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THE FOURTH AMENDMENT FETCHES FIDO: NEW APPROACHES TO DOG SNIFFS

Robert M. Bloom[*] *& Dana L. Walsh*[**]

INTRODUCTION

In *Florida v. Jardines*,[1] the Court dealt with the issue of whether a drug-sniffing dog on a porch of a home qualifies as a search under the Fourth Amendment to the United States Constitution.[2] Justice Antonin Scalia, writing for a five-to-four majority, opted for a property-based approach, noting that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."[3] The *Jardines* approach stems from the Court's 2012 property approach in *United States v. Jones*.[4] *Jones* held that physically mounting a GPS receiver onto the undercarriage of an automobile was a search.[5] In this way the Court reinstituted a property concept and added to the subjective expectation of privacy tests created by *Katz v. United States*.[6] While this approach made *Jardines* an "easy" case, it left many unanswered questions with regard to the relationship between dog sniffs and the Fourth Amendment.

Jardines involved the use of Franky, a drug-detection dog, at the door of Mr. Jardines's home to investigate whether drugs were present.[7] The Court previously characterized a dog sniff as "*sui generis*," holding that a canine sniff is unique from other search

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1. 133 S. Ct. 1409 (2013).
2. *Id.* at 1413–14.
3. *Id.* at 1417.
4. 132 S.Ct. 945 (2012)
5. *Id.* at 949.
6. 389 U.S. 347, 359 (1967). The Court in *Katz* held that a recording device placed on a public telephone booth violated the privacy upon which the defendant relied and violated his expectation of privacy, therefore constituting a search under the Fourth Amendment. *Id.* In adopting this approach, the Court seemed to repudiate a property approach. *See id.* The *Katz* Court stated that the "'trespass' doctrine . . . can no longer be regarded as controlling." *Id.* at 353.
7. *Jardines*, 133 S. Ct. at 1417–18.

techniques.[8] The Court mentioned two reasons for this *sui generis* characterization: first, the intrusion is limited and second, the dogs only detect contraband.[9] Utilizing this *sui generis* characterization, the Court maintained that dog sniffs of luggage at an airport[10] or of lawfully stopped vehicles are not searches within the meaning of the Fourth Amendment.[11] Consequently, when police activity is not regarded as a search for Fourth Amendment purposes, officers do not need a warrant or any justification to utilize canine drug-detection units to discover contraband or illegal activities.[12]

The Supreme Court's previous cases involving drug-detection dogs, however, did not address the question of a sniff at a person's home.[13] The fact that a home is involved raises additional concerns because the home is seen as having a significant expectation of privacy, or, as Justice Scalia has characterized it, the home is at the "very core"[14] of the Fourth Amendment.[15] Additionally, scientific data that emerged in recent years suggests that drug-detection dogs are not as reliable as police and judges initially thought,[16] thus squarely putting into question the dogs' ability to sniff contraband consistently. False alerts to legal substances or errors made by handlers indicate that dogs are not completely accurate and are not

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8. *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005) (citing United States v. Place, 462 U.S. 696, 707 (1983)). The issue of dog sniffs in *Place*, it should be noted, was only discussed as dicta; the Court ultimately held that there had been a violation of the Fourth Amendment because the defendant was made to wait over ninety minutes in the search of her suitcase. *Place*, 462 U.S. at 710. As Justice Blackmun explained in his concurring opinion: "Neither party has had an opportunity to brief the [the issue of dog sniffs] . . . [a]lthough it is not essential that the Court ever adopt the views of one of the parties, it should not decide an issue on which neither party has expressed any opinion at all. The Court is certainly in no position to consider all the ramifications of this important issue." *Id.* at 723–24 (Blackmun, J., concurring).

9. *See Caballes*, 543 U.S. at 409; *Place*, 462 U.S. at 707. At the heart of the Court's explanations of dog sniffs in both *Caballes* and *Place* is the proposition that dog sniffs are *sui generis* because their reaction is only to the presence or absence of contraband. *See Caballes*, 543 U.S. at 411 (Souter, J., dissenting). The Court in *Place* explained further that "the canine sniff is *sui generis*. 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." *Place*, 462 U.S. at 707.

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

11. *See Caballes*, 543 U.S. at 409.

12. *See id.*; *Place*, 462 U.S. at 707.

13. *See* Jardines v. State, 73 So. 3d 34, 45 (Fla. 2011).

14. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013). Justice Thomas, an originalist like Justice Scalia, also joined in the opinion of *Jardines*. *Id.* at 1412.

15. Kyllo v. United States, 533 U.S. 27, 40 (2001).

16. *See infra* notes 125–62 and accompanying text.

the same as a chemical test that reveals the scientific nature of a substance.[17]

This Article seeks to answer the hard questions left unanswered by *Jardines*. What if the dog sniff in this case occurred on a public sidewalk? Would the expectation-of-privacy analysis provide the answer? Should a dog sniff be like a thermal-imaging device pointed at a home similar to the *Kyllo* decision?[18] What if a dog sniffs a person in a public place? This Article will analyze the future of dog sniffs in light of *Jardines* and explore the *sui generis* nature of dog sniffs, in particular the notion that dog sniffs only discover contraband.[19] It should be pointed out that this Article does not deal with utilization of dog sniffs in a terrorist situation.[20]

Part I describes the Supreme Court's jurisprudence involving drug-detection dogs leading up to *Jardines* including the *Jones* case and the holding of *Jardines*.[21] Part II discusses what *Jardines* failed to do[22] and further argues that the underlying proposition concluding that the uniqueness of dogs should be questioned and dogs should be treated like other enhancement devices under Fourth Amendment jurisprudence.[23] Finally, Part III argues that, because drug-detection dogs are an important investigatory tool and a lesser intrusion than other searches, the balancing test and reasonable suspicion standard found in *Terry v. Ohio*[24] dealing with intrusions less than an arrest or intrusive searches should govern.[25]

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17. *See infra* notes 125–62 and accompanying text. As explained by Justice Souter: "The infallible dog . . . is . . . a legal fiction." Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting).

18. *See Kyllo*, 533 U.S. at 40 (holding that the police could not use a thermal-imaging device to look inside a person's home to detect marijuana growth).

19. *See infra* notes 125–62. As will be examined, research indicates that a dog's senses alert to more than just contraband. A search of a person's home also potentially undermines a second premise underpinning the Court's dog-sniff jurisprudence, that a canine sniff is so nonintrusive that we need not be concerned about Fourth Amendment implications. *Infra* notes 163–96 and accompanying text.

20. *See* City of Indianapolis v. Edmond 531 U.S. 32, 44 (2000).

21. *See infra* notes 27–119 and accompanying text.

22. *See infra* notes 120–61 and accompanying text.

23. *See infra* notes 124–61 and accompanying text.

24. 392 U.S. 1, 21 (1968).

25. *See infra* notes 162–95 and accompanying text. The Court in *Terry* held that the "stop and frisk" techniques used by police were a lesser intrusion than an arrest, and given the officer's reasonable suspicion, based on experience, that a crime was about to occur, he was justified in his stop and did not violate the defendant's Fourth Amendment rights. *Terry*, 392 U.S. at 27.

I. SUPREME COURT CASE LAW ON DRUG-DETECTION DOGS & *FLORIDA V. JARDINES*

Men have exploited dogs' keen senses of smell for generations to ferret out crime.[26] Police forces have adopted this practice by training dogs to detect drugs and other contraband, raising questions about the applicability of the Fourth Amendment and its prohibition against unreasonable searches.[27] This Part outlines the history of Supreme Court case law involving drug-detection canines, including the Court's unwillingness to hold that a drug-detection dog sniff implicates the Fourth Amendment; *United States v. Jones*, the decision most relied on by the *Jardines* majority; and finally, the holding of *Florida v. Jardines* and how it will likely be applied in the future.

A. The Supreme Court's Previous Case Law on Canines Sui Generis

The Supreme Court has addressed the Fourth Amendment implications surrounding police officers' use of trained narcotics-detection dogs and has held that because a sniff by a drug-detection dog is *sui generis*, it is not a search.[28] The Fourth Amendment protects persons from "unreasonable governmental intrusions into their legitimate expectations of privacy."[29] Utilizing this standard, the Court has found the Fourth Amendment applicable and inapplicable in a variety of cases.[30] For example, under this standard, when the Court found that a reasonable expectation of privacy existed, it restricted the police's warrantless use of devices to record telephone conversations[31] and the warrantless use of

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26. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 25–26 (1990) (explaining that dogs have been used "in hunting slaves, tracking down fugitives, and hunting game," as well as "during Prohibition to track down moonshiners"); *see also* Debruler v. Commonwealth, 231 S.W.3d 752, 758 (Ky. 2007) ("It is a matter of common knowledge . . . that dogs of some varieties (as the bloodhound, foxhound, pointer, and setter) are remarkable for the acuteness of their sense of smell and for their power of discrimination between the track they are first laid on and others which may cross it." (quoting Pedigo v. Commonwealth, 44 S.W. 143, 145 (Ky. 1898)).

27. The Fourth Amendment states:

> 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.

U.S. CONST. amend. IV.

28. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 409 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

29. United States v. Chadwick, 433 U.S. 1, 7 (1977).

30. *See, e.g.*, *Caballes*, 543 U.S. at 409; *Place*, 462 U.S. at 706–07.

31. Katz v. United States, 389 U.S. 347, 359 (1967).

thermal-imaging devices aimed inside a person's home.[32] Activity not protected under the Fourth Amendment includes warrantless searches of trash,[33] planting a beeper in a container in the public domain,[34] and canine sniffs of a person's luggage at the airport[35] or during a traffic stop.[36]

In the 1983 decision of *United States v. Place*, the Court noted that a dog sniff of a person's luggage at the airport did not constitute a search within the meaning of the Fourth Amendment.[37] The Court characterized the canine sniff as *sui generis* because the limited intrusion resulting from the sniff only discloses the "presence or absence of narcotics, a contraband item."[38] The Court observed that the person's luggage did not even need to be opened, and the only items that the dog could expose with the sniff were contraband.[39] The Court further emphasized the limited scope of the dog's search, describing the procedure as "limited both in the manner in which the information is obtained and in the content of the information revealed . . . ."[40] However, the actual holding in *Place* had more to do with the extended detention of the luggage (ninety minutes) than the dog sniff.[41]

The Court reiterated the dog-related dicta from *Place* in its 2000 decision *City of Indianapolis v. Edmond*,[42] a case resulting from an administrative checkpoint search for the purpose of discovering drugs.[43] The Court stated, "The fact that officers walk a narcotics-detection dog around the exterior of each car . . . does not transform the seizure into a search."[44] Much like much of the language in *Place*, however, this quote was not crucial to the decision as the

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32. Kyllo v. United States, 533 U.S. 27, 29, 40 (2001) (holding that police use of the Agema Thermovision 210, a thermal-imaging device, directed toward the defendant's home violated the defendant's Fourth Amendment right against unreasonable searches).

33. California v. Greenwood, 486 U.S. 35, 43–44 (1988).

34. United States v. Knotts, 460 U.S. 276, 285 (1983). The Court in *Knotts*, however, specifically noted that the police had not used the beeper to track the defendant inside his home, preserving the traditional expectation of privacy within one's home. *Id.* at 282.

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

36. Illinois v. Caballes, 543 U.S. 405, 409 (2005).

37. *Place*, 462 U.S. at 707 ("In these respects, the canine sniff is *sui generis*.").

38. *Id.*

39. *Id.* ("[D]espite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.").

40. *Id.*

41. *Id.* at 710; *see supra* note 8 and accompanying text.

42. 531 U.S. 32, 40 (2000).

43. *Id.* at 32.

44. *Id.*

Court ultimately held that the stop for drug-detection purposes in *Edmond* violated the Fourth Amendment because of the nature of the stop itself (to discover drugs), not because of the use of a narcotics-detection dog during the stop.[45]

In the 2005 *Illinois v. Caballes* decision, the Court, adopting the language from *Place,* confirmed that a dog sniff is *sui generis*.[46] In *Caballes*, a police officer stopped a speeding vehicle on the interstate highway.[47] It was a legitimate traffic stop, and when the officer who stopped the car reported the incident to the dispatcher, a police drug-interdiction team located nearby went to the scene with a drug-detection dog.[48] The Court found that the immediacy of the dog's arrival did not extend the scope of the stop.[49] The Court emphasized the fact that the drug-detection dog could only detect narcotics (contraband).[50] The majority relied on its decision in *United States v. Jacobson*, where the Court had previously held that a chemical test performed on a packet of cocaine was not a search because the test merely alerted the officers to the presence of illegal narcotics.[51]

The *Caballes* Court noted that governmental action "that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment."[52] In *Caballes*, the initial seizure on the highway was lawful because the police officer had probable cause.[53] Subsequently, because the dog that appeared on the scene could only detect contraband, the passenger had no legitimate expectation of privacy in his vehicle.[54] Consequently, the Court held the dog sniff was not a search.[55] The Court dismissed arguments that high error rates and false positives undermine the idea that these dogs detect only contraband because the record of the lower

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45. *See id.* at 41–42 ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.").

46. Illinois v. Caballes, 543 U.S. 405, 409 (2005) (citing *Place*, 543 U.S. at 707).

47. *Id.* at 406.

48. *Id.*

49. *Id.* at 408.

50. *Id.* at 409 (citing *Place*, 543 U.S. at 707).

51. United States v. Jacobsen, 466 U.S. 109, 122–23 (1984). The Court in *Jacobsen* also cited *Place* for the proposition that there is no legitimate expectation of privacy in contraband. *Id.* at 124 (citing *Place*, 543 U.S. at 707).

52. *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123).

53. *Id.*

54. *Id.* at 408–09. The Court noted that the result might be different if the initial seizure was unlawful. *Id.* at 407–08. The Illinois Supreme Court had previously held that the use of a canine during an unlawful traffic stop and the subsequent discovery of contraband were unconstitutional. *Id.* (citing People v. Cox, 782 N.E.2d 275 (Ill. 2002), *overruled on other grounds*, People v. Bew, 886 N.E.2d 1002 (Ill. 2008)).

55. *Id.* at 409.

court was devoid of this issue.[56] Thus, the Court gave short shrift to Justice Souter's argument that, unlike the chemical test in *Jacobson*, a dog sniff did not have the certainty associated with a chemical test.[57] Justice Souter explained that the reason for the *sui generis* characterization of a dog sniff was two-fold: the limited nature of the intrusion and the determination of contraband.[58]

Post-*Caballes*, police officers may use trained drug-detection dogs to expose contraband that would otherwise be hidden from the public during a lawful traffic stop because such action does not implicate legitimate privacy interests.[59] A key distinction the Court seems to make is that there is no legitimate expectation of privacy in contraband.[60] This strongly suggests that there is an expectation of privacy in noncontraband. In addition, the conclusion that dog sniffs are *sui generis* rests upon the presumption that drug-detection dogs can *only* detect contraband, which scientific data shows may be a false premise.[61]

This expectation of privacy approach had made it difficult to predict what police activity would be governed by the Fourth Amendment.[62] This all changed in 2012 with the majority opinion of Justice Scalia in *United States v. Jones*, which analyzed the Fourth Amendment under common law trespass standards.[63] The Court held that the government's installation of a global positioning device ("GPS") on a person's vehicle and the use of that device to monitor the vehicle's movements constituted a "search."[64] Justice Scalia emphasized that the government's physical intrusion on the vehicle for purposes of obtaining information would have been considered a

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56. *Id.*

57. *Id.* at 415–16 (Souter, J., dissenting).

58. *Id.* at 410–11. It is important to note that *Caballes*' dog sniff reasoning, unlike *Place* and *Edwards*, was essential to the holding.

59. *Id.* at 408. The Court discussed how this holding is "entirely consistent" with its earlier decision in *Kyllo v. United States*, where the Court held that the use of a thermal-imaging device to detect the growth of marijuana plants inside a home constituted an unlawful search. *Id.* at 409 (citing *Kyllo*, 533 U.S. 27 (2001)). The majority stated that the device's capability of detecting lawful activities inside the home was critical to *Kyllo*. *Id.* at 409–10. In *Caballes*, however, the Court held 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." *Id.* at 410.

60. *See id.* at 409–10 (discussing the categorical difference between the expectation of privacy for a lawful activity versus the "nondetection" of contraband).

61. *See infra* notes 122–53 and accompanying text.

62. "*Katz* . . . has often been criticized as circular and hence subjective and unpredictable." *Kyllo*, 553 U.S. at 34.

63. United States v. Jones, 132 S. Ct. 945, 950 (2012).

64. *Id.* at 949.

search when the Fourth Amendment was adopted.[65] Justice Scalia, an originalist, argued that the Fourth Amendment had a close connection to property rights given the insertion of the phrase "in their persons, houses, papers, and effects" to the phrase prohibiting "unreasonable searches and seizure" by our founding ancestors.[66] This is particularly relevant because the Court applied the reasoning in *Jones* to *Jardines* and concluded that the use of a drug-detection dog at a person's front door qualifies as a search.[67]

B. Lower Courts Tackle the Issue of Dog Sniffs

Lower courts have confronted police use of drug-detection dogs and have analyzed the issue in light of the Supreme Court case law on the subject. Three particularly relevant cases are the Second Circuit's *United States v. Thomas*[68] case, the Maryland Court of Appeals' *Fitzgerald v. State*[69] case, and the Florida appellate court's *State v. Rabb*[70] decision. In *Thomas*, the police obtained a search warrant for the defendant's apartment.[71] The magistrate who granted the warrant relied on the officer's affidavit, which claimed that probable cause existed in part because of a canine sniff outside the defendant's apartment that indicated drugs were inside.[72] The defendant argued that the canine sniff was indeed a search and that the search was without probable cause and a warrant.[73] Because the magistrate relied in part on the illegal canine information, the Second Circuit held that the warrant was invalid.[74]

Like the Second Circuit in *Thomas*, the District Court of Appeal in Florida's Fourth District held in *State v. Rabb* that a canine sniff at the door of the defendant's home constituted an unreasonable

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65. *Id.* Note that this approach did not replace the *Katz* expectation of privacy approach, it merely added to it. *Id.* at 952.

66. *Id.* at 949.

67. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) (referring to *Jones*, 132 S. Ct. 945). Justice Scalia in *Jardines* turned to the wording of the Fourth Amendment in which the house is specifically referred to. *Id.*

68. 757 F.2d 1359 (2d Cir. 1985).

69. 864 A.2d 1006 (Md. 2004).

70. 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006).

71. *Thomas*, 757 F.2d at 1365–66.

72. *Id.* at 1366.

73. *Id.*

74. *Id.* at 1367. The Second Circuit noted that the other information in the affidavit was not enough to establish probable cause with the dog sniff. *Id.* at 1367–68. The Second Circuit also noted that there is a distinction between a dog sniff at the airport, in a public place, and a sniff at a person's home. *Id.* at 1366–67. Although a drug-detection dog will only disclose the presence or absence of narcotics, the dog sniff is still "a way of detecting the contents of a private, enclosed space." *Id.* at 1367. The Second Circuit in *Thomas* was willing to grant a "heightened expectation of privacy" inside a dwelling and confined *Place* to its facts, a dog sniffing luggage at an airport. *Id.*

search.[75] A search warrant was granted to search Rabb's home based in part on a drug-detection dog's alert to narcotics at Rabb's residence.[76] Much like the court in *Thomas*, the court distinguished *Place* and *Caballes*, describing the situations in both of those cases as less intrusive than a canine sniff upon a person's home.[77] The court held that the other evidence, without the canine sniff, was insufficient to establish probable cause and granted the defendant's motion to suppress evidence found based on the faulty warrant.[78] Further, using *Thomas* as persuasive precedent, the court explained that by using a drug-detection dog, police are able to get information about the inside of a person's dwelling that they would not be able to obtain with only their own senses.[79] Because the defendant had a legitimate expectation that the inside of his home would remain private and would not be "sensed" from the outside, the use of the drug-detection dog impermissibly intruded on his expectation of privacy, and the sniff constituted a Fourth Amendment search.[80] The court thus held that the information gathered from the dog sniff could not be used in an application for a search warrant.[81]

The Maryland Court of Appeals confronted the Fourth Amendment implications of a canine sniff in *Fitzgerald v. State*.[82] After receiving an anonymous tip, officers went to an apartment building with a drug-detection dog.[83] The dog and his handler went to four apartment doors, and the dog only alerted at the defendant's apartment.[84] The Maryland court rejected the distinction the Second Circuit had made in *Thomas* that distinguished houses from cars and public areas.[85] The court held that so long as a handler and dog were lawfully on the premises, a dog sniff of the outside of a home is not a search under the Fourth Amendment.[86]

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75. State v. Rabb, 920 So. 2d 1175, 1192 (Fla. Dist. Ct. App. 2006). It is important to note that this case was decided after the Supreme Court's *Caballes* decision.

76. *Id.* at 1178.

77. *Id.* at 1183–84, 1188–89. The court also noted the difference between a dog sniff at a hotel, which would be less intrusive, and a dog sniff at a person's home. *Id.* at 1185–86; *see also Thomas*, 757 F.2d at 1366–67 (discussing the intrusion of a dog sniff on privacy at one's residence).

78. *Rabb*, 920 So. 2d at 1188.

79. *Id.* at 1191; *see also Thomas*, 757 F.2d at 1367 (noting a police dog may sense what is inside a dwelling where a person may not).

80. *Rabb*, 920 So. 2d at 1184, 1188, 1192; *see also Thomas*, 757 F.2d at 1367 (finding a canine sniff at a residence constituted an illegal search under the Fourth Amendment).

81. *Rabb*, 920 So. 2d at 1187; *see also Thomas*, 757 F.2d at 1367 (finding the information from the dog's alert could not be used to support a search warrant).

82. 864 A.2d 1006, 1017 (Md. 2004).

83. *Id.* at 1008.

84. *Id.*

85. *Id.* at 1016–17.

86. *Id.* at 1017.

The court distinguished *Kyllo v. United States*,[87] and discounted the seeming importance that the Supreme Court had placed on the expectation of privacy in the home, by explaining that a dog is not technology like the thermal imager used in *Kyllo*.[88] Additionally, the court held that *Kyllo* is not applicable in the context of dog sniffs because dogs are not "advancing technology;" a dog's sense of smell has essentially remained constant over the years.[89] This Article, although not discounting this approach, will point out that a dog sniff is nonetheless an intrusion implicating the Fourth Amendment.

C. Florida v. Jardines

The majority's five-to-four opinion in *Jardines* does precisely what Justice Scalia intended—it keeps easy cases easy.[90] Nevertheless, it has left many issues that are not easily resolved lurking in the future, though ironically, the Court directly addressed the use of canine sniffs for the probable cause determination.[91]

Jardines involved a police officer who conducted a warrantless search of Mr. Jardines's home using a drug-detection dog and discovered live marijuana plants.[92] A detective received an unverified tip that Jardines's home was being used to grow marijuana, and one month later, two officers went to the home with

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87. *See* 533 U.S. 27 (2001). In *Kyllo*, the Agema Thermovision 210 was used to scan a home in order to determine whether the amount of heat emanating from the house was consistent with the use of high intensity lamps typically used to grow marijuana indoors. *Id.* at 29. Justice Scalia, writing for the majority, explained that "'[a]t the very core of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusions.'" *Id.* at 31 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).

88. *Fitzgerald*, 864 A.2d at 1015–16. "A dog has commonly been referred to as 'man's best friend,'" and is considered part of the family. *Id.* at 1015. Dogs could hardly be considered just some sort of technological device like a car, computer, or thermal imaging machine. *Id.*

89. *Id.* at 1015–16 ("Even taking into account potential gains from evolution, breeding, and improved nutrition, the limits to dogs' future ability to smell are not far from the current limits.").

90. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

91. Also in 2013, the Court decided *Florida v. Harris*, another case involving drug-detection dogs. 133 S. Ct. 1050 (2013). In *Harris*, a unanimous Court held that an alert by a drug-detection dog during a traffic stop provides probable cause to search the vehicle, without requiring the state to provide extensive records to establish the dog's reliability. *Id.* at 1055–56. The Court favored a practical and flexible standard to evaluate probable cause as opposed to rigid, bright-line tests. *Id.* The Court's decision in *Harris* merely preserved the status quo allowing officers to use alerts by drug-detection dogs as probable cause at least at a lawful traffic stop. *Id.* at 1057. It did not, however, answer the question of whether a drug-detection dog's alert at the doorway of a home was a search.

92. *Jardines*, 133 S. Ct. at 1413–14.

a drug-detection dog and approached the house.[93] The dog alerted to contraband at the front door, and one detective went to the front door and smelled marijuana.[94] The detective obtained a search warrant and conducted a search, and the police confirmed that marijuana was being grown in the house.[95] Jardines moved to suppress the evidence seized inside his home.[96] The motion was initially granted by the trial court but was subsequently reversed.[97]

The Court granted certiorari to answer the narrow question of whether the officers' behavior at Jardines's home was a search under the Fourth Amendment.[98] The Court concluded that there was a physical intrusion in the area surrounding Jardines's home when the officers brought the dog there to gather information.[99] Because this was not explicitly or implicitly authorized by the homeowner, the Court ultimately held that the government's use of trained drug-detection dogs to investigate a home and its immediate surroundings was a search within the meaning of the Fourth Amendment.[100] The Court emphasized the importance of the privacy of the home and the curtilage as constitutionally protected areas and subsequently analyzed whether the homeowner had explicitly or implicitly granted the officers a license to be there.[101] The Court concluded that Mr. Jardines had not granted the officers a license and noted that "background social norms that invite a visitor to the front door do not invite him there to conduct a search."[102] Visitors knocking at the door or girl scouts selling cookies are distinguishable from an officer with a dog investigating for incriminating material, explained the Court.[103]

The Court also noted that the question before it was whether the officer's conduct was an objectively reasonable search, which

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1414. The Florida Supreme Court had analyzed the federal case law surrounding the issue and held that it was not applicable to a dog-sniff test conducted at private residence. Jardines v. State, 73 So. 3d 34, 45 (Fla. 2011). The court noted that "all the sniff and field tests in the above [federal] cases were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*—that warrant no special protection under the Fourth Amendment." *Id.* The Florida court noted that the previous cases involved tests that were not susceptible to being employed in an arbitrary way, and the objects were "seized and tested in an objective and nondiscriminatory manner," with no "evidence of overbearing or harassing government conduct." *Id.*
99. *Jardines*, 133 S. Ct. at 1414.
100. *Id.* at 1417–18.
101. *Id.* at 1414–16.
102. *Id.* at 1416.
103. *Id.* at 1415–16.

depends on whether the officers had an implied license to enter the porch, which in turn depends on the purpose for which they entered the curtilage.[104] Because the purpose of the officers' behavior was to conduct a search, there was no implied license granted by the homeowner.[105] The Court rejected using a *Katz*-type analysis in looking at Jardines's expectation of privacy in the area; instead, it relied on reasoning from *Jones* and used a property-based understanding of the Fourth Amendment to decide the case.[106] This eliminated the need to go into a *Jacobsen* analysis that would likely favor admission of the evidence because a drug-detection dog is only trained to detect contraband.[107] The Court noted that it was unnecessary to analyze Jardines's expectation of privacy under *Katz* because *Katz* has merely "'*added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment."[108] Thus, use of the property law standard made *Jardines* "an easy case."[109] This, interestingly, was analogous to the logic Justice Sotomayor used in her concurrence in *Jones*, which opted for a property law approach because it was a cleaner way to resolve the issue rather than dealing with the amorphous issue of how long a GPS device needed to be on a car to implicate the expectation of privacy approach.[110]

Additionally, the Court rejected the argument that because drug-detection dogs have been used for centuries, their use should not be considered a search.[111] Instead, the Court focused on the physical intrusion of the home and the exploration of its details to conclude that the officers' use of a drug-detection dog at the porch of the defendant's home was a search.[112] In her concurrence, Justice Kagan, joined by Justices Ginsburg and Sotomayor, called for an analysis under *Katz*'s legitimate expectation of privacy test and would have held that *Kyllo*[113] already resolved the case.[114] Furthermore, Justice Kagan equates dogs to a sense-enhancing tool not in general public use, focusing her opinion on the analogy of a

104. *Id.* at 1416–17.
105. *Id.* at 1417.
106. *Id.*
107. *Id.*
108. *Id.* (quoting United States v. Jones, 132 S. Ct. 945, 951–52 (2012)).
109. *Id.*
110. *See Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring).
111. *Jardines*, 133 S. Ct. at 1417.
112. *Id.* at 1417–18.
113. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001). In *Kyllo*, a search was found when police used a thermal imaging device pointed at the home from a sidewalk to detect heat emanating from a house. *Id.* at 29. The Court defined the thermal-imaging device as a "device that is not in general public use" and its use to "explore details of the home that would previously have been unknowable without physical intrusion" constituted a "'search' [that was] presumptively unreasonable without a warrant." *Id.* at 40.
114. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring).

dog to a pair of super-high-powered binoculars.[115] Much like Justice Scalia's majority opinion, she places significant emphasis on the fact that the sniff occurred at the home.[116]

Justice Alito's dissent rejects the majority's property-based reasoning by arguing that the detective in *Jardines* "adhered to the customary path" leading up to Jardines's home, and, having every right to be there, his conduct was consequently not a search.[117] In addition, the dissent contends that the officer did not exceed the scope of his license.[118] Justice Alito further rejects the concurring opinion's contention that the officer's conduct violated Jardines's reasonable expectation of privacy, focusing instead on the Court's previous decision in *Caballes* and distinguishing this case from *Kyllo*.[119] The dissent points out that the majority in *Caballes* rejected Justice Souter's argument that questioned the ability of dogs to sniff just contraband.[120] With regard to *Kyllo*, the dissent pointed out that *Kyllo* was concerned with advanced technology not in general public use; dogs, Justice Alito argued, are not a new form of advanced technology as they had been used for centuries.[121]

Although Justice Scalia never employs the word "trespass," the idea of trespass permeates his entire opinion. The question of whether officers can walk to the front of a person's home and use a drug-detection dog to investigate is resolved. It is likely in response to this that the dissent extensively analyzes the history of trespass and finds no trespass or other property infringement in cases of dogs approaching a house.[122] What is left unanswered, however, by both the Scalia opinion and the Kagan concurrence, is whether the use of drug-detection dogs in places other than the front porch of a home is also a search within the meaning of the Fourth Amendment. For example, is an officer who walks up to a pedestrian with a drug-detection dog that alerts to drugs performing a "search"? Or what about an officer who walks up to a person in a bar or other public space with a drug-detection dog and sniffs that person? Using Justice Scalia's property-based analysis of the Fourth Amendment,

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115. *Id.* at 1418.
116. *Id.* at 1419.
117. *Id.* at 1423 (Alito, J., dissenting).
118. *Id.* at 1423–24.
119. *Id.* at 1425–26.
120. *Id.* at 1425.
121. *Id.* at 1425; *see supra* note 117 and accompanying text.
122. *Id.* at 1420–21. The dissent argues that "dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries." *Id.* at 1420. The dissent then further explains that "the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court's holding today." *Id.* at 1420–21.

it would seem that these acts would not constitute searches because there is no physical intrusion upon property of the person being "searched."[123]

Nonetheless, these activities still represent an intrusion into a person's privacy. Because a drug-detection dog significantly enhances a police officer's abilities, it is different from an officer walking on the street and either smelling marijuana or seeing drugs present. The Court left open the question of what justification, if any, the police need to use drug-detection dogs as an investigatory tool outside the context of a porch of a home. This is especially important as the fallibility of dog sniffs seems to have been accepted by the Court.[124]

II. THE (UN)RELIABILITY AND (IN)ACCURACY OF DRUG-DETECTION DOGS

The majority decision by Justice Stevens in *Caballes* emphasized their reliance on *Jacobsen* and *Place*. "[W]e treated a canine sniff by a well-trained narcotics-detection dog as '*sui generis*' because it 'discloses only the presence or absence of narcotics, a contraband item.'"[125] The Court refused to consider Justice Souter's dissenting position, pointing out that the record was devoid of facts to support his argument.[126] This Part will show that there is ample support for the proposition that dogs, unlike the chemical test in *Jacobsen*, do not always disclose contraband.[127] Because *Caballes* was the only decision that actually utilized the *sui generis* argument for its holding, questioning the contraband proposition should have a significant impact on the viability of the *Caballes* decision as well as the approach to dog sniffs.[128]

A significant problem with the Court continuing to hold that dog sniffs are *sui generis* and that their use therefore does not implicate the Fourth Amendment is that canine sniffs do not

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123. *See id.* at 1420–21.

124. *See* Florida v. Harris, 133 S. Ct. 1050, 1056–57 (2013). In *Harris*, the Court recognized that while dogs are imperfect, dog sniffs can nonetheless be used as probable cause to search "[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting." *Id.* at 1057. The Court specifies that "[a] defendant . . . must have an opportunity to challenge [the] evidence of a dog's reliability." *Id.* The Court, however, makes no mention of expectation of privacy.

125. Illinois v. Caballes, 543 U.S. 405, 409 (2005) (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

126. *See id.* Justice Souter in his dissent, agreeing with the respondent's brief, argues that dogs are not infallible, often make mistakes, and therefore should not be characterized as *sui generis* and that an alert cannot claim the certainty that *Place* assumed. *Id.* at 411–13 (Souter, S., dissenting); *see infra* note 131 and accompanying text.

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

128. *See Caballes*, 543 U.S. at 409.

reliably and accurately alert solely to contraband.[129] Although not substantially intrusive, dogs' sensitive olfactory senses are able to detect smells other than contraband.[130] For example, the odor in heroin that drug-detection dogs are trained to alert to, acetic acid, is a common chemical used in benign substances such as pickles and glue.[131] Additionally, studies indicate that drug-detection dogs do not alert to the illegal substances themselves, but to byproducts of the drug.[132] The source of the chemical, however, need not be present, and only trace amounts, not bulk, are necessary for the dog to detect the odor.[133] Thus, a dog merely detects what it has been conditioned to detect, which could be a lawful scent. This is noticeable in the case of discerning marijuana and hashish from objects that have similar smells, such as hemp products, juniper trees, or firs.[134]

Another important factor in the reliability of drug-detection dogs detecting only contraband is the proximity of the dog to the illegal substance.[135] For a drug-detection dog's sniff to be effective

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129. *See* Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 755 (2007) ("Even with its superior sense of smell, it is not possible for a dog to distinguish the scent of all contraband from otherwise legal substances."); Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 838 (2009) (finding that the odor that drug-detection dogs alert to for cocaine is a byproduct of the drug, methyl benzoate); *Id.* at 839 (noting that methyl benzoate can be found in lawful substances, including perfume). Furthermore, false alerts and false positives also demonstrate the unreliability and frequent inaccuracy of drug-detection dogs. This inaccuracy could be due to dogs alerting to lawful substances that are also the byproducts of contraband. *See* Katz & Golembiewski, *supra*, at 756 (noting that it is unclear whether a dog alerting to methyl benzoate is alerting to cocaine or to another lawful substance). For example, it is estimated that ninety percent of U.S. currency has on it traces of cocaine, and courts give very little evidentiary weight to currency discovered with cocaine on it. *See id.* The reliability and evidentiary value, therefore, of a drug-detection dog's alert to currency seems very limited. *See, e.g.*, *Caballes*, 543 U.S. at 411–12 (Souter, J., dissenting); Fitzgerald v. State, 864 A.2d 1006, 1018 (Md. Ct. App. 2004) (noting that the dog here was able to detect diazepam, a generic drug for valium and a legal pain medication).

130. *See* Katz & Golembiewski, *supra* note 129.

131. *Id.*

132. *See* Lunney, *supra* note 129, at 837–38.

133. Gary S. Settles, *Sniffers: Fluid-Dynamic Sampling for Olfactory Trace Detection in Nature and Homeland Security—The 2004 Freeman Scholar Lecture*, 127 J. FLUIDS ENGINEERING 189, 191 (2005).

134. Katz & Golembiewski, *supra* note 129, at 756 (citing an expert in chemistry who stated that "it is impossible to Pavlovian train dogs to detect marijuana because (1) there are more than sixty different odors for strains of marijuana and hashish, and (2) each component has a distinct and different odor").

135. Settles, *supra* note 133, at 192 ("[S]niffing is not a stand-off activity and proximity is essential for a nose to acquire a localized scent.").

and accurate, the dog would have to get very close to the source of the contraband in order to detect its presence.[136] This would mean getting very close to a person on the street and intruding on their personal space.

The way that dogs are "trained" also helps explain their reliability, or in some cases, unreliability.[137] Dogs are not trained like humans to try and find a substance because it is contraband; dogs are not motivated to find contraband at all.[138] Instead, dogs are "conditioned," or induced to respond to particular stimuli in specific ways.[139] An ideal, perfectly conditioned dog would "always respond[] to specified stimuli in a consistent and recognizable way, yet never respond[] in that manner absent the stimuli."[140] This, however, does not happen. Dogs cannot be calibrated like machines to always achieve consistent results.[141] Consequently, some training and certification programs put up with a degree of error in granting the certification, and there is not a national, uniform standard.[142] This lack of uniformity means that it is difficult to know what "certification" or "training" actually means.[143]

False alerts can also occur because the human handler makes a mistake, not the dog.[144] Handlers may influence their dogs through

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136. *Id.* at 199 ("[I]n order to properly interrogate chemical traces it really is necessary for a dog to poke its nose in everyone's business.").

137. *See* Monica Fazekas, Comment, *Pawing Their Way to the Supreme Court: The Evidence Required to Prove a Narcotic Detection Dog's Reliability*, 32 N. ILL. U. L. REV. 473, 482–84 (2012). In his dissenting opinion in *Caballes*, Justice Souter states, "The infallible dog . . . is a creature of legal fiction." Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting). Justice Souter cites several cases where well-trained dogs sniffed and alerted to contraband that was inaccurate because of either error by the handler, the dog, or pervasive contamination on objects like currency. *Id.* at 411–12. Justice Souter cited, among other cases, *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997), which described a dog that had a 71% accuracy rate, and *United States v. Scarborough*, 128 F.3d 1373, 1378 (10th Cir. 1997), which described a dog that inaccurately alerted four out of nineteen times while working for the post office and eight percent of the time during the dog's career. *Id.* at 412. Justice Souter also cited *United States v. $242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003), which explained that "because as much as 80% of all currency in circulation contains drug residue, a dog alert 'is of little value.'" *Id.*

138. Matheson v. State, 870 So. 2d 8, 13 (Fla. Dist. Ct. App. 2003).

139. *Id.* at 13–14.

140. *Id.* at 14.

141. *Id.*

142. *Id.* ("Whereas the Customs Service will certify only dogs who achieve and maintain a perfect record, [the] certification program [for the dog in question] accepted a seventy percent proficiency.").

143. *Id.* ("These disparities demonstrate that simply characterizing a dog as 'trained' and 'certified' imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.").

144. *See* Brief for Respondent at 34, Florida v. Harris, 133 S. Ct. 1050 (2013) (No. 11-817), 2012 WL 3716865, at *15.

conscious or unconscious signals.[145] Courts have recognized that handlers can influence dogs to alert even in the absence of a signal odor.[146] The D.C. Circuit court stated that "less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs."[147] A potential cure to such "cuing" may be to videotape all dog-sniff procedures, but this may not be widely adopted and might be too difficult to implement.[148]

The Supreme Court in *United States v. Jacobsen* held that there is no legitimate expectation of privacy in contraband.[149] The Court held that a search did not occur when a chemical test was performed to determine whether a substance was cocaine.[150] A box had been damaged at a Federal Express office in Minnesota, and the office manager opened the package to examine its contents, which contained white powder.[151] This "search" did not implicate the Fourth Amendment because private agents, employees of Federal Express, performed the search.[152] Federal agents then inspected the package, performed a chemical field test, and identified the substance as cocaine.[153] Because the test could *only* disclose "whether or not a particular substance [was] cocaine," the Court concluded that no legitimate privacy interest was compromised by the performance of such a test, even though the agents had to open the bag to perform the test and the test exceeded the scope of the

145. *See* State v. Nguyen, 811 N.E.2d 1180, 1195 n.109 (Oh. Ct. App. 2004) ("Handler cues are conscious or unconscious signals given from the handler that can lead a detection dog to where a handler thinks drugs are located.").

146. Brief for Respondent, *supra* note 144.

147. United States v. Trayer, 898 F.2d 805, 809 (D.C. Cir. 1990).

148. *See* Richard E. Meyers II, *In the Wake of* Caballes, *Should We Let Sniffing Dogs Lie?*, 20 CRIM. JUST. 4, Winter 2006, at 13 ("Dr. Lawrence Myers of Auburn University suggests that searches be videotaped when possible to ensure that the result is reliable and not a reaction to cuing from a handler, even when done subconsciously. The best-intentioned officer may be telling the dog to alert without knowing it.").

149. United States v. Jacobsen, 466 U.S. 109, 123 (1984). *Jacobsen* has not so far been confined to its facts and continues to be used for cases other than chemical tests. *See, e.g.*, United States v. Runyan, 275 F.3d 449, 457 (5th Cir. 2001) (citing *Jacobsen* in allowing for the search of computer storage materials by government agents without violating the Fourth Amendment); United States v. Rodriguez-Morales, 929 F.2d 780, 788 (1st Cir. 1991) (using *Jacobsen* and its use of *Place* to find that because there is no expectation of privacy in contraband, a dog sniff of a car is not a violation of the Fourth Amendment); United States v. Morales-Zamora, 914 F.2d 200, 204–05 (10th Cir. 1990) (using *Jacobsen* to allow evidence of contraband found by a dog sniff at a license checkpoint).

150. *Jacobsen*, 466 U.S. at 123.

151. *Id.* at 111.

152. *Id.* at 119.

153. *Id.* at 111–12.

search performed by the Federal Express employees.[154] The Court noted that a privacy interest that society is prepared to recognize as reasonable is "critically different" from the expectation that certain facts will not become known to the authorities.[155]

This standard was applied by the Court in *Caballes*, where it held that because dogs could only detect contraband, their use did not constitute a Fourth Amendment search; no legitimate expectation of privacy existed.[156] Justice Brennan had warned in his dissenting opinion in *Jacobsen* that such a broad reading of the Court's prior decision would enable officers to use drug-detection dogs to randomly roam the streets and alert the police to people carrying narcotics at random.[157] Justice Souter echoed Justice Brennan's warning in his dissenting opinion in *Caballes*, noting that a rigid application of the holding that there is never a reasonable expectation of privacy in contraband could lead to pervasive practices by police officers that include sweeping cars and pedestrians indiscriminately for contraband.[158]

Lower courts have applied the *Jacobsen* standard to a number of circumstances, including cases involving narcotics. One key lesson that courts seem to draw from *Jacobsen* is that the expectation of privacy must not only be subjectively reasonable (a necessary factor) but also objectively reasonable by societal standards.[159] This means that the mere desire to shield activity from the police is not enough to raise a legitimate expectation of privacy. Another way in which courts have relied on *Jacobsen* is in a more fact-specific inquiry for probable cause. In *Jacobsen*, the DEA agents merely had to look at the substance (which had already been opened by private actors) to develop their suspicion that the bags contained cocaine.[160] Similar instances could be imagined where officers need only look at or smell something to reasonably

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154. *Id.* at 123.

155. *Id.* at 122.

156. Illinois v. Caballes, 543 U.S. 405, 409 (2005).

157. *Jacobson*, 466 U.S. at 138 (Brennan, J., dissenting) ("[U]nder the Court's analysis in these cases, law enforcement officers could release a trained cocaine-sensitive dog—to paraphrase the California Court of Appeal, a 'canine cocaine connoisseur'—to roam the streets at random, alerting the officers to people carrying cocaine.").

158. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting) ("[A]n uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search.").

159. *See, e.g.*, United States v. Walker, 20 F. Supp. 2d 971, 974 (S.D. W. Va. 1998) (holding that a package addressed to an alias constituted conduct that society is not prepared to recognize as legitimate and reasonable and there is no legitimate expectation of privacy in such conduct).

160. *See Jacobsen*, 466 U.S. at 121–22.

believe that the substance is contraband, and this may or may not be enough to establish probable cause depending on the facts and circumstances.[161]

A chemical test, like the one performed in *Jacobsen*, seems very different, however, from a sniff by a drug-detection dog, a living, breathing animal. Although a chemical test might produce a false positive, it is unlike a drug-detection dog that is conditioned to detect certain substances but whose ability to be consistent one hundred percent of the time is virtually impossible.[162] Additionally, courts interpreting *Jacobsen* have relied on the case for the proposition that once a private party has conducted a search, a government agent viewing or testing what has already been viewed does not violate the Fourth Amendment.[163] This is substantially different than when the initial intrusion is a sniff.

In *Jardines*, the majority opinion did not go into a *Jacobsen* analysis because the case was decided on a property-based reading of the Fourth Amendment.[164] As this Article has argued, a drug-detection dog is unable to distinguish a lawful substance from contraband, thereby undermining a key premise of the *sui generis* rationale from *Place* and *Caballes*. Drug-detection dogs have the potential to detect things other than just contraband, including lawful substances.[165] Instead, dogs look more like any other police procedure subject to imperfections and against which persons should be protected under the Fourth Amendment.[166]

III. REASONABLE SUSPICION REQUIRED

In *Terry v. Ohio* the Court recognized that certain activity falling short of a full-scale arrest and search (known as a stop and frisk) should be governed by the Fourth Amendment.[167] Because this activity did not lend itself to probable cause or a need for a warrant, the Court turned to the Fourth Amendment's general

161. *See, e.g.*, People v. Leichty, 205 Cal. App. 3d 914, 921 (Cal. Dist. Ct. App. 1988) (holding that officers' viewing and smelling of a liquid substance was enough to establish probable cause that the bottles in question contained contraband and the officers were justified in seizing the bottles).

162. *See supra* notes 124–61 and accompanying text.

163. *See* People v. Radcliff, 712 N.E.2d 424, 430 (Ill. App. Ct. 1999) (citing *Jacobsen*, 466 U.S. at 119); *see also* State v. Wallace, 910 P.2d 695, 703–04 (Haw. 1996) (citing *Jacobsen* and holding that testing packets of cocaine did not violate the defendant's Fourth Amendment rights).

164. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

165. *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

166. *Cf.* Terry v. Ohio, 392 U.S. 1, 30 (1968) (establishing the standard of reasonable suspicion for an officer to stop and frisk a person).

167. *Id.* at 9.

prohibition against unreasonable search and seizures.[168] As the court explained:

> "[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observation of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[169]

The Court thus came up with a balancing test that weighed the government interest with the type of intrusion.[170] In this way, the Court concluded that the justification for this police activity would be something less than probable cause—reasonable suspicion.[171]

In *United States v. Place*, the Court found a dog sniff to be *sui generis* for both the manner in which the information is obtained (sniff) and revealed (contraband).[172] Both factors were needed for the *sui generis* classification.[173] *Place* indicated the intrusion by a dog sniff was less than a full-scale search, as it did not require the opening of the luggage.[174] It is the limited nature of the intrusion that we focus on. The Fourth Amendment should nonetheless still govern this rubric of police conduct and be classified as a less-than-traditional search.

Thus, although the use of drug-detection dogs is only minimally intrusive, the Fourth Amendment should still govern their use. The issue of suspicionless, sweeping searches using drug-detection dogs is still a concern, even though the police may encounter practical problems in implementing such an approach.[175] These potential practical limitations should not color the Court's Fourth Amendment jurisprudence. It seems that whether a sniff by a drug-detection dog constitutes a "search," regardless of if the dog sniffs a

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168. *Id.*
169. *Id.* at 20.
170. *Id.* at 20–21.
171. *Id.* at 10–11.
172. United States v. Place, 462 U.S. 696, 707 (1983).
173. *Id.*
174. *Id.*
175. Brief for the State of Florida at 28, Florida v. Jardines 133 S. Ct. 1409 (2013) (No. 11-564), 2012 WL 1594294 at *28.

> Dog-handler teams are not cheap and surreptitious devices that evade the ordinary checks of "limited police resources and community hostility" on abusive law enforcement practices. These ordinary constraints apply. Trained drug-detection dogs are a scarce resource that are in high demand. And, unlike the GPS device in *Jones*, neighborhood-wide sweeps with numerous dogs and their handlers would not be surreptitious.

Id. at 27–28, 2012 WL 1594294 at *27–28 (quoting United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring)).

pedestrian on the street or a house from a public sidewalk, should not turn on the *Kyllo* decision as the dissent in *Jardines* seems to suggest, pointing out that *Kyllo* was based on new technology not in general public use.[176] Further, although dog sniffs are not perfect, they are focusing on contraband as opposed to heat in *Kyllo*. Thus the intrusion is somewhat less severe. It should also not turn on whether the police had implicit or explicit consent to be on certain property, as Justice Scalia suggests in the majority opinion of *Jardines*.[177] Instead, the proper standard for determining whether the police have the authority to use a drug-detection dog should be reasonable suspicion.[178]

Similar to a *Terry* stop, it seems proper to require an officer to have, based on experience, reasonable grounds to suspect criminal activity before utilizing a drug-detection dog to investigate a person.[179] Also, similar to *Terry*, where the search was restricted to what was necessary to discover particular items, a dog sniff is generally limited to detecting contraband.[180]

The *Jacobsen* rationale, which would require no level of justification for the police to use a drug-detection dog, is simply inapplicable for dogs.[181] As the Maryland court in *Fitzgerald v. State* noted, dogs have been given the title "man's best friend."[182] Due to this moniker, and because "across America, people consider dogs as members of their family," the Maryland Court of Appeals concluded that the U.S. Supreme Court's reasoning in *Kyllo* was not applicable, and one cannot analogize a dog to a machine like a thermal-imaging device.[183] The court also explained that dogs are not an "advancing technology."[184] The court went so far as to cite Homer's *Odyssey*, a twelfth century statement by Richard I, and Sherlock Holmes as evidence that a dog's sense of smell was then, and continues to be, superior to humans'.[185] Nonetheless, a dog's sense of smell has not progressed beyond this point, unlike most technology that humans develop, such as computers, chemical tests, and electronics.[186] Based on these premises, that a dog is not like

176. *See* Kyllo v. United States, 533 U.S. 27, 39–40 (2001). In *Kyllo* the Court found that the use of a thermal imaging devise (measuring heat) targeted at a home was a Fourth Amendment search. *Id.*

177. Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

178. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

179. *See id.*

180. *See id.* at 30.

181. *See Kyllo*, 533 U.S. at 40; Katz v. United States, 389 U.S. 347, 359 (1967).

182. Fitzgerald v. State, 864 A.2d 1006, 1015 (Md. 2004); *see also supra* notes 120–61 and accompanying text.

183. *Id.* at 1015–16.

184. *Id.* at 1016.

185. *Id.*

186. *See id.*

technology to begin with, nor does it have the capability of advancing, and that the dog could detect only contraband, the Maryland court held that a dog sniff of the exterior of a residence was not a "search" under the Fourth Amendment.[187]

Although the Maryland court seems to have been correct in its analysis of the nature of a drug-detection dog in that it is not like a machine, nor does it advance in sophistication like other technologies, the court came to the wrong conclusion. It is *because* a dog is not like a machine that its use by the police constitutes a search under the Fourth Amendment. Dogs are fallible, they make mistakes, and consequently, they do not solely detect contraband.[188] Therefore, although one probably cannot satisfactorily compare a drug-detection dog to a machine like the Agema Thermovision 210,[189] the Supreme Court's analysis on the expectation of privacy in *Kyllo* and other Fourth Amendment cases is relevant, though not enough to complete the analysis. Although a dog could not detect "at what hour each night the lady of the house takes her daily sauna and bath,"[190] a dog could potentially detect alcohol, perfume, or prescription or nonprescription drugs, which are all lawful to possess, as well as homegrown marijuana.[191] Without this major rationale for declaring that dog sniffs are *sui generis*, there is an expectation of privacy and Fourth Amendment applicability for sniffs.

Although it could be argued that the justification for treating dog sniffs as a nonsearch no longer exists, thus putting into question the *Caballes* decision, we recognize that the Court might be inclined to uphold *Caballes* and *Place* because the Court has recognized lesser privacy expectations for intrusions of an automobile[192] or of luggage at an airport.[193] Thus, this minimal intrusion might not require Fourth Amendment protection.[194] The *Jardines* court left unanswered whether a sniff of a person on a public street[195] or a

187. *Id.* at 1017.

188. *See supra* notes 140–61 and accompanying text.

189. *See* Kyllo v. United States 533 U.S. 27, 38 (2001).

190. *Id.*

191. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013).

192. Illinois v. Caballes, 543 U.S. 405, 409 (2005); *supra* note 77 and accompanying text.

193. *See* United States v. Place, 462 U.S. 696, 707 (1983).

194. *Cf.* Maryland v. Wilson, 519 U.S. 408, 415 (1997) (holding that a police officer making a traffic stop may order passengers to get out of the car pending the completion of the stop because the additional intrusion on the passenger is minimal); Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (holding that during a lawful traffic stop it is not a violation of the Fourth Amendment to order the driver out of the vehicle and to preform a pat down if there is a reasonable belief that the driver may be armed).

195. The Court has consistently held that "[v]irtually any 'intrusio[n] into the human body'" is a search. Maryland v. King, 133 S. Ct. 1958, 1969, 1980 (2013) (quoting Schmerber v. California, 384 U.S. 757, 770 (1966)) (holding that

sniff of a home from a public place[196] require a Fourth Amendment analysis. Pursuant to the *Terry* balancing test, we should take into account the level of intrusiveness of the search (minimal) and the importance of the use of drug-detection dogs as an investigatory tool (high).[197] Nonetheless, unlike luggage at an airport or a vehicle, a drug-detection dog's sniff of a person seems more intrusive, similar to a home in terms of detecting odors other than solely contraband and the level of intrusiveness.[198] Further, Justices Scalia and Thomas would probably agree as they turn to the original wording of the Fourth Amendment in which both houses and persons are mentioned. Again, *Jacobsen*'s contraband analysis is not satisfactory because a drug-detection dog is probably not solely smelling contraband but normal body odors as well.

A dog sniff of a person seems to meet both the objective and subjective reasonableness requirements, suggesting that people have a legitimate expectation of privacy in their persons.[199] Justice Kagan's concurring opinion in *Jardines* would require a warrant and probable cause for the use of a drug-detection dog.[200] Although we recognize the intrusiveness of a sniff of a person or a home, this Article seeks to make the Fourth Amendment applicable to sniffs and suggests a reasonable suspicion standard to attract a majority of the Court. We also recognize the importance of drug-detection dogs as an investigatory tool and that the intrusion is less than that in *Kyllo* because dogs are conditioned to recognize contraband.[201]

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though a DNA cheek swab taken as the defendant was being booked was a search, like fingerprinting or photography, it is a legitimate booking practice that is reasonable under the Fourth Amendment); *see also* Cupp v. Murphy, 412 U.S. 291, 295 (1973).

196. "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.'" Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

197. In *King* the dissenters recognized that special needs or administrative rationale did not work when the objective of the search was for criminal investigation. *King*, 133 S. Ct. at 1981–82 (Scalia, J. dissenting); *see also*, Indianapolis v. Edmonds, 531 U.S. 32, 37 (2000).

198. *See* Bond v. United States 529 U.S. 334 (2000) (indicating that physically invasive inspection was more intrusive than a visual inspection.) B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999) ("The Ninth Circuit has recognized, however, that the level of intrusiveness is greater when the dog is permitted to sniff a person than when a dog sniffs unattended luggage.").

199. *Id.* ("Because we believe that the dog sniff at issue in this case infringed B.C.'s reasonable expectation of privacy, we hold that it constitutes a search.").

200. Florida v. Jardines, 133 S. Ct. 1409, 1419–20 (2013) (Kagan, J., concurring).

201. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 123–24 (1984). Because the protected privacy interest had already been frustrated by the

Because a drug-detection dog's sniff is still less intrusive than other investigatory tools, and because it is an important police practice, the proper standard to determine the validity of such a search is reasonable suspicion.

CONCLUSION

The Supreme Court had an opportunity in 2013 to revisit its jurisprudence involving the Fourth Amendment and police use of drug-detection dogs. At least when it comes to homes, the Court held that a dog sniff from the porch of a home is a search under the Fourth Amendment and that police need probable cause *before* allowing the sniff to occur.[202] Nonetheless, the Court left unanswered the question of the use of drug-detection dogs in areas outside the home, including their use on persons on the street or in a public place.

The *Jacobsen* contraband rationale does not adequately address the issue of drug-detection dogs. The unreliability and inaccuracy of narcotics canines suggest that they do not detect solely contraband, and can actually alert to lawful substances. There is indeed an expectation of privacy for dog sniffs. Without the traditional safeguards of the Fourth Amendment, including applying a reasonable suspicion standard, the risk of indiscriminate searches of homes, vehicles, and persons is a threat. Although drug-detection dogs are minimally instrusive and can be useful police tools to detect crime and illegal substances, as they have been doing for decades, it is necessary to analyze their use in light of the strictures of the Fourth Amendment. This requires an establishment of at least reasonable suspicion before a dog sniff is performed.

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private carrier, the Court in *Jacobsen* found that the seizure for testing was constitutionally reasonable. *Id.* at 114–15.

202. *Jardines*, 133 S. Ct. at 1417–18.