



FLORIDA V. JARDINES: THE WOLF AT THE CASTLE DOOR

Timothy C. MacDonnell*

INTRODUCTION

Even before the United States declared its independence, colonists believed that their homes were their castles.¹ This belief had its origins in English common law, declared by the Prime Minister of Great Britain, William Pitt, in 1763:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.²

* Timothy C. MacDonnell is Associate Professor of Law, Washington and Lee University School of Law.

¹ LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 151 (1999).

² *Id.*

This doctrine is embodied in the Fourth Amendment³ to our Constitution and is currently at a crossroads.

Advances in technology and investigative techniques have resulted in the “King,” or government, being capable of entering a citizen’s home without physically crossing its threshold.⁴ Today, the government can hear what is being said,⁵ see what is being done,⁶ and know what is being written,⁷ without a physical intrusion into the home. All that stops the King from crossing the threshold of each citizen’s home is the Fourth Amendment and the Supreme Court’s repeated declaration that “[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”⁸

³ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

⁴ In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212, Title III (codified as amended at 18 U.S.C. §§ 2510–2522 (2006)). This statute governed wiretapping and electronic eavesdropping. Jonathan J. Green, Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 GEO. WASH. L. REV. 438, 440 n.12 (1984); R. Scot Hopkins & Pamela R. Reynolds, *Current Development 2002-2003: Redefining Privacy and Security in the Electronic Communication Age: A Lawyer’s Ethical Duty in the Virtual World of the Internet*, 16 GEO. J. LEGAL ETHICS 675, 681 (2003).

⁵ Green, *supra* note 4, at 445.

⁶ See Tania Branigan, *Big Brother: Measure for Measure*, THE GUARDIAN (Sept. 13, 2002), <http://www.guardian.co.uk/uk/2002/sep/14/privacy.taniabranigan?INTCMP=SRCH> (last visited Nov. 11, 2012) (noting that surveillance experts can use wave detectors, optic taps, window bouncers, power surveillance, microchip implants, radiation analysis, and keystroke logging).

⁷ See Hopkins & Reynolds, *supra* note 4, at 683 (arguing that in order for the government to monitor electronic mail there is usually a requirement to have probable cause and a warrant authorizing the monitoring).

⁸ *E.g.*, *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citing *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1066 (1765); *Boyd v. United States*, 116 U.S. 616, 626–30 (1886)).

On January 6, 2012, the United States Supreme Court granted certiorari in *Florida v. Jardines*,⁹ a case that has the potential to dramatically impact the degree of protection the Fourth Amendment provides individuals in their homes.

Despite its potential impact, *Jardines* seems innocuous at first. The State of Florida has appealed the Florida Supreme Court's determination that police violated the Fourth Amendment when they used a narcotics dog to sniff the front door of a suspect's home without a warrant.¹⁰ In its brief in support of certiorari, the State of Florida points out that police are already permitted to use narcotics dogs without warrants in airports and at traffic stops.¹¹ Florida and seventeen other states have argued that the dog sniff of an automobile is no different than the dog sniff of a home.¹² The claim is that

⁹ See *Jardines v. State*, 73 So. 3d 34, 37 (Fla. 2011) (holding "that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior to conducting a dog 'sniff test' at a private residence"), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564).

¹⁰ See *id.* at 49 (concluding "that a 'sniff test[]' . . . is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment—specifically, the search must be preceded by an evidentiary showing of wrongdoing"); Petition for Writ of Certiorari at *i, *State v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564) (appealing "[w]hether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause"); *Florida v. Jardines*, 132 S. Ct. 995, 995, 181 L. Ed. 2d 726, 726 (2012) (granting the "[p]etition for writ of certiorari" as to question one).

¹¹ Petition for Writ of Certiorari at 14–15, *State v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564).

¹² *Id.*; Brief of the State of Texas et. al. as Amici Curiae Supporting Petitioner at 1, *Florida v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564). In addition to the amicus brief from 17 state attorney generals, the United States, the National Police K-9 Association, and Wayne County, Michigan have submitted amici briefs challenging the Florida Supreme Court's ruling. Brief for the United States as Amicus Curiae Supporting Petitioner, *Florida v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564); Brief of The National Police Canine Association and Police K-9 Magazine As Amici Curiae in Support of Petitioner, *Florida v. Jardines*, 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564); Brief of Wayne County, Michigan as Amicus Curiae

there is no reasonable expectation of privacy in possessing contraband, thus any investigative technique that only reveals the presence or absence of contraband is not a search.¹³ The logic used to support the canine sniff as a “non-search” threatens to significantly reduce the Fourth Amendment’s protection of the home.

Courts that have upheld warrantless dog sniffs of the home have done so by applying a line of cases decided by the Supreme Court that carve out an exception to the application of the Fourth Amendment for cases involving investigative techniques ostensibly capable of discovering contraband without otherwise violating a person’s privacy interest.¹⁴ Although the Supreme Court has not named this exception, legal scholars have called it the canine search doctrine, the contraband exception, and the binary search doctrine.¹⁵ At its most expansive, the exception declares that individu-

ae in Support of Petitioner, *Florida v. Jardines*, 73 So. 3d 34 (Fla. 2011), cert. granted, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564).

¹³ See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (“We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’” (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))).

¹⁴ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983).

¹⁵ See Ric Simmons, *The Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411, 424 (2005); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1348 (2002). I suggest that the use of the term “binary search” might be misleading. The line of cases from *Place* through *Caballes* has focused exclusively on contraband. A binary search, one that is extremely narrow and will only reveal the presence or absence of a particular item, need not be limited to contraband. Law enforcement could seek a search authorization for a computer to find a particular file that was not contraband and use a binary search to find that file. I suggest the exception created by the Supreme Court in *Place* and its progeny is better described as the contraband exception. This is also done with the recognition that, in order to apply the contraband exception, a binary search must be used. Thus not all binary searches fall under the contraband exception, but all searches falling under the contraband exception must be binary. See Leslie A. (Lunney) Shoebottom, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expan-*

als do not have a legitimate expectation of privacy in items that are illegal to possess.¹⁶ Thus, investigative techniques that reveal only the presence or absence of illegal items, such as drugs, are not searches within the meaning of the Fourth Amendment.¹⁷ To date, the Supreme Court has recognized two techniques that meet this requirement: dog sniffs and chemical testing for drugs.¹⁸ The Court has never applied this doctrine in the context of the home.

The purpose of this article is to examine the controversy regarding the application of the contraband exception to the home and the potential impact of the *Jardines* decision. The article will begin by examining the cases that make up the Supreme Court's contraband exception and some of the Court's precedent regarding the home and warrantless searches. Next, the article will examine the Florida Supreme Court's holding in *Jardines* and discuss how the Florida court arrived at the conclusion that the canine sniff in that case was a search. This section will compare the Florida court's conclusions with Supreme Court precedent. Finally, the article will examine the

sion of Canine Sniff Doctrine to Include Sniffs of the Home, 88 OR. L. REV. 829, 865-66 (2009) (noting that "Courts that apply the *Place/Jacobsen* analysis describe their legal analysis as a 'binary' inquiry[.]" and suggesting that this is an issue because "[t]hese courts focus exclusively on the unlawfulness of contraband possession without any consideration of the circumstances under which the contraband is possessed").

¹⁶ See *Caballes*, 543 U.S. at 408 ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'" (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))).

¹⁷ See *id.* at 410 ("A dog sniff conducted during a concededly lawful traffic stop 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."); *Place*, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment.").

¹⁸ See *Place*, 462 U.S. at 707 (sniffing by a "trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment"); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.").

three most probable results of the *Jardines* decision and advocate for the Court's rejection of warrantless canine sniffs of the home.

I. THE CONTRABAND EXCEPTION AND THE HOME

Four cases make up the United States Supreme Court's contraband exception. Three of the decisions deal with warrantless dog sniffs—*United States v. Place*,¹⁹ *City of Indianapolis v. Edmond*,²⁰ and *Illinois v. Caballes*²¹—and one, *United States v. Jacobsen*,²² involves the use of a chemical-detection kit. One additional case, *United States v. Kyllo*, is critical to understanding the contraband exception's application to the home. In *Kyllo* the Court determined that a Fourth Amendment violation occurred when police used a thermal-imaging device on the home without a warrant.²³

United States v. Place, decided in 1983, established the primary components of the contraband exception.²⁴ *Place* seems more timid than the later contraband exception cases. This could be because it is the seminal case for a new doctrine or because the Court was addressing a question without the benefit of the parties briefing the

¹⁹ *Place*, 462 U.S. at 707 (sniffing by a "trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment").

²⁰ 531 U.S. 32, 40 (2000) (finding that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search").

²¹ *Caballes*, 543 U.S. at 410 (holding that "[a] dog sniff conducted during a concededly lawful traffic stop 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").

²² *Jacobsen*, 466 U.S. at 123.

²³ 533 U.S. 27, 34–35 (2001) ("[T]he information obtained by the thermal imager in this case was the product of a search.").

²⁴ See 462 U.S. 696, 707 (1983) (explaining that the manner of investigation "is much less intrusive than a typical search [because it] . . . discloses only the presence or absence of narcotics, a contraband item[, and] . . . the information obtained is limited"). "The canine sniff is sui generis." *Id.*

issue. Regardless, the Court in *Place* appears to establish some limits on the contraband exception which may fall away in later cases.²⁵

The defendant in *Place* was traveling from Florida to New York.²⁶ Drug Enforcement Agents in Miami briefly detained Place because he was acting suspiciously.²⁷ After letting Place leave on his flight to New York, the Miami Police did more investigation and discovered that Place had given false or conflicting addresses and an incorrect telephone number before getting his plane ticket.²⁸ The Miami Police contacted the police at La Guardia Airport who met Place as he got off the plane in New York.²⁹ The agents questioned Place and then informed him that they intended to seek a search warrant for his luggage.³⁰ The agents offered to let Place remain with his luggage while they sought a search warrant.³¹ Place declined.³² Before seeking a warrant, the agents took Place's bag to J.F.K. Airport to have a narcotics dog conduct a "sniff test" of the bag.³³ It took the agents approximately ninety minutes to get a dog to sniff the luggage.³⁴ Upon sniffing, the dog alerted the police to the presence of drugs.³⁵ The agents then secured a warrant and a subsequent search revealed a bag containing cocaine.³⁶

At trial, Place brought a motion to exclude the evidence obtained during the search of his bag, which the trial court denied. Place appealed to the Second Circuit Court of Appeals, which ruled that there was reasonable suspicion to detain Place and his luggage;

²⁵ There is at least an argument that can be made that the minimal intrusiveness prong of the *Place* contraband exception is reduced or removed in *Jacobsen*.

²⁶ *Place*, 462 U.S. at 698-99.

²⁷ *Id.* at 698.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 699.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

however, under *Terry v. Ohio*, the ninety-minute detention of Place's luggage was too long.³⁷ The case was appealed to the Supreme Court, which agreed with the circuit court that the *Terry* stop was too long,³⁸ but also went on to explain why the dog sniff did not constitute a search.

In two short paragraphs the Court explained that the manner in which the search took place and the limitation on what was being searched for meant the dog sniff was not a search for Fourth Amendment purposes.³⁹ First, the Court noted that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment."⁴⁰ Next, the Court identified two characteristics of a canine sniff, which, according to the Court, make it unique among investigative techniques: minimal intrusiveness and limited disclosure.⁴¹ Based on these two characteristics, the Court ruled that the dog sniff "did not constitute a 'search' within the meaning of the Fourth Amendment."⁴²

It is important to briefly examine what the Court appears to mean when it discusses intrusiveness and limited disclosure. Regarding intrusiveness the Court noted, "A 'canine sniff' by a well-trained narcotics detection dog . . . does not require opening the luggage."⁴³ It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an

³⁷ *Id.* at 709-710.

³⁸ *Id.* at 709 ("The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.").

³⁹ *See id.* ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 707.

officer's rummaging through the contents of the luggage.⁴⁴ Thus, the intrusiveness the Court discussed is exposure of items in the luggage to public view. Although the Court does not elaborate on what "public view" means, it seems likely the Court simply meant the view of anyone who is not the owner. The Court's discussion of limited disclosure is, well, limited. The Court points out that a dog sniff provides limited information and this limited disclosure "ensures the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."⁴⁵

The somewhat cautious language the Court used in *Place* does not seem like the first step on a path toward permitting canine sniffs of the home. It put in a number of qualifiers on the rule it was announcing. The Court stated the dog sniff was permissible based on "the particular course of investigation the agents intended to pursue," which included the fact that the luggage in question "was located in a public place."⁴⁶ Thus, *Place* established a limited exception to the Fourth Amendment that focused on the manner of the investigative technique, what is disclosed by the technique, and possibly the public location of the item being exposed to the technique.

Given the Court's ultimate conclusion that *Place*'s luggage was detained for too long, its discussion of dog sniffs could be dismissed as dicta. In fact, Justices Brennan, Blackmun, and Marshall appear to argue just that in their concurring opinions in *Place*.⁴⁷

The next contraband exception case, *United States v. Jacobsen*, was decided within a year of *Place*, and it is the case in which the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 710-20 (Brennan, J., concurring); *id.* at 720-24 (Blackmun, J., concurring); *id.* at 710-24 (Marshall, J., concurring).

contraband exception takes on weight. The *Jacobsen* decision transforms what was arguably dicta in *Place* into binding precedent.

In *Jacobsen*, the DEA was contacted by Federal Express after they discovered that a package they were transporting contained a suspicious white powder.⁴⁸ The package contained newspaper and a duct-taped tube, which the employee opened, finding several bags of white powder.⁴⁹ Agents went to the Federal Express office and removed a small amount of the substance from the bag; field testing revealed that it was cocaine.⁵⁰ The substance that was removed for testing was destroyed during the test.⁵¹ *Jacobsen*, who lived at the house where the package was being sent, was indicted on drug possession and intent to distribute.⁵² *Jacobsen* and his co-defendants moved to suppress the evidence against them, claiming it had been secured through an illegal search and seizure of the Federal Express package.⁵³ The trial court denied the motion but the Eight Circuit Court of Appeals granted it, concluding the DEA agents had significantly expanded the search done by the Federal Express employees when they tested the white powder.⁵⁴ On appeal the Supreme Court reversed.⁵⁵

The Court began its discussion of whether the chemical-field test was a search by asking: “[D]id it infringe an expectation of privacy that society is prepared to consider reasonable?”⁵⁶ The Court’s

⁴⁸ United States v. *Jacobsen*, 466 U.S. 109, 111 (1984).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 124–25.

⁵² *Id.* at 112.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 126.

⁵⁶ *Id.* at 122.

answer was no.⁵⁷ Justice Stevens writing for the majority explained at some length that “a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”⁵⁸ He focused on what it means to have a privacy interest that society is willing to recognize as legitimate, concluding that, “Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguable ‘private’ fact, compromises no legitimate privacy interest.”⁵⁹

There are at least two striking aspects of the *Jacobsen* decision. First, the decision is an unqualified endorsement of the contraband exception—the Court provides no limitations or balancing test that police or courts must apply. Rather the Court simply declares that investigative techniques that reveal nothing more than whether a substance is contraband are not searches.⁶⁰ Second, the *Jacobsen* Court appears to either disregard the intrusiveness element discussed in *Place* or to modify it. In *Place*, the absence of intrusiveness appeared to turn on the fact that the dog sniffed only the exterior of the luggage, thereby not exposing the content of the luggage to public view.⁶¹ In *Jacobsen*, the DEA agents opened the bags of white powder and destroyed some of its content.⁶² This action would appear to be an intrusion of a sort not present in *Place*. The *Jacobsen*

⁵⁷ See *id.* at 123 (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *id.* at 121–22 (“[I]t is well-settled that it is constitutionally reasonable for law enforcement officials to seize ‘effects’ that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband.”).

⁶¹ See *United States v. Place*, 462 U.S. 696, 707 (1983) (“[E]xposure of respondent’s luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.”).

⁶² *Jacobsen*, 466 U.S. at 124–25.

Court explained that “the reason [the dog sniff] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items.”⁶³

Justice Brennan, joined by Justice Marshall, in dissent expressed concern over “excluding a class of surveillance techniques from the reach of the Fourth Amendment.”⁶⁴ Justice Brennan noted, “[I]n determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed, not to the identity of the concealed item.”⁶⁵ By describing these investigative techniques as non-searches, police could use them “whenever and wherever law enforcement officers desire.”⁶⁶ Justice Brennan noted that the logical conclusion of such a rule is “Orwellian.” Despite this concern, he declared his confidence “that this Court ultimately stands ready to prevent this . . . from coming to pass.”⁶⁷

The next contraband exception case, *City of Indianapolis v. Edmond*, was decided by the Supreme Court approximately sixteen years after *Jacobsen*. The case stems from a civil suit seeking a preliminary injunction against the City of Indianapolis’s drug-interdiction roadblocks.⁶⁸ The focus of the Court’s opinion was not the warrantless dog sniff but rather the City’s suspicionless seizure of vehicles at a drug-interdiction roadblock.⁶⁹ The Court’s discussion of the canine sniff is one paragraph and can be viewed as gen-

⁶³ *Id.* at 124 n.24.

⁶⁴ *Id.* at 137 (Brennan, J., dissenting).

⁶⁵ *Id.* at 139.

⁶⁶ *Id.* at 138.

⁶⁷ *Id.*

⁶⁸ *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000).

⁶⁹ *See id.* (noting that, in general, a “search or seizure is unreasonable under the Fourth Amendment absent individualized suspicion of wrongdoing”).

erally supportive of the *Place* decision.⁷⁰ Notably, the Court makes no reference to *Jacobsen* in its decision.

In *Edmond*, the City of Indianapolis arranged several drug-interdiction roadblocks at various locations around the city.⁷¹ The roadblocks worked very much like drunk-driving checkpoints, only in this case, the primary purpose was to interdict drug trafficking.⁷² The petitioner was stopped at one of the checkpoints and subjected to police walking a narcotics dog around his vehicle.⁷³ The dog did not alert.⁷⁴ The petitioner sought injunctive relief against the checkpoints; the injunction was denied by the district court, but granted by the Seventh Circuit Court of Appeals.⁷⁵ The Supreme Court granted certiorari and upheld the decision of the Seventh Circuit.⁷⁶

Nearly all of the Court's discussion in *Edmond* focused on whether a drug-interdiction roadblock was permissible. The Court concluded it was not.⁷⁷ In arriving at this conclusion, the majority began its analysis by stating, "[A] search or seizure is ordinarily unreasonable in the absence of individualized wrongdoing."⁷⁸ Next, it discussed the "special needs" exception to this general rule and explained why the special needs exception would not apply to a drug-interdiction roadblock.⁷⁹ The Court's discussion of whether the dog sniff constituted a search is one paragraph long and conclusory. The Court stated "[j]ust as in *Place*, an exterior sniff of an au-

⁷⁰ See *id.* at 40 (acknowledging that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search").

⁷¹ *Id.* at 34.

⁷² *Id.*

⁷³ *Id.* at 36, 40.

⁷⁴ *Id.* at 36.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.* at 44 (declining "to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control").

⁷⁸ *Id.* at 37.

⁷⁹ See *id.* at 40 (noting that there is "a difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control").

tomobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is ‘much less intrusive than a typical search.’⁸⁰

In *Edmond*, there is a return to a focus on the manner and intrusiveness of the investigative technique along with the limited disclosure provided by it. The declarations in *Edmond* may have greater weight than *Place* because they are less qualified. The *Edmond* Court makes no reference to the automobile being in a public place or to whether the police had any level of suspicion that would justify the use of the narcotics dog. Instead, the Court simply declared that the dog sniff was not a search based on the limited disclosure provided by the dog and the minimally intrusive manner by which the sniff was conducted.⁸¹

If *Edmond* did little to add to the contraband exception, it also did not take anything away from it. After *Edmond*, the exception seemed to encompass all that it did after *Place* and *Jacobsen*, and nothing in *Jacobsen* appeared to limit the reach of the contraband exception to the home. Thus, at the end of *Edmond* there appeared to be nothing to limit the contraband exception from reaching into the home as easily as it had reached into automobiles, that is, until *Kyllo v. United States*.

Kyllo has been recognized as one of the Supreme Court’s most significant Fourth Amendment cases.⁸² *Kyllo* sought to address the

⁸⁰ *Id.*

⁸¹ *Id.* at 52–53 (“[A] ‘sniff test’ by a trained narcotics dog is not a ‘search’ within the meaning of the Fourth Amendment because it does not require physical intrusion of the object being sniffed and it does not expose anything other than the contraband items.” (citing *United States v. Place*, 462 U.S. 696, 706–07 (1983))).

⁸² Paul St. Lawrence, Note, *Kyllo: As Libertarian Defense Against Orwellian Enforcement*, 1 GEO. J.L. & PUB. POL’Y 155, 156 (2002); Thomas K. Clancy, *What Is a Search Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 33 (2006); see also *Kyllo v. United States*, 533 U.S. 27, 30, 40 (2001) (holding that the use of “thermal

challenge that advances in technology present to Fourth Amendment protections. According to Justice Scalia's majority opinion, "[t]he question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."⁸³

In *Kyllo*, agents from the United States Department of the Interior suspected Kyllo of growing marijuana in his home.⁸⁴ In an effort to secure a warrant, the officers parked on the public street outside of Kyllo's home and scanned the home with a thermal-imaging device.⁸⁵ The device was capable of measuring the heat being emitted from Kyllo's home and showing it on a screen as a color image.⁸⁶ The images created by the device were not detailed, and the device could not be used to show specific objects in the home.⁸⁷ The scan revealed that Kyllo's garage was significantly warmer than the garages of his neighbors; suggesting that marijuana grow lights were being used in Kyllo's home and garage.⁸⁸ Armed with this information and a significant amount of other evidence, agents were able to secure a search warrant and seize 100 marijuana plants from Kyllo's home.⁸⁹ At trial, Kyllo moved to suppress the marijuana, arguing that the thermal scan was a warrantless search; the motion was denied, and Kyllo was convicted.⁹⁰ During an evidentiary hearing, the district court found that the thermal scanner "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the

imagers [to] detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye" to identify the use of marijuana grow lamps is "a 'search' and is presumptively unreasonable without a warrant").

⁸³ *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁸⁴ *Id.* at 29.

⁸⁵ *Id.*

⁸⁶ *Id.* at 29–30.

⁸⁷ *See id.* at 29–30 ("The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images.").

⁸⁸ *Id.* at 30.

⁸⁹ *Id.*

⁹⁰ *Id.*

house.”⁹¹ Based on these findings, the Ninth Circuit Court of Appeals upheld the denial of the motion to suppress.⁹² The Supreme Court granted certiorari and reversed.⁹³

Justice Scalia began the majority opinion by reaffirming the importance of the home to the Fourth Amendment stating, “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”⁹⁴ In support of this statement, Justice Scalia pointed out that “[w]ith few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”⁹⁵ Thus, the central question in *Kyllo* was whether the thermal scan was a search within the meaning of the Fourth Amendment.⁹⁶ Justice Scalia noted that the term “search” has a specific meaning under the Supreme Court’s precedent that does not include visual observations made by police from a lawful vantage point.⁹⁷ In *Kyllo*, police were on a public street when they scanned the home, and the device used by the government did not

⁹¹ *Id.*

⁹² *Id.* at 31. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, and even if he had, there was no objectively reasonable expectation of privacy because the imager ‘did not expose any intimate details of Kyllo’s life,’ only ‘amorphous ‘hot spots’ on the roof and exterior wall.
Id. (citation omitted).

⁹³ *Id.* at 40. “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” *Id.*

⁹⁴ *Kyllo*, 533 U.S. at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

⁹⁵ *Id.*

⁹⁶ *See id.* at 31 (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. On the other hand, the antecedent question whether or not a Fourth Amendment ‘search’ has occurred is not so simple under our precedent.” (citations omitted)).

⁹⁷ *Id.* at 32 (“[W]e have held that visual observation is no ‘search’ at all.”).

penetrate Kyllo's home with a ray or beam.⁹⁸ Despite these facts, the majority found the use of the thermal scan to be a search.⁹⁹

Justice Scalia applied the two-prong test established in *Katz v. United States*, which assesses whether an individual manifested a subjective expectation of privacy and whether that expectation is one society was willing to recognize as reasonable.¹⁰⁰ Although Justice Scalia had previously criticized the *Katz* test as being subjective and circular,¹⁰¹ in *Kyllo* he found it easy enough to apply.¹⁰² Justice Scalia concluded that determining what was a reasonable expectation of privacy in the home was relatively easy: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search"¹⁰³ Later in the opinion, Justice Scalia summed up the majority's opinion by stating:

We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright – which requires clear specification of those methods of surveillance that require a warrant. . . . Where, as here, the Government uses a device that is not in general public use, to explore details of the

⁹⁸ *Id.* at 30.

⁹⁹ *See id.* at 40 ("Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant.").

¹⁰⁰ 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

¹⁰¹ *See Minnesota v. Carter*, 525 U.S. 83, 97 (1998).

¹⁰² *See Kyllo*, 533 U.S. at 34.

¹⁰³ *Id.* (citation omitted).

home that would previously have been unknowable without physical intrusion, the surveillance is a “search”¹⁰⁴

Justice Scalia went on to explain why the dissent and the government’s arguments were unpersuasive by responding to two of their arguments. First, the dissent argued that because the thermal-imaging device was only reading the heat signature off the exterior of Kyllo’s home, it was not searching the interior of the home.¹⁰⁵ In rejecting this argument, Justice Scalia pointed out that such a distinction would permit the government to use powerful microphones to pick up conversations occurring in a house and then claim it was not a search because they only amplified the sound waves that had left the home.¹⁰⁶ Justice Scalia stated that “such a mechanical interpretation of the Fourth Amendment” had already been rejected in *Katz*.¹⁰⁷ Second, both the government and dissent argued that the thermal-imaging device did not reveal intimate details of the home and thus was not a search.¹⁰⁸ In rejecting this argument, Justice Scalia used sweeping language, noting that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”¹⁰⁹ Justice Scalia went on to discuss the impracticality of a Fourth Amendment standard that turned on whether an investigative technique reveals

¹⁰⁴ *Id.* at 40 (citation omitted).

¹⁰⁵ *Id.* at 41 (Stevens, J., dissenting) (“There is, in my judgment, a distinction of constitutional magnitude between ‘through-the-wall surveillance’ that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand.”).

¹⁰⁶ *Id.* at 35–36.

¹⁰⁷ *Id.* at 35.

¹⁰⁸ *Id.* at 37, 50.

¹⁰⁹ *Id.* at 37.

an intimate or non-intimate detail.¹¹⁰ It is in this context that Justice Scalia noted that a device such as the thermal scanner in the case at bar, might reveal a range of facts arguably intimate and non-intimate.¹¹¹ Police would have no way of calibrating such a device to insure only non-intimate details were revealed.¹¹² Moreover, the Court was skeptical of the very notion that there are non-intimate details connected to the home: “In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”¹¹³ Thus, the intimate detail argument was rejected because all the details of the home are “intimate” and because “intimacy” is an unworkable standard for a Fourth Amendment test.

Justice Stevens’s dissent is significant given that he authored the two most important contraband exception cases.¹¹⁴ It is also significant to note that the author of the other two contraband exception cases, Justice O’Connor, joined Justice Stevens’s dissent.¹¹⁵ As indicated above, Justice Stevens argued that there should be a distinction between through-the-wall technology and off-the-wall technology.¹¹⁶ He also argued the privacy interest at stake in this case, to prevent detection of heat going out of Kyllo’s house, was

¹¹⁰ *Id.* at 38–39 (noting that it would be difficult to determine what would be considered “intimate,” and even if this were possible, “no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up ‘intimate’ details—and thus would be unable to know in advance whether it is constitutional”).

¹¹¹ *Id.* at 38 (noting that a device could detect details all the way from the “hour each night the lady of the house takes her daily sauna and bath . . . [to] the fact that someone left a closet light on”).

¹¹² *Id.* at 39.

¹¹³ *Id.* at 38.

¹¹⁴ Justice Stevens is the author of *Illinois v. Caballes*, 543 U.S. 405 (2005) and *United States v. Jacobsen*, 466 U.S. 109 (1984).

¹¹⁵ *Kyllo*, 533 U.S. at 41–51 (Stevens, J., dissenting). Justice O’Connor is the author of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *United States v. Place*, 462 U.S. 696 (1983).

¹¹⁶ *See supra* note 105.

“at best trivial.”¹¹⁷ Finally, the dissent characterized the majority opinion as “at once too broad and too narrow.”¹¹⁸ Justice Stevens specifically mentioned that the majority opinion was too broad, in part, because

[i]t would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *Place* . . . we held that a dog sniff that “discloses only the presence or absence of narcotics” does “not constitute a ‘search’ within the meaning of the Fourth Amendment,” and it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either.¹¹⁹

Based on his dissent, prior to the *Kyllo* decision, Justice Stevens believed the contraband exception applied to the home. Further, Justice Stevens clearly felt the rule was not limited to dogs, but would embrace technology that could be sufficiently discerning and utilized without a physical invasion into a home or other protected area.¹²⁰

When the majority opinion and dissent are taken together, it seems that the contraband exception would not apply to the home. Although Justice Stevens clearly implied that dog sniffs of the home might survive the majority opinion, all other technology-based applications of the exception would be denied. Despite Justice Stevens’s dissent, the majority opinion appears to deny even the use of dog sniffs. Justice Scalia articulated two reasons why the intimate-

¹¹⁷ *Id.* at 45.

¹¹⁸ *Id.* at 46–47.

¹¹⁹ *Id.* at 47–48 (citation omitted).

¹²⁰ *Id.* (“[I]t must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either.”).

details test proposed by the government fails in the context of the home.¹²¹ The first reason offered by Justice Scalia is that all details of the home are intimate—from the trivial to the sacred—and must be kept secret “from prying government eyes.”¹²² Additionally, Justice Scalia pointed to the need for clear and firm rules when it comes to the Fourth Amendment’s protection of the home.¹²³ According to Justice Scalia, the line of protection around the home must be firm and bright.¹²⁴ This, along with the declaration that all details of the home are intimate, supports a rejection of even dog sniffs of the home.

The final contraband exception case, *Illinois v. Caballes*, is the most significant for at least three reasons. First, *Caballes* condones an entirely suspicionless canine sniff, a position hinted at in *Edmond*, but now fully embraced in *Caballes*.¹²⁵ Second, the language the Court uses has a similarly expansive tone as the *Jacobsen* decision. Like *Jacobsen*, the manner and degree of intrusiveness of the search is not mentioned as a limiting factor for why the dog sniff was not a search. Third, the *Caballes* Court purports to explain why the *Caballes* decision is entirely consistent with *Kyllo*.¹²⁶

The facts of *Caballes* are simple. Caballes was pulled over by police for driving 71 mph in a 65 mph zone.¹²⁷ After the first state po-

¹²¹ See *id.* at 37 (“In the home, our cases show, all details are intimate details.”); *id.* at 40 (noting that the Fourth Amendment draws “not only [a] firm but also [a] bright” “line at the entrance to the house” (citation omitted)).

¹²² *Id.* at 37.

¹²³ See *id.* at 40 (“We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’” (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980))).

¹²⁴ *Id.* (“That line, we think, must be not only firm but also bright. . .”).

¹²⁵ See *Illinois v. Caballes*, 543 U.S. 405, 414 (2005) (Souter, J., dissenting) (“As a general proposition, using a dog to sniff for drugs is subject to the rule that the object of enforcing criminal laws does not, without more, justify suspicionless Fourth Amendment intrusions.”).

¹²⁶ See *id.* at 409 (“This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search.”).

¹²⁷ *Id.* at 417–18 (Ginsburg, J., dissenting).

lice officer pulled Caballes over, a second officer arrived with a dog trained to detect narcotics.¹²⁸ According to the police, they had no basis for suspecting Caballes had illegal drugs.¹²⁹ The dog was walked around the vehicle and alerted to the presence of drugs.¹³⁰ Based on the dog's alert, police searched the trunk of Caballes's car and found drugs.¹³¹ The facts indicated that the traffic stop was not prolonged by the canine sniff.¹³²

At trial Caballes moved to exclude the drugs found in his trunk, claiming the canine sniff was an illegal search.¹³³ The trial court denied the motion, and Caballes was convicted of a drug offense.¹³⁴ Caballes's first appeal was unsuccessful, but the conviction was ultimately overturned by the Illinois Supreme Court, which concluded that the police had unjustifiably converted a lawful traffic stop into an illegal drug investigation.¹³⁵ The state appealed the decision to the United States Supreme Court, which reversed the Illinois Supreme Court, ruling the warrantless use of a narcotics dog did not offend the Fourth Amendment.¹³⁶

The question before the Court was "whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."¹³⁷ As noted above, the majority's answer was no.¹³⁸ In

¹²⁸ *Id.* at 406.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 407.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.* at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.").

¹³⁷ *Id.* at 407.

arriving at this conclusion, the Court relied heavily on the *Jacobsen* decision. The Court spoke expansively regarding the absence of a legitimate expectation of privacy in contraband. Further, the majority claimed to explain how the *Caballes* decision was entirely consistent with *Kyllo*.

In discussing whether the warrantless dog sniff violated the Fourth Amendment, the Court began by extensively quoting the *Jacobsen* decision. Justice Stevens, writing for the majority, stated, “We have held that any interest in possessing contraband cannot be deemed ‘legitimate’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate, privacy interest.’”¹³⁹ The Court’s focus appears to be on the limited disclosure of the canine sniff, with only two sentences of the opinion devoted to the minimal intrusion of the dog sniff. Justice Stevens quoted the *Place* decision primarily to support the conclusion that canine sniffs do “not expose noncontraband items that otherwise would remain hidden from public view.”¹⁴⁰

Finally, the majority stated its decision in *Caballes* “is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constitute[s] an unlawful search.”¹⁴¹ This last paragraph of the majority opinion has been central to how lower courts have addressed the warrantless use of a dog to sniff a home.¹⁴² Justice Stevens argued that “critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity – in that case, intimate details in a home, such as ‘at what hour each night the lady of the house takes

¹³⁸ *Id.* at 409 (“In this case, the dog sniff was performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation. Any intrusion on respondent’s privacy expectations does not rise to the level of a constitutionally cognizable infringement.”).

¹³⁹ *Id.* at 408.

¹⁴⁰ *Id.* at 409.

¹⁴¹ *Id.*

¹⁴² See *infra* notes 381–94 and accompanying text.

her daily sauna and bath.”¹⁴³ Justice Stevens went on to write that “[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.”¹⁴⁴ Section four of the article will discuss whether Justice Stevens’s characterization of the *Kyllo* decision withstands scrutiny. At this point, it is enough to examine how this paragraph impacts the question of warrantless dog sniffs of the home.

Justice Stevens’s opinion strongly indicates that a warrantless dog sniff of a home would no more offend the Fourth Amendment than a warrantless sniff of a car. This indication comes through in at least two ways. First, the comparison of *Caballes* and *Kyllo* can do nothing but support the use of a dog sniff of the home. Given that *Kyllo* dealt with Fourth Amendment protection of the home and *Caballes* of a car, most would not have thought to compare the two decisions. If the majority was concerned that some would argue a conflict, it could have simply noted that the Fourth Amendment protection of a home has always been greater than those in a car on public streets. Second, the explanation provided by the majority to support the claimed consistency between the cases comes from the distinction between the investigative techniques employed in each case and has nothing to do with the distinction between a home and a car. In *Kyllo*, the investigative technique was too broad, detecting lawful activity as well as unlawful. In *Caballes*, however, the investigative technique was allegedly more refined, detecting only illegal items. Thus, law enforcement’s activity in *Caballes* was permissible while in *Kyllo* it was not. This logic has nothing to do with the place being investigated, but rather with the technique of investigation.

¹⁴³ *Caballes*, 543 U.S. at 409–10.

¹⁴⁴ *Id.* at 410.

Justices Ginsburg and Souter dissented.¹⁴⁵ Both Justices pointed out that the majority opinion would permit warrantless dog sniffs of parked cars and pedestrians.¹⁴⁶ Justice Souter also argued that the Court has provided no logical stopping point to the doctrine it announced.¹⁴⁷ Finally, both Justices noted that this case involved a drug-sniffing dog, and the warrantless use of bomb dogs should be treated differently.¹⁴⁸

II. FOURTH AMENDMENT AND THE HOME

Although the Court's contraband exception is worded broadly, when it comes to warrantless canine sniffs, the contraband exception runs up against the most resolutely defended zone of Fourth Amendment protection—the home. The Court has repeatedly declared that protection of the home is at the core of the Fourth Amendment.¹⁴⁹ In *Silverman v. United States*, the Court quotes with approval Judge Jerome Frank, who described the Fourth Amendment's protection of the home in the following way:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is a sizable hunk of liberty worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from pub-

¹⁴⁵ *Id.* at 417–425 (Ginsburg, J., dissenting).

¹⁴⁶ *Id.* at 417, 422.

¹⁴⁷ *Id.* at 417.

¹⁴⁸ *Id.* at 417 n.7, 424–25.

¹⁴⁹ *See, e.g., Silverman v. United States*, 365 U.S. 505, 511 (“At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” (citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd v. United States*, 116 U.S. 616, 626–30 (1886))).

lic scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.¹⁵⁰

Protecting the sanctity of the home is central to the Third and Fourth Amendments.¹⁵¹ Even in cases that do not involve the Fourth Amendment, the Court has recognized that the home is a unique redoubt of individual liberty.¹⁵²

With regard to the home, the Court's long-standing position has been that a warrantless search of the interior of an individual's home is *per se* unreasonable absent a clearly defined exception.¹⁵³ Although this rule is sometimes linked to *United States v. Carroll*,¹⁵⁴ its origins are arguably older. *United States v. Boyd*¹⁵⁵ is the earliest

¹⁵⁰ *Id.* at 511 n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)).

¹⁵¹ *But see* Josh Dugan, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L. J. 555, 563 (2009). The author argues that quartering of soldiers was not limited to protecting the home. *Id.* Rather it was meant to have a broader impact, removing soldiers from living among citizens. *Id.*

¹⁵² *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (noting that a "particularly important and sensitive area of privacy . . . [is] the marital home").

¹⁵³ *Kentucky v. King*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting); *United States v. Kyllo*, 533 U.S. 27, 31 (2001); *Illinois v. Rodriguez*, 497 U.S. 177, 191 (1990); *Steagald v. United States*, 451 U.S. 204, 212 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

¹⁵⁴ 267 U.S. 132, 136, 162 (1925) (finding that when "officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor, . . . the search, seizure, and arrest" was not a violation of the Fourth Amendment); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 479, 91 S. Ct. 2022, 2044 ("Carroll, on its face, appears to be a classic example of the doctrine that warrantless searches are *per se* unreasonable in the absence of exigent circumstances.").

¹⁵⁵ 116 U.S. 616, 638 (1886) (finding that the district judge's "notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and . . . [therefore] the inspec-

declaration by the Supreme Court that the government generally must secure a warrant before searching an individual's home.¹⁵⁶ Since *Boyd* this rule has been repeated again and again.¹⁵⁷ *United States v. Kyllo* is one of the most recent and definitive reiterations of this general rule.¹⁵⁸ The requirement that no search of a home be conducted absent a warrant is so potent that even when exigencies permit the warrantless entry of a home, law enforcement is limited to "searches," which are demanded by the exigencies or are permitted under the "plain view" doctrine.¹⁵⁹ This section will discuss three cases that provide some sense of the Court's vigor with regard to the warrant requirement in the home.

Boyd v. United States was the first case where the Supreme Court attempted to define in detail how the Fourth Amendment should be applied to the home.¹⁶⁰ Since being decided, it has been cited by the Supreme Court repeatedly for its explanation of the origins and

tion and . . . admission [of the invoice] in[to] evidence . . . were erroneous and unconstitutional").

¹⁵⁶ See *id.* at 641 (Miller, J., concurring) ("Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing . . . [S]earches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.").

¹⁵⁷ See *supra* notes 155-56 and accompanying text; *infra* notes 158-227 and accompanying text.

¹⁵⁸ See *Kyllo*, 533 U.S. at 40 ("Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant.").

¹⁵⁹ See *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (finding that when exigent circumstances existed for police to enter an apartment, it was not a seizure to record serial numbers off of a stolen turntable, but moving the equipment was "a 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment").

¹⁶⁰ Although some might see *Boyd* as a case that only involves an individual's papers, the papers in that case were in Boyd's home. See *Boyd v. United States*, 116 U.S. 616, 618 (1886) (requiring Boyd "to produce the invoice of the 29 cases"). Also, much of the Court's discussion in *Boyd* is directed toward the sanctity of the home. *Id.* at 621-30.

purpose of the Fourth Amendment.¹⁶¹ As recently as *United States v. Jones*,¹⁶² the Court has used *Boyd* to illuminate the origins of the Fourth Amendment.¹⁶³

The appellant in *Boyd* challenged the constitutionality of a federal forfeiture statute, claiming that the statute violated the Fourth and Fifth Amendments.¹⁶⁴ Prior to trial the government moved to compel the defendant to turn over certain business documents, arguing it was entitled to the documents based on § 5 of the forfeiture statute.¹⁶⁵ Section 5 of the statute authorized “the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion” requesting production of the documents.¹⁶⁶ If the court granted the motion and the defendant refused to produce the document, then “the allegation stated in the . . . motion [would] be taken as confessed.”¹⁶⁷ Although the discre-

¹⁶¹ See, e.g., *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (citing *Brower v. County of Inyo*, 489 U. S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U. S. 616, 626 (1886))) (internal quotation marks omitted) (“*Entick v. Carrington* (citation omitted) is a case we have described as a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure.”).

¹⁶² See *id.* (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”).

¹⁶³ See *id.* (citing *Brower v. County of Inyo*, 489 U. S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U. S. 616, 626 (1886))) (internal quotation marks omitted) (“*Entick v. Carrington* (citation omitted) is a case we have described as a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure.”).

¹⁶⁴ *Boyd*, 116 U.S. at 618, 621.

¹⁶⁵ *Id.* at 619.

¹⁶⁶ *Id.* at 619–20.

¹⁶⁷ *Id.* at 620.

tion to order production of the documents was left to the court, the statute did not require the court to conduct a Fourth Amendment analysis of whether to issue the order.¹⁶⁸

The Supreme Court held that the statute in *Boyd* implicated both the Fourth and Fifth Amendments to the Constitution.¹⁶⁹ Regarding the Fourth Amendment, the Court began by dismissing the argument that because the statute being challenged did not authorize searches or seizures, the Fourth Amendment was not implicated.¹⁷⁰ The Court stated:

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's home and searching amongst his papers, are wanting, . . . but [the statute] accomplishes the substantial object of those acts in forcing from a party evidence against himself. . . . It is our opinion, therefore, that compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment.¹⁷¹

Next, the Court addressed whether the compulsory surrender of the items in the cases was "an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."¹⁷² To answer the question whether the Fourth Amendment applied, the Court relied

¹⁶⁸ *Id.* at 622 (finding that "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure").

¹⁶⁹ *See id.* at 632 ("[T]he law, though very speciously worded, is still obnoxious to the prohibition of the fourth amendment of the constitution, as well as of the fifth.").

¹⁷⁰ *Id.* at 622-32. The Government argued that the statute in question did not involve a search of the Appellant's home, rather it merely required production of items. *Id.* at 622.

¹⁷¹ *Id.* at 622.

¹⁷² *Id.*

heavily on American and British history prior to the American Revolution.¹⁷³ The Court focused particular attention on the British case of *Entick v. Carrington and Three Other King's Messengers*.¹⁷⁴ According to the Court, Lord Camden's opinion in *Entick* should be applied in the current case because it is "sufficiently explanatory of what was meant by unreasonable searches and seizures" at the time of the framing of the Constitution.¹⁷⁵

The *Entick* case dealt with the practice in England of the Secretary of State issuing general warrants to search private homes.¹⁷⁶ Such warrants were usually issued in order to find and seize books and papers to be used in criminal prosecutions for libel committed against public officials.¹⁷⁷ After one such case, the individual against whom the general warrant was issued, John Wilkes, brought a trespass suit against the individuals who executed the general warrant.¹⁷⁸ The individuals who executed the general warrant claimed the action for trespass should be dismissed because they had the authority to enter Wilkes's home based on the general warrant.¹⁷⁹

¹⁷³ *Id.* at 622-32.

¹⁷⁴ *Id.* at 626-32. *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765) (finding that "the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void").

¹⁷⁵ *Boyd*, 116 U.S. at 627.

¹⁷⁶ *See id.* at 626 ("The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers." (citing *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765))).

¹⁷⁷ *See id.* at 625-26 ("Prominent and principal among these was the practice of issuing general warrants by the secretary of state, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel.").

¹⁷⁸ *See id.* at 626 ("The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers." (citing *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765))).

¹⁷⁹ *Id.* at 625-26.

The court considered the lawfulness of this justification and found it insufficient.¹⁸⁰ Lord Camden wrote in his opinion that “[t]he great end for which men entered into society was to secure their property,” and absent “some public law for the good of the whole,” property rights are “sacred and incommunicable.”¹⁸¹ Lord Camden went on to write that laws that claim to give magistrates the authority to issue general warrants are “too much for us . . . to pronounce a practice legal which would be subversive of all the comforts of society.”¹⁸²

In applying the essence of the *Entick* opinion, the Supreme Court held that § 5 of the statute under consideration would have never been approved by the First Congress.¹⁸³ The Court explained,

The struggle against arbitrary power in which [the members of the First Congress] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.¹⁸⁴

Thus, based on a violation of the Fourth and Fifth Amendments, the Court declared § 5 of the statute unconstitutional and overturned the case.¹⁸⁵

Although the Court in *Boyd* analyzed the language of the Fourth Amendment, that was only the starting point of the opinion. The Court looked beyond the literal language of the Fourth Amendment and made broad statements about the values the

¹⁸⁰ See *id.* at 629 (“[W]e are all of opinion that the warrant to seize and carry away the party’s papers in the case of a seditious libel is illegal and void.” (quoting *Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765))).

¹⁸¹ *Id.* at 627 (quoting *Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765)).

¹⁸² *Id.* at 628.

¹⁸³ *Id.* at 630.

¹⁸⁴ *Id.*

Fourth Amendment was supposed to protect. Prophetically, Justice Bradley wrote:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court. . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.¹⁸⁶

The second case that is particularly significant to the warrant requirement in the home is *Payton v. New York*.¹⁸⁷ Although the facts of *Payton* deal with a seizure rather than a search, the case consolidates the Court's position on searches of the home.¹⁸⁸ The *Payton* Court folds into its discussion of the Fourth Amendment several critical cases.¹⁸⁹ This discussion leads the Court to the conclusion that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."¹⁹⁰

In *Payton* the Court considered two cases that involved a New York statute that authorized police to enter an individual's home to

¹⁸⁵ *Id.* at 638.

¹⁸⁶ *Id.* at 630.

¹⁸⁷ 445 U.S. 573, 576 (1980) (holding "that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" (internal citations omitted)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 574-90 (citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. United States District Court*, 407 U.S. 297 (1972); *Chimel v. California*, 395 U.S. 752 (1969); *Beck v. Ohio*, 379 U.S. 89 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1948); *Boyd v. United States*, 116 U.S. 616 (1886)).

¹⁹⁰ *Id.* at 586.

make an arrest without a warrant.¹⁹¹ In both cases police entered the defendants' homes based on probable cause but without a warrant.¹⁹² In one case police found narcotics in plain view while arresting the defendant,¹⁹³ and in the other case police found an incriminating shell casing.¹⁹⁴ The New York Court of Appeals found the arrests lawful and the evidence admissible.¹⁹⁵ The Supreme Court granted certiorari and reversed.¹⁹⁶

The Court began its analysis by noting that exigencies did not exist that would have justified the warrantless entry of the defendant's homes in either of the cases it was reviewing.¹⁹⁷ Next, the Court discussed the familiar history of the Fourth Amendment and its purpose as a check on the arbitrary power.¹⁹⁸ The Court quoted extensively from *Johnson v. United States* where Justice Jackson "co-gently observed":

The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to society which chooses to dwell in a reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.¹⁹⁹

¹⁹¹ *Id.* at 573.

¹⁹² *Id.*

¹⁹³ *See id.* at 578 ("Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia.").

¹⁹⁴ *See id.* at 576-77 ("In plain view . . . was a .30-caliber shell casing that was seized and later admitted into evidence at Payton's murder trial.").

¹⁹⁵ *Id.* at 579.

¹⁹⁶ *Id.* at 602.

¹⁹⁷ *Id.* at 583.

¹⁹⁸ *Id.* at 583-600.

¹⁹⁹ *Id.* at 586 n.24 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

The Court concluded by rejecting an argument that searches and seizures in the home should be treated differently.²⁰⁰ The majority wrote:

[A]ny differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. . . . In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.²⁰¹

The Court in *Payton* noted that absent consent there is one exception to the warrant requirement—exigent circumstances.²⁰² However, even when exigent circumstances exist, law enforcement is limited by the plain view doctrine.²⁰³ This limitation is illustrated in *Arizona v. Hicks*.²⁰⁴ *Hicks* is particularly significant to a discussion of the contraband exception because the item central to the case was

²⁰⁰ *Id.* at 588–89.

²⁰¹ *Id.* at 589–90.

²⁰² *See id.* at 588–89 (“To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present.”).

²⁰³ *See Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (finding that when exigent circumstances existed for police to enter an apartment, it was not a seizure to record serial numbers off of a stolen turntable, but moving the equipment was “a ‘search’ separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment”).

²⁰⁴ *Id.*

a piece of stolen property.²⁰⁵ This is important because it would seem reasonable to conclude society would be no more willing to recognize Hick's expectation of privacy in stolen goods than it would in illegal drugs.

In *Hicks*, police entered the defendant's apartment after a bullet was fired through its floor, injuring a man in the apartment below.²⁰⁶ Police entered to search for the shooter and other possible victims.²⁰⁷ Once inside, the police found several guns and expensive stereo equipment.²⁰⁸ Suspecting the equipment was stolen, one of the officers moved some of the equipment in order to record the serial numbers.²⁰⁹ Based on the serial numbers the officer determined that the stereo equipment had in fact been stolen.²¹⁰ At trial the defendant moved to suppress the stereo equipment claiming the police had conducted a warrantless search.²¹¹ The trial court's decision to grant the motion was upheld by the Arizona court of appeals.²¹² The matter was ultimately appealed to the Supreme Court and was affirmed.²¹³

²⁰⁵ *Id.* at 323–324. See also *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (comparing the facts to *Hicks* and noting that “[o]nce again, the analogy to the plain-view doctrine is apt”). The court states that this case is like *Hicks* because the “incriminating character of the object was not immediately apparent to” the officer. *Id.* at 379. “Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement.” *Id.* The court goes on to again rely on *Hicks* stating: “If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – i.e., if ‘its incriminating character [is not] ‘immediately apparent,’ the plain-view doctrine cannot justify its seizure.” *Id.* at 375 (internal citations omitted).

²⁰⁶ *Hicks*, 480 U.S. at 323.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 324.

²¹² *Id.*

²¹³ *Id.* at 329.

The Court began its discussion of the case by agreeing with the government that the officer's act of moving the stereo equipment was not a seizure within the meaning of the Fourth Amendment.²¹⁴ The Court reasoned that merely moving the equipment "did not 'meaningfully interfere' with the respondent's possessory interest."²¹⁵ The Court also noted that simply "inspecting those parts of the turntable that came into view during [the search justified by the exigent circumstances] would not have constituted an independent search."²¹⁶ However, the majority held that when the officer moved the turntable he did expose "to view concealed portions of the apartment . . . [and] produce[d] a new invasion of respondent's interest unjustified by the exigent circumstances that validated the entry."²¹⁷ In response to Justice Powell's dissent, the majority noted that there was a significant difference between looking and moving—concluding that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable."²¹⁸ Finally, the majority rejected Justice O'Connor's invitation to permit police to conduct "a cursory inspection of a suspicious item in plain view in order to determine whether it is indeed evidence of a crime."²¹⁹ Justice O'Connor argued such a reasonable suspicion inspection should be permitted because it is minimally intrusive and serves important governmental interests.²²⁰ In support of this argument, she cited *United States v. Place* and noted that the intrusion in *Place* was more significant than that in *Hicks*.²²¹

²¹⁴ *Id.* at 324.

²¹⁵ *Id.*

²¹⁶ *Id.* at 325.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 328–29; *id.* at 335 (O'Connor, J., dissenting).

²²⁰ *Id.* at 338 (O'Connor, J., dissenting).

²²¹ *Id.*

Although *Hicks* was primarily about keeping the exigent circumstances exception to the warrant requirement in check, it is nonetheless potentially relevant to the contraband exception.²²² At the heart of the contraband exception is the conclusion that the use of a test that reveals nothing more than the presence or absence of an item in which a person has no legitimate expectation of privacy does not constitute an impermissible search.²²³ The officer's actions in *Hicks*, arguably, did nothing more than reveal that the turntable in Hicks's apartment was stolen. If the Court's conclusions in *Place* and *Jacobsen* were intended to apply in all contexts, then why not in the *Hicks* case?

Boyd, *Payton*, and *Kyllo* all reinforce the continuing significance of Pitt's 1763 declaration.²²⁴ With few exceptions, warrantless searches of the home presumptively violate the Fourth Amendment.²²⁵ These cases make it clear that there is more than just privacy at stake with regard to the home. Each of the cases use terms like "sanctity," "security," and "liberty" to describe the interests at stake in the home.²²⁶ These interests seem to come into play in *Kyllo* and

²²² But see Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 HARV. L. REV. F. 38, 42 (2005) (noting that "[a]t first glance, the facts in *Hicks* may seem analogous to a hash calculation[,] . . . [b]ut those similarities are superficial").

Hashing is a powerful and pervasive technique used in nearly every examination of seized digital media. The concept behind hashing is quite elegant: take a large amount of data, such as a file or all the bits on a hard drive, and use a complex mathematical algorithm to generate a relatively compact numerical identifier (the hash value) unique to that data.

Id. at 38.

²²³ See *United States v. Place*, 462 U.S. 696, 707 (1983) (noting that the Fourth Amendment protects legitimate expectations of privacy, and a dog "sniff discloses only the presence or absence of narcotics, a contraband item").

²²⁴ See *supra* note 2 and accompanying text.

²²⁵ See *Payton v. New York*, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971))).

²²⁶ See *id.* at 589 (noting that to be arrested in the home is "an invasion of the sanctity of the home"); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (noting that "it is the

Hicks where efforts to permit arguably minimally intrusive non-searches have been rejected.²²⁷

III. UNITED STATES V. JONES: A NEW WAY FORWARD?

In addition to the cases discussed above, the impact of *United States v. Jones*²²⁸ must be considered. *Jones* was one of the most anticipated Supreme Court decisions of 2012. The opinion did not disappoint. In what some saw as an unanticipated result, the Court unanimously determined that affixing a credit-card-sized tracking device on the exterior of a suspect's car without a warrant was a violation of the Fourth Amendment.²²⁹ Not only were many surprised by the 9-0 holding, but some were also surprised by the majority's apparent partial resurrection of the trespass doctrine in Fourth Amendment law.²³⁰

In *Jones*, police suspected the respondent of drug trafficking.²³¹ As part of a joint investigation with the FBI, police sought a search warrant that would permit them to affix a GPS tracking device to

invasion of his infeasible right of personal security, personal liberty, and private property" at stake).

²²⁷ See *Kyllo v. United States*, 533 U.S. 27, 40 (holding that when "the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant"); *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (finding that when exigent circumstances existed for police to enter an apartment, it was not a seizure to record serial numbers off of a stolen turntable, but moving the equipment was "a 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment").

²²⁸ See 132 S. Ct. 945, 949 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'").

²²⁹ *Id.*

²³⁰ See generally *id.* at 952 ("[T]he Katz reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test.").

²³¹ *Id.* at 948.

Jones's car.²³² A warrant was issued authorizing police to affix the device within ten days, but police did not place the GPS device on Jones's car until the eleventh day.²³³ Police then tracked Jones's movements over the next twenty-eight days, and the government used the information secured from the GPS in charging Jones with conspiracy to distribute cocaine.²³⁴ The trial court granted in part Jones's motion to suppress the information, suppressing only the information gathered by the GPS device while Jones's car was parked in the garage next to his house.²³⁵ Ultimately, Jones was convicted, and the trial court's ruling on the motion was appealed to the United States Court of Appeals for the District of Columbia.²³⁶ The Court of Appeals reversed, ruling that the evidence obtained by warrantless use of the GPS device should have been excluded.²³⁷ The United States Supreme Court granted certiorari and affirmed.²³⁸

Although the Court's decision to affirm the D.C. Circuit was unanimous, the justices did not agree on a rationale. The central disagreement within the Court was over the role the government's physical trespass should play in the Fourth Amendment analysis. Justices Scalia and Sotomayor concluded that the physical trespass committed by the government on Jones's car was enough, on its own, to create a Fourth Amendment violation.²³⁹ Both Justices Scal-

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 949.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.* at 954 (Sotomayor, J., concurring) ("I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.") (alteration in original) (citation omitted).

ia and Sotomayor stated that had there been no physical trespass, then the *Katz* “reasonable expectation of privacy” test would have to be applied to the facts.²⁴⁰ Justice Alito argued that relying on the government’s physical trespass as the basis for finding a Fourth Amendment violation “is unwise.”²⁴¹ Rather, Justice Alito argued that the *Katz* test should be applied in the first place, instead of as a fallback to a trespass analysis.²⁴²

Justices Scalia and Sotomayor suggested a modification in the Court’s current method of analyzing the Fourth Amendment. According to both, a search within the meaning of the Fourth Amendment occurs “where, as here, the Government obtains information by physically intruding on a constitutionally protected area.”²⁴³ Further, both agreed that in the absence of a physical trespass the Court should apply the *Katz* “reasonable expectation of privacy” test.²⁴⁴ Central to Justice Scalia’s argument is the belief that the Fourth Amendment “is to be construed in light of what was deemed to be an unreasonable search and seizure when it was adopted.”²⁴⁵ This statement was first written in a Supreme Court decision in 1925.²⁴⁶ Since joining the Court, Justice Scalia has referred to it several times.²⁴⁷ Based on this core idea, Justice Scalia

²⁴⁰ See *id.* at 950, 955

²⁴¹ *Id.* at 957–64 (Alito, J., concurring).

²⁴² See *id.* at 964 (“The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.”).

²⁴³ *Id.* at 950 n.3. See also *id.* at 957 (Sotomayor, J., concurring).

²⁴⁴ See *id.* at 952 (“[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, but not *substituted for*, the common-law trespassory test.”).

²⁴⁵ *Carroll v. United States*, 267 U.S. 132, 149 (1925).

²⁴⁶ *Id.*

²⁴⁷ See, e.g., *Jones*, 132 S. Ct. 945, 950 (2012); *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring); *California v. Acevedo*, 500 U.S. 565, 583–84 (1991) (Scalia, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991).

concluded reference to the *Katz* test was unnecessary.²⁴⁸ According to Justice Scalia, when the government physically occupies private property for the purpose of obtaining information, “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”²⁴⁹

Application of a trespass theory as a first line of Fourth Amendment defense could place a limit on some applications of the contraband exception. For example, in *Jacobsen* the government agents opened the defendant’s Federal Express package, removed a portion of the contents and tested it, potentially committing a trespass.²⁵⁰ Other potential applications of the contraband exception involving technologies that emit a ray or wave that makes contact with the property of a suspect may be off-limits as well. In at least one case, the government has in fact attempted to expand the application of the contraband exception to the search of a computer for digital contraband.²⁵¹ Although the Court never resolved the issue, *Jones* may make such warrantless searches forbidden. These potential impacts are speculative. As Justice Alito points out in his concurrence, not all states have agreed that “transmission of electrons that occurs when a communication is sent from one computer to another is enough” to constitute a trespass.²⁵² These impacts rely on Justice Sotomayor remaining shoulder-to-shoulder with Justices Thomas, Kennedy, Roberts, and Scalia on the issue. Although Justice Sotomayor joined Justice Scalia’s majority opinion in full, her

²⁴⁸ *Jones*, 132 S. Ct. at 952.

²⁴⁹ *Id.* at 949.

²⁵⁰ *United States v. Jacobsen*, 466 U.S. 109, 111–12 (1984).

²⁵¹ *United States v. Crist*, 627 F. Supp. 2d 575, 581–82 (M.D. Pa. 2008). Additionally, Robyn Burrows argues that at least one other case has paved the way for warrantless hashing. Robyn Burrows, *Judicial Confusion and the Digital Drug Dog Sniff: Pragmatic Solutions Permitting Warrantless Hashing of Known Illegal Files*, 19 GEO. MASON L. REV. 255 (2011).

²⁵² *Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (citing *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997); *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566 n.6 (1996)).

concurrency straddled the line between Justice Scalia's opinion and Justice Alito's. Justice Sotomayor's concurrence seems to say, "I see both your points of view," yet her concurrence actually goes further than either of the other opinions in suggesting a modification (if not wholesale rejection) of the third-party exception as it relates to technology.²⁵³

If the Court finds that the police presence on Jardines's porch is lawful, the Court is left with applying the *Katz* test. Historically, courts that have applied the *Katz* test to warrantless dog sniffs of the home have concluded that the defendant had no reasonable expectation of privacy.²⁵⁴ Owing to statements made by the Supreme

²⁵³ Justice Sotomayor writes:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disintegrated to Fourth Amendment protection.

Jones, 132 S. Ct. at 957 (Sotomayor, J., concurring).

²⁵⁴ See *State v. Dunn*, 564 N.E.2d 1054, 1056 (1990) ("In light of the rationale adopted by the Supreme Court in *Place*, and reaffirmed in *Jacobsen*, we reject defendant's contention that his Federal constitutional rights were violated."). Because the canine sniff was "conducted outside his apartment [and] could reveal only the presence or absence of illicit drugs, it did not constitute a search within the meaning of the Fourth Amendment." *Id.* See also *United States v. Tarazon-Silva*, 960 F. Supp. 1152, 1163 (W.D. Tex. 1997) (finding that the officer and canine "were positioned in an area where they lawfully had a right to be . . . [therefore the dog's] sniff and subsequent alert to the scent of narcotics emanating from the dryer vent did not constitute a search"). Before 1997, courts ruled that dog sniffs were permissible for Amtrak sleeper cars. *United States v. Coyle*, 278 U.S. App. D.C. 367, 474-77 (D.C. Cir. 1989). Courts also ruled dog sniffs permissible outside motel rooms and homes where the dog was lawfully present because it was not a search. *United States v. Reed*, 141 F.3d 644 (6th Cir. 1998); *United States v. Marlar*, 828 F. Supp. 415, 419 (N.D. Miss. 1993); *but see United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) ("Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door [and the] [u]se of the trained dog impermissibly intruded on that legitimate expectation."); *United States v. Jackson*, No. IP 03-79-CR-1 H/F, 2004 U.S. Dist. LEXIS 15676, at *16 (S.D. Ind. Feb. 4, 2004) ("Because the issuance of the search warrant depended on infor-

Court in *Place* and *Jacobsen*, most state and federal courts have ruled dog sniffs of the home are not searches within the meaning of the Fourth Amendment.²⁵⁵ Since the Supreme Court's ruling in *Caballes*, this mostly one-sided line of cases became almost entirely one-sided.²⁵⁶ The only holdout courts have been from Florida.²⁵⁷ Between the Supreme Court's decision in *Caballes* in 2005 and the Florida Supreme Court's *Jardines* decision in 2011, only one other appellate court had declared warrantless dog sniffs of the home violated the Fourth Amendment.²⁵⁸

mation the police had gathered by [using a drug-sniffing dog around the home, which] violat[ed] the Fourth Amendment, the search warrant was invalid and the evidence obtained from the February 17, 2002 search must be suppressed.”).

²⁵⁵ See, e.g., *Reed*, 141 F.3d at 649; *Tarazon-Silva*, 960 F. Supp. at 1163; *Marlar*, 828 F. Supp. at 419; *Dunn*, 564 N.E.2d at 1056.

²⁵⁶ See, e.g., *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *United States v. Scott*, No. 3:08-cr-00057-JAJ, 2009 U.S. Dist. LEXIS 9895 (S.D. Iowa Jan. 28, 2009); *United States v. Broadway*, 580 F. Supp. 2d 1179 (D. Colo. 2008); *State v. Jardines*, 9 So. 3d 1 (Fla. Dist. Ct. App. 2008); *Stabler v. State*, 990 So. 2d 1258 (Fla. Dist. Ct. App. 2008); *Hoop v. State*, 909 N.E.2d 463 (Ind. Ct. App. 2009); *People v. Jones*, 755 N.W.2d 224 (Mich. Ct. App. 2008); *State v. Cook*, Nos. 2010-CA-40 & 2010-CA-41, 2011 WL 1376622 (Ohio Ct. App. 2011); but see *State v. Rabb*, 920 So. 2d 1175, 1184-85 (Fla. Dist. Ct. App. 2006).

²⁵⁷ See, e.g., *Jardines v. State*, 73 So. 3d 34, 36 (Fla. 2011) (“Accordingly, we conclude that a ‘sniff test,’ such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a ‘search’ within the meaning of the Fourth Amendment. As such, it must be preceded by an evidentiary showing of wrongdoing.”), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564). Some courts have chosen not to rule on the matter. For example, the Arizona Supreme Court in *State v. Guillen* chose to avoid the issue, ruling the suspect gave consent. See 223 P.3d 658, 662 (Ariz. 2010) (en banc) (“Assuming, without deciding, that the dog sniff violated Article 2, Section 8, we conclude that Mrs. Guillen’s consent was valid because under Brown’s three-factor test, intervening circumstances obviated any alleged taint and the first dog sniff conducted from outside the garage was not flagrant police misconduct.”).

²⁵⁸ See *Rabb*, 920 So. 2d at 1185 (holding that “the dog sniff of Rabb’s house [was] violative of the Fourth Amendment”).

IV. FLORIDA V. JARDINES AND THE MEANING OF INTRUSIVENESS.

Jardines is the first state supreme court case, post-*Caballes*,²⁵⁹ to declare that the Fourth Amendment prohibits warrantless dog sniffs of the home.²⁶⁰ The *Jardines* court concluded that the intrusiveness, embarrassment, fear, and humiliation caused by police walking a dog up to a person's front door were too much.²⁶¹ The analysis used by the *Jardines* court is unique, putting a new spin on earlier contraband exception cases. Rather than concluding that *Kyllo* overruled *Caballes*, the Florida court held that one of the hallmarks of the contraband exception, minimal intrusiveness, was violated in this case.²⁶²

A. THE BACKGROUND

The investigation of *Jardines* began with an unverified tip to a crime-stoppers hotline that *Jardines* was growing marijuana in his home.²⁶³ Approximately a month later, Detective Pedraja with the Miami-Dade County Police Department went to *Jardines*'s home at 7:00 a.m.²⁶⁴ The detective observed that the window blinds were closed, there was no car in the driveway, and the air conditioner

²⁵⁹ In *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), the Nebraska Supreme Court held a dog sniff at the front door of the defendant's apartment violated the Fourth Amendment.

²⁶⁰ See *Jardines v. State*, 73 So. 3d 34, 55-56 (Fla. 2011) (holding "that the warrantless 'sniff test' that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment"), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564).

²⁶¹ *Id.* at 48-49.

²⁶² See *id.* at 45 ("Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*—that warrant no special protection under the Fourth Amendment.").

²⁶³ *Id.* at 37.

²⁶⁴ *Id.*

was running constantly.²⁶⁵ Fifteen minutes later, an officer arrived with a narcotics dog named Franky.²⁶⁶ The officer let Franky out of the car, placed him on a leash, and accompanied the dog to the front porch of Jardines's home.²⁶⁷ According to the officer's testimony at a suppression hearing, Franky began alerting to the presence of narcotics the moment he entered the porch.²⁶⁸ Franky walked to the front door of the home and sat, signaling to his handler that he had found the source of the narcotic smell. The officer then left the porch and informed Detective Pedraja that Franky had alerted to the presence of drugs.²⁶⁹ Detective Pedraja then approached the door of the Jardines home to request consent to search the house.²⁷⁰ While at the front door, Detective Pedraja detected the smell of live marijuana.²⁷¹ This information, along with the information about the air conditioner and the anonymous tip, was included in an affidavit submitted in support of a request for a warrant to search Jardines's home.²⁷² Based on the affidavit a search warrant was issued and a search revealed live marijuana plants and a hydroponics lab for growing marijuana.²⁷³ Jardines was charged with trafficking in cannabis and grand larceny.²⁷⁴ At a suppression hearing, Jardines argued the warrantless use of Franky to sniff at the front porch and door of his home violated the Fourth Amendment.²⁷⁵ The trial court agreed and suppressed the evidence obtained in the search.²⁷⁶

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *See id.* (stating that at the front door, "the dog alerted to the scent of contraband").

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 37-38.

²⁷³ *Id.*

²⁷⁴ *Id.* at 62 (Polston, J., dissenting).

²⁷⁵ *Id.* at 38.

²⁷⁶ *Id.*

The State appealed the judge's ruling, and Florida's Third District Court reversed the trial judge—concluding the warrantless sniff was not a search.²⁷⁷ The Third District Court of Florida was the third intermediate Florida appellate court to answer whether a warrantless dog sniff was a search.²⁷⁸ Two of the district courts held it was not, and one found that it was.²⁷⁹ Thus, the Florida Supreme Court had to resolve a split among the Florida appellate courts. A majority of the Florida Supreme Court reversed the Third District Court and held that a search had occurred.²⁸⁰

B. FLORIDA SUPREME COURT'S DECISION

The Florida Supreme Court reviewed all the major contraband exception cases: *Place*, *Edmond*, *Caballes*, *Jacobsen* and *Kyllo*.²⁸¹ After reviewing these cases, the court found “the analysis used in the above federal ‘dog sniff’ cases [] inapplicable to a ‘sniff test’ conducted at a private home.”²⁸² The *Jardines* court based this conclusion on the fact that “all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects . . . that warrant no special protection under the Fourth Amend-

²⁷⁷ *Id.*

²⁷⁸ See *Stabler v. State*, 990 So. 2d 1258, 1263 (Fla. Dist. Ct. App. 2008) (concluding “that the dog sniff at the front door of the apartment did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest”); *Nelson v. State*, 867 So. 2d 534, 537 (Fla. Dist. Ct. App. 2004) (holding “that a trained dog’s detection of odor in a common corridor does not contravene the Fourth Amendment”).

²⁷⁹ *Jardines*, 73 So. 3d at 55–56 (holding “that the warrantless ‘sniff test’ that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment”); *Stabler*, 990 So. 2d at 1263; *Nelson*, 867 So. 2d at 537.

²⁸⁰ *Jardines*, 73 So. 3d at 55–56.

²⁸¹ *Id.* at 42–44.

²⁸² *Id.* at 44.

ment.”²⁸³ The court went on to observe that in *Place, Jacobsen, Edmond, and Caballes*, “the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation, or embarrassment.”²⁸⁴ Additionally, according to the court, “under the particular circumstances of each of the above cases the tests were not susceptible to being employed in a discriminatory or arbitrary manner”²⁸⁵ The court summed up its conclusion by stating:

[A] “sniff test” by a drug detection dog at a private residence does not *only* reveal the presence of contraband . . . but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation, or embarrassment, and it raises the specter of arbitrary or discriminatory application.²⁸⁶

Thus, the Florida Supreme Court appeared to root its holding in at least three bases: First, under the facts of *Jardines*, the dog sniff was conducted in an intrusive fashion that exposed the residents of the home to public scorn, humiliation, and fear that could cause a “reflexive or unpredictable response.”²⁸⁷ Second, the home, unlike an automobile, luggage, or mail, is entitled to “special protection.”²⁸⁸ Finally, the investigative technique in *Jardines*, unlike *Place, Jacobsen, Edmond, or Caballes* was susceptible to arbitrary application.²⁸⁹

One of the challenges of determining how the Supreme Court will react to the *Jardines* opinion is the fashion in which the Florida

²⁸³ *Id.* at 46.

²⁸⁴ *Id.* at 45.

²⁸⁵ *Id.* at 46.

²⁸⁶ *Id.* at 49.

²⁸⁷ *Jardines*, 73 So. 3d at 49.

²⁸⁸ *Id.* at 45–46.

²⁸⁹ *Id.* at 49.

court applied the *Katz* “reasonable expectation of privacy” test. In each of the Supreme Court’s contraband exception cases, the Court applied the *Katz* two-prong test, asking whether the defendant had a subjective expectation of privacy and whether that was an expectation society was willing to recognize as legitimate.²⁹⁰ In each of those cases the Court found the defendants had a subjective expectation of privacy but not one society was willing to recognize as legitimate. In *Jardines*, the Florida court seems to side step application of the *Katz* analysis. To be sure, the court cites *Katz* several times but instead of asking whether *Jardines* has a legitimate expectation of privacy in contraband, the court catalogs criticisms of the dog sniff as it was conducted in the case and factual distinctions between the *Jardines* sniff and other contraband exception cases.²⁹¹ However, the opinion is unclear as to how these criticisms and distinctions relate to one another. The court does not explain whether it is citing multiple independent bases for finding the dog sniff was a search or if the dog sniff became a search under a kind of totality of the circumstances test. Despite this shortcoming, the *Jardines* court does zero in on an aspect of the contraband exception important to its application, minimal intrusiveness.²⁹² In all but *Jacob-*

²⁹⁰ See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that “[a] dog sniff conducted during a concededly lawful traffic stop 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”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (finding that “[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search”); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”); *United States v. Place*, 462 U.S. 696, 707 (1983) (sniffing by a “trained canine did not constitute a ‘search’ within the meaning of the Fourth Amendment”).

²⁹¹ *Jardines*, 73 So. 3d at 40–44.

²⁹² See *id.* at 45.

sen, the fact that the investigative technique was minimally intrusive was an important factor in the application of the exception.²⁹³

1. Intrusiveness

The *Jardines* court focused considerable attention on this aspect of the dog sniff. In the course of concluding that the dog sniff of Jardines's home "was an intrusive procedure" the court discussed several aspects of the sniff.²⁹⁴ The court concluded that "the 'sniff test' was a sophisticated undertaking that involved state and federal agencies, numerous agents and vehicles, and hours of police involvement."²⁹⁵ Further, the court noted that "there was no anonymity for the resident."²⁹⁶ The court described the events as "a public spectacle" that was conducted on a residential street and would "invariably entail a degree of public opprobrium, humiliation, and embarrassment."²⁹⁷ It appears that these factors—the number of police and agencies involved, the time police were present at or near Jardines's home, and the public spectacle coupled with the absence of anonymity—led the court to find the dog sniff intrusive.

This analysis presents at least three difficulties. First, the court's conclusion that the dog sniff in this case created a public spectacle seems to be an overstatement. Second, adopting a test that punishes police for creating a public spectacle invites police to simply be more covert. Finally, the court's interpretation of intrusiveness in

²⁹³ See *Caballes*, 543 U.S. at 409 ("Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."); *Edmond*, 531 U.S. at 53 (noting that stops "executed in a regularized and neutral manner . . . only minimally intrude upon the privacy of the motorists . . . [and] should therefore be constitutional"); *Place*, 462 U.S. at 703 ("When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.").

²⁹⁴ *Jardines*, 73 So. 3d at 36.

²⁹⁵ *Id.* at 36, 48.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

the context of the contraband exception is different from that of the Supreme Court.²⁹⁸

The *Jardines* court painted an ominous picture of the dog sniff in this case. The court noted there were state and federal agencies involved, several police vehicles, and it took several hours from dog sniff to search, with law enforcement keeping surveillance on Jardines's home all the while.²⁹⁹ These facts led the court to find that the manner in which the dog sniff was conducted was "a public spectacle."³⁰⁰ What is not clear from the facts is how many of the police vehicles were marked or unmarked, how many officers were in uniform, or how close the additional officers were to Jardines's house. The court concluded this particular dog sniff created a public spectacle, and yet Jardines himself was apparently unaware of the spectacle occurring right outside his front door. When police arrived to execute the search warrant approximately an hour and a half after the dog sniff, Jardines attempted to flee the house through the back door.³⁰¹ The court noted that from start to finish the events at the defendant's home "lasted for hours."³⁰² However, the dog sniff took place 15 minutes after the first officer arrived on the scene.³⁰³ The dog sniff itself seems to have been very brief. The narcotics dog Franky began signaling that narcotics were present as he was being walked up the porch of the home.³⁰⁴ The court's use of events that occurred after Franky had come and gone from the scene to determine if the sniff was a search seems untenable. Either the dog sniff was a search or not a search when it occurred. It does not

²⁹⁸ See *infra* notes 305–18 and accompanying text.

²⁹⁹ *Jardines*, 73 So. 3d at 48.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 36.

³⁰³ *Id.* at 37.

³⁰⁴ *Id.*

seem logical to say a dog sniff becomes a search if too many police remain too long after the sniff was conducted.

Another problem with the court's public spectacle test is that it invites police to simply be more subtle. Instead of several officers in uniform and marked police vehicles, law enforcement could use an undercover officer with a dog and unmarked cars. Thus, the public and potentially the suspect would be entirely unaware of the dog sniff. By using the *Jardines* court's analysis, such measures could cause the dog sniff to no longer be categorized as a search. This result seems unsatisfactory. In some ways the *Jardines* court may inadvertently be trading one harm for another. A very public dog sniff may be embarrassing, but if police are required to do covert dog sniffs the public is left to wonder if every stranger with a dog is actually conducting a search.

The third difficulty in the court's intrusiveness analysis is that the court's use of the word appears inconsistent with the Supreme Court's. Although the word *intrusive* is capable of various definitions, in the context of the contraband exception it seems to have a specific meaning.³⁰⁵ In *Place, Edmond, and Caballes*, *intrusive* means exposure to public view or actual physical entry.³⁰⁶ Of the contraband exception cases, the *Place* court gives the clearest indication of what is meant when the Court describes dog sniffs as minimally intrusive. In *Place*, the Court notes that the dog sniff "does not re-

³⁰⁵ See *infra* note 306 and accompanying text.

³⁰⁶ See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (noting that noncontraband items are not exposed to public view, and there "[a]ny intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 53 (2000) (noting that stops "executed in a regularized and neutral manner . . . only minimally intrude upon the privacy of the motorists . . . [and] should therefore be constitutional"); *United States v. Place*, 462 U.S. 696, 707 (1983) (noting that the "limited disclosure [by a dog sniff] . . . ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods").

quire opening the luggage[.]”³⁰⁷ and “it does not expose noncontraband items that otherwise would remain hidden from public view.”³⁰⁸ The *Edmond* Court’s discussion supports this conclusion.³⁰⁹ In *Edmond*, the Court held the dog sniff of a vehicle was less intrusive because it “does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics.”³¹⁰ Finally, the *Caballes* Court merely quotes *Place*, noting dog sniffs are unique because they do “not expose noncontraband items that otherwise would remain hidden from public view.”³¹¹

The *Jardines* court argued that the dog sniff in that case was intrusive because it was a public spectacle, the defendant was exposed to public humiliation, and the sniff of his residence lacked anonymity.³¹² Although some of the Supreme Court’s discussion of intrusiveness deals with public embarrassment, it is not the public embarrassment that creates the intrusiveness. Rather, the Court in *Place* makes clear that dog sniffs do not expose otherwise private information to public view and thereby reduce public embarrassment.³¹³ Thus, it is the minimally intrusive nature of the dog sniff that reduces the public embarrassment, not the reduction of embarrassment that creates minimal intrusiveness.³¹⁴

³⁰⁷ *Place*, 462 U.S. at 707.

³⁰⁸ *Id.*

³⁰⁹ See *Edmond*, 531 U.S. at 40 (holding that a dog sniff of a vehicle was less intrusive because it “does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics”).

³¹⁰ *Id.*

³¹¹ *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707).

³¹² See *supra* notes 295–97 and accompanying text.

³¹³ See *Place*, 462 U.S. at 707 (noting that the “limited disclosure [by a dog sniff] . . . ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods”).

³¹⁴ *Id.*

Further, the *Jardines* court concludes that walking a dog up to a person's home automatically creates public humiliation and opprobrium.³¹⁵ Some may argue this conclusion is suspect. Assuming, *arguendo*, there is nothing humiliating about an officer walking up to a person's front door, why then is an officer with a dog a public spectacle? If the Supreme Court had the same view as the *Jardines* court would not the *Caballes* dog sniff also be a search? In *Caballes*, the suspect's car was pulled over on a public highway, and a narcotics dog was permitted to walk around and sniff the car.³¹⁶ Arguably *Caballes* was placed in a more embarrassing position. Unlike *Jardines*, *Caballes* had been detained by police.³¹⁷ *Jardines*'s neighbors could have concluded the officer with Franky was part of a law enforcement outreach program, or was present for some benign reason. In *Caballes* that conclusion was not possible. Arguably, a dog sniffing around a car pulled over on a highway could seem more damning than a dog sniffing as it is being walked up to a front door.

The *Jardines* court was in a difficult position. It was bound to interpret the Fourth Amendment and the state constitution's corollary, consistent with the precedent laid down by the United States Supreme Court. Minimal intrusiveness is one aspect of dog sniffs that the Supreme Court has relied upon to conclude the practice is not a search.³¹⁸ It appears the Florida court attempted to work with-

³¹⁵ *Jardines v. State*, 73 So. 3d 34, 36 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564).

³¹⁶ *Caballes*, 543 U.S. at 406.

³¹⁷ *Id.*

³¹⁸ *See Place*, 462 U.S. at 707 (noting that the "limited disclosure [by a dog sniff]. . . ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 53 (2000) (noting that stops "executed in a regularized and neutral manner . . . only minimally intrude upon the privacy of the motorists . . . [and] should therefore be constitutional"); *Caballes*, 543 U.S. at 409 (noting that noncontraband items are not exposed to public view, and there "[a]ny intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement").

in the Supreme Court's precedent to arrive at the conclusion that a dog sniff of a home is a search. The difficulty with this method is that the *Jardines* court has treated intrusiveness differently than the Supreme Court. Thus far the Supreme Court's use of the term intrusive in the context of dog sniffs is not as broad as the *Jardines* court's.

2. *The Home is Unique*

In addition to relying on the intrusiveness of the dog sniff in *Jardines*, the Florida court also noted that the home is a unique area of privacy under the Fourth Amendment.³¹⁹ The special place the home occupies under the Constitution and case law is certainly relevant to this discussion, but the majority seemed to connect this independent point with its discussion of intrusiveness. Immediately after discussing the Supreme Court's precedent regarding the inviolability of the home, the Florida court explained the dog sniff in this case "was a vigorous and intensive procedure."³²⁰ The court then went on to discuss the events at *Jardines*'s home as a "public spectacle."³²¹ By failing to clearly delineate the protection of the home from the public spectacle aspect of the dog sniff, it is unclear that absent the public embarrassment the court would feel a Fourth Amendment violation occurred.

3. *Potential for Arbitrary Application*

The *Jardines* court's final area of concern is that a ruling that dog sniffs are not a search would invite discriminatory or arbitrary use

³¹⁹ See *Jardines v. State*, 73 So. 3d 34, 45 (Fla. 2011), cert. granted, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564) ("Nowhere is . . . [the] right [to be free from unreasonable government intrusion] more resolute than in the private home.").

³²⁰ *Id.* at 46.

³²¹ *Id.* at 48.

of the procedure.³²² To that end, the court cited established precedent which states: “The basic purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”³²³ The court’s concern regarding arbitrary dog sniffs is well-placed. However, the challenge the court faced was explaining why the dog sniffs and chemical test in *Place*, *Jacobsen*, *Edmond*, and *Caballes* do not raise the same danger of arbitrary invasion as the *Jardines* dog sniff.³²⁴ The *Jardines* court seems to say that the dog sniffs in *Place*, *Jacobsen*, and *Caballes* avoid the danger of an arbitrary search because there had been a lawful seizure made prior to the dog sniffs.³²⁵ To support this conclusion, the *Jardines* court points out that the use of suspicionless drug-interdiction roadblocks was held to be impermissible in *Edmond*.³²⁶ The court

³²² *See id.* at 49 (“[I]f government agents can conduct a dog ‘sniff test’ at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen.” (citing *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967)).

³²³ *Id.*

³²⁴ *See Caballes*, 543 U.S. at 410 (holding that “[a] dog sniff conducted during a concededly lawful traffic stop 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”); *Edmond*, 531 U.S. at 40 (finding that “[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search”); *Jacobsen*, 466 U.S. at 123 (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”); *Place*, 462 U.S. at 707 (sniffing by a “trained canine did not constitute a ‘search’ within the meaning of the Fourth Amendment”); *Jardines*, 73 So. 3d at 36 (“Assuming, without deciding, that the dog sniff violated Article 2, Section 8, we conclude that Mrs. Guillen’s consent was valid because under Brown’s three-factor test, intervening circumstances obviated any alleged taint and the first dog sniff conducted from outside the garage was not flagrant police misconduct.”).

³²⁵ *Jardines*, 73 So. 3d at 49.

³²⁶ *See id.* at 49 n.7 (“We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a

also used *Edmond* to support a claim that “[t]here is little doubt, however, that a dragnet-style sweep of an entire residential neighborhood . . . without any individualized suspicion of wrongdoing[] would be impermissible.”³²⁷ It does not seem that *Edmond* necessarily supports this conclusion. *Edmond* prohibited law enforcement from using roadblocks “to detect evidence of ordinary criminal wrongdoing.”³²⁸ However, it was the seizure in *Edmond* that was illegal, not the search.³²⁹ In fact, the Court in *Edmond* reiterated its position that dog sniffs are not a search.³³⁰

Ultimately the *Jardines* court’s attempt to distinguish *Place*, *Edmond*, *Caballes*, and *Jacobsen* from *Jardines* seems to misplace its focus. Rather than focusing on the lawfulness of the seizures in other contraband exception cases, the strongest argument for distinguishing the sniff in *Jardines* is the most obvious: *Jardines* deals with a home. To be sure, the court repeatedly emphasizes the importance of the home in this analysis.³³¹ However, the focus on distinguishing *Place*, *Jacobsen*, *Edmond*, and *Caballes* based on the seizure involved in the case seems to distract from the court’s argument.

As a likely preview to the briefs on the merits in the Supreme Court, a certiorari-stage amicus curiae brief in support of the State

seizure must be accompanied by some measure of individualized suspicion.” (quoting *Edmond*, 531 U.S. at 41)).

³²⁷ *Id.*

³²⁸ *Edmond*, 531 U.S. at 41.

³²⁹ *See id.* at 40 (finding that “[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search”).

³³⁰ *See id.* (“Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is ‘much less intrusive than a typical search.’” (citing *United States v. Turpin*, 920 F.2d 1377, 1385 (C.A.8 1990))). “Rather, what principally distinguishes these checkpoints from those we have previously approved is their primary purpose.” *Id.*

³³¹ *See, e.g., Jardines*, 73 So. 3d at 36–37 (noting that no case holds that “search[ing] for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause[, and this] . . . applies with extra force where the sanctity of the home is concerned”).

of Florida attacked the Florida court's use of what it described as a "public spectacle" test.³³² The outcome of the *Jardines* case may relate to how the Supreme Court reacts to the Florida courts' use of public humiliation as creating intrusiveness.

4. Concurrence

Justice Lewis of the Florida Supreme Court concurred with the majority decision and was joined by two other justices.³³³ The concurrence can best be summed up by Justice Lewis's statement, "In my view the primary emphasis in this case must fall on [the] concept of 'home' and its sacred place under Fourth Amendment law."³³⁴ Rather than getting bogged down in the question of intrusiveness, the concurrence repeatedly returned to the heightened privacy individuals possess in their homes.³³⁵ The concurrence also disagreed with the dissent's declaration that the majority opinion ignored binding Supreme Court precedent.³³⁶ To this charge the concurrence argued there is no such precedent because the Supreme Court has never declared that a dog sniff of a private family residence was not a search.³³⁷ The concurrence concluded by chal-

³³² See Petition for Writ of Certiorari at 24, *State v. Jardines*, 73 So. 3d 34 (Fla. 2011), cert. granted, 132 S. Ct. 995 (Jan. 6, 2012) (No. 11-564) (claiming that the new public spectacle test "violates a plethora of this Court's Fourth Amendment cases").

³³³ *Jardines*, 73 So. 3d at 56-61. Justice Pariente and Justice Labarga also concurred. *Id.*

³³⁴ *Id.* at 56.

³³⁵ See *id.* at 57 (noting "the heightened expectation of privacy that one enjoys in one's home").

³³⁶ See *id.* at 58 ("My esteemed colleague in dissent incorrectly asserts that a recognition of the right of Floridians to be free from unauthorized dog sniffs *in their homes* is a violation of United States Supreme Court precedent.").

³³⁷ See *id.* at 59 (noting that "contrary to the assertion of the dissent, there is no 'binding United States Supreme Court precedent' to violate" (quoting *id.* at 61 (Polston, J., dissenting))).

lenging the reliability of dog sniffs in locations, like Florida, where there is no standardized certification program for narcotics dogs.³³⁸

The concurring opinion has some advantages worth discussing. First, the concurrence frames the issue as whether the fact that the dog sniff was conducted on a home makes it a search.³³⁹ Rather than focusing its discussion on Supreme Court contraband exception cases, the concurrence focuses on cases involving the home. The concurrence cites a number of Supreme Court decisions and one Eleventh Circuit decision to emphasize that “[o]f all the places that can be searched by the police, one’s home is the most sacrosanct, and receives the greatest Fourth Amendment protection.”³⁴⁰ Moreover, the concurrence rejects the majority’s use of public embarrassment by stating that “[t]he level of embarrassment suffered by the party that has been searched is not a significant part of the constitutional analysis.”³⁴¹

The concurrence is weakest in its explanation of how *Caballes* should be treated as part of the court’s analysis. Clearly the greatest challenge to the *Jardines* holding is the language in *Caballes* where Justice Stevens writes that *Caballes*

is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a

³³⁸ See *id.* at 60. (“[T]he lack of a uniform system of training and certification for drug detection canines makes it unconstitutionally difficult for a defendant to challenge a dog sniff after circumstances such as these have occurred.”).

³³⁹ *Id.* at 56.

³⁴⁰ *Id.* at 56 (Lewis, J., concurring) (quoting *United States v. McGough*, 412 F.3d 1232, 1236 (11th Cir. 2005)).

³⁴¹ *Id.* at 61.

home, such as “at what hour each night the lady of the house takes her daily sauna and bath.” The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.³⁴²

In response to *Caballes*, the concurrence merely notes the actual holding of that Court only involved the use of a “dog to sniff a vehicle during a legitimate traffic stop.”³⁴³ Although this is a critically important point, the concurrence fails to expressly take on Justice Stevens’s statements as dicta or as an inaccurate statement of *Kyllo*.

5. Dissent

Justice Polston—who was joined by Justice Canady—was the only Justice to write a dissent.³⁴⁴ The dissent doggedly explains the Supreme Court precedent, which declares that individuals have “no legitimate privacy interest in contraband.”³⁴⁵ The dissent also cites all the other courts that have concluded a warrantless dog sniff of the home is not a search.³⁴⁶ Justice Polston points to Justice Stevens’s discussion in *Caballes* of *Kyllo* as the final word on the matter.³⁴⁷ Although the dissent repeatedly emphasizes the Supreme Court’s declaration that individuals do not have a reasonable expectation of privacy in contraband, it seems a stretch to assert without equivocation that there is binding precedent to support this broad statement with regard to the home. Certainly Justice Polston is correct that most courts to address this issue after *Caballes* have agreed with him, but the Supreme Court has yet to resolve the issue.

³⁴² *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (internal citations omitted).

³⁴³ *Jardines*, 73 So. 3d at 59.

³⁴⁴ *Id.* at 61–70 (Polston, J., dissenting).

³⁴⁵ *Id.* at 64, 67.

³⁴⁶ *Id.* at 68 n.17.

³⁴⁷ *Id.* at 66–68.

C. WHERE WILL THE SUPREME COURT GO?

Now the Court must decide where to go from here. Any decision carries significant second- and third-order effects. To deny law enforcement the use of warrantless dog sniffs will, according to seventeen state attorneys general, significantly impede efforts to fight crime.³⁴⁸ To fully embrace the contraband exception—and all its implications—will reduce individual privacy and encourage law enforcement to devise more techniques and technology to sniff out contraband. As the Court considers how to proceed three possible paths seem most likely. First, the Court could fully embrace the contraband exception as described in *Jacobsen* and *Caballes*.³⁴⁹ Second, the Court may adopt a middle ground approach which would incorporate its decisions in *Kyllo*, *Caballes*, and *Jones*, declaring that passive, naturally occurring investigative techniques can be used provided they otherwise meet the contraband exception requirements.³⁵⁰ Finally, the Court might reject dog sniffs and all similar

³⁴⁸ See Brief of the State of Texas et. al. as Amici Curiae Supporting Petitioner, *supra* note 13, at 1 (“[T]he Florida Supreme Court’s decision jeopardizes the States’ ability to use [drug-detection dogs, which are a] . . . crucial tool to discover illegal drugs prior to their distribution.”).

³⁴⁹ See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (“We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’” (quoting *Jacobsen*, 466 U.S. at 123)); *Jacobsen*, 466 U.S. at 123 (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”).

³⁵⁰ See generally *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”); *Caballes*, 543 U.S. at 408; *Jacobsen*, 466 U.S. at 123.

techniques with regard to the home, relying on its conclusion in *Kyllo* that all details of the home are intimate.³⁵¹

1. *First Path*

The first possible path would fully adopt the language of *Jacobsen* and *Caballes* and the contraband exception generally. Such a rule would declare all minimally intrusive investigative techniques, which only reveal the presence or absence of contraband, are not searches within the meaning of the Fourth Amendment.³⁵² Such a decision could have at least three potential effects: First and most obviously, it could clear the way for unfettered use of dog sniffs of the home. Second, it would open the door to the use of currently available technology to detect contraband or illegal activity. Third, it would create a significant incentive for law enforcement and private enterprise to develop more technology that is minimally intrusive and sufficiently discerning.

The first and most obvious effect of the Court fully embracing the *Jacobsen–Caballes* contraband exception impacts law enforcement’s use of dogs on homes. Although several lower courts have already stated that dog sniffs of the home are permissible,³⁵³ having the issue laid to rest by the Supreme Court would remove any lingering reluctance on the part of law enforcement. Currently state

³⁵¹ See *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (“In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.”).

³⁵² See *Caballes*, 543 U.S. at 408.

³⁵³ See *United States v. Broadway*, 580 F. Supp. 2d 1179, 1194 (D. Colo. 2008) (finding that the detective “was properly in the secure hallway and the walkway outside Defendant’s apartment when he initiated the dog sniff, and [therefore] Defendant’s motion to suppress the results of the dog sniff are denied”); *State v. Jardines*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008) (upholding the canine sniff at the front door because “a canine sniff is not a Fourth Amendment search . . . the officer and the dog were lawfully present at the defendant’s front door[,] and . . . the evidence seized would inevitably have been discovered”).

and federal government agencies use narcotics dogs extensively.³⁵⁴ Under such a formulation, dogs could be used to sweep bad neighborhoods as part of a more aggressive community policing program.³⁵⁵ In theory, dogs could be used during all other lawful searches. Thus, if the officer is present to execute a search warrant that describes a handgun, a narcotics dog could accompany the officer. If the dog were to alert while in the home, the alert could be used as evidence to seek a second search warrant for narcotics.

Next, a fully realized *Jacobsen-Caballes* contraband exception would permit law enforcement to use currently available investigative techniques/technology in the home. In effect, such a formula would create an exception to the rule regarding the home and technology—a backdoor to the firm and bright line described in *Kyllo*.³⁵⁶ It might seem unlikely that the Court would be willing to entertain such an exception. However, at least one member of the Court may have already entertained such a formulation during the oral argument in *Caballes*. During an exchange between Justice Kennedy, Justice Scalia, and Attorney General Madigan, Justice Scalia made the following statement:

³⁵⁴ See Brief of the State of Texas et. al. as Amici Curiae Supporting Petitioner, *supra* note 13, at 1-3 (noting that “all States have a keen interest in combating illegal drugs, and [d]rug-detection dogs play a vital role in these efforts”).

³⁵⁵ The majority in *Jardines* argues this use of dogs is prohibited based on *Edmond*. However, that conclusion seems suspect and is discussed in the body of the article. This concern was also raised by Professor Leslie A. (Lunney) Shoebottom in her 2009 article *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of the Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 831 (2009).

³⁵⁶ See *Kyllo*, 533 U.S. at 40 (holding that when “the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search,’ and is presumptively unreasonable without a warrant”).

[A]re you sure that *Kyllo* . . . would have come out the same way if the only thing . . . that the imaging could pick out is not any of the other private activities in the home, but the only thing it could possibly discern is a dead body with a knife through the heart? Are you sure the case would have come out the same way? I'm not at all sure.³⁵⁷

Today, the investigative technique that seems best suited to the contraband exception involves computers.³⁵⁸ For years the government has been using a technique called hash-value searches to find digital contraband on computers.³⁵⁹ Hash values have been used to create a digital fingerprint for computer programs for over fifteen years.³⁶⁰ Hash values are currently used during criminal investiga-

³⁵⁷ Transcript of Oral Argument at 9, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923).

³⁵⁸ In 2005, Professor Orin Kerr and Professor Salgado exchanged law review articles discussing whether, based on *Caballes*, hash-value searches were permissible. See Salgado, *supra* note 222 and Orin Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

³⁵⁹ See Marcia Hofmann, *Arguing For Suppression of 'Hash' Evidence*, 33 CHAMPION 20, 20 (May 2009) ("A hash may also help to assess whether a suspect's computer contains files already known to be contraband."). But see, Stephen Hoffman, *An Illustration of Hashing and Its Effect on Illegal File Content in the Digital Age*, INTELL. PROP. & TECH. L. J., Feb. 22, 2010, at 6, 9, available at <http://ssrn.com/abstract=1564980> (noting the "shortcomings of the use of hash values in pursuing the tech-savvy criminal[, which is that] . . . [s]ince each file theoretically has a unique electronic fingerprint, the smallest alteration to any existing file will cause that file's hash value to change drastically").

³⁶⁰ See John P. Tomaszewski, Comment, *The Pandora's Box of Cyberspace: State Regulation of Digital Signatures and the Dormant Commerce Clause*, 33 GONZ. L. REV. 417, 434 (1997) (describing the digital signature procedure, which includes the use of a hash value).

In a nutshell, a digital signature uses a dual key (one public, one private) encryption method to "hash" (or compress) the value of a message in such a manner that the recipient knows the only person who could have sent that message is the holder of a specific private key that corresponds with the published key. The receiver need not know the private key, as the message can be decrypted by using the author's published key. The digital signature is not just the public key of the sender; it also includes a hash value of the text of the message. Thus, there are three components of a dig-

tions where law enforcement is permitted to search an individual's computer.³⁶¹ The protocol for such searches usually involves making a "mirror image" of the computer's memory and reviewing the data off-site.³⁶² To ensure the copy of the computer's memory is accurate, a hash value is created.³⁶³ This value verifies that the copy is exactly the same as the original.³⁶⁴ In addition to creating hash values for whole hard drives, there are hash values for particular files.³⁶⁵ As of 2005, the FBI's Cyber Crimes Innocent Images database had over 30,000 hash values of known images of child pornography.³⁶⁶ Hash-value databases are not limited to child pornogra-

ital signature: 1) the sender's public key, 2) the hash value of the message, and 3) the authorizing certificate. In practice, the methodology is as simple as clicking a "verify" or a "sign" button in your browser or e-mail software. The computer automatically verifies the message by running the message through the same hash algorithm the sender used. If the hash value appended to the plain text message is not the same as the hash value generated by the computer of the receiver (this assumes both sender and receiver are using a standard hash algorithm), then the receiver knows something has changed in the transmission process and is on notice that the message received is not exactly what was sent.

Id. at 433-434 (footnotes omitted).

³⁶¹ See Hofmann, *supra* note 359, at 20 ("Hashing is an effective forensic technique for examining information on computers to identify, verify, and authenticate data.").

³⁶² See Salgado, *supra* note 222, at 38 ("Hash algorithms are used to confirm that when a copy of data is made, the original is unaltered and the copy is identical, bit-for-bit.").

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ See *id.* at 40 ("There are now libraries of hash values calculated for common programs and files.").

³⁶⁶ See Stephen Hoffman, *An Illustration of Hashing and Its Effect on Illegal File Content in the Digital Age*, INTELL. PROP. & TECH. L. J., Feb. 22, 2010, at 8 n. 25, available at <http://ssrn.com/abstract=1564980> ("This database, known as the 'Innocent Images National Initiative,' contained more than 100,000 distinct hash values of known child pornography as of 2005." (citing Wayne Jekot, "Computer Forensics, Search Strategies, and the Particularity Requirement," 7 J. TECH. L. & POL'Y 16 n.120 (2007), available at http://tlp.law.pitt.edu/articles/Vol_12_Jekot.pdf (last visited July 12, 2009))).

phy.³⁶⁷ Other government agencies, like the National Drug Intelligence Center, also maintain hash-value libraries that include other forms of digital contraband.³⁶⁸

Hash-value searches, even more than dog sniffs, ensure that the only information that is conveyed is the presence or absence of contraband. Computer programs exist that search only for files that are a hash-value match with known digital contraband.³⁶⁹ If the Court were to accept a *Jacobsen-Caballes* contraband exception, it would seem permissible, at least under the Fourth Amendment, for the government to introduce a program on an individual's computer to search for known digital contraband. Such a search program could be introduced without the owner of the computer knowing by using what is known as a Trojan horse program.³⁷⁰ Both the U.S. and German governments have been accused of using Trojan horse programs in the past.³⁷¹ Once the program was introduced into the computer, it could search files until it found a file containing digital contraband. Then the program would automatically alert law enforcement. Law enforcement could then use the information to secure a search warrant.

³⁶⁷ See Orin Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 546 (2005) ("The National Drug Intelligence Center has calculated and collected common hash values for nearly every known application and operating system file and for many images of child pornography in a database called the Hashkeeper.").

³⁶⁸ *Id.*

³⁶⁹ See Salgado, *supra* note 222, at 45 ("Hash-based file detection works extraordinarily well in identifying only those files that are exact matches . . .").

³⁷⁰ See Sara M. Smyth, *Back to the Future: Crimes and Punishment in Second Life*, 36 RUTGERS COMPUTER & TECH. L.J. 18, 69 n. 302 (2009) (noting that SurfRecon has developed the most expansive database "for child-pornography images in the world"); MARC LIBERATORE ET AL., FORENSIC INVESTIGATION OF PEER-TO-PEER FILE SHARING NETWORKS 7 (2010) (describing how to gather "evidence using the Gnutella protocol").

³⁷¹ Bob Yirka, *Hacker Group Accuses German Government of Using Illegal Trojan Horse*, PYSORG.COM (Oct. 11, 2011), <http://www.physorg.com/news/2011-10-hacker-group-accuses-german-illegal.html> (last visited Nov. 11, 2012).

Finally, a *Jacobsen-Caballes* contraband exception would create a powerful incentive for law enforcement to create more discerning and unintrusive technology that would qualify as non-searches. The FBI's National Institute of Justice provides updates and funding to advance investigative technology.³⁷² In 2010, the NIJ published a fact sheet that provides an introduction to portal contraband detection technology.³⁷³ The fact sheet discusses several technologies³⁷⁴ that with modification could meet the criteria established in *Jacobsen* and *Caballes*. Of particular note is ion-scan technology.³⁷⁵ An ion scanner samples the air around a person, vehicle, or living space to detect contraband.³⁷⁶ Also significant is backscatter x-ray technology.³⁷⁷ Today this technology is used at airports, jails, and national borders.³⁷⁸ The device works by exposing objects or individuals to low doses of x-rays and then passing the information through analytical software.³⁷⁹ The software then creates a graphic image of

³⁷² NATIONAL INSTITUTE OF JUSTICE: NATIONAL LAW ENFORCEMENT AND CORRECTIONS TECHNOLOGY CENTER, AN INTRODUCTION TO PORTAL CONTRABAND DETECTION TECHNOLOGY: FACT SHEET, 1 (June 2010), available at https://www.justnet.org/pdf/00-Portal%20Primer_web.pdf.

³⁷³ See *id.* (noting that "[i]t will help the correctional professional increase understanding of contraband detection and hopefully generate new thinking related to this area").

³⁷⁴ See *id.* at 2-4 (discussing Metal Detectors, Millimeter Wave Detection Devices, Magnetometer (Gradiometer) Metal Detection, Electric Field Tomography, Heartbeat Detection, Ion Scan Technology, and Backscatter X-Ray Contraband Detection).

³⁷⁵ See *id.* at 3 (noting that ion scan technology "senses organic compounds and typically is used"). See also Robyn Burrows, *Judicial Confusion and The Digital Dog Sniff: Pragmatic Solutions Permitting Warrantless Hashing of Known Illegal Files*, 19 GEO. MASON L. REV. 255 (2011).

³⁷⁶ NATIONAL INSTITUTE OF JUSTICE: NATIONAL LAW ENFORCEMENT AND CORRECTIONS TECHNOLOGY CENTER, *supra* note 372, at 3.

³⁷⁷ See *id.* at 4 ("[T]he software produces an immediate graphic display of a human with clear outlines of any contraband on the body. It will image all objects on a body, both organic and inorganic.").

³⁷⁸ *Id.*

³⁷⁹ *Id.*

what has been scanned.³⁸⁰ Efforts are currently being made to further enhance the imaging software so that it only reveals whether the object or individual scanned possesses contraband.³⁸¹

It is of course difficult to imagine where technology will take law enforcement. This is even harder to know if police are given the incentive that a broad contraband exception would supply. What can be known is that law enforcement will take advantage of every tool the courts give them in what Justice Jackson described as “the often competitive enterprise of ferreting out crime.”³⁸² With that knowledge must come the realization that such an expansive contraband exception will lead to more technology used by law enforcement on homes.

In *Jacobsen*, Justice Stevens cites a Michigan Law Review article in support of his statement that “governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”³⁸³ The article was written by Professor Arnold H. Loewy and is entitled “The

³⁸⁰ *Id.*

³⁸¹ See Jon Hilkevitch, *O’Hare to Get Less Intrusive Body Scanner*, CHI. TRIB., Oct. 23, 2012, http://articles.chicagotribune.com/2012-10-23/travel/ct-met-tsa-ohare-body-scanners-1023-20121023_1_body-scanner-generic-outline-tsa-security-officer (explaining that the new body scanners at O’Hare International Airport only use a generic picture and are “equipped with ‘automated target recognition’ software that detects any possible threats under a passenger’s clothing”); NAT’L INST. OF JUSTICE, GUIDE TO THE TECHNOLOGIES OF CONCEALED WEAPON AND CONTRABAND IMAGING AND DETECTION, NIJ GUIDE 602-00, 3-4 (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/184432.pdf> (describing a sophisticated image-based system that could verbally sound for contraband, but noting that “[f]or the computer to recognize a specific weapon or threat item, the computer will have to compare the threat item with an electronic catalog of images of uniquely-shaped threat items . . .”).

³⁸² *Johnson v. United States*, 333 U.S. 10, 14 (1948).

³⁸³ *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (citing Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH.L.REV. 1229 (1983)).

Fourth Amendment as a Device for Protecting the Innocent.”³⁸⁴ In the article, Professor Loewy proposes:

In a Utopian society, each policeman would be equipped with an evidence-detecting divining rod. He would walk up and down the street and whenever the divining rod detected evidence of crime, it would locate the evidence. First, it would single out the house, then the drawer, and finally the evidence itself.³⁸⁵

Although Professor Loewy’s position clearly influenced Justice Stevens, Professor Loewy acknowledges that some have voiced concern that his position conjures images of Orwell’s “1984.”³⁸⁶ Professor Loewy also acknowledges that at least one author would argue that his position is inconsistent with how the Founders must have viewed the Amendment.³⁸⁷ Colonial objections to writs of assistance were intimately tied to their objections to the laws those writs were used to enforce.³⁸⁸ It seems reasonable to question whether colonial objections to the writs would have been silenced had they been carried out by specially trained dogs that would only alert to the smell of contraband tea or sugar. Significant disagreement over whether Professor Loewy’s vision of the future is utopian or dystopian is certainly possible. However, should the *Jacobsen-Caballes* expansive view of the contraband exception be adopted, it cannot be disputed that the Court will have moved closer to Loewy’s vision.

³⁸⁴ Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH.L.REV. 1229 (1983).

³⁸⁵ *Id.* at 1244.

³⁸⁶ *Id.* at 1246.

³⁸⁷ *Id.* at 1246, n.86.

³⁸⁸ Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court’s Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 203 (1986).

2. Second Path: Dog Sniffs of the Home are Sui Generis

The second possible path for the Court would be to accept dog sniffs of the home but use the *Jardines* opinion to place limits on the contraband exception. Such an opinion would use *Kyllo* and *Jones* to explain why the dog sniff of a home might be permissible while other investigative techniques—even if sufficiently discerning and minimally intrusive—would not be acceptable.³⁸⁹

Since *Caballes*, several courts have confronted the apparent conflict between *Kyllo* and *Caballes*.³⁹⁰ Some lower courts have accepted Justice Stevens's explanation in *Caballes* for why the two opinions are not in conflict, while other courts appear to be unconvinced.³⁹¹ These courts have arrived at another explanation for why a dog sniff of the home may not violate *Kyllo*'s seemingly complete bar to law enforcement using extra sensory techniques to gather information about the interior of a home. These courts have focused on two distinctions between dog sniffs and thermal-imaging devices.³⁹²

³⁸⁹ See *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”); *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (“In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.”).

³⁹⁰ See, e.g., *United States v. Broadway*, 580 F. Supp. 2d 1179, 1190 (D. Colo. 2008); *State v. Jardines*, 9 So. 3d 1 (Fla. Dist. Ct. App. 2008).

³⁹¹ See *Broadway*, 580 F. Supp. 2d at 1190 (noting that even though this court relies on different factors for distinguishing *Kyllo* and *Caballes*, “[d]efendant’s reliance on *Kyllo* in the context of a dog sniff test is misplaced . . . [because] the Supreme Court in *Caballes* distinguished a dog sniff test from the use of thermal imaging equipment considered in *Kyllo*”); *Jardines*, 9 So. 3d at 5 (noting that the factors it considers also led “the Court in *Caballes* to note that its conclusion that the dog sniff involved there was lawful was consistent with its earlier decision in *Kyllo*”).

³⁹² See *Broadway*, 580 F. Supp. 2d at 1190 (disagreeing with the claim that “a drug-sniffing dog—like thermal imaging equipment—is a specialized device that reveals private details about the interior of a home”); *id.* at 1191 (citing *Fitzgerald v. Maryland*, 153 Md. App. 601, 837 A.2d 989, 1037 (2003) (citing *Blair v. Kentucky*, 181 Ky. 218, 204 S.W. 67, 68 (Ky.Ct.App.1918))) (“In 1918, a court in Kentucky noted dogs had been employed as scent-detectors for hundreds of years.”). See also *infra* notes 394 and 397 and accompanying text.

The first distinction can be summed up in the phrase: a dog's nose is not technology.³⁹³ At the heart of the *Kyllo* decision was the Court's effort to prevent technology from shrinking Fourth Amendment protections.³⁹⁴ Courts that have focused on this distinction point out that a dog's nose has not been augmented by mechanical advances.³⁹⁵ Based on this fact, the chief concern of *Kyllo* is not at play.

The second distinction these courts have suggested is that dogs, unlike thermal-imaging devices, were used to gather information that humans could not have gathered in 1791.³⁹⁶ This distinction is important because *Kyllo* reiterates the position declared in *Carroll* that, "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted."³⁹⁷ Since thermal-imaging devices, or anything like them, did not exist at the time the Fourth Amendment was adopted, the use of such a device in the absence of a warrant cannot be considered reasonable.³⁹⁸ In 1791, the only way to gather the same information the thermal scan provides would be to enter a constitutionally protected area—thus a warrant would be required.³⁹⁹ Since

³⁹³ See *Broadway*, 580 F. Supp. 2d at 1190 (disagreeing with the claim that "a drug-sniffing dog—like thermal imaging equipment—is a specialized device that reveals private details about the interior of a home").

³⁹⁴ See *Kyllo v. United States*, 533 U.S. 27, 28 (2001) (worrying about leaving "the homeowner at the mercy of advancing technology").

³⁹⁵ See *Broadway*, 580 F. Supp. 2d at 1190 (disagreeing with the claim that "a drug-sniffing dog—like thermal imaging equipment—is a specialized device that reveals private details about the interior of a home").

³⁹⁶ See *id.* at 1191.

³⁹⁷ *Carroll v. United States*, 267 U.S. 132, 149 (1925). See *Kyllo*, 533 U.S. at 34 (assuring the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted").

³⁹⁸ *Kyllo*, 533 U.S. at 34.

³⁹⁹ See *id.* ("[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least

dogs were used in 1791 to track smells that humans could not sense, they could be considered reasonable.⁴⁰⁰ These courts cite to no concrete examples of courts accepting the use of a dog to track a smell to a house without a warrant. Rather, the courts point to this distinction as further evidence that the use of a dog to sniff at an individual's home was not the danger that the *Kyllo* decision was designed to prevent.⁴⁰¹

If the Court were to adopt the above analysis, it would go a long way toward returning dog sniffs to their earlier status as *sui generis*, at least with regard to the home. If adopted, any contraband exception technique would have to use a biological rather than a mechanical tool to gather information about the home. Further, such a biological tool would have to have been used in 1791 for the purpose of gathering information beyond human capabilities. In other words, dogs would again be unique.

Should the Court choose to follow this second path, at least one lingering question remains, especially in the wake of *Jones*. The question is whether bringing a dog onto the porch of a home without a warrant constitutes a trespass within the meaning of the *Jones* decision. The police in *Jardines* walked their narcotics dog up the driveway of the suspect's home and to the front door without a warrant.⁴⁰² Although it remains possible the Court will find this action a trespass, such a result seems unlikely. Under such a trespass theory, every individual who approached *Jardines*'s front door

where (as here) the technology in question is not in general public use." (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961))).

⁴⁰⁰ See Leah Waldron, *Police Dog Facts*, EHOW,

http://www.ehow.com/about_6569233_police-dog.html (last visited Feb. 24, 2012)

("[B]y 1610, the British colonists of Jamestown were using dogs in anti-Indian measures, specifically in the search and seizing of American natives.").

⁴⁰¹ See *Broadway*, 580 F. Supp. 2d at 1191 (noting that because dogs have been used as "scent-detectors for hundreds of years[,] . . . [t]o the extent a dog can detect a scent, therefore, it does not detect anything that 'would have been unknowable' without physical intrusion when the Fourth Amendment was adopted in 1791").

⁴⁰² *Id.*

would be committing a tort. Girl scouts, trick-or-treaters, and uninvited family members would be committing an offense. Although the Supreme Court has never expressly declared that police walking onto a citizen's real estate and up to his front door is permissible, it has said all but that in *Kentucky v. King*.⁴⁰³

In *King*, police witnessed a drug deal take place near an apartment complex and then sought to arrest the suspects.⁴⁰⁴ One of the suspects briefly eluded police.⁴⁰⁵ A pursuing officer followed the suspect to a part of the complex that included two apartments.⁴⁰⁶ The suspect went into the apartment on the right.⁴⁰⁷ The officer heard a door shut and could smell the odor of burnt marijuana coming from the apartment on the left.⁴⁰⁸ The officer knocked loudly on the door and identified himself as the police.⁴⁰⁹ The officer then heard people in the apartment moving and objects in the apartment being moved.⁴¹⁰ Believing evidence was about to be destroyed, the officer kicked the door in and found three people and a large quantity of drugs.⁴¹¹ The Court ruled the search was permissible under the exigent circumstances doctrine.⁴¹² During its discussion of the police officer's conduct the Court noted that "[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."⁴¹³ It may

⁴⁰³ See *Kentucky v. King*, 131 S. Ct. 1849, 1852 (2011) (holding that "[t]he exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment").

⁴⁰⁴ *Id.* at 1854.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 1863.

⁴¹³ *Id.* at 1862.

be argued that the home in *King* is an apartment and thus police did not have to cross King's real property to get to the front door. This distinction would seem to miss the Court's emphasis. The *King* Court's holding appears to say that it is true that when police are without a warrant they do not have any more authority to enter upon a person's property than the average citizen, but they do not possess any less either.

Although *Jones* may not have a dramatic impact on the outcome of *Jardines*, the Court has the opportunity to use the *Jones* decision to limit the contraband exception inside and outside the home. In *Jones*, the Court resurrected physical trespass as a basis for determining a Fourth Amendment violation.⁴¹⁴ Many of the potential applications of the contraband exception involve technologies that make some form of contact with the objects they are searching. Hash value Trojan horse programs, backscatter x-ray technology, and millimeter-wave-detection devices all involve some contact between the device and the object being examined.⁴¹⁵ In *Jones*, Justice Alito noted that some jurisdictions have accepted such "electron" contacts as trespasses.⁴¹⁶ *Jardines* offers the Court the opportunity to expand its discussion in *Jones* to make clear that the contraband exception should be limited to passive techniques. Thus,

⁴¹⁴ See *United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. Katz did not repudiate that understanding.").

⁴¹⁵ NATIONAL INSTITUTE OF JUSTICE: NATIONAL LAW ENFORCEMENT AND CORRECTIONS TECHNOLOGY CENTER, AN INTRODUCTION TO PORTAL CONTRABAND DETECTION TECHNOLOGY: FACT SHEET, 2-4 (June 2010), available at https://www.justnet.org/pdf/00-Portal%20Primer_web.pdf.

⁴¹⁶ See *Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (citing *CompuServe, Inc. v. Cyber Promotions, Inc.* 962 F. Supp. 1015, 1021 (S.D. Ohio 1997); *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566 n. 6 (1996)) ("In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough.").

any technology that uses a ray or beam that must make contact with a constitutionally protected zone of privacy would be considered to have trespassed. Consistent with Justice Scalia's opinion, such a trespass would have been committed in "an attempt to find something or to obtain information,"⁴¹⁷ and thereby would be a search.⁴¹⁸ In order to use one of these devices consistent with the Fourth Amendment, either a warrant or some other exception beyond the contraband exception would be necessary. Such limitations on the contraband exception might be consistent with the 9-0 holding in *Jones*.⁴¹⁹ Furthermore, among the Justices who joined with Justice Alito's concurrence was Justice Ginsburg,⁴²⁰ who had dissented in *Caballes*, expressing concern about the potential for pervasive and arbitrary use of narcotics dogs.⁴²¹

3. Third Path: *Kyllo* Meant What It Said

The third possible path for the Court would be to reject the use of narcotics dogs in the home by reiterating the Court's holding in *Kyllo*.⁴²² In *Jardines*, the Court could remove any confusion created by Justice Stevens's opinion in *Caballes*,⁴²³ stating once again that

⁴¹⁷ *Id.* at 951 n.5 (majority opinion).

⁴¹⁸ *Id.*

⁴¹⁹ *See id.* at 949 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'.").

⁴²⁰ *Id.* at 957-64 (Alito, J., concurring).

⁴²¹ *Illinois v. Caballes*, 543 U.S. 405, 417-25 (2005) (Ginsburg, J., dissenting). "Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population." *Id.* at 422 (Ginsburg, J., dissenting).

⁴²² *See Kyllo v. United States*, 533 U.S. 27, 37 (2001).

⁴²³ *See Caballes*, 543 U.S. at 410 ("A dog sniff conducted during a concededly lawful traffic stop 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."). "This conclusion is entirely consistent with our recent decision" in *Kyllo*. *Id.* at 409. "Critical to that decision was the fact that the device was capable of detecting lawful activi-

"[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."⁴²⁴ At the heart of this path is recognizing that the home is unique among constitutionally protected locations. The Court's use in past cases of terms such as "sanctity," "liberty," and "security,"⁴²⁵ augments the Fourth Amendment's concern for privacy.⁴²⁶ The Court's recent reinvigoration of the trespass theory could also add strength to this position.

As discussed above, the Court has not succumbed to the temptation of permitting minimally intrusive investigative techniques in the home without a warrant.⁴²⁷ In *Hicks*, the Court held the act of moving a stolen object to reveal a serial number without a warrant was too much.⁴²⁸ Further, the Court chose to reject the use of the lesser standard of reasonable suspicion for a lesser search in the home.⁴²⁹ According to the majority in *Hicks*, "a search is a search."⁴³⁰ In *Kyllo*, the Court refused to permit a device, which was used from

ty—in that case, intimate details in a home[.]” *Id.* at 409–10. “The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the non-detection of contraband in the trunk of his car.” *Id.* at 410.

⁴²⁴ *Kyllo*, 533 U.S. at 37.

⁴²⁵ See *Payton v. New York*, 445 U.S. 573, 589 (1980) (noting that to be arrested in the home is “an invasion of the sanctity of the home”); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (noting that “it is the invasion of his indefeasible right of personal security, personal liberty, and private property”).

⁴²⁶ See Thomas K. Clancy, *What is a Search Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 1–51 (2006) (focusing on “what governmental methods of obtaining tangible things or information are or should be considered invasions of the individual’s protected interest and, hence, a search within the meaning of the Fourth Amendment”).

⁴²⁷ See *supra* note 416 and accompanying text.

⁴²⁸ See *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (finding that “Officer Nelson’s moving of the equipment, however, did constitute a ‘search’ separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment”).

⁴²⁹ See *id.* at 328 (holding that “[p]robable cause to believe the equipment was stolen” was required).

⁴³⁰ *Id.* at 325.

a public road, which passively revealed nothing more than the relative warmth of sections of the defendant's home.⁴³¹ In response to the argument that the device in *Kyllo* never penetrated the home, but only acquired information that escaped the home, the majority noted that in *Katz* the Court had "rejected such a mechanical interpretation of the Fourth Amendment."⁴³² The Court's refusal to permit a lesser standard for a lesser search⁴³³ as it had in *Terry v. Ohio*⁴³⁴ and its refusal to accept that a search of a home could reveal only "non-intimate" details,⁴³⁵ reflects the uniqueness of the home.⁴³⁶

⁴³¹ See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant.").

⁴³² *Id.* at 35.

⁴³³ See *id.* at 40 (leaving it up to the "District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause").

⁴³⁴ See 392 U.S. 1, 30 (1968) (requiring the officer to have only "reasonable grounds to believe that petitioner was armed and dangerous").

⁴³⁵ See *Kyllo*, 533 U.S. at 37.

⁴³⁶ As discussed in the section that reviews the *Caballes* decision, some may argue there remains a narrow distinction between intimate and non-intimate details. See *supra* notes 125-48 and accompanying text. According to Justice Stevens, at a minimum, a non-intimate detail would include the possession of contraband. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). It could also be argued that this view has support in *Florida v. Riley* and *California v. Ciraolo* where the Court discussed that no intimate details of the home or curtilage was revealed when the police flew aircraft over the defendants' properties and discovered drugs in the curtilage. *Florida v. Riley*, 488 U.S. 445, 449-52 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986). It seems *Kyllo* rejected this position, resting instead on "otherwise-imperceptibility." *Kyllo*, 533 U.S. at 38 n.5. Further, *Riley* and *Ciraolo* rested principally on the fact that both defendants were exposing their drugs to anyone who chose to fly over their homes. See *Ciraolo*, 476 U.S. at 2015 ("The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."); *Riley*, 488 U.S. at 450 (arriving "at the same conclusion" as *Ciraolo*). In both decisions, the Court notes that the observations were made with the naked eye. *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 450.

An additional argument, raised by two of the amicus briefs filed in the *Jardines* case, deserves discussion.⁴³⁷ The briefs submitted by Fourth Amendment Scholars⁴³⁸ and the National and Florida Associations of Criminal Defense Lawyers⁴³⁹ have raised a scientific challenge to the traditional belief that a dog sniff only reveals the presence or absence of contraband.⁴⁴⁰ In challenging the science, both briefs argue that dog sniffs are more like the thermal-imaging device in *Kyllo* than they are like the chemical test in *Jacobsen*.⁴⁴¹ Thus, the use of dog sniffs of the home are impermissible for the same reason the use of the thermal-imaging device in *Kyllo* was impermissible.⁴⁴²

Both briefs cite an article by Professor Leslie (Lunney) Shoebottom to explain that when a narcotics dog “alerts” it does not alert to the specific smell of illegal drugs.⁴⁴³ Instead, dogs alert to odors

⁴³⁷ The same argument was also raised in Leslie A. (Lunney) Shoebottom, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 837–39, 867 (2009).

⁴³⁸ Brief for Fourth Amendment Scholars as Amici Curiae Supporting Respondent, *State of Florida v. Jardines* (2012) (No. 11-564) 2012 WL 2641847 [hereinafter *Fourth Amendment*].

⁴³⁹ Brief for the Nat’l Assoc. of Crim. Def. Lawyers and the Fla. Assoc. of Crim. Def. Lawyers as Amici Curiae Supporting Respondents, *State v. Jardines* (2012) (No. 11-564), 2012 WL 2641848 [hereinafter *National Association*].

⁴⁴⁰ *Fourth Amendment*, at 1–35; *National Association*, at 1–22.

⁴⁴¹ See *Fourth Amendment*, at 6 (“Here, the canine drug-detection sniff makes possible sense-enhanced police inferencing about the interior of the home that is analogous to the technology-assisted inferencing about a home’s interior that the Court rejected in *Kyllo v. United States*, 533 U.S. 27 (2001), and *United States v. Karo*, 468 U.S. 705 (1984).”); *National Association*, at 3 (“Like the thermal imager in *Kyllo v. United States*, 533 U.S. 27 (2001), a dog sniff thus reveals details about the interior of the home beyond the mere presence or absence of contraband.”).

⁴⁴² See *Fourth Amendment*, at 2 (“[A] warrant is also required when police direct a device at a home to gain information, even if that device does no more than provide measurements that enable police to *infer* that illegal activity is taking place inside.”) (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). *National Association*, at 3 (“And because ‘[i]n the home, ...all details are intimate details,’ ... a suspicionless dog sniff of a house violates the privacy right at the heart of the Fourth Amendment.” (quoting *Kyllo*, 533 U.S. at 37)).

⁴⁴³ *Fourth Amendment*, at 18–32; *National Association*, at 11–15.

that are associated with contraband.⁴⁴⁴ The problem with this fact is that some noncontraband items share the same odors with contraband.⁴⁴⁵ The majority in *Caballes* reasoned that a dog sniff was different from a thermal scan because the dog sniff only revealed the presence or absence of contraband.⁴⁴⁶ Based on a number of scientific studies, however, that assertion appears to be incorrect.⁴⁴⁷ According to the amicus briefs, dog sniffs can reveal the presence of certain flowers, perfume, and food additives, in addition to the presence of contraband.⁴⁴⁸ The briefs do not directly attack the effectiveness of dog sniffs as contraband detectors, rather the briefs point out that the underlying premise of Justice Stevens's dicta in *Caballes* is factually incorrect.⁴⁴⁹ Thus, when a dog alerts, it is uncertain that the alert is due to contraband.⁴⁵⁰

⁴⁴⁴ Fourth Amendment, at 19; National Association, at 13.

⁴⁴⁵ Fourth Amendment, at 19; National Association, at 13.

⁴⁴⁶ *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (holding that “[a] dog sniff conducted during a concededly lawful traffic stop 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”).

⁴⁴⁷ Fourth Amendment, at 19–32; National Association, at 13–15.

⁴⁴⁸ Fourth Amendment, at 19; National Association, at 13–15.

⁴⁴⁹ *Caballes*, 543 U.S. at 409–10 (internal citations omitted). Justice Stevens stated: [The decision in *Caballes*] is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as “at what hour each night the lady of the house takes her daily sauna and bath.” The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.

Id.

⁴⁵⁰ See Fourth Amendment, at 3 (“Therefore, rather than detecting the contraband itself, a detection dog’s alert to these entirely-legal molecules or compounds instead produces an *inference* that contraband is *also* present.”); National Association, at 13–15 (“Accordingly, dogs trained to detect drugs like cocaine, heroin, and ecstasy may

Perhaps the most interesting aspect of this argument is that it does not appear to be directed at challenging the reliability of dog sniffs to detect contraband. Rather, this argument asserts that a dog sniff is very much like the thermal-imaging device in *Kyllo*.⁴⁵¹ Because a dog sniff can reveal the presence or absence of both lawful and unlawful activity, a warrant is required.⁴⁵² The strength of this argument is that if the Court chose to adopt it, the earlier dog sniff cases could remain intact while extension of dog sniffs to the home could be prevented. Because the restrictions on the governmental action described in *Kyllo* only applies to investigative techniques directed at the home,⁴⁵³ dog sniffs of luggage, cars, and so forth would still be permissible.

Although the Court could adopt the approach suggested by the amicus briefs and clearly preserve its earlier precedent regarding dog sniffs, it would leave open the question of whether a true contraband detector could be used on a home. The decision in *Jones* and the granting of certiorari in *Jardines* gives the Court the opportunity to take a definitive step regarding the Fourth Amendment and the home. The Court's theory of the Fourth Amendment articulated in *Jones* might be described as "trespass plus." Five Justices agree that a physical trespass alone can create a Fourth Amendment violation and in its absence, the Court should apply the *Katz* reasonable expectation of privacy test.⁴⁵⁴ The return of the trespass theory may

also alert to a host of household items that contain the same 'signature' odors, even when no illegal narcotics are present.").

⁴⁵¹ See Fourth Amendment, at 6.

⁴⁵² See Fourth Amendment, at 2.

⁴⁵³ See *Kyllo*, 533 U.S. at 40 (holding that when "the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant").

⁴⁵⁴ See *United States v. Jones*, 132 S. Ct. 945, 952 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, but not *substituted for*, the common-law trespassory test."); *id.* at 954 (Sotomayor, J., concurring) ("As the majority's opinion makes clear, however, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.").

signal recognition by the Court that in its effort to create Fourth Amendment jurisprudence that keeps up with evolving technology it left an important aspect of the amendment behind. Although privacy is of course part of what is protected by the Fourth Amendment, since before *Boyd* it has been recognized that the rights of property are likewise implicated.⁴⁵⁵ According to Lord Camden, “The great end for which men entered into society was to secure their property.”⁴⁵⁶ When the property involved is a home, the bundle of rights associated with that property includes liberty, sanctity and security.⁴⁵⁷ In *Boyd*, the Court ruled that even when the government does not actually enter an individual’s home, a Fourth Amendment violation can occur when the government commits an invasion of “the sanctity of a man’s home.”⁴⁵⁸ By creating a “trespass plus” approach to the Fourth Amendment, the Court reinforces its holdings in *Hicks* and *Kyllo* by returning to the recognition that property rights and privacy rights complement one another but neither encompasses the other entirely.⁴⁵⁹

It may be argued that the *Jardines* dog sniff passes the *Jones* “trespass plus” theory of the Fourth Amendment. The officer conducting the dog sniff did not commit a trespass in walking Franky

⁴⁵⁵ See *Boyd v. United States*, 116 U.S. 616, 627 (1886).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 630.

⁴⁵⁸ *Id.*

⁴⁵⁹ See *Kyllo v. United States*, 533 U.S. 27, 40 (holding that when “the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment ‘search,’ and is presumptively unreasonable without a warrant”); *Arizona v. Hicks*, 480 U.S. 321, 321 (1987) (finding that when exigent circumstances existed for police to enter an apartment, it was not a seizure to record serial numbers off of a stolen turntable, but moving “the equipment was a ‘search’ separate and apart from the search that was the lawful objective of entering the apartment”).

up to Jardines's door.⁴⁶⁰ Further, the Court has made clear under *Place*, *Edmond*, and *Caballes* that dog sniffs do not infringe on a reasonable expectation of privacy.⁴⁶¹ Although such an argument has superficial appeal, it misses the core value of the *Kyllo* declaration that everything in the home, which is kept from prying government eyes, is protected.⁴⁶² Since *Carroll*, the Court has declared that the Fourth Amendment is to be interpreted consistent with what it meant when it was adopted.⁴⁶³ From the beginning, the Fourth Amendment was one of several constitutional provisions meant as a check on the arbitrary application of power.⁴⁶⁴ The arbitrary power the Fourth Amendment was concerned with is the power to arbitrarily search.⁴⁶⁵ Part of why the Florida Supreme Court rejected the canine sniff in that case was out of concern that to do otherwise would clear the way for arbitrary use of the technique. If the Court were to declare that canine sniffs of the home are not searches, the Court would be opening the way, at least in this one respect, to the

⁴⁶⁰ See *United States v. Titemore*, 437 F.3d 251, 252 (2d Cir. 2006) ("Because the trooper approached a principal entrance to the home using a route that other visitors could be expected to take, we hold that the trooper's actions did not offend the Fourth Amendment.").

⁴⁶¹ See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that "[a] dog sniff conducted during a concededly lawful traffic stop 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"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (finding that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search"); *United States v. Place*, 462 U.S. 696, 707 (1983) (sniffing by a "trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment").

⁴⁶² See *Kyllo*, 533 U.S. at 37.

⁴⁶³ See *Carroll v. United States*, 267 U.S. 132, 149 (1925) (noting that the Fourth Amendment "is to be construed in light of what was deemed to be an unreasonable search and seizure when it was adopted").

⁴⁶⁴ See GPO ACCESS, FOURTH AMENDMENT: SEARCH AND SEIZURE, 1209, available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf> ("That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall." (citing *Ex parte Burford*, 7 U.S. 448 (1806))).

⁴⁶⁵ *Id.*

government conducting arbitrary searches of homes. This, in effect, gives law enforcement a general warrant for a specific set of items. This does not seem consistent with what is known of the Founders' views of the Fourth Amendment.

The *Kyllo* complete bar⁴⁶⁶ is an effective bright line rule. It reasonably applies the Court's precedent that "a search is a search,"⁴⁶⁷ and it prohibits the government from conducting arbitrary searches of the home. The *Kyllo* bar protects the privacy of an individual's home, and its sanctity, liberty and security.

CONCLUSION

The path of warrantless dog sniffs from an individual's luggage to front door has been prolonged but seemingly inevitable. In 1984 Justice Brennan dissented from the majority in *Jacobsen*, cautioning that the rule the Court had created would permit warrantless searches of homes.⁴⁶⁸ Justice Brennan wrote:

In fact, the Court's analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present.⁴⁶⁹

Justice Brennan, however, followed this observation with the prediction that "this Court ultimately stands ready to prevent this Orwellian world from coming to pass."⁴⁷⁰ The Court's holdings in

⁴⁶⁶ See *Kyllo*, 533 U.S. at 28.

⁴⁶⁷ *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

⁴⁶⁸ *United States v. Jacobsen*, 466 U.S. 109, 133-143 (1984) (Brennan, J., dissenting).

⁴⁶⁹ *Id.* at 138.

⁴⁷⁰ *Id.*

Jones and *Kyllo* arguably have already begun fulfilling Justice Brennan's prediction. Both decisions may serve to protect against active detection devices being used on the home, but the question of whether a passive biological device can be used appears open. In *Jardines* the Court has the opportunity to clarify *Caballes* and reinvigorate *Kyllo*. By restating that "all details [of a home] are intimate,"⁴⁷¹ and "a search is a search"⁴⁷² absent plain view, the Court can resolve the question of whether Americans can still claim their homes as their castles.

⁴⁷¹ *Kyllo*, 533 U.S. at 37.

⁴⁷² *Hicks*, 480 U.S. at 325.

