

In very early civilization, people were primarily hunters and gatherers; this often put them in direct competition with early descendants of modern day domesticated dogs.[61] After recognizing the advanced abilities possessed by dogs, often by seeing the dog do things more efficiently, people began to team up with them in an effort to ensure mutual survival.[62] Artifacts from the earliest days of humanity have uncovered images and other evidence of dog burial sights; "the burial of dogs directly reflects the [early] domestic relationship" between man and dogs.[63] As people began to perform more specialized tasks, so did their canine counterparts; people began using dogs for more complex tasks like herding sheep and cows, and protecting people and property.[64] With the increase in the use of dogs came the increased skill in training techniques as well; people began to understand how dogs communicated, and after time, they were able to use dogs for just about anything.[65]

A dog's specialized skill set, capable of being refined through training, soon had the military very interested in what dogs could do for them.[66] Ancient Egyptian murals depict dogs being unleashed on their enemies, and Greek records show the extensive involvement of dogs in their victory over Persia during the Battle of Marathon in 490 BC, which was often considered a turning point in the Greco-Persian Wars.[67] Throughout history, well-known warriors such as Attila the Hun, William the Conqueror, Frederick the Great, and the Spanish Conquistadors have used dogs to win their

61. DARCY F. MOREY, DOGS: DOMESTICATION AND THE DEVELOPMENT OF A SOCIAL BOND 69 (2010).

62. *Id.*

63. *Id.* at 54.

64. *See generally id.* at 86-111.

65. *See generally id.*

66. *See id.* at 227.

67. MICHAEL RITLAND WITH GARY BROZEK, TRIDENT K9 WARRIORS 141 (2013) [hereinafter K-9 WARRIORS]; *The Battle of Marathon, 490 BC*, EYE WITNESS TO HISTORY, http://www.eyewitnesstohistory.com/marathon.htm (last visited Oct. 25, 2013).

battlefield victories.[68] In his memoirs, Napoleon Bonaparte even recounts the emotional toll it took on him to see the canine casualties involved in his battles: "I walked over the battlefield and among the slain, a poodle killed bestowing a last lick upon his dead friend's face. Never had anything on any battlefield caused me a like emotion."[69]

In America, the use of dogs in war became prevalent during late World War I.[70] Although America never implemented its own program to train and use war dogs, after seeing just some of the many tasks that other countries would delegate to these furry fighters, America recruited some dogs that were already trained by the French and British.[71] During World War II, the benefits of canines were immediately apparent in the form of a moral boost for the troops from the companionship offered by the dogs.[72] As military K-9 training advanced, the dogs became much more useful working on search and rescue missions and as early alerts for otherwise stealthy enemies.[73] Seeing all the advantages gained from a canine program, the military began using canines for a full array of purposes such as hauling, rescue, protection, detection, scouting, and even delivering messages.[74]

2. From Battlefields to City Streets

The first documented police K-9 unit was in St. Malo, France, where the police used dogs to guard dock installations.[75] However, the true beginning of the modern K-9 unit was not until 1888 when the London Metropolitan Police Force utilized two bloodhounds in an attempt to track and capture the infamous Jack the Ripper.[76] Although Jack was never apprehended, the use of dogs in police work really caught on. In 1899 the first formal canine

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68. K-9 WARRIORS, *supra* note 67, at 141.

69. *Id.*

70. MOREY, *supra* note 61, at 228.

71. *Id.*

72. *Id.*

73. *Id.* In one instance "a Doberman pinscher [even], alerted his handler . . . a full thirty minutes before a Japanese attack[,]" allowing the Marines to decimate the lurking ambush. *Id.*

74. *Id.* at 226-28.

75. *Police Dog History*, K9 HANDLER.COM, http://k9handler.com/police-dog-history/police dog history (last visited Oct. 19, 2013).

76. *Id.*

training facilities were established in Belgium.[77] Once the abilities of a canine were refined through police specific training, people became aware of, and were surprised at, just how useful dogs could be in this career field; their utilization spread like wildfire.[78] In the United States, although some departments toyed with the idea of police K-9 units in the early 1900's,[79] the concept became prevalent during the mid-1960's when they were primarily used for riot control, earning them a reputation as "attack dogs."[80] Although the "attack dog" perception may still be alive in some circles, the truth is that much more sophisticated work makes up the bulk of a canine's responsibilities in modern day police work.[81] Aside from detecting illegal narcotics, canines are routinely used by police to find missing persons, sweep for explosives, find remains of murder victims, locate discarded pieces of evidence, or even assist fire investigators in determining if an accelerant might have been used.[82] With the more specialized tasks and increased expectations on police dogs, the level and intensity of training has grown commensurately.

3. Police Canine Certification and Training

There are numerous types of certifications available for police canines depending upon the type of fieldwork in which they will participate.[83] For

77. Travis Matthews, *Learn About Police History*, THE LONG ARM OF THE LAW, http://law-enforcement.info4uabout.com /2009/07/learn-about-police-dog-history.html (last visited Oct. 26, 2013).

78. *Id.*

79. Memorandum from Officer Daniel Smith, Fraudulent Use of Canines in Police Work (unpublished police training material, Lincoln Park Police Department) (on file with Eastern Michigan University), *available at* http://www.emich.edu/cerns/downloads /papers/PoliceStaff/Patrol,%20Operations,%20Tactics/Fraudulent%20Use%20of%20Canines %20in%20Police%20Work.pdf. The first K-9 program was in 1907 in South Orange, New Jersey and New York City. *Id.* The programs disbanded in 1911. *Id.* Detroit Police Department also put together a K-9 unit beginning in 1917. *Id.* All of these early K-9 units were disbanded shortly after they began due to a lack of proper training. *Id.*

80. *Police Dog History*, *supra* note 75.

81. *Id.*

82. *Id.*

83. NORTH AMERICAN POLICE WORKING DOG ASSOCIATION, BYLAWS AND CERTIFICATION RULES (June 2, 2013) [hereinafter *NAPWDA certification*], *available at* http://www.napwda.com/uploads/bylaws-cert-rules-november-16-2013.pdf; UNITED STATES POLICE CANINE ASSOCIATION, CERTIFICATION RULES AND REGULATIONS 2013-2014 [hereinafter *USPCA certification*], *available at* http://www.uspcak9.com/certification/ USPCARulebook2014.pdf.

the purposes of this Note, the discussion of police canine training will be restricted to what is applicable to narcotics detection, which is the focus of *Jardines*.

The general principles of dog training do not change just because you want a dog to perform specialized work, as in the case of law enforcement; however, every dog is different and will respond differently to different training techniques.[84] You can train a dog to do almost anything consistently if you have "patience and timing."[85] Dog training starts with the selection process; you first need a dog that is "reinforceable,"[86] and has preferred drives.[87] Once a proper dog is selected, they are taught to play fetch—this should be very easy if the dog selected has the preferred drives.[88] Next, the smell to be detected is incorporated into the game of fetch by saturating the toy with the odor or attaching some of the substance to the toy—taking care to ensure the dog will not be able to eat the substance.[89] Once the dog has had an opportunity to become accustomed to the desired scent, the trainers begin to incorporate a desired response by allowing the dog to smell and see the item; they then make the dog respond in the

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84. *See* DEBORAH PALMAN, TIMING IS EVERYTHING [hereinafter TIMING IS EVERYTHING], *available at* http://www.uspcak9.com/ training/timingiseverything.pdf (USPCA Canine Training Articles) (last visited Oct. 26, 2013). "The basic principles of training dogs are very simple. If you reward or positively reinforce the behaviors you want the dog to display, the frequency of these behaviors will increase. If you don't reinforce or discourage the behaviors you don't want, the frequency of these behaviors will decrease." *Id.*

85. Cpl. Terry Dixon, Training Officer, Hillsborough County Sheriff's Office K-9 Unit, Remarks during K-9 training certification class, held at Vandenberg Airport in Seffner, Florida (Feb. 2008).

86. TIMING IS EVERYTHING, *supra* note 84; *see* Deborah Palman, *Obtaining and Selecting Dogs for Police Work*, UNITED STATES POLICE CANINE ASSOCIATION, http://www.uspcak9.com/training/canineselection.html (last visited Oct. 26, 2013) [hereinafter *Dogs for Police Work*].

87. *See* WILLIAM S. HELTON, CANINE ERGONOMICS: THE SCIENCE OF WORKING DOGS 217-18 (2009). "Drive" refers to the emphasis a dog will generally place on performing a task. *Id.* Dogs with higher drives for certain activities are much more conducive to many types of training since their drives make them prone to stay focused on a task. *Id.*

88. *See id.*; *Dogs for Police Work*, *supra* note 86.

89. *See* TIMING IS EVERYTHING, *supra* note 84. At this point it would also be prudent to incorporate a command for "search" into the game of fetch so that the dog will begin to be conditioned to look for the desired smell when given the specific command. *See id.* A good way to incorporate the smell is to use rolled up towels stored with the substance because these really absorb the smell. *See* Dixon, *supra* note 85. Also, some of the substance could be placed inside PVC pipes with small holes drilled in it so the dog can easily smell inside but cannot get to the substance. *Id.*

desired manner before rewarding the dog with the toy.[90] Over time, handlers should phase-out of letting the dog see the item, instead opting for them to only use their sense of smell; the handler would also want to phase-out of using anything other than the actual substance you desire the dog to detect, i.e., no towel, PVC, or other toys.[91] Now that was an incredible oversimplification of the detection canine training process. There are volumes written on the topic, which are all beyond the subject of this Note. However, once the dog can detect an odor efficiently, the real training has begun.

To be useful, both in reality and in court, a detection canine needs continual training as frequently as possible.[92] Not only can a dog lose a scent over time if it is not reinforced, but also without proper and consistent documentation of training, a dog's positive alerts may not be able to hold up to the scrutiny placed on them by the courts.[93] One of the best ways to document training while showing the dog's and handler's accuracy, hard work, and effort is through national detection certifications.[94] Depending on the certifying body, the handler and canine will be put through a battery of tests that will determine if the canine can accurately detect narcotics in a variety of real world situations.[95] Most national certificates require at least an annual recertification to remain active.[96]

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90. *See* Dixon, *supra* note 85.

91. *Id.*

92. Florida v. Harris, 133 S. Ct. 1050, 1058 (2013). To show a canine is accurate, there must be enough evidence found in training records to allow a person of common sense to believe the dog is likely to be accurate in the detection of narcotics. *Id.*

93. *Id.*

94. *USPCA certification*, *supra* note 83; *NAPWDA certification*, *supra* note 83. Many states do not require certification, only proper and adequate canine training documentation; however, a national certification will more clearly solidify what the training documentation already indicates, i.e., the reliability of the canine. *See, e.g.*, *Harris*, 133 S. Ct. at 1055.

95. *See, e.g.*, UNITED STATES POLICE CANINE ASSOCIATION, CERTIFICATION PACKAGE: DETECTOR DOGS [hereinafter *Detector Dogs*], *available at* http://www.uspcak9.com/certification/detector_certification_noEOD.2014.pdf (last visited Oct. 19, 2014). Situations in which canines will be tested include the following: an outside open area, inside several different rooms, around vehicle exteriors, and inside vehicle; also all tests incorporate blank areas to ensure the canine is as accurate in not alerting as they are in alerting. *Id.*

96. *See, e.g.*, *Detector Dogs*, *supra* note 95; *NAPWDA certification*, *supra* note 83.

C. *The Science of Sniff*

So far, this Note has described what a dog can do. Next, we will take a look at how a dog can do this. Dogs do not reason like people; they merely respond to a stimulus in a manner that yields a positive result. As the saying goes, there are no bad dogs, only bad owners; this is never truer than when it is applied to detection canines. Most mistakes the dog makes will be the fault of the handler, not the dog.[97] Since the handler is thinking about the task and not simply acting on instinct, they may inadvertently cue the dog through an unintended stimulus.[98] People's propensity to *anthropomorphize* the dog's actions is the reason some of the biggest misconceptions are made by: handlers working their dogs, spectators watching the handlers, or even judges interpreting the actions of the handler.[99] A dog is not a person, and as such, to perform a thorough analysis of canine detection, someone should really have a thorough understanding of detection from a dog's-eye view.

1. Canine's Olfactory Abilities

The olfactory system is made up of the nose, the chambers inside the nose, receptor cells, nerves, and the olfactory lobes of the brain.[100] It is through this system that odor comes into the body, is processed by the brain, and then stored in the memory as being from a particular source and associated with a particular response—either positive or negative. This process allows the dog to later recall what person, animal, or item goes along with that particular odor.[101] This process conditions the dog to pay extra attention to odors that lead to positive sources and ignore or avoid odors that lead to a negative source.[102]

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97. Dixon, *supra* note 85.

98. *Id.*

99. Joe Clingan, *K-9 training — what, when & why?*, UNITED STATES POLICE CANINE ASSOCIATION, http://www.uspcak9.com /training/k9traininwhatwhenwhy.html (last visited Oct. 26, 2013) ("attributing human characteristics to animals."). It is only natural for people to anthropomorphize when dealing with canines; however, the less this is done, the more someone can focus on the real animal behavior which is what will help develop the true communication and understanding between a handler and their partner. *Id.*

100. *See* ALEXANDRA HOROWITZ, INSIDE OF A DOG 68-70 (2009); *see also* OFFICER STEVE WHITE & DETECTIVE TIM TIEKEN, SCENT — K9'S REASON FOR BEING [hereinafter *SCENT*], *available at* http://www.uspcak9.com/training/scent.pdf (USPCA Canine Training Articles) (last visited Oct. 26, 2013).

101. *Id.*

102. *Id.*

The workings of the dog's olfactory system, described above, are not entirely different from the human system. Where dogs differ from people is in the amount of sensors, receptors, nerves, and lobes dedicated to the activity of smell. "Almost 12% of the dog's brain and 50% of the nasal chambers are devoted to olfaction."[103] This is more than forty times larger than that of a person.[104] "It's been estimated that dogs can identify smells somewhere between 1,000 to 10,000 times better than nasally challenged [people] can."[105] In addition, the average person has about 5 million receptor cells working for their olfactory system; whereas the average German Shepard—one of the most commonly used dogs in police work—has approximately 220 million receptors.[106] It is also important to remember that with training and refinement, the canine's ability becomes more polished, allowing a trained police canine to reach the upper limits of olfactory senses.[107] In addition to the makeup of the olfactory system, canines actually breathe differently than people. People breathe in and out the exact same way which actually forces scent away from their nose that might otherwise have been smelled on the next inhale.[108] When dogs exhale, they do so through the slits in the side of their noses; this actually swirls the air around their nose and strengthens the odor on the next inhale, allowing a dog to practically smell continuously.[109]

2. Effects of Externalities on a Canine's Abilities

With an abundance of people weighing in on the latest technique of how to hide scents from detection dogs, this might be one of the most

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103. *SCENT*, *supra* note 100.

104. *See* HOROWITZ, *supra* note 100; *see also Understanding a Dog's Sense of Smell*, FOR DUMMIES, http://www.dummies.com/how-to/content/understanding-a-dogs-sense-of-smell.html (last visited Oct. 26, 2013) [hereinafter *Dogs for Dummies*]. On a person, "the area containing these odor analyzers is about one square inch . . . . If you could unfold this area in a dog . . . it may be as large as 60 square inches . . . ." *Id.*

105. *Dogs for Dummies*, *supra* note 104.

106. *See* HOROWITZ, *supra* note 100; *see also SCENT*, *supra* note 100. Mathematically this would indicate a dog is forty-four times better at smelling than people; however, when you factor in a larger portion of their brain being dedicated to this sense, this simple equation increases exponentially. *SCENT*, *supra* note 100.

107. *SCENT*, *supra* note 100.

108. *See* HOROWITZ, *supra* note 100, at 70. The dog's inhaling method is "markedly different from human sniffing without clumsy 'in through one nostril hole, out through the same hole' method." *Id.*

109. *Id.*

misunderstood areas of a canine's scent ability. From wrapping the items in coffee beans, to distracting the dog with other animal smells, people have tried everything to throw detection canines off the trail, all to no avail on a properly trained and maintained detection dog.[110]

a. Distractors won't hide the smell

Dogs can smell similar to how people see and vice versa.[111] Walk into a pizza restaurant and you will smell the distinct smell of pizza. You will not be able to tell what kind of pizza is being cooked, but when you mix bread, tomato sauce, cheese, and whatever other toppings you may like, there is a distinct smell that people recognize as pizza.[112] When a person looks at the pizza, they can tell immediately if their desired topping is missing. They can see the cheese, the pepperoni, the mushrooms, and the anchovies. When a dog walks into a pizza restaurant, they will be asked to leave because it is most likely a health code violation; although, if they could stay, they would not smell pizza. Instead, a dog would individually and distinctly smell bread, tomato sauce, cheese, pepperoni, mushrooms, anchovies, other items the cook may have touched before handling the pizza, and just about anything else present in the restaurant.[113] To put this in the context of distractors, when people try to hide the smell of narcotics with something else, like coffee for example, the dog just smells the coffee and the narcotics. The narcotics will still elicit the alert.

b. Packaging won't conceal the smell

Dogs detect odors in parts per trillion.[114] This is the equivalent of being able to taste a teaspoon of sugar in a million gallons of water, or roughly two Olympic-sized swimming pools.[115] This super sensitivity creates two major problems for someone attempting to use clever packaging to thwart a detector dog. First, it will be nearly impossible to handle the item without

110. Officer Jose Bosque, Training Officer, Lakeland Police Department (LPD) K-9 Unit, Remarks during ongoing K-9 training certification classes held at LPD training compound, Lakeland, Florida (2009-11).

111. *See id.*

112. See *id.*

113. *See id.*

114. *See* HELTON, *supra* note 87, at 84.

115. HOROWITZ, *supra* note 100, at 72.

transferring even a little of the sent by touch.[116] Second, assuming arguendo that the substance could be carefully packaged with no transferred scent, to some extent and under the right conditions, even an airtight container that someone may use to store such an item is permeable to some degree given enough time.[117] Contrary to popular belief,[118] a detection dog does not smell *through* anything, they can only smell what comes out.[119] Over time, scent will emanate out and up from its place of origin.[120] Since the dog's sense of smell is so sensitive, only a miniscule amount of the scent needs to permeate the container.[121] If the dog finds even a trace amount of a desired scent in the air, then the dog can trace the scent back to its origin by sniffing for the place from where the scent emanates the strongest. This amount will often leak out of a container through a lid or a seal; however, assuming the container is completely airtight, then over enough time and under the right conditions, a little bit of the scent will still seep through almost anything.[122] Since a little bit is all a dog needs to detect and identify a specific scent, it is incredibly difficult to prevent a dog from smelling what is inside most packages.

c. Handler error is the dog's biggest weakness

One of the biggest concerns often heard from the opponents of law enforcement canines is not about the dog itself; instead, it is the handler

116. *See, e.g.*, Florida v. Harris, 133 S. Ct. 1050, 1054 (2013) (police canine alerted to driver's door handle and door seemed to indicate the scent was transferred by touch, from the driver to the exterior of the vehicle).

117. *See* Barry Cooper, *Never Get Busted: Tips to Fool Drug Dogs*, CANNABIS CULTURE (Jan. 16, 2013) http://www.cannabisculture. com/content/2013/01/16/NeverGetBusted-Tips-Fool-Drug-Dogs. Barry Cooper is an ex-police canine handler and narcotics interdiction specialist from eastern Texas. He has received national attention for his outspoken commentary against the war on drugs and has been reported in over 700 newspapers and magazines.

118. Florida v. Jardines, 133 S. Ct. 1409, 1417-18 (2013) (holding that the use of a canine constituted a physical intrusion of the home because it explored details that would have been unknown without such an intrusion).

119. *See* Cooper, *supra* note 117.

120. *Id.*

121. *See* HOROWITZ, *supra* note 100, at 72 (analogizing, through simile, that a teaspoon of sugar in a million gallons of water is all that is needed for a canine to detect an odor in the air).

122. Cooper, *supra* note 117.

they oppose and their presumed propensity to elicit a false alert.[123] Although this abhorred practice undoubtedly happens, it would be absurd to argue against an effective policing tool because it has the potential to be abused by some unscrupulous officer. If such were the case, police would be required to be unarmed on foot patrol with bubble wrap around the pointy parts of their hats and badges. The reality is that if handler error affects a detection dog's performance, more often than not, it causes the dog to miss the scent, not falsely alert to one not there.[124]

To understand how this could be, look no further than Pavlov's famous dog.[125] There are some things that dogs do that they do not have to be taught; for Pavlov, it was salivating.[126] Here, it is commonly referred to as "chasing the rabbit," which happens when the dog's drives are engaged.[127] In detection work, people use dogs' instincts and associate them with the things they want the dogs to find. When a dog associates something (the smell of narcotics) as its stimulus that will ultimately yield a positive result, then its instincts will kick in and cause the dog to provide whatever response to that stimulus is necessary to achieve the desired positive result (usually toy play).[128] For example, in the wild, if a dog smelled a predator

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123. *See, e.g.*, Jacob Sullum, *How Even a 'Well-Trained Narcotics Detection Dog' Can Be Wrong 84 Percent of The Time*, REASON.COM (Fed. 27, 2013), http://reason.com/blog/2013/02/27/how-even-a-well-trained-narcotics-detect; Daniel Tencer, *'False Positives' Suggest Police Exploit Canines to Justify Searches*, THE RAW STORY (Jan. 6, 2011), http://www.rawstory.com/rs/ 2011/01/06/false-positives-police-canines-searches/.

124. *See* Cooper, *supra* note 117.

125. Saul McLeod, *Pavlov's Dogs*, SIMPLY PSYCHOLOGY, http://www.simplypsychology.org/pavlov.html, (last visited Nov. 2, 2013). Saul McLeod is a psychology lecturer at Wigan and Leigh College in Manchester, England. He is the founder of *Simplypsychology.com* and has been publishing scholarly psychology articles, student resources, and psychology videos since 2007. Saul McLeod, *Saul McLeod Bio*, SIMPLY PSYCHOLOGY, *http://www.simplypsychology.org/saul-mcleod.html*, (last visited Oct. 18, 2014).

126. *Id.* Ivan Pavlov noticed that in response to being fed, dogs would salivate; this is called an unconditioned response. *Id.*

127. *See* HELTON, *supra* note 87, at 217-18 (high drives in dogs—both prey drives and hunt drives—are essential to cause them to react upon smelling the desired scent—this will be the unconditioned response to help reinforce a conditioned response, i.e., alert). A dog "chasing the rabbit" is a dog that is highly motivated to locate and go after a desired sight or scent as though they just saw or smelled a rabbit and are trying to catch it. Dixon, *supra* note 85. This stems from the dog's natural desire to hunt its prey, i.e., its prey drive. *Id.*

128. McLeod, *supra* note 125. This point in the Note provides a simplistic explanation of only the first half of detection dog training as utilizing Pavlov's theories. Once the desired stimulus has been conditioned in the dog, then a desired response must be conditioned in

(stimulus) it would run to avoid danger (response to achieve positive result) by instinct; it would not have to be told to run (obedience). In short, once a dog learns the smell of narcotics, it will react as though by instinct and not merely by obedience, to achieve a desired positive result, usually a toy from the handler.[129]

This is important to understand for two reasons. First, a dog will be less driven to alert if it is merely responding to an unscrupulous officer provoking a false alert by a command, since by command the dog is performing out of obedience instead of instinct.[130] Second, assuming there are no shenanigans on the handler's part, at best, a handler will cause the dog to overlook the smell by not properly indicating to the dog the specific area the handler wants the dog to sniff.[131] All things being equal, if the dog smells the scent in spite of the handler's mistake, then instinct will kick in and the dog will do what is necessary to get the positive result (present the conditioned response, i.e., alert) as a result of the conditioned stimulus (narcotics).[132] If the dog's nose is unable to overcome the handler's faulty presentation of the search area, then the dog will simply not smell the substance and thus will not alert.

One additional area of concern when dealing with the handler factor in canine scent detection is the actual training conditions. To state the obvious, dogs cannot talk; however, this does not make their communication any less effective. To a dog, everything is communication. People often communicate with dogs without ever realizing it; people can let dogs know if they are happy or mad with nothing more than a look. This is a great thing and can be very advantageous, especially in a vocation like police work where you may want a partner that can pick up on many nonverbal cues. Nevertheless, this can pose a problem in detection work if the dog becomes confused as to an unintended conditioned stimulus.[133] When handlers develop or carry over mannerisms that their canine partner picks up on, it is easy for the dog to begin to be conditioned to the slight,

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the dog, which will become the alert. *See id.*; *see also* HELTON, *supra* note 87; Dixon, *supra* note 85.

129. *See* McLeod, *supra* note 125; *see also* Dixon, *supra* note 85.

130. *See* HELTON, *supra* note 87, at 217-18. When a dog is acting out of instinct as opposed to obedience, it is their pure drives that are spurring their actions. *Id.*

131. *See* Cooper, *supra* note 117.

132. *See* McLeod, *supra* note 125.

133. *See id.*; *see also* TIMING IS EVERYTHING, *supra* note 84.

seemingly insignificant, action of the handler instead of the narcotics.[134] For example, many handlers get excited when they think their canine partner has found something; they will often completely change their behavior.[135] Some handlers change the pitch in their voice, stop moving when they had been moving before, or start moving when they had previously been still, some handlers will even change from their "search" command, to simply saying "what ya got" or "get it out."[136] While there is nothing inherently wrong with encouraging your partner and getting excited when you can tell they are close, any change in behavior from the handler, when coupled with the actual conditioned stimulus and positive reinforcement, will become part of the conditioned stimulus.[137] In short, the dog will need to smell narcotics *and* see their handler stop, or move, or change pitch, or encourage, etc., before recognizing the complete conditioned stimulus.[138] Over time, if this is allowed to continue, the canine will begin to present the conditioned response (alert) based solely on the handler's changed behavior.[139] This is a strong reason for handlers to perform regular double blind tests and trainings with their canine. This way neither the dog nor the handler knows where the hide is located and the handler can't inadvertently become part of the stimulus.

D. Previous Canine Sniff Jurisprudence

With as much as police canines have been used in law enforcement it should come as no surprise that the legalities surrounding their utilization has made its way to the Supreme Court of the United States more than once.[140] It was not until the decision in *Jardines*, however, that the Court placed severe restrictions on the use of canines in narcotics detection.[141] These restrictions are such that a door has been opened, which could threaten the effectiveness of law enforcement canine programs nationwide. There are two major things that come from the decision in *Jardines*. First,

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134. *See, e.g.*, TIMING IS EVERYTHING, *supra* note 84.

135. *See* Bosque, *supra* note 110.

136. *Id.*

137. *See generally* TIMING IS EVERYTHING, *supra* note 84.

138. *See id.*

139. *See id.*

140. *See, e.g.*, Florida v. Harris, 133 S. Ct. 1050 (2013); Illinois v. Caballes, 543 U.S. 405 (2005); United States v. Place, 462 U.S. 696 (1983).

141. Florida v. Jardines, 133 S. Ct. 1409, 1424 (2013) (Alito, J., dissenting).

the court has officially labeled a canine sniff a search,[142] at least in this situation, which had not been the case before now.[143] Second, regardless of whether the officer's actions were subjectively a pretext, the Court called the simple "knock and talk" actions of Officer Bartelt a trespassory invasion of Jardines's home even though objectively he did nothing more than any ordinary salesman or religious proselytizer could have done with impunity.[144] Case precedent shows that in *Jardines*, the Court deviated from *stare decisis*, and because of this, *Jardines* threatens this important law enforcement tool and gives the bad guys the advantage of a *house of brick*[145] so to speak.

1. Canine Sniff is Not a Search

Up until *Jardines*, the Court had been consistent on the fact that a canine sniff—being unintrusive and limited in scope to only items no one should possess—is not a search and thus does not implicate Fourth Amendment protections.[146] A canine sniff only required some reasonable suspicion for the investigatory stop, coupled with a lawful reason for the law enforcement officer's presence.[147]

a. *United States v. Place*

United States v. Place is a well known case in the area of canine sniff jurisprudence.[148] *Place* stands for the proposition that a sniff test by a well-trained narcotics detection dog does "not constitute a 'search' within the meaning of the Fourth Amendment."[149]

Place was a customer at Miami International Airport, waiting in line to buy tickets to New York.[150] Place was acting in a manner that aroused the suspicion of airport police.[151] Police made contact with Place, and once police learned his information did not match that which was on his bags the

142. *Id.*

143. *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

144. *Jardines*, 133 S. Ct. at 1412.

145. *See* HALLIWELL, supra note 1.

146. *See* discussion *infra* Part II.D.1.a.; *see also* discussion *infra* Part II.D.1.b.

147. *Place*, 462 U.S. at 707.

148. *Id.* at 696.

149. *Id.* at 707.

150. *Id.* at 698.

151. *Id.*

police contacted narcotics agents for further investigation.[152] Place was allowed to continue to travel to New York but was again stopped by law enforcement on his arrival.[153] This time, Place was less than cooperative and refused a search of his baggage.[154] The police held on to Place's baggage and took it to a location where it could be "sniffed" by a narcotic detection canine.[155] After the bag had been in police custody for ninety minutes, the canine finally arrived on scene, conducted a sniff of Place's bags and gave a positive alert on one of them.[156] Ultimately, police arrested Place after illegal narcotics were found.[157]

The state applied a reasonable suspicion standard, as laid out in *Terry v. Ohio*,[158] for their justification for seizing Place's bags and subjecting them to a canine sniff; this was an attempt to extend *Terry's* standard for suspicious people to suspicious property as well.[159] Although Place was initially convicted and the searches were deemed valid, the case ultimately made its way to the Supreme Court of the United States, where it was overturned, but not because the canine sniff was unlawful.[160] The search was deemed invalid only due to the unreasonable amount of time that Place was detained and the fact that police seized his bags without probable cause.[161] The Court said that the canine sniff was completely reasonable and the sniff

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152. *Id.*

153. *Id.*

154. *Id.* at 699.

155. *Id.*

156. *Id.*

157. *Id.*

158. Terry v. Ohio, 392 U.S. 1 (1968). This case is the origin of what is now commonly referred to as a "Terry stop." *Id.* When a police officer observes conduct that creates reasonable articulable suspicion, which in light of their training and experience, causes them to believe that a crime is being, has been, or will be committed, they are justified in conducting a brief investigatory stop on such a suspicious person. *Id.* at 30. During such an investigatory stop, "for the protection of himself and others in the area" the officer is justified in conducting a "carefully limited search of the outer clothing . . . to discover weapons which might be used to assault him[,]" i.e., a Terry frisk. *Id.* Anything found during a Terry frisk is admissible as evidence against the suspicious person because the Court ruled that, even in light of the Fourth Amendment, this type of detention and pat down was reasonable. *Id.* at 31.

159. *Place*, 462 U.S. at 700.

160. *Id.* at 709.

161. *Id.* at 708-10. *Terry*-type investigative stops must be brief and as minimally intrusive as reasonably possible since they are justified merely on reasonable suspicion and have not yet reached the standard of probable cause. *Id.* at 702.

was not an invasion of Place's privacy interest.[162] The Court said that "[a] 'canine sniff' by a well-trained narcotics detection dog," does not invade a person's privacy interest.[163] The canine sniff "discloses only the presence or absence of narcotics, a contraband item[;]" therefore, the information gathered by authorities in this manner is very limited.[164] The sniff does not expose noncontraband items and is much less intrusive than a traditional search.[165] The Court ultimately held, as it relates to canine utilization, that exposure to a trained canine in a place that the officer is legally allowed to be, is not a violation of the Fourth Amendment, even if a defendant may have a reasonable expectation of privacy in a particular item, because a sniff is *not* a search.[166]

b. *Illinois v. Caballes*

Illinois v. Caballes had a similar outcome as *United States v. Place*, only it stems from a different situation.[167] *Caballes* stands for the proposition that a sniff by a properly trained narcotics detection canine conducted on a lawfully detained vehicle, which does nothing to extend the length of time of the lawful detention, is not a search because it reveals nothing other than the presence of a "substance that no individual has any right to possess."[168]

An Illinois State Trooper stopped Caballes for speeding.[169] While the first trooper was checking Caballes's information and issuing a warning ticket, a second trooper, along with his canine partner, arrived on scene.[170] While the first trooper was still writing out the ticket, the canine conducted a sniff of the vehicle, which resulted in a positive alert.[171] As a result of the alert, the troopers searched the truck, found marijuana and arrested Caballes; this entire incident took less than ten minutes.[172] Caballes was initially

162. *Id.* at 707.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. Illinois v. Caballes, 543 U.S. 405 (2005).
168. *Id.* at 410.
169. *Id.* at 406.
170. *Id.*
171. *Id.*
172. *Id.*

convicted, but the state's supreme court reversed the case, holding that the stop became unlawful when the sniff occurred.[173]

The case made its way to the Supreme Court of the United States, which overturned the state supreme court's ruling and made two crucial and interesting points in doing so.[174] First, the Court reaffirmed what it had said in *Place*, that, because the sniff was conducted in an area the officer could legally be, and the sniff would not expose noncontraband items, that any infinitesimal "intrusion on [Caballes's] privacy expectations does not rise to the level of a constitutionally cognizable infringement."[175] Second, the Court articulated why a canine sniff is not analogous to the use of a thermal imaging device,[176] which was found to be an unlawful search in *Kyllo v. United States*.[177] The device in *Kyllo* revealed information about contraband as well as information about normal everyday lawful possessions and activities taking place inside the home—as opposed to a canine sniff, which can only reveal the presence of "substance[s] that no individual has any right to possess."[178] The Court makes a categorical distinction between a legitimate expectation of privacy concerning lawful activity versus the mere hope that contraband will evade police detection.[179]

2. Police Can Lawfully Approach a Home

Even the Court in *Jardines* recognized that a police officer can lawfully approach a home.[180] The Court decided, however, that because the officer brought his canine partner along with him, the simple approach for a knock and talk suddenly became an unlawful trespass and a physical invasion of privacy.[181] Contrary to the Court's decision here, a police officer is able to approach a home for limited investigative purposes, even without probable

173. *Id.* at 408.

174. *Id.* at 410.

175. *Id.* at 409.

176. *Id.*

177. Kyllo v. United States, 533 U.S. 27 (2001). A thermal imaging device was used to look into the defendant's home after police became suspicious that marijuana was being grown inside. *Id.*

178. *Caballes*, 543 U.S. at 409-10.

179. *Id.* at 410.

180. Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013).

181. *Id.*

cause,[182] and police have never before been required to leave behind either their partner or their equipment, both of which is a role filled by a canine.

a. *United States v. Dunn*

United States v. Dunn delineated between the "curtilage" around someone's home and other areas on a property where someone may or may not have a reasonable expectation of privacy.[183] *Dunn* further lays out four factors to weigh when determining if an area is to be considered part of the curtilage of the home.[184] Deciding whether property falls within the curtilage of one's home determines whether the area in question is afforded a heightened expectation of privacy or if the area falls into the "open field" exception.[185] The Court in *Dunn* was careful to note, however, that to be considered an "open field," an area need be neither "open" nor a "field;" instead, that phrase is used to distinguish any area outside someone's home from specific areas that may be outside someone's home but are still used to facilitate "intimate activity associated with the sanctity of a man's home and the privacies of life."[186]

In 1980, Drug Enforcement Administration ("DEA") agents began surveillance on Dunn's co-defendant, Carpenter, after learning that he ordered large quantities of chemicals and equipment commonly used to manufacture amphetamines.[187] The DEA got a warrant and placed an electronic tracking device in some of the chemicals, which were eventually received by Carpenter and led the DEA to Dunn's property.[188] Dunn's property was about 198 acres and was completely encircled by a fence with several additional interior fences between the property line and the barn

182. *See* discussion *infra* Part II.D.2.a; *see also* discussion *infra* Part II.D.2.b.

183. United States v. Dunn, 480 U.S. 294 (1987).

184. *Id.* at 302.

185. *Id.* at 300. The Supreme Court first articulated the "open field" exception in Hester v. United States, 265 U.S. 57 (1924). Under this exception, the Fourth Amendment only extends to areas around the home that are so connected to a person's privacy as to be considered included with "persons, houses, papers, and effects." *Id.* at 59. Anything on a person's property that was further removed from the person's expectation of privacy, i.e., in an "open field," was not afforded the same Fourth Amendment protections. *Id.*

186. *Dunn*, 480 U.S. at 300 (internal citations omitted).

187. *Id.* at 296. Amphetamines are an illegal scheduled narcotic in Texas, where this took place. *Id.* Along with amphetamines, the chemicals ordered were commonly used in the manufacture of phenylacetone, which is also an illegal scheduled narcotic in Texas. *Id.*

188. *Id.*

where the chemicals were ultimately being stored.[189] Law enforcement officers made a warrantless entry onto the property, crossing over the perimeter fence and two of the interior fences, including one with barbed wire.[190] The officers made their way near the front of the barn where they were able to use a flashlight to look in and observe what appeared to be a clandestine laboratory for manufacturing narcotics.[191] The officers later made two additional warrantless entries similar to the one just described before applying for a warrant to search the barn and seize the lab.[192] Dunn was ultimately convicted, despite his objections to the actions taken by police as being an unreasonable search in violation of the Fourth Amendment.[193]

The Court weighed the following four factors to determine if the area of the barn should be considered curtilage: (1) the proximity of the area in question to the home, (2) whether the area is included in an enclosure with the home, (3) the nature of the use of the area, and (4) the steps used to stop people form observing the area.[194] Even though the DEA agents had to cross multiple fences on Dunn's property to reach a vantage point where they could observe the barn, the Court—applying the four-factor balancing test—effortlessly shot down the idea that the barn could be included in the curtilage of the home.[195] Therefore, the DEA agents' entry and observations were lawful.[196] The Court was careful to note, however, that this four-factor test is not determinative and there is no specific formula for curtilage; instead, this is a useful analytical tool to evaluate someone's reasonable expectation of privacy in an area surrounding their home and whether it can be included in the "home's 'umbrella' of Fourth Amendment protection."[197]

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189. *Id.* at 297.

190. *Id.* at 297-98.

191. *Id.* at 298. Inside the barn in *Dunn* both phenylacetone and amphetamines were being manufactured, both of which are scheduled narcotics. *Id.*

192. *Id.* at 298-99.

193. *Id.* at 299. Dunn was initially convicted on the possession charges, but after a rollercoaster of appellate procedure, the seized evidence was thrown out based on a violation of Dunn's expectation of privacy; the case was granted *certiorari* by the Supreme Court of the United States. *Id.* The Court ultimately reversed this and determined that the evidence was validly obtained. *Id.*

194. *Id.* at 301-04.

195. *Id.*

196. *Id.* at 305.

197. *Id.* at 301.

b. *Kentucky v. King*

King stands for the proposition that police officers are allowed to approach a home, without a warrant, in an attempt to contact people inside.[198] This approach, commonly referred to as a "knock and talk," even if for purely investigative purposes, is not provocation by police for anything the people inside may do, regardless of any possible ulterior motive by police.[199] Additionally, observations made from the vantage point obtained during an attempted "knock and talk" are relevant and lawful to be used for the purposes of further investigation, e.g., exigency or obtaining a probable cause warrant.[200]

In Lexington, Kentucky, after undercover police officers observed someone selling crack cocaine, then watched as the suspect retreated into a nearby apartment breezeway and towards one of two apartments.[201] When uniform officers, responding to the undercover officer's radio communication, made it to the two doors, they smelled marijuana emanating from one of the apartments and attempted a knock and talk to make contact with someone inside.[202] Unbeknownst to the officers making contact, the suspect had retreated into the other apartment.[203] Without a warrant, the officers announced their presence and waited outside; however, they soon heard sounds that—due to their training and experience—they immediately recognized as being consistent with sounds made during the typical destruction of narcotics or other evidence.[204] At this point, officers announced their intention to make a warrantless entry based on the now present exigent circumstances (the destruction of evidence).[205] Then the officers breached the door and found three people inside, one of whom was King.[206] Inside the apartment, in plain view, police found marijuana and cocaine.[207] Despite King's opposition on the grounds that the entry was unreasonable and thus a violation of the Fourth Amendment, the

198. Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).
199. *Id.* at 1862.
200. *Id.* at 1860.
201. *Id.* at 1854.
202. *Id.*
203. *Id.* at 1855.
204. *Id.* at 1854.
205. *Id.*
206. *Id.*
207. *Id.*

state trial court ultimately convicted King based on what the police found after they entered King's home.[208]

The U.S. Supreme Court made its decision based on the long-standing principle that the Fourth Amendment does not delineate *exactly* when a search warrant is necessary, and "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[209] The line drawn pertaining to Fourth Amendment protections is "at the entrance to the house."[210] Police officers or other state agents cannot create the circumstances that give rise to what would otherwise be a lawful reason to make entry into someone's protected, private home.[211] In King's situation specifically, the Court was careful to consider what exactly might rise to the level of a police created exigency.[212] The Court concluded that police merely knocking at the door is not creating anything, even if the people inside become so afraid that they begin to act in a manner that does give rise to an exigency, i.e., destroying evidence.[213]

The Court expanded on the issue of police created exigencies by stating "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."[214] The Court recognized a number of reasons that police may want to knock on someone's door. They may want to talk before deciding to investigate further, they may want to ask permission to search and possibly avoid any unnecessary inconvenience to the officers or residents, or they may just be looking for more evidence before getting a search warrant.[215] The Fourth Amendment has never required officers to shield their senses so as not to

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208. *Id.* at 1855. King was initially convicted of trafficking in marijuana and controlled substances and sentenced under persistent felony offender status. *Id.* King attempted to have the evidence excluded by arguing that the officer's entry was unlawful; he claimed that by knocking on the door, police created the exigent circumstances that they used as reason to make entry. *Id.* King's motion was denied but later overturned by the state's supreme court, prompting the Supreme Court of the United States to grant certiorari to ultimately weigh in on the issue of the latitude police have while at someone's front door. *Id.*

209. *Id.* at 1856.

210. *Id.*

211. *Id.* at 1856-57. "[E]xigent circumstances may justify a warrantless probable cause entry into [a] home," however, "they will not do so if the exigent circumstances were manufactured by the agents." *Id.* at 1857.

212. *Id.* at 1857.

213. *Id.*

214. *Id.* at 1862.

215. *Id.* at 1860.

notice illegal activity when the officers are lawfully present in a place,[216] and the Court affirmed the lawfulness of law enforcement officers in making an approach to someone's front door.[217] When police approach and knock on someone's front door in a manner that would grant to any citizen, at the very least, an implied license, it is lawful conduct by police regardless of the subjective desires of either party; as such, observations from this vantage point may be used in their investigation.[218]

III. *JARDINES* REVISITED: CONSIDERING THE TRUTH ABOUT CANINES AND CASE LAW

At this point, it is important to recap what has been uncovered about canines thus far. Canines have a rich history of involvement with people in every area of their life, from companionship, to the workforce, to the battlefield.[219] Canines finally found a niche in law enforcement where they were sworn in as officers, given a badge, and used to help "take a bite out of crime."[220] The science behind a canine is what makes them so useful in law enforcement. With a dog's ability to smell upwards of 10,000 times better than a person, it can even smell a criminal's fear.[221] So, detecting narcotics without invading into someone's expected privacy is not a problem. The dog's nose cannot be tricked and even the best packaging will allow some

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216. *See* Kyllo v. United States, 533 U.S. 27, 32 (2001).

217. *King*, 131 S. Ct. at 1862.

218. *See id.* When police knock on the door, the occupant may answer, decline to speak to police, or may not answer at all; there is no obligation of them to do anything and no expectation that police will make entry. *See id.* The police can use information gathered during the approach to further an investigation. *See id.* at 1860. The police may, however, be unable to gather any additional information from this approach, at which time their "investigation will have reached a conspicuously low point." *Id.* at 1862. Regardless, there is no new standard from this case that would suggest police must now shield their sense simply because their lawful investigation takes them *near* an area in which someone may have a reasonable expectation of privacy, i.e., their front door. *See id.*; *see also Kyllo*, 533 U.S. at 32.

219. *See* discussion *supra* Part II.B.

220. *See supra* text accompanying note 12; *see also* MCGRUFF THE CRIME DOG, http://www.mcgruff.org/#/Main (last visited Feb. 8, 2014).

221. *See* discussion *supra* Part II.C.; *see also* Dixon, *supra* note 85; HOROWITZ, *supra* note 100, at 80-81. In the context of a search for a suspect, handlers will often refer to the "fear scent." *See* Dixon, *supra* note 85. Although the dog is not actually smelling fear, they are smelling the change in combination and intensity of endocrine chemicals that the suspect's body is giving off due to the fear incorporated with their involuntary fight or flight response. *See* HOROWITZ, *supra* note 100, at 80-81.

smell to escape given enough time.[222] The dog's only real weakness is the handler, and even then, truly scrupulous mistakes will be merely errors on the side of privacy.[223] This brings us to precedent. Prior Supreme Court rulings—up until *Jardines*—have established two relevant consistencies: first, a canine sniff is not a search;[224] and second, police can lawfully approach a home through an open walkway for any number of reasons.[225] In light of this precedent, and coupled with the truth about dogs, we are now able to put this all together and apply everything to *Jardines* to see how the Court's analysis should have gone, which looks a lot more like that of Justice Alito's dissent.[226]

A. *Police Approaching Jardines's Home was Lawful Even With Their Canine*

Police approached Jardines's home during the course of an investigation involving possible drug crimes.[227] During this lawful approach, police officers (including the Florida certified law enforcement canine officer) were using, and were lawfully allowed to use, their eyes, ears, and their noses to gather any additional information that may aid in their investigation.[228] In the Court's own recount of this incident, "[a]s the dog *approached* Jardines's front porch" the dog indicated, through an articulable change in his behavior, the presence of an illegal substance—one which he had been trained to locate.[229] Since the alert was given before even reaching

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222. *See* discussion *supra* Part II.C.2.

223. *See* discussion *supra* Part II.C.2.c.

224. *See* discussion *supra* Part II.D.1; *see also* United States v. Place, 462 U.S. 696, 707 (1983) (using a trained canine "did not constitute a 'search' within the meaning of the Fourth Amendment."); Illinois v. Caballes, 543 U.S. 405, 410 (2005) ("[a] dog sniff . . . that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

225. *See* discussion *supra* Part II.D.2; *see also* United States v. Dunn, 480 U.S. 294 (1987) ("no constitutional violation occurred here when the officers . . . never entered the barn, nor did they enter any other structure on respondent's premises."); Kentucky v. King, 131 S. Ct. 1849, 1862 (2011) ("[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

226. Florida v. Jardines, 133 S. Ct. 1409, 1420 (2013) (Alito, J., dissenting).

227. *Id.* at 1412. This approach is justified with or without a warrant or probable cause for any number of reasons. *See King*, 131 S. Ct. at 1860.

228. *Jardines*, 133 S. Ct. at 1413; *see King*, 131 S. Ct. at 1862.

229. *Jardines*, 133 S. Ct. at 1413 (emphasis added). A K-9 alert is simply any articulable change in the dog's behavior. *See* MACKENZIE, *supra* note 24, at 50. A sit or scratch by the

the front porch, the focus should first be on whether police were lawfully present as they were approaching the porch, and second, on whether the area encountered *on approach* to the front porch was a constitutionally protected area.

With a plethora of reasons that police may want to approach a home, there was nothing wrong with the officers' approach in *Jardines*.[230] The officers were attempting to make contact with the resident to follow up on a tip they received about drug activity.[231] There has never been a case or an interpretation of the Constitution that requires police to leave their equipment or partners behind simply because they are near someone's home. Thus, the canine (both an officer and equipment) was also lawfully present during the approach with the officer.[232]

The Court in *Jardines* assumed that the front porch—and apparently the area *on approach* to it—is automatically curtilage and afforded the same expectation of privacy as the inside of the home.[233] Instead, the Court should have applied the four-factor test from *Dunn* to see if the area in which the officers had entered—the area they were in while *approaching* the front porch—was in fact curtilage in this situation.[234]

First, the proximity of the area here is not completely clear by the facts recounted in this case. However, it is made clear by the Court that it looks beyond even the front porch and beyond an area where intimate activities of the home would customarily extend.[235] Second, the area of the porch is included within nothing more than an open ramshackle fence surrounding the entire yard. There was nothing purposefully sectioning off this area from the rest of the yard; even the porch was only slightly covered at best

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dog, which is more commonly thought of as the alert, is simply a conditioned final response and is preferred, but not necessary to articulate that a canine has indeed alerted to the presence of a substance. *Id.*

230. *See King*, 131 S. Ct. at 1860.

231. *Jardines*, 133 S. Ct. at 1413; State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 2008) ("approached . . . in an attempt to obtain a consent to search.").

232. *Jardines*, 133 S. Ct. at 1413.

233. *Id.* at 1414. "[T]his case is a straightforward one. . . . The officers were gathering information in an area . . . immediately surrounding [Jardines's] house." *Id.*

234. United States v. Dunn, 480 U.S. 294, 299-301 (1987). "[C]urtilage questions should be resolved with particular reference to four factors . . . ." *Id.* at 301. There is no formula for curtilage; instead, the four factors are "useful analytical tools." *Id.*

235. *See Jardines*, 133 S. Ct. at 1413; *Dunn*, 480 U.S. at 300; *see also* street view of Jardines's residence, http://maps.google.com (search for 13005 SW 257th Terrace, Homestead, FL; then zoom to street view).

and not enclosed by any railings, separators, or the like.[236] Third, the nature of the use of the area was nothing more than a walkway. As such, the area can clearly be used by the residents, but was equally offered for use as an implied license for guests to at least attempt contact, unless and until such license was revoked.[237] Fourth, the resident took very few, if any, steps to protect this area from being observed by those passing by. Nothing prevented the canine from smelling the odor of an illicit substance before even reaching the front porch. Additionally, the porch was approximately a mere two to three car-lengths from the public sidewalk.[238]

Furthermore, by continually referring to the area in question as a "porch" without giving more detail, the Court casts visions of a large country-style wrap around porch facing a large open yard on which intimate activities of the home clearly extend. This was far from the circumstances in this case.[239] The yard was a tiny lot in a heavily populated urban setting, and the "porch" at issue would be better classified as a stoop; it was nothing more than a small inlet to allow someone outside of the front door to avoid the rain while searching for their keys or waiting for a resident to respond to a knock.[240] Had the Court applied these four factors, as laid out in *Dunn*, it would see that not only Jardines's porch but especially the area encountered upon approach to his porch would be severely lacking in the factors used to decide if an area is in fact curtilage. Given the totality of the circumstances, any curtilage in this situation could not be said to extend far beyond the front door. This being so, the police were justified and authorized in their actions during the entire approach to Jardines's home in an attempt to make contact with him, and they did not violate an expectation of privacy.

In addition, even if the stoop is considered curtilage, the officers had not even reached it before an officer—the canine—sensed the odor of an illicit

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236. *See* street view of Jardines's residence, http://maps.google.com (search for 13005 SW 257th Terrace, Homestead, FL; then zoom to street view).

237. *See Jardines*, 133 S. Ct. at 1415-16. An implied license is extended for a home that maintains a clear and open walkway from the sidewalk to the front door. *Jardines*, 133 S. Ct. at 1420 (Alito, J., dissenting).

238. *See Jardines*, 133 S. Ct. at 1413; *Dunn*, 480 U.S. at 300; *see also* street view of Jardines's residence, http://maps.google.com (search for 13005 SW 257th Terrace, Homestead, FL; then zoom to street view).

239. *See* street view of Jardines's residence, http://maps.google.com (search for 13005 SW 257th Terrace, Homestead, FL; then zoom to street view).

240. *See id.*

substance that Jardines carelessly allowed to emanate from his home.[241] Therefore, even if the Court granted the heightened expectation of privacy to the "porch," in light of the *Dunn* factors, such a heightened expectation could extend no further. The area *in front* of the porch—where the police were when the odor was detected—would not be included and there would be no reasonable expectation of privacy in this area outside the curtilage of the home.

B. No Search Was Conducted Before the Warrant Was Issued

Using a canine to conduct a *sniff* in a place where a law enforcement officer is legally allowed to be has never before been declared a search.[242] The officers were allowed to approach Jardines's home,[243] and without more, this approach cannot be considered a search simply because an unlawful smell was detected.[244] The fact that a canine is sniffing the air around a place where an officer is legally allowed to be does not make it a search; it is not intrusive and, at best, it will only disclose information about the presence of items no person should lawfully possess.[245]

The Court, even though it may say otherwise, was quick to look at the subjective intent of the officers in this case.[246] The Court noted that even if a pathway created an invitation or implied license to the front porch, the license would not extend for the purposes of a search.[247] Even if this is true, the Court should not look at the subjective intent of the officer. As declared in *King*, there may be many reasons that an officer might want to approach a home for a knock and talk.[248] It would be more appropriate in this case for the Court to look at the officer's objective actions to determine if this was a search or just a strategic knock and talk that lawfully uncovered some good observations.[249]

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241. *See Jardines*, 133 S. Ct. at 1413.

242. *See Jardines*, 133 S. Ct. at 1424 (Alito, J., dissenting).

243. *See* discussion *supra* Part III.A.

244. *Jardines*, 133 S. Ct. at 1413.

245. *See* discussion *supra* Part II.D.1.

246. *Jardines*, 133 S. Ct. at 1416 ("[A] police officer . . . may approach a home and knock[, however,] introducing a trained police dog to explore the area around the home *in hopes of discovering incriminating evidence* is something else.") (emphasis added).

247. *Id.*

248. Kentucky v. King, 131 S. Ct. 1849, 1860 (2011).

249. *Id.*

By the Court's own recount of the events, the officers walked up a pathway towards the front door in an attempt to make contact, spent a normal amount of time at the front door in which an occupant could answer if he or she were going to, then left using the same path the officers used on their approach to the house.[250] The presence of the canine, however, caused the Court to conclude that this otherwise lawful action by police was an unlawful search.[251] The Court likens these actions to scanning the front walk with a metal detector, or tramping a bloodhound through the garden.[252] These examples are, however, both gross exaggerations that would objectively indicate a very different intent by the officers.

The fact remains, by the Court's own recount, the officer did not deviate from the walking path that led to the front door.[253] The officer did not command his dog to perform a detailed search of the door and window seams around the house or any other cracks and crevices; moreover, the facts do not indicate a search command was ever given at all.[254] The officer simply had his partner walk to the door with him while he attempted a knock and talk.[255] Jardines was careless enough to allow the odor of marijuana to escape his home to such an extent that it could be smelled before even reaching his porch.[256] No objective actions were taken that indicated the officer approached for the *sole* purpose of conducting a sniff.[257] Even if the knock and talk was a pretext, as long as it was for a lawful purpose, then the approach is valid.[258] For example, many lawful arrests and good investigations have been made off of traffic stops for something as simple as a tag light being out. Even if the officer's subjective intent in the stop for a tag light is to look for further criminal activity, the

250. *Jardines*, 133 S. Ct. at 1412.

251. *Id.* at 1416.

252. *Id.*

253. *Id.* at 1412.

254. *Id.*

255. *Id.* at 1423.

256. *Id.* at 1412.

257. *See generally id.*; *see also* State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 2008) (officers approaching the home to attempt to contact the resident with no indication of a search command even being given).

258. *See* Whren v. United States, 517 U.S. 806, 819 (1996). The Court found that subsequent investigation resulting from an initial observed violation is valid even if the violation may not have been the primary purpose for the investigation in the first place. *Id.* The Court decided it would not look into the subjective intent of officers so long as some objective criminal activity is afoot. *Id.*

fact that the stop is objectively valid, i.e., an observed traffic infraction, makes the officer's actions lawful.[259] Furthermore, the Court has previously declared that *even if* an officer's activities are a violation of the Fourth Amendment—which is not the case here—this would still not transform the concededly lawful and unintrusive activity of a canine sniff into a search.[260]

There was no search conducted in *Jardines* prior to the issuing of the warrant. There was simply an approach to a home for a knock and talk by an officer who happened to have his partner with him.[261] His partner happened to smell the odor of an illicit substance, before even reaching the porch, which was part of the probable cause presented to secure a warrant for a further search of the premises.[262] The real issue here is that one of the officers was a dog; however, this fact cannot suddenly turn actions that do not even constitute a search into an unlawful search in violation of the Fourth Amendment.

IV. THE FUTURE OF CANINE USE IN LIGHT OF THE *JARDINES* DECISION

Following *Jardines*, the future of law enforcement's use of canines has been jeopardized. Additionally, this ruling may threaten ordinary community oriented policing activities throughout the country. There are two new and dangerous axioms that will eventually be taken away from this ruling and can quickly be used to reshape case law pertaining to law enforcement. This will make police officers' already difficult and dangerous jobs even harder. First, a canine sniff, although not at all invasive, can now be considered a search.[263] Second, a police officer that objectively does nothing more than approach the front door of a residence through an open walkway, may be considered a trespasser based on his or her subjective intentions.[264]

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259. *Id.*

260. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). The Court ruled that a vehicle checkpoint conducted for the purpose of interdicting narcotics with only incidental highway safety consequences was a seizure in violation of the Fourth Amendment. *Id.* at 48. Nevertheless, when addressing the issue of the use of a detection canine at this improper checkpoint, the Court was quick to affirm that the use of the narcotics detection dog "does not transform [even an unlawful] seizure into a search." *Id.* at 40.

261. *Jardines*, 133 S. Ct. at 1413.

262. *Id.*

263. *See id.* at 1416.

264. *Id.*

A. *Sniffs Are Now Searches*

Well-reasoned cases such as *Caballes* and *Place* have reaffirmed that a canine sniff is *not* a search.[265] Although these cases do not deal with a canine sniff that took place near a residence, the premise is the same; the canine was with the handler and in a place where the handler was lawfully allowed to be when they alerted to the presence of an illegal substance.[266] This conduct is nonintrusive and threatens to disclose nothing except the presence of items no one can lawfully possess.[267]

The Fourth Amendment is in place to affirm the people's inalienable right against unreasonable searches and seizures and to protect people from "physical intrusion" of their "persons, houses, papers, and effects."[268] The expectation of privacy protected under the Fourth Amendment should always be one that is reasonable based on societal expectations.[269] That being said, society has yet to recognize an expectation for criminals to be able to evade law enforcement detection.[270] With the ruling in *Jardines*, however, the Court has taken a step to create such an expectation for criminals. Jardines allowed evidence of his criminal activity to emanate from his home to the point it was detectable by police before even reaching his front porch.[271] Nothing else was revealed about the home: not who was inside, not what was happening inside, not the layout of the residence.[272] There was no search conducted; yet the Court still called this a search.[273] The Court here did nothing to protect law-abiding citizens;[274] it only served

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265. Illinois v. Caballes, 543 U.S. 405 (2005); United States v. Place, 462 U.S. 696 (1983).

266. *Jardines*, 133 S. Ct. at 1413 ("[a]s the dog approached Jardines's front porch"); *see* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

267. *Place*, 462 U.S. at 707 ("[A] sniff discloses only the presence or absence of narcotics, a contraband item . . . . Therefore, [the Court concluded] that the particular course of investigation . . . did not constitute a 'search' within the meaning of the Fourth Amendment.").

268. U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1414.

269. Katz v. United States, 389 U.S. 347, 361 (1967).

270. *Caballes*, 543 U.S. at 409-10.

271. *Jardines*, 133 S. Ct. at 1412.

272. *See generally id.*

273. *Id.*

274. United States v. Jacobsen, 466 U.S. 109, 123 (1984) (government conduct that can only reveal contraband and "no other arguably 'private' fact," compromised no legitimate privacy interest).

to make police work more difficult and provide an expectation that certain criminal activity can now evade detection. Now, even if there is evidence of criminal activity emanating from a home (the smell of narcotics inside), police need a warrant to observe it (to have an officer sniff) in order to get a warrant to search the home.[275] This is not only redundant, but also opens the door for requiring warrants for canine sniffs in any other area of detection in which a canine may be used, which severely limits the usefulness of the canine's narcotics detection ability as a whole.

B. Good Police Work Is Now Considered Trespassing

King is a good example of the Court recognizing that there are many ways to investigate and many reasons police may want or need to approach someone's front door with or without probable cause.[276] *Jardines*, however, has now declared that this tactical investigative technique is now a trespassory invasion by the police if they intend to use the approach to gather certain evidence.[277] This is both an unnecessary restriction on canine officers and an open door to ultimately require police to obtain permission for any entry onto property. This can severely limit police even in everyday service calls such as welfare checks and community oriented policing activities to get to know the citizens in their assigned patrol area, and this could be a big problem in investigating domestic issues where one party may want police present while another may not. Even without a canine, a good police officer will always look for evidence while approaching a home. Such was the case in *Jardines*. Had any other officer smelled the marijuana upon approach to the front door, this case would never have been an issue. Instead, because the officer who actually smelled the illegal substance was a canine,[278] the simple yet effective tool of a knock and talk became a trespass.

Even assuming that the officer in *Jardines* had the subjective intent to attempt to collect evidence by using the canine, the objective actions taken did not deviate from the implied license created by the open walkway from the road to the front door.[279] Compare this to the objective actions taken in *Dunn*.[280] The officers crossed several fences that clearly expressed the

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275. *Id.* at 127-28.

276. Kentucky v. King, 131 S. Ct. 1849, 1860 (2011).

277. *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

278. *See supra* text accompanying note 12.

279. Breard v. Alexandria, 341 U.S. 622, 644 (1951).

280. United States v. Dunn, 480 U.S. 294 (1987).

owner's intention to keep people out; there could be no implied license even for salespeople, or a neighbor, based on the totality of the circumstances in *Dunn*.[281] The Court, however, determined that officers crossing over these fences to look into an enclosed building on the property on multiple occasions were lawful in their actions, and their observations were deemed legally obtained evidence good for developing probable cause.[282] Although the Court applied the open field doctrine in *Dunn*, the Court was careful to espouse the fact that for the open field doctrine to apply the area need be neither "open" nor a "field" as commonly understood.[283] The key factor was whether "intimate activities" from the home should extend to the area in question.[284] It would seem more logical to think that intimate activities would be more likely to extend to an area secured by multiple fences within a large piece of property near a barn-type building on an active farm (*Dunn*) as opposed to a completely open walkway on a tiny residential lot in a crowded neighborhood that leads to a small, semi-covered front stoop area of a house (*Jardines*). The Court, however, found the exact opposite: sneaking over fences under the cover of night to look into someone's barn is not a trespass for Fourth Amendment purposes, but walking through an open walkway up to their front door, which is a mere two to three car-lengths from a public sidewalk, is a trespass.[285]

V. CONCLUSION

The Supreme Court truly built a "house of bricks" with its ruling in *Jardines*; the only difference is the bad guy is on the inside, and the good guys are stuck on the outside with their hands tied.[286] The effects of this decision have yet to be fully felt, but when they are, the law enforcement community will be severely restricted, both with the use of canine units and in every other investigative capacity that requires a response to a private residence.

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281. *Id.* at 297.

282. *Id.* at 305.

283. *Id.* at 300.

284. *Id.*

285. *See* Florida v. Jardines, 133 S. Ct. 1409 (2013); *Dunn*, 480 U.S. at 305.

286. *See* HALLIWELL, *supra* note 1.

The purpose of this Note is not to suggest a complete administrative-search[287] state—i.e., one where officers have free reign to tramp a bloodhound through the gardens of every house down the street for the sole purpose of searching until narcotics are found, as the concurring opinion of *Jardines* would suggest.[288] This would not only be impractical, but it *would* be intruding on protected areas and would be incredibly ineffective in the aggregate, wasting valuable law enforcement resources and citizen tax dollars. However, if officers have a reason to be in an area—whether it is due to probable cause, reasonable suspicion, invitation, or good community oriented policing—there is no reason why their canine partner should have to be left behind simply because they are better at smelling than other officers. This is analogous to requiring an officer to shield their senses when passing near someone's residence simply to protect the resident's privacy that might be spilling out from within—which the Court has already said is not required of police.[289] Additionally, this Note is not suggesting that high-powered advanced technology can be used to peer into the otherwise hidden recesses of someone's home, as also suggested by the concurrence in *Jardines*.[290] The canine does not smell what is inside, only the odor that comes out.

This Note does suggest three things in regards to the use of detection canines at someone's front door. First, a police officer should never have to leave their partner behind when in the lawful performance of their duties, even if that partner is a canine. Police have no obligation to shield any of their senses; this should go for four-legged officers as well. Second, our inalienable right to be free from unreasonable search and seizures, as protected through the Constitution, should not be construed to create a complete expectation that careful criminal activity can be carried on and concealed from law enforcement. Career criminals should expect to be caught. Finally, ad hoc residential canine sniffs are not *per se* lawful. The courts should scrutinize all residential sniffs, however, the courts should follow Justice Alito's line of reasoning in doing so.[291] In the case of *Jardines*,

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287. Camara v. Mun. Court of S.F., 387 U.S. 523, 540 (1967) (ruling that entry and inspection of a premises for municipal code violations is lawful, even without a warrant, so long as there is a "citizen complaint or . . . other satisfactory reason for securing immediate entry.").

288. *See Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

289. *See* Kyllo v. United States, 533 U.S. 27, 32 (2001).

290. *See Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

291. *See Id.* at 1422-23 (Alito, J., dissenting).

there was plenty of reasonable suspicion, which turned out to be substantiated, pointing to the fact that Jardines was engaged in illegal activity.[292] The dog sniff was just good tactical police work conducted in a lawful manner and in a place the police were lawfully allowed to be for the short time they were there.

Using a dog is one of the least intrusive ways for police to check for the presence of illegal substances. By severely restricting canine use, the Court protected only those breaking the law. These restrictions also opened the door to future court rulings that could render useless police canines and could even open police up to unnecessary liability for trespass. Had the Court gone through the proper analytical framework as previously laid out concerning canine sniffs and curtilage, the result in *Jardines* would have been different. Instead, this ruling created a proverbial *house of bricks* to conceal criminal activity with a potentially limitless amount of curtilage all around.

292. *See generally* State v. Jardines, 9 So. 3d 1, 3 (Fla. Dist. Ct. App. 2008); Jardines v. State, 73 So. 3d 34, 37 (Fla. 2011).