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Protecting Apartment Dwellers From Warrantless Dog Sniffs

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I. THE PROBLEM

For decades, law enforcement has used what the state of Florida calls an "irreplaceable tool in detecting those who grow marijuana in their living rooms; construct meth labs in their kitchens; hide bodies in their basements; or make bombs in their garages": dogs.[1] Every year, state and federal law enforcement authorities conduct thousands of dog sniffs.[2] In 2010 alone, the Drug Enforcement Administration (DEA) used dogs to uncover over 4,700 indoor marijuana "grow sites."[3]

The detection of one such grow operation was the catalyst for the Florida Supreme Court's attempt to limit the scope of dog sniffs. In *Jardines v. State*, the police walked their drug-sniffing dog Franky to

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1. Petition for Writ of Certiorari at 31, Florida v. Jardines, No. 11-564 (U.S. Oct. 26, 2011), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/11/Jardines-petition-final.pdf.

2. Brief of Texas et al. as Amici Curiae in Support of Petitioner at 2–4, Florida v. Jardines, No. 11-564 (U.S. Dec. 5, 2011), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-564-Jardines_Amicus-Brief1.pdf.

3. *Id.* at 3.

Joelis Jardines's front door.[4] After Franky alerted, the police got a warrant; their ensuing search revealed a marijuana grow operation.[5]

The Florida Supreme Court held that the sniff "violated the Fourth Amendment":[6] A dog sniff of the outside of a house "is a substantial government intrusion into the sanctity of the home and constitutes a 'search,'"[7] thus requiring probable cause and a warrant.[8] The court determined that one's reasonable expectation of privacy is most powerful in the home—"[t]he sanctity of the citizen's home" compels Fourth Amendment protection from warrantless dog sniffs, whereas other, less sacred places such as cars do not.[9]

Despite the Florida Supreme Court's stated desire to protect the sanctity of the *home*, *Jardines* applies only to dog sniffs conducted outside *houses*. The court did not invalidate warrantless dog sniffs conducted outside other types of homes, such as apartments. In fact, the court distinguished *Stabler v. State* (which held that a dog sniff conducted at an apartment door was not a search)[10] on the ground that an apartment is a "temporary dwelling" not accorded the same status as a genuine "private residence."[11]

The United States Supreme Court has granted Florida's petition for a writ of certiorari[12] to decide the following question: "Whether 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[.]"[13] In his brief opposing the granting of certiorari, Jardines argued that the Florida Supreme Court's decision was correct because, among other reasons, houses receive greater Fourth Amendment protection than other areas: "The dog sniff in this case did not take place at the door of an apartment from a common hallway in a large apartment com-

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

5. *Id.* at 37–38.

6. *Id.* at 56.

7. *Id.* at 36.

8. *Id.* at 37.

9. *Id.* at 45.

10. Stabler v. State, 990 So. 2d 1258, 1263 (Fla. Dist. Ct. App. 2008).

11. *Jardines*, 73 So. 3d at 39 n.3. Similarly, in *Rabb*—which the *Jardines* court approved, *id.* at 56—the Fourth District Court of Appeal held that a sniff conducted at the front door of a house was a search. State v. Rabb, 920 So. 2d 1175, 1188 (Fla. Dist. Ct. App. 2006). The court distinguished a case upholding a dog sniff conducted at a hotel room door by arguing that a hotel room "is neither as private nor as sacrosanct" as a house. *Id.* at 1186 (distinguishing Nelson v. State, 867 So. 2d 534 (Fla. Dist. Ct. App. 2004)). The court "view[ed] the reasonable expectation of privacy afforded to locations along a hierarchy from public to private," with hotel rooms "somewhere in between." *Id.*

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

13. Petition for Writ of Certiorari, *supra* note 1, at i.

plex," but "at the front door of a private residence."[14] Florida countered that "[t]here is no difference between an apartment and a detached house for Fourth Amendment purposes," so that neither should have Fourth Amendment protection from warrantless dog sniffs.[15]

A majority of state and federal courts interprets United States Supreme Court precedent to mean that a dog sniff is never a search.[16] If these courts are correct, then the place where the sniff occurs is irrelevant; neither a house nor an apartment is protected. But despite these authorities, the Florida Supreme Court set out to protect homes from dog sniffs. Once determined on that path, the court should not have limited its protection just to houses; instead, it should have disapproved of *Stabler*, and extended Fourth Amendment protection to "temporary dwelling[s]"[17] as well.

This article will show that, contrary to the Florida Supreme Court's distinction between them, apartments[18] and houses are similar, so that they should be subject to the same rule regarding warrantless dog sniffs. The reasons that courts cite for attributing to houses a heightened expectation of privacy apply equally to apartments, and the reasons given for attributing a reduced expectation of privacy to apartments apply equally to houses. Houses and apartments should therefore be treated the same—either protected or not. If, like the Florida Supreme Court, one abandons the *per se* rule that a dog sniff is not a search, and instead holds that the sanctity of the home triggers the warrant requirement, then there is no valid reason to exclude apartments from the same protection granted to houses.

This article will further argue that the United States Supreme Court will probably reverse the Florida Supreme Court's decision in *Jardines* because prior United States Supreme Court precedent holds that a dog sniff is not a search. However, the United States Supreme Court ought to overrule its *per se* rule that a dog sniff is not a search, and instead grant Fourth Amendment protection from warrantless dog sniffs not just to houses (which is where the Florida Supreme Court stopped), but to apartments as well.

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14. Respondent's Amended Brief in Opposition at 24, Florida v. Jardines, No. 11-564 (U.S. Dec. 2, 2011), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-564-BIO.pdf.

15. Reply Brief in Support of Petition for Writ of Certiorari at 8, Florida v. Jardines, No. 11-564 (U.S. Dec. 15, 2011), 2011 WL 6417742.

16. *Jardines*, 73 So. 3d at 67–68 & nn.15–16 (Polston, J., dissenting) (collecting cases). The state of Florida relied on this argument in its petition for certiorari. Petition for Writ of Certiorari, *supra* note 1, at 14 ("[A] dog sniff is not a search.").

17. *Jardines*, 73 So. 3d at 39 n.3.

18. For the sake of brevity, I use the term "apartments" to mean dwellings in any multi-unit structures.

Part II of this article surveys the relevant cases, including those concerning the reasonable expectation of privacy test, and its application to different types of places; and the constitutionality of warrantless dog sniffs in general, and of such dog sniffs of houses and apartments in particular. Part III shows that in its zeal to protect the sanctity of the home, the *Jardines* court misapplied United States Supreme Court precedent, but that its opinion was still defensible, given the flaws of the United States Supreme Court's dog sniff jurisprudence, and given the United States Supreme Court's own solicitude for the sacred home. Lastly, Part IV first argues that *Jardines* should also apply to apartments because, as homes, they engender expectations of privacy similar to those of houses; and then describes the consequences of a contrary approach in this era of economic depression.

II. THE RELEVANT CASE LAW

The Fourth Amendment provides, "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 . . . ."[19] A warrantless search is "presumptively unreasonable."[20] But what constitutes a search? And is a dog sniff a search?

A. *Reasonable Expectations of Privacy*

To determine whether official conduct is a search, modern courts use a test devised by Justice Harlan in his concurrence in *Katz v. United States*.[21] Under this test, "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.'"[22] The reasonableness of one's expectation of privacy often depends on the nature of the place or object that engenders that expectation; for example, one usually has a reasonable expectation of privacy in the home, but not in objects in plain view.[23]

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19. U.S. CONST. amend. IV. Florida courts are bound by the United States Supreme Court's interpretations of the Fourth Amendment. FLA. CONST. art. I, § 12.

20. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

21. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 32–33 (2001) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

22. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

23. *Id.* (Harlan, J., concurring).

1. Reasonable Expectations: The Home

The Fourth Amendment reflects "the ancient adage that a man's house is his castle."[24] Indeed, the United States Supreme Court has said on multiple occasions that the Fourth Amendment's primary purpose is the protection of the sanctity of the home.[25] This protection also applies to the home's curtilage, or the area around the home "to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life."[26]

So strong is the impulse to preserve the home's sanctity that the Supreme Court has often extended Fourth Amendment protection to dwellings other than houses.[27] In *McDonald v. United States*, the Court held unconstitutional a search of a room in a rooming house conducted after police broke into the building.[28] In his concurrence, Justice Jackson was particularly adamant: "It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it."[29] In *Miller v. United States*, the Court held unconstitutional the warrantless entry of an apartment, equating an apartment with a house: "Every *householder*, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the *house*."[30] And in *Stoner v. California*, the Court likewise held unlawful the warrantless search of the petitioner's hotel room, proclaiming, "*No less than a tenant of a house*, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."[31]

More recently, the Court expressed its solicitude for the sanctity of the home in *Kyllo v. United States*, in which it determined that the use of

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24. Miller v. United States, 357 U.S. 301, 307 (1958).

25. Payton v. New York, 445 U.S. 573, 585 (1980) ("[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (internal quotation marks omitted)); Weeks v. United States, 232 U.S. 383, 394 (1914) ("[T]he 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law . . . .").

26. Oliver v. United States, 466 U.S. 170, 180 (1984) (internal quotation marks omitted); *see also* United States v. Dunn, 480 U.S. 294, 301 (1987) (identifying factors relevant to determining "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection").

27. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 Geo. Mason U. C.R. L.J. 297, 310 (2005) ("The Supreme Court has afforded apartments and hotel rooms status as 'homes' under the Fourth Amendment.").

28. McDonald v. United States, 335 U.S. 451, 452, 456 (1948).

29. *Id.* at 459 (Jackson, J., concurring).

30. Miller v. United States, 357 U.S. 301, 302, 313 (1958) (emphasis added).

31. Stoner v. California, 376 U.S. 483, 484, 490 (1964) (emphasis added).

a thermal imager to scan the heat emanating from a house was a search.[32] The Court held, "[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 where (as here) the technology in question is not in general public use."[33] There is a heightened expectation of privacy in the home, in which "*all* details are intimate details, because the entire area is held safe from prying government eyes."[34]

2. Unreasonable Expectations: Publicly Accessible Areas and Contraband

In contrast to the home, areas that the public may access physically or by sight do not engender reasonable expectations of privacy. For example, open fields (as distinct from curtilage) do not receive Fourth Amendment protection.[35] One cannot have a reasonable expectation of privacy in open fields because they "usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be."[36] Even the presence of a fence might not be enough to make a field part of the curtilage if members of the public can see what occurs in the field.[37]

Police do not violate the Fourth Amendment when their conduct occurs in a place where they have a right to be. In *California v. Ciraolo*, police flew over Ciraolo's house, and spotted marijuana being grown in his yard.[38] The Supreme Court held that this was not a search because Ciraolo could not reasonably expect that his garden would go unobserved.[39] Flight is routine, so "[a]ny member of the public" could have seen the garden; the police were thus observing "from a public vantage point where [they had] a right to be."[40] Similarly, in *California v. Greenwood*, the police found evidence of drug dealing by going through the respondents' trash without a warrant.[41] The Court held that the respondents had no reasonable expectation of privacy in the trash because they left it at the curb, where it was "readily accessible to ani-

32. Kyllo v. United States, 533 U.S. 27, 29, 34–35 (2001).
33. *Id.* at 34 (citation and internal quotation marks omitted).
34. *Id.* at 33, 37.
35. Hester v. United States, 265 U.S. 57, 59 (1924).
36. Oliver v. United States, 466 U.S. 170, 179 (1984).
37. United States v. Dunn, 480 U.S. 294, 296, 303 (1987).
38. California v. Ciraolo, 476 U.S. 207, 209 (1986).
39. *Id.* at 214.
40. *Id.* at 215, 213; *accord* Florida v. Riley, 488 U.S. 445, 450–51 (1989) (plurality opinion).
41. California v. Greenwood, 486 U.S. 35, 37–38 (1988).

mals, children, scavengers, snoops, and other members of the public."[42]

Another gap in Fourth Amendment protection is what one scholar calls "the contraband exception," according to which there is no reasonable expectation of privacy in contraband, so that a process that reveals only contraband is not a search.[43] For instance, in *United States v. Jacobsen*, a federal agent tested a powder that turned out to be cocaine.[44] The Supreme Court held that this test was not a search[45] because conduct that reveals only contraband, and not any "'private' fact, compromises no legitimate privacy interest."[46]

B. *Dog Sniffs*

The contraband exception had its roots in *United States v. Place*.[47] In fact, the contraband exception was the Supreme Court's very rationale for holding that a dog sniff is not a search. In *Place*, agents suspecting Place of drug trafficking took his luggage and subjected it to a dog sniff; after the dog alerted, the agents obtained a search warrant, and subsequently found cocaine in one of the bags.[48] The Court held that the dog sniff was not a search because "the canine sniff is *sui generis*"—it does not require "expos[ing] noncontraband items" (opening the luggage, for example), and it "discloses only the presence or absence of . . . contraband."[49]

Since *Place*, the Supreme Court has addressed the constitutionality of dog sniffs of the exterior of a car. In *City of Indianapolis v. Edmond*, the Court determined that the dog sniff of a car stopped at a vehicle checkpoint "does not transform the seizure into a search" because the sniff "does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics."[50]

Five years later, *Illinois v. Caballes* involved a dog sniff of a car during a traffic stop.[51] Relying on the contraband exception, and on *Place*'s characterization of the dog sniff as *sui generis*,[52] the Supreme Court held that the sniff was not a search: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than

42. *Id.* at 40–41.

43. Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 303 (2010).

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

45. *Id.* at 124.

46. *Id.* at 123.

47. MacDonnell, *supra* note 43, at 302.

48. United States v. Place, 462 U.S. 696, 699 (1983).

49. *Id.* at 707.

50. City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000).

51. Illinois v. Caballes, 543 U.S. 405, 406 (2005).

52. *Id.* at 408–09.

the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[53]

1. Dog Sniffs Conducted at Houses

A conclusive answer to the question whether a dog sniff conducted outside of a home is a search must wait until the United States Supreme Court decides *Jardines*. Nonetheless, some federal and state courts have addressed the issue, most of them concluding that a dog sniff conducted outside of a home is not a search.[54]

The few cases that hold that a dog sniff conducted outside a house is a search often rely on *Kyllo*. For example, in *State v. Rabb*, a Florida court held that a dog sniff conducted at the front door of a house was an unconstitutional search.[55] "Relying on *Kyllo*," the court argued that the dog was "sense-enhancing technology" that law enforcement used "to detect that which it otherwise could not detect with unaided human senses"—"the smell of marijuana," which was "an 'intimate detail' of that house."[56]

But courts holding that a dog sniff conducted outside a house is not a search refuse to make an analogy between dogs and the thermal imager in *Kyllo* because the imager could also detect noncontraband, whereas dogs supposedly cannot.[57] Additionally, these courts emphasize that sniffs conducted at the front door or other commonly accessed areas outside a house are not searches because the police have a right to be there. Thus, in *Hoop v. State*, an Indiana court held that a dog sniff at the front door of the appellant's house was not a search because the policeman "could lawfully approach Hoop's front door using the walkway that would ordinary be used by any visitor."[58] Under such circumstances, there is no reasonable expectation of privacy.[59]

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53. *Id.* at 410.

54. 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, 831 & n.7 (2009). In contrast, most academic opinion concludes that a dog sniff of the outside of a home is a search. *E.g.*, *id.* at 832; Renee Swanson, Comment, *Are We Safe at Home from the Prying Dog Sniff?*, 11 Loy. J. Pub. Int. L. 131, 132 (2009).

55. State v. Rabb, 920 So. 2d 1175, 1179, 1188 (Fla. Dist. Ct. App. 2006).

56. *Id.* at 1184; *accord* United States v. Jackson, No. IP 03-79-CR-1H/F, 2004 WL 1784756, at *3 (S.D. Ind. Feb. 2, 2004) ("The court sees no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior.").

57. Hoop v. State, 909 N.E.2d 463, 468 (Ind. Ct. App. 2009) (citing United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005)).

58. *Id.*

59. United States v. Byle, No. 8:10-CR-419-T-30TGW, 2011 WL 1983355, at *3–4 (M.D. Fla. May 20, 2011); Rodriguez v. State, 106 S.W.3d 224, 228 (Tex. Ct. App. 2003). The *Byle*

2. Dog Sniffs Conducted at Apartments

Nor, according to most courts, is there a reasonable expectation of privacy in the hallways and other common areas of apartment buildings.[60] These courts reason that a tenant lacks the right to exclude people from such spaces, so that landlords, neighbors, visitors, mailmen, deliverymen, and others may use them.[61] Consequently, the police may lawfully enter common areas.[62] Although the apartment itself receives as much Fourth Amendment protection as any other home, the area outside it is (in the words of one Maryland court) "no different than a public street or an open field," so that "[t]he police need no justification for being there"—they could go "on the most baseless or random of fishing expeditions and it would be beyond our area of concern."[63] Meanwhile, only the Sixth Circuit has held that there is a reasonable expectation of privacy in common areas—but only in cases in which the apartment buildings have been locked, when tenants reasonably expect only tenants and guests, but not trespassers, to enter.[64]

Because of the low expectation of privacy attached to common areas, most courts uphold dog sniffs conducted at the doors of apartments or similar dwellings (like hotel or motel rooms, or train sleeper compartments).[65] In these cases, courts emphasize the same rationales, including the police's presence where they have a right to be,[66] and the

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court proceeded to criticize *Jardines* as wrongly decided: "[T]his Court accepts the Supreme Court meant what it said—a dog sniff is not a search." *Byle*, 2011 WL 1983355, at *4.

60. United States v. Brown, 169 F.3d 89, 92 (1st Cir. 1999); United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993); United States v. Holland, 755 F.2d 253, 255 (2d Cir. 1985); United States v. Broadway, 580 F. Supp. 2d 1179, 1193 (D. Colo. 2008); United States v. Deleon-Bayardo, No. 07-99 (JRT/SRN), 2008 WL 141761, at *3 (D. Minn. Jan. 14, 2008).

61. United States v. Cephas, 254 F.3d 488, 494 (4th Cir. 2001); *Nohara*, 3 F.3d at 1242; United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); *Holland*, 755 F.2d at 255–56; United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977); State v. Davis, 732 N.W.2d 173, 179 (Minn. 2007).

62. *Brown*, 169 F.3d at 92; United States v. Miguel, 340 F.2d 812, 814 (2d Cir. 1965); *Deleon-Bayardo*, 2008 WL 141761, at *3.

63. Fitzgerald v. State, 837 A.2d 989, 1025–1026 (Md. Ct. Spec. App. 2003); *accord* United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997); *Concepcion*, 942 F.2d at 1172; *Davis*, 732 N.W.2d at 179; *see also* Leonetti, *supra* note 27, at 310.

64. United States v. Heath, 259 F.3d 522, 524, 534 (6th Cir. 2001); United States v. Carriger, 541 F.2d 545, 547, 551, 552 (6th Cir. 1976); Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 Mich. L. Rev. 273, 274, 277, 282–83 (2002).

65. *Roby*, 122 F.3d at 1122 (motel room); United States v. Colyer, 878 F.2d 469, 471 (D.C. Cir. 1989) (train sleeper compartment); Nelson v. State, 867 So. 2d 534, 535 (Fla. Dist. Ct. App. 2004) (hotel room).

66. United States v. Scott, 610 F.3d 1009, 1015 (8th Cir. 2010); United States v. Drayton, Criminal No. 10-20018-01-KHV, 2010 WL 4721188, at *3 (D. Kan. Nov. 15, 2010); Stabler v. State, 990 So. 2d 1258, 1263 (Fla. Dist. Ct. App. 2008); Kerr v. State, No. 14-02-00569, 2003 WL 21542497, at *3 (Tex. Ct. App. July 10, 2003).

dog's ability to detect only contraband, in which there is no legitimate expectation of privacy.[67]

Two cases are illustrative. In *Fitzgerald v. State*, the police entered an apartment building through unlocked doors, and conducted a dog sniff at Fitzgerald's apartment door.[68] The Maryland Court of Appeals held that the sniff was not a search because the police conducted it from a publicly accessible hallway in which they were lawfully present.[69] The court interpreted *Place* as holding that a dog sniff is not a search, regardless of the location sniffed.[70] Moreover, it found *Kyllo* inapplicable because "a dog is not technology—he or she is a dog."[71] Likewise, in *United States v. Broadway*, the District of Colorado upheld a dog sniff done from a common hallway because another tenant permitted the police to enter the building, making their presence lawful;[72] and because a dog, unlike a thermal imager, does not reveal noncontraband.[73]

Even states that consider dog sniffs to be searches under their constitutions permit warrantless dog sniffs if the police have reasonable suspicion that contraband is present.[74] The source[75] of this standard was Justice Blackmun's concurrence in *Place*, in which he speculated that "a dog sniff may be a search, but a minimally intrusive one that could be justified . . . upon mere reasonable suspicion."[76] Consistent with that analysis, in apartment cases, New York,[77] Nebraska,[78] and Minnesota[79] adopted a reasonable suspicion standard for dog sniffs of homes in general, on the grounds that there is a reasonable expectation of privacy in one's home,[80] but that dog sniffs are *sui generis*, minimally intrusive searches capable only of detecting contraband.[81]

Only one court has held that a dog sniff conducted outside an apart-

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67. *Scott*, 610 F.3d at 1016; *Stabler*, 990 So. 2d at 1263; *Kerr*, 2003 WL 21542497, at *3.

68. Fitzgerald v. State, 864 A.2d 1006, 1008 (Md. 2004).

69. *Id.* at 1017.

70. *Id.* at 1012.

71. *Id.* at 1015.

72. United States v. Broadway, 580 F. Supp. 2d 1179, 1193 (D. Colo. 2008).

73. *Id.* at 1191; *accord* United States v. Anthony, Criminal No. 11-68 (JBS), 2012 WL959448, at *4-5 (D.N.J. Mar. 20, 2012).

74. *See generally* Kenneth L. Pollack, Note, *Stretching the Terry Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard*, 47 VAND. L. REV. 803, 806 (1994) (advocating a narrowly construed reasonable suspicion standard "to regulate certain types of minimally intrusive pure investigatory searches").

75. *Fitzgerald*, 864 A.2d at 1021, 1022.

76. United States v. Place, 462 U.S. 696, 723 (1983) (Blackmun, J., concurring in the judgment).

77. People v. Dunn, 564 N.E.2d 1054, 1055 (N.Y. 1990).

78. State v. Ortiz, 600 N.W.2d 805, 811 (Neb. 1999).

79. State v. Davis, 732 N.W.2d 173, 181 (Minn. 2007).

80. *Id.* at 177; *Ortiz*, 600 N.W.2d at 811, 819; *Dunn*, 564 N.E.2d at 1058.

81. *Davis*, 732 N.W.2d at 180; *Dunn*, 564 N.E.2d at 1058.

ment was a search requiring a warrant. In *United States v. Thomas*, the DEA conducted a warrantless dog sniff outside the apartment of one of the defendants.[82] The Second Circuit held that because the defendant had "a heightened expectation of privacy in his dwelling"—"a legitimate expectation that the contents of his closed apartment would remain private"—the dog sniff was a search in violation of the Fourth Amendment.[83] In a way, the *Thomas* court foreshadowed *Kyllo*; it portrayed the drug-sniffing dog as a form of sense-enhancement that—even though it senses only contraband—"remains a way of detecting the contents of a private, enclosed space," which the police could not detect with their own senses.[84]

But *Thomas* is atypical. With the exception of a few cases and law review articles,[85] *Thomas* is nearly universally criticized for suggesting that one can still have a reasonable expectation of privacy in contraband.[86]

C. *The Contours of the Dog Sniff Debate*

The two sides in the dog sniff debate separate over two main issues. The first dispute is over whether the controlling issue is the dog sniff's *sui generis* nature, or the nature of the place sniffed, such as the home. For example, dissenting in *Jardines*, Justice Polston argued that *Kyllo* was inapplicable because "the very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home."[87] In contrast, the *Rabb* court argued that "[t]he function of 'place' in Fourth Amendment jurisprudence was instrumental in the decision in *Place*," which involved a sniff of mere luggage; the

82. United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).

83. *Id.* at 1367. The use of the word "dwelling" shows that *Thomas* applies to dog sniffs outside any home, not just an apartment.

84. *Id.*; *see also* Barbara Tarlow, Note, *Dog Sniff Searches and* United States v. Thomas*: The Second Circuit Takes a Needed Bite Out of* Place, 19 LOY. L.A. L. REV. 1097, 1121 (1986) ("[T]he holding is based on the rationale that individuals have an expectation that the contents of their homes will not be sensed by a *device* outside their homes." (emphasis added)).

85. State v. Rabb, 920 So. 2d 1175, 1184 (Fla. Dist. Ct. App. 2006); *Ortiz*, 600 N.W.2d at 817; Tarlow, *supra* note 84, at 1100.

86. United States v. Colyer, 878 F.2d 469, 475 (D.C. Cir. 1989); United States v. Broadway, 580 F. Supp. 2d 1179, 1189 (D. Colo. 2008); *Rabb*, 920 So. 2d at 1200 (Gross, J., dissenting); Nelson v. State, 867 So. 2d 534, 536 (Fla. Dist. Ct. App. 2004); Hoop v. State, 909 N.E.2d 463, 467 & n.4 (Ind. Ct. App. 2009) (collecting cases); Fitzgerald v. State, 864 A.2d 1006, 1016 (Md. 2004); Fitzgerald v. State, 837 A.2d 989, 1031 (Md. Ct. Spec. App. 2003).

87. Jardines v. State, 73 So. 3d 34, 69 (Fla. 2011) (Polston, J., dissenting); *accord* Stabler v. State, 990 So. 2d 1258, 1261 (Fla. Dist. Ct. App. 2008); *Rabb*, 920 So. 2d at 1193, 1196–97 (Gross, J., dissenting); *Fitzgerald*, 864 A.2d at 1010, 1012 ("[T]he location or circumstance of the sniff [is] relevant only to determine whether the dog and officer's presence there [is] constitutional.").

question whether conduct is a search requires "reference to a place," and the expectation of privacy that it creates.[88]

Second, and relatedly, courts differ over whether the nature of the object sniffed for—contraband or noncontraband—or the nature of the place sniffed should control. The majority and dissent in *Rabb* sparred over this very issue, with the majority arguing that the expectation of privacy in the home—not in contraband—is the proper focus,[89] and the dissent pointing to *Place* and *Jacobsen*.[90]

These aspects of the dog sniff debate also appear in *Jardines*. The Florida Supreme Court based its decision on "[t]he sanctity of the citizen's home," in which the expectation of privacy is strongest and most reasonable.[91] To sidestep *Place*, the *Jardines* court argued that a dog sniff of the exterior of a home is not *sui generis* because "it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment."[92] The sniff at Jardines's house was "a public spectacle" featuring many agents and police, who were "in plain view of the general public" for hours, from the preparation for the sniff to the ensuing search of Jardines's house; under such circumstances, Jardines could have no anonymity.[93] In short, the court emphasized Jardines's privacy expectation in his home over the dog sniff's supposedly *sui generis* nature—indeed, according to the court, the privacy expectation in the home negated the dog sniff's *sui generis* nature—and over the illegitimate expectation of privacy in contraband.

Part III of this article shows how far afield of binding precedent the *Jardines* court went (though its argument was still defensible). In other words, the court's desire to preserve the sanctity of the home was so powerful that not even United States Supreme Court precedent could

88. *Rabb*, 920 So. 2d at 1183–84, 1190. *Contra* Timothy C. Stone, Comment, State v. Rabb: *Dog Sniffs Close to Home*, 80 ST. JOHN'S L. REV. 1123, 1132–33 (2006) (arguing that *Rabb* was wrong because a dog sniff is *sui generis*, and hence "unaffected by location").

89. *Rabb*, 920 So. 2d at1190. Academic opinion agrees with the *Rabb* majority that the focus should be on the expectation of privacy in the location sniffed, rather than on the expectation of privacy in contraband. Lunney, *supra* note 54, at 832, 868; Jeffrey A. Bekiares, Comment, *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 FLA. L. REV. 963, 972 (2005); Swanson, *supra* note 54, at 150; Tarlow, *supra* note 84, at 1128.

90. *Rabb*, 920 So. 2d at 1196–97 (Gross, J., dissenting); *accord Stabler*, 990 So. 2d at 1260–61.

91. *Jardines*, 73 So. 3d at 45.

92. *Id.* at 49.

93. *Id.* at 48. In its certiorari petition, Florida argued that this "'public spectacle' test" finds no support in case law. Petition for Writ of Certiorari, *supra* note 1, at 24; *accord* Brief of Texas et al. as Amici Curiae in Support of Petitioner, *supra* note 2, at 6. Jardines countered that the Florida Supreme Court did not create a public spectacle test, but only applied United States Supreme Court precedent that permits inquiry into the intrusiveness of official conduct to determine whether it is a search. Respondent's Amended Brief in Opposition, *supra* note 14, at 13.

stand in the way. Part IV argues that given this strong preservationist impulse, the court could have and should have gone farther, extending Fourth Amendment protection against warrantless dog sniffs to apartments, rather than leaving *Stabler* in place.

III. PROTECTING THE SANCTITY OF THE HOME

Because of its zeal to protect the sanctity of the home, in *Jardines* the Florida Supreme Court misapplied United States Supreme Court precedent. Consequently, the United States Supreme Court will probably reverse *Jardines*. However, the Florida Supreme Court's decision was still defensible because dog sniffs are not actually *sui generis*, and because other United States Supreme Court precedents give special prominence to the sanctity of the home.

A. *The* Jardines *Court's Misapplication of Precedent*

One of the *Jardines* dissent's main arguments was that the majority incorrectly applied binding precedent: "[T]he United States Supreme Court did not limit its reasoning regarding dogs [sic] sniffs to locations or objects unrelated to the home."[94] The dissent's argument finds support in the precedents themselves.

In *Place*, the Supreme Court determined that a sniff by a well-trained dog "is much less intrusive than a typical search" because it "discloses only the presence or absence of narcotics, a contraband item."[95] The Court continued, "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*."[96] It is in this respect in which "the canine sniff is *sui generis*."[97]

This passage refers only to the nature of the dog sniff itself. The Court meant that a sniff by a well-trained dog is in and of itself less intrusive than other *methods*, not that such a sniff is more or less intrusive depending on the circumstance in which it takes place. Moreover, the Court said that the sniff reveals only contraband, without requiring the opening of the thing in which it is stored.[98] That is equally true of a dog sniff of the exterior of a home—the dog does not need to enter the home to determine if contraband is present. The Court never suggested that the intrusiveness of a sniff depends on whether the public could see

94. *Jardines*, 73 So. 3d at 68 (Polston, J., dissenting).
95. United States v. Place, 462 U.S. 696, 707 (1983).
96. *Id.* (emphasis added).
97. *Id.*
98. *Id.*

the sniff itself; much less did it set forth a "public spectacle"[99] standard, as the *Jardines* court did. In fact, Place was questioned and detained in an airport (where, presumably, others could see him), and the dog sniffed Place's "luggage, which was located in a public place."[100] Most courts that have considered the question also have interpreted *Place* to apply to dog sniffs in general, regardless of the location sniffed.[101]

Although some courts[102] rely on *Kyllo* to argue that a dog sniff of a home is a search, others realize that *Kyllo* did not create an exception to *Place*. For example, in *Fitzgerald*, the Maryland Court of Appeals interpreted *Kyllo* as applying only to "advancing technology," not to dogs, which are not a technology at all,[103] and, unlike thermal imagers, do not reveal "intimate private details," only the presence of contraband.[104]

Kyllo's inapplicability to dog sniffs becomes clearer upon examining *Caballes*,[105] in which the Supreme Court described its conclusion that the dog sniff did not violate the Constitution as "entirely consistent with" *Kyllo*.[106] The crucial distinction was not that the dog sniff in *Caballes* was of a car rather than a home, but that the thermal imager in *Kyllo* could detect "lawful activity," whereas a dog sniff "reveals no information other than the location of a substance that no individual has any right to possess."[107] In other words, the Court focused on the nature of the dog sniff, not on the privacy expectation in the location where the sniff occurred. Under current Supreme Court precedent, a dog sniff is not a search, whether the thing sniffed is a house, a car, or anything else.

The justices had considered the issue of dog sniffs conducted at

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99. *Jardines*, 73 So. 3d at 48.

100. *Place*, 462 U.S. at 698–99, 707.

101. United States v. Byle, No. 8:10-CR-419-T-30TGW, 2011 WL 1983355, at *4 (M.D. Fla. May 20, 2011) (criticizing *Jardines* because "the Supreme Court meant what it said—a dog sniff is not a search"); Fitzgerald v. State, 864 A.2d 1006, 1010 (Md. 2004) (arguing that the Supreme Court has "adopted the . . . view" that *Place* is not "narrowly directed at airplane luggage," but rather "a general categorization of canine sniffs as non-searches"); State v. Davis, 732 N.W.2d 173, 188 (Minn. 2007) ("[T]he Court's observations about dog sniffs in *Place* were predicated on the Court's view that a dog sniff is not a search at all . . . .").

102. *See supra* notes 55–56 and accompanying text.

103. *Fitzgerald*, 864 A.2d at 1015–16 (internal quotation marks omitted); *accord* Stone, *supra* note 88, at 1134–35.

104. *Fitzgerald*, 864 A.2d at 1016. Interestingly and revealingly, a pre-*Kyllo* case holding that thermal imaging is a search likewise distinguished thermal imaging from dog sniffs, on the ground that dogs "alert only to contraband," whereas "the thermal imager picks up information of lawful activities as well as unlawful." United States v. Field, 855 F. Supp. 1518, 1519, 1533 (W.D. Wis. 1994).

105. *See* United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) ("We reject Scott's argument that this court should extend the holding in *Kyllo v. United States* to encompass dog sniffs. Indeed, the Supreme Court rejected such an interpretation of *Kyllo* in *Caballes*." (citation omitted)).

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

107. *Id.* at 409–10.

homes during oral argument for *Caballes*. Justice Scalia—the author of *Kyllo*—said that he was "not at all sure" that the Court would have decided *Kyllo* as it did if the thermal imager could not discern "any of the other private activities in the home," but only "a dead body with a knife through the heart."[108] Again, after counsel for the petitioner referred to "the tension between *Kyllo* and *Place*," Justice Scalia jumped in:

> [W]asn't what . . . the Court was worried about in *Kyllo* not just the relatively crude heat imaging that existed in the case before it, but the prospect of more and more sophisticated heat imaging which . . . we had evidence was already in development that would enable you to see people moving around a room? I thought the case referred to that. Now, are we going to have more and more—what's going to happen with dogs? I . . . can't imagine that . . . this thing is going anywhere other than smelling narcotics and smelling bombs.[109]

In other words, dogs were not the sort of "technology" that *Kyllo* contemplated.

Taking into account *Place* and *Caballes*, and the policy considerations regarding advancing technology underlying *Kyllo*, the soundest conclusion is that in *Jardines* the Florida Supreme Court incorrectly applied precedent. Therefore, if the United States Supreme Court follows its precedent, it will most likely reverse the Florida Supreme Court. That is not to say, however, that *Jardines* is indefensible. On the contrary, the Florida Supreme Court had powerful and justifiable motives for deciding as it did.

B. *Justifications for* Jardines

1. Dog Sniffs Are Not *Sui Generis*

The first point in *Jardines*'s favor is that the United States Supreme Court's dog sniff jurisprudence is severely flawed. Although that does not by itself justify going against precedent, it does present a satisfactory reason for the United States Supreme Court to reexamine its prior decisions. With *Jardines*, the Florida Supreme Court has given it an opportunity to do so.

Frankly, dog sniffs are not *sui generis*. As Justice Souter, dissenting in *Caballes*, pointed out, "The infallible dog . . . is a creature of legal

108. Transcript of Oral Argument at 9, Illinois v. Caballes, 543 U.S. 405 (2005) (No. 03-923), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-923.pdf. Justice Scalia also speculated that the Court could hold that a dog sniff is a search, with the sniff's location as a factor in determining whether it was reasonable. Nevertheless, the Court did not adopt this approach in its *Caballes* opinion. *Id.* at 22, 24.

109. *Id.* at 14.

fiction."[110] Justice Souter proceeded to list the accuracy rates of certain dogs, citing a study "show[ing] that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search."[111] A false positive will lead to a search of the place or thing sniffed, risking the disclosure of "'intimate details' without revealing contraband"—just like the thermal imager in *Kyllo*.[112] "[T]he dog's fallibility" prevents it from revealing only contraband, thereby "end[ing] the justification claimed in *Place* for treating the sniff as *sui generis*."[113]

High false alert rates can result from the dogs' inherent unreliability.[114] Some dogs lack the temperament necessary to be "a working dog," while others are "distractible or suggestible."[115] Furthermore, dogs often alert to noncontraband because they smell certain items associated with contraband, like plastic bags or air freshener,[116] or because they recognize a contaminant commonly associated with a drug, or smell a drug's byproduct, which is not itself contraband.[117] For example, it is possible that dogs alert not to cocaine itself, but to the cocaine byproduct methyl benzoate, which is also found in perfumes and insecticides.[118] Similarly, dogs sniffing for heroin alert to acetic acid, "a common substance used in pickles and certain glues."[119] And a dog might not be able to distinguish marijuana or hashish "from legal objects which have the

110. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

111. *Id.* at 412 (Souter, J., dissenting); *accord* Harris v. State, 71 So. 3d 756, 772 n.12 (Fla. 2011) (citing cases, including one in which the dog's accuracy rate was as low as fifty-five percent).

112. *Caballes*, 543 U.S. at 413 (Souter, J., dissenting).

113. *Id.* at 412 (Souter, J., dissenting)

114. 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, 737, 739 (2007) (arguing that *Place* is flawed, and should be overturned); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 20–21 (2006) (describing a dog who "had flunked dog school twice," and had a "less than fifty percent hit rate"); Richard E. Myers II, *In the Wake of* Caballes, *Should We Let Sniffing Dogs Lie?*, CRIM. JUST., Winter 2006, at 4, 6 ("[S]ome dogs are unreliable."); Bekiares, *supra* note 89, at 971; Swanson, *supra* note 54, at 153–55; Tarlow, *supra* note 84, at 1124–27; *see also* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 432 (1996-1997) (conceding that "dog sniffs often fail," but arguing that false positives "can be minimized" by ensuring that the dog is reliable, and by refraining from random sniffs); Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 41, 133 (1990) (debunking "the dog's mythic infallibility," and arguing that dog scent lineups should be inadmissible in criminal trials).

115. Myers, *Detector Dogs*, *supra* note 114, at 4.

116. *Id.*

117. Lunney, *supra* note 54, at 837–39.

118. *Id.* at 838–39; *accord* Katz & Golembiewski, *supra* note 114, at 755.

119. Katz & Golembiewski, *supra* note 114, at 755.

same odors, such as hemp products, and fir and juniper trees."[120]

Another source of error is the dog handler. Handlers can cue the dog that contraband is present, either subconsciously or consciously.[121] The handler can send signals to the dog—either purposely or accidentally—by his actions, such as by "causing [the dog] to linger over an area for a longer period of time," or "holding his breath a little longer when he believes drugs may be present, shifting his weight, or slightly altering his commands."[122] A handler might also misinterpret the dog's behavior, so that he thinks the dog is alerting when it really is not.[123]

A false positive can result even if the dog *accurately* identifies the smell of a drug. Sometimes the residue left by a drug triggers an alert, even though the drug is not there.[124] For example, in *Harris v. State*, a dog sniff of Harris's car revealed evidence of methamphetamine production.[125] Two months later, the same dog (Aldo) sniffed Harris's car again, and "alerted to the same driver's side door handle."[126] This time, however, no contraband was in the car.[127] Aldo's policeman-handler testified that Aldo could sense "residual odors," which might exist simply because someone who had the odor on his hand touched the door handle.[128]

Dogs' sensitivity to residual odors shows that even reliable dogs can falsely alert. If the authorities conduct dog sniffs indiscriminately (as Justices Souter[129] and Ginsburg[130] have feared), then even a dog with a low false positive rate would produce a greater number of false positives than accurate sniffs. For example, if a dog with an accuracy rate as high as ninety percent sniffs one hundred people, only one of whom has contraband, the dog might alert to that one person, but might also falsely alert to ten innocent people, searches of whom would reveal only non-contraband.[131] If the police were to conduct dog sniffs only on reasonable suspicion, then the proportion of innocent to guilty people searched would likely shift.[132] Nevertheless, the many opportunities for error—

120. *Id.* at 756.

121. Myers, *Detector Dogs*, *supra* note 114, at 5, 22–24.

122. Katz & Golembiewski, *supra* note 114, at 763.

123. *Id.* at 762; Taslitz, *supra* note 114, at 83.

124. Myers, *Detector Dogs*, *supra* note 114, at 4–5.

125. Harris v. State, 71 So. 3d 756, 760 (Fla. 2011).

126. *Id.* at 761.

127. *Id.*

128. *Id.*

129. Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting).

130. *Id.* at 422 (Ginsburg, J., dissenting).

131. Katz & Golembiewski, *supra* note 114, at 758; *accord* Bird, *supra* note 114, at 427–29; Myers, *Detector Dogs*, *supra* note 114, at 13–15.

132. Bird, *supra* note 114, at 430; Myers, *Detector Dogs*, *supra* note 114, at 17.

from residual odor detection to handler cuing—demonstrate that even the most reliable dogs are not *sui generis*.

2. Prioritizing the Protection of the Home

That a home could be searched, and its intimate details exposed, based on nothing more than an alert that stood a good chance of being wrong would be especially disconcerting to a court that prioritized protecting the sanctity of the home. The Florida Supreme Court is such a court.

In *Jardines*, the Florida Supreme Court emphasized "the sanctity of the citizen's home," and the potency of the expectation of privacy attached to it.[133] The court noted that United States Supreme Court precedent mandates that a search must be based on probable cause—"[a]nd that precedent . . . applies with extra force where the sanctity of the home is concerned."[134] The sniff at issue intruded "into the sanctity of the home."[135]

The Florida Supreme Court was correct that United States Supreme Court precedent gives a special place to the home. For example, *Kyllo* referred to the home as "a constitutionally protected area"[136]—a sacred place to be protected more fervently than, for instance, an industrial complex.[137] "[P]rivacy expectations are most heightened" in the home.[138] The United States Supreme Court continued, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[139] In light of pronouncements like these, the Florida Supreme Court justifiably could conclude that a dog sniff conducted at a home should receive greater constitutional scrutiny than a dog sniff of luggage or a car.

There is also a common-sense argument in favor of the Florida Supreme Court's position: When the police conduct a dog sniff, they are *searching* for drugs. As the dissent in *Fitzgerald* argued, a dog sniff is a search because it is "an investigative technique" used "to detect the presence of drugs."[140] The dissent continued, "The canine sniff at the door of Fitzgerald's apartment was not a detection of something in the hallway, but rather was a detection of something inside Fitzgerald's apartment—a

133. Jardines v. State, 73 So. 3d 34, 45 (Fla. 2011).
134. *Id.* at 36–37.
135. *Id.* at 36, 56.
136. Kyllo v. United States, 533 U.S. 27, 34 (2001).
137. *Id.* at 37.
138. *Id.* at 33 (internal quotation marks omitted).
139. *Id.*
140. Fitzgerald v. State, 864 A.2d 1006, 1024 (Md. 2004) (Greene, J., dissenting).

private dwelling."[141]

In the face of the precedents set by *Place*, *Jacobsen*, and *Caballes*, this probably is the losing argument, but it is the argument more compatible with this country's traditions and values.[142] Once the Florida Supreme Court made a point of preserving those traditions and values against the intrusion presented by warrantless dog sniffs, it should have been consistent and extended the same protection to apartments.

IV. EXTENDING *JARDINES*'S PROTECTION TO APARTMENTS

When *Jardines* comes before it, the United States Supreme Court should extend to apartments the protection that *Jardines* established for houses. As homes, apartments generate expectations of privacy similar to those of houses. If houses are sacred enough to be protected from warrantless dog sniffs, so are apartments. A failure to protect apartments from warrantless dog sniffs will adversely affect a substantial segment of the citizenry, considering that many—perhaps most—people will live in apartments at some point in their lives, especially in this era of economic depression, in which financial exigency might oblige more people than in previous years to move into apartments.

A. *Houses and Apartments Generate Similar Expectations of Privacy*

Apartments and similar dwellings are homes, too, as the United States Supreme Court has recognized.[143] Concurring in *McDonald*, Justice Jackson identified "quarters in a tenement" as "private homes."[144] In *Miller*, the Court equated an apartment with a house, and its tenant with a "householder."[145] And in *Stoner*, the Court asserted, "*No less than a tenant of a house*, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."[146]

Much later, in *Thomas*, which involved a warrantless dog sniff con-

141. *Id.* (Greene, J., dissenting).

142. *See* Jardines v. State, 73 So. 3d 34, 56 (Fla. 2011) (Lewis, J., specially concurring) (arguing that the Fourth Amendment expresses "[t]he importance of freedom and liberty upon which this nation was founded," and "reflects who we are as a people and reflects our values that protect every citizen from unreasonable intrusions by the government").

143. Stoner v. California, 376 U.S. 483, 484 (1964) (hotel room); Miller v. United States, 357 U.S. 301, 302 (1958) (apartment); McDonald v. United States, 335 U.S. 451, 452 (1948) (room in rooming house).

144. *McDonald*, 335 U.S. at 459 (Jackson, J., concurring).

145. *Miller*, 357 U.S. at 313 ("Every *householder*, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the *house*." (emphasis added)).

146. *Stoner*, 376 U.S. at 490 (emphasis added).

ducted at an apartment door,[147] the Second Circuit held that the sniff was an unconstitutional search of a "*dwelling*," in which the defendant had a "heightened expectation of privacy."[148] The Second Circuit was correct in attributing to *dwellings* the same heightened expectation of privacy. An apartment is just a type of home, as is a house; there is no meaningful distinction between houses and apartments that justified the Florida Supreme Court in treating one type of home as sacred, while deeming the other unworthy of the same status and protection.

Courts often note that the police have a right to be in common hallways in front of apartments; they reason that "a tenant has no reasonable expectation of privacy in the common areas of an apartment building" because anyone else can use that space.[149] But the hallway in front of an apartment is similar to the walkway leading up to a house. One Maryland court even argued that the police could conduct a dog sniff from the hallway in front of an apartment because such a hallway is as accessible to the public as a sidewalk or walkway outside a house.[150] Indeed, other courts have upheld warrantless dog sniffs conducted at front doors of houses on the ground that the police could access the area like anyone else, so that the area did not generate a reasonable expectation of privacy.[151] The *Jardines* court itself acknowledged that the police may lawfully walk up to a citizen's front door because of the area's reduced privacy expectation.[152]

However, the fact that the police conducted the sniff from the publicly accessible area at Jardines's front door had no bearing on the Florida Supreme Court's decision. The court focused not on the reasonableness of the privacy expectation in the place from which the police conducted the sniff, but rather on the reasonableness of the pri-

147. United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).

148. *Id.* at 1366, 1367 (emphasis added).

149. United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991); *accord* United States v. Nohara, 3 F.3d 1239, 1242 (9th Cir. 1993); United States v. Holland, 755 F.2d 253, 256 (2d Cir. 1985). *Contra* United States v. Roby, 122 F.3d 1120, 1126 (8th Cir. 1997) (Heaney, J., dissenting) ("While the corridor of a hotel is shared by guests and personnel alike, it is not a public area akin to an airport or a commercial bus. Neither guests nor the hotel personnel expect to have police officers, much less large German Shepherds, patrolling the hotel hallways.").

150. Fitzgerald v. State, 837 A.2d 989, 1024 (Md. Ct. Spec. App. 2003).

151. Hoop v. State, 909 N.E.2d 463, 468 (Ind. Ct. App. 2009) ("Detective Krider could lawfully approach Hoop's front door using the walkway that would ordinarily be used by any visitor, and the sniff did not implicate the Fourth Amendment."); Rodriguez v. State, 106 S.W.3d 224, 228 (Tex. Ct. App. 2003) ("We hold that appellant did not have a reasonable expectation of privacy outside his home where the drug-dog sniffed because the front door area was not enclosed, it was used as the main entrance to the house, and it was not protected from observation by passersby."). *But see* Lunney, *supra* note 54, at 852 (criticizing courts for permitting dog sniffs outside homes if conducted from publicly accessible areas because *Place* and *Caballes* "did not turn on the lawfulness of the location of the officer's feet (or the dog's paws)").

152. Jardines v. State, 73 So. 3d 34, 46 (Fla. 2011).

vacy expectation in the place that was the target of the sniff—the sacred home.[153]

Because the real issue to the Florida Supreme Court was not whether the police were lawfully present, but whether the home carries a heightened expectation of privacy, it does not matter if the home is a stand-alone structure or an apartment in a multi-unit building. As a home, an apartment is protected even if the hallway outside it is not[154]—just like a house is protected even if the walkway approaching it is not.

Contrary to the Florida Supreme Court's attempt to distinguish *Stabler*,[155] *on the court's own terms* there is no meaningful distinction between a dog sniff targeting an apartment and a dog sniff targeting a house. One of the court's main concerns was the intrusion effected by the "public spectacle" of the dog sniff, which deprives the citizen of anonymity, and subjects him to "public opprobrium, humiliation and embarrassment."[156]

Such a spectacle could materialize just as easily in the hallway of an apartment building as in the middle of a residential neighborhood. Just like residents of houses, apartment tenants have neighbors who will be aware of the investigation, and perhaps interpret it as an accusation of criminal wrongdoing.[157] The tenant could experience the same fear and anxiety that the Florida Supreme Court worried the resident of a house might experience.[158] His humiliation would be no less potent. In fact, the close proximity between apartments might even make the risk of neighbor awareness and observation greater than would be the case with a dog sniff targeting a house. Regardless, because apartments and houses are just different types of homes, they harbor similarly powerful and reasonable expectations of privacy, so that a warrantless dog sniff of one is just as intrusive as a warrantless dog sniff of the other.

Once one realizes that the correct analogy is not between an apartment *building* and a house, but instead between an apartment and a house (with the hallway outside the apartment serving as the counterpart to the path leading up to the house), then for Fourth Amendment purposes it does not matter whether the sharing of the apartment building's

153. *Id.* at 45.

154. *E.g.*, Fitzgerald v. State, 837 A.2d 989, 1026 (Md. Ct. Spec. App. 2003) ("[T]he outer boundary of the protected area was the property line of the apartment itself. Beyond that line, the vestibule of the apartment house was no different than a public street or an open field.").

155. *Jardines*, 73 So. 3d at 39 n.3.

156. *Id.* at 48.

157. *See id.* ("[S]uch dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime.").

158. *Id.* at 49 ("And if the resident happens to be present at the time of the 'sniff test,' such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience that could prompt a reflexive or unpredictable response.").

common areas vitiates the expectation of privacy in those areas,[159] or whether any individual tenant has "the right to exclude others from" the building.[160]

In dog sniff cases, focusing on the privacy expectation in the building would produce inconsistent results. Some buildings might have greater privacy expectations than others, depending on whether the building has security, whether it is locked or requires visitors to be buzzed in, and other factors.[161] Focusing instead on the fact that the apartment is a home that harbors a heightened expectation of privacy not only better comports with this country's traditions and with common sense; it also provides a more workable standard.

B. *Negative Consequences of Retaining Different Rules for Houses and Apartments*

Difficulties in application might not be the only problem caused by retaining different rules for dog sniffs of houses and apartments. By excluding apartments from protection against warrantless dog sniffs, the Florida Supreme Court left nearly two million Floridian homes[162] vul-

159. *See* United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977); Trevor Allen, Note, State v. Guillen*: Home Privacy Protection Disappearing in the Desert*, 51 ARIZ. L. REV. 1097, 1105, 1107 (2009).

160. *See* Allen, *supra* note 159, at 1107; *see also* United States v. Anderson, 154 F.3d 1225, 1232 n.3 (10th Cir. 1998) (determining that the apartment cases did not apply when the issue was entry into a room in an office building because Anderson "had the authority to *exclude* others from" the room, whereas "a tenant does not have the authority to exclude others from a common hallway"). *Contra* Leonetti, *supra* note 27, at 317 (referring to the right to exclude from "an apartment building, condominium complex, or hotel" as a "collective right"); Lewis, *supra* note 64, at 288 ("The fact that tenants do not have an absolute right to exclude all others from the locked common areas of their buildings should not obliterate their constitutional interests in these areas.").

161. *See* United States v. Holland, 755 F.2d 253, 259 (2d Cir. 1985) (Newman, J., dissenting) ("I believe a tenant has a legitimate expectation of privacy in a hallway when he is using it to admit someone to his home; at least, this should be so in a small two-family house like Holland's."); United States v. Carriger, 541 F.2d 545, 551, 552 (6th Cir. 1976) (noting, in a case involving a locked building, that "[a] tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not [expect] trespassers"); State v. Ortiz, 600 N.W.2d 805, 819 (Neb. 1999) (stating that an apartment building hallway is a private, not public, area; and listing factors to determine "the degree of privacy," including "whether there is an outer door locked to the street . . .; the number of residents using the hallway; the number of units in the apartment complex; and the presence or absence of no trespassing signage" (citations omitted)).

162. According to Census Bureau data, in 2010, Florida had 7,035,068 homes, twenty-six percent—or 1,829,118—of which were in structures with at least two apartment units. *Table S2504: Physical Housing Characteristics for Occupied Housing Units: 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_S2504&prodType=table (last visited Mar. 20, 2012). To access the data for Florida, click "Back to Search"; click on the "Geographies" tab; add Florida; type "S2504" in the search box; click "Go"; and select the data set for "1-year estimates."

nerable to the very practice that it sought to curtail.

Some judges have raised the possibility that a lack of protection for apartments and similar dwellings could disproportionately affect the poorest citizens in the society. For instance, in *United States v. Roby*, one judge dissented from the majority's upholding of a dog sniff at a motel room door,[163] writing, "I do not believe that the Fourth Amendment protects only those persons who can afford to live in a single-family residence with no surrounding common space."[164] Another judge (dissenting in a Maryland case upholding a warrantless dog sniff conducted at an apartment door)[165] predicted "that those who reside in apartment buildings with gated or secured entrances will be afforded greater protections under the law than those who reside in apartment buildings that are left unsecured or open to the public";[166] in consequence, the police would target poor and minority neighborhoods.[167] To avoid the "Orwellian" "specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs," the New York Court of Appeals held that a dog sniff of a residence is a search requiring reasonable suspicion.[168]

Scholars have also expressed concern that "Fourth Amendment law . . . may make poorer suspects worse off."[169] One speculated that this occurs because "[p]rivacy . . . exists only in" places occupied by the well-off, like houses, but not in places occupied by the poor, like apart-

163. United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997).

164. *Id.* at 1127 (Heaney, J., dissenting).

165. Fitzgerald v. State, 864 A.2d 1006, 1007 (Md. 2004).

166. *Id.* at 1023 (Greene, J., dissenting); *accord* Lindsay Victoria Ruth Moss, Recent Development, Fitzgerald v. State*: A Drug-Dog Sniff of Exterior Portions of a Residence Does Not Constitute a Search Under the Fourth Amendment of the U.S. Constitution*, 35 U. BALT. L.F. 155, 158 (2005); *see also* United States v. Holland, 755 F.2d 253, 257 (2d Cir. 1985) (Newman, J., dissenting) ("I do not believe the Fourth Amendment protection available to those admitting visitors to their apartment homes in a modern building is lost in the humble surroundings in which Mose Holland lives."). *But see* United States v. Nohara, 3 F.3d 1239, 1240 (9th Cir. 1993) (holding that Nohara did not have "a reasonable expectation of privacy in the hallway outside his apartment in his high security, high rise apartment building").

167. *Fitzgerald*, 864 A.2d at 1023, 1026 (Greene, J., dissenting).

168. People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990); *accord* Hoop v. State, 909 N.E.2d 463, 470 (Ind. Ct. App. 2009) (requiring reasonable suspicion for a dog sniff of a residence, to "restrict arbitrary selection of persons to be searched"); Lunney, *supra* note 54, at 831 ("Without a warrant requirement, or even a suspicion requirement, police are thereby granted unfettered discretion to conduct dragnet investigations at housing projects or other multidwelling locations, such as apartment complexes, or to arbitrarily select sniff locations."); *see also* Christopher M. Pardo, *Driving Off the Face of the Fourth Amendment: Weighing* Caballes *Under the Proposed "Vehicular Frisk" Standard*, 43 VAL. U. L. REV. 113, 120, 146 (2008) (arguing that *Caballes* would lead to discriminatory dog sniffs targeting the poor and minorities).

169. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).

ments.[170] Furthermore, according to this scholar, Fourth Amendment jurisprudence has focused on the most intrusive practices, which happen to be those used to ferret out crimes by the wealthy; in consequence, the police divert resources to "uncovering the crimes of the poor."[171] For example, "in well-off neighborhoods, [drug] transactions are likely to take place in private dwellings . . .; in poorer neighborhoods, transactions take place on the street. Fourth Amendment law makes it much harder to police the former, and thereby pushes police to focus ever more on the latter."[172] There is thus a disparity in enforcement, despite the tendency of drug use to "cut across social class and ethnic affiliation."[173] Another scholar has argued for "an expansion of the definition of curtilage" to include the areas outside apartments and similar dwellings, to combat the use of dog sniffs and other "investigatory techniques in urban areas and among multi-occupant dwellings."[174]

But the problem is actually greater than these judges and scholars realize. Although poor people are more likely to live in apartments than people with higher incomes,[175] income statistics to a large extent reflect mere differences in earning power between young adults and the middle-aged, with the young earning considerably less because they have yet to accumulate the experience, raises, benefits, and promotions possessed by older income-earners.[176] Therefore, at some point in their lives,

170. *Id.* at 1266, 1274.

171. *Id.* at 1267.

172. *Id.* at 1274.

173. *Id.* at 1281. Stuntz continued, "Though illegal drug use is much more common in some communities than others, it nevertheless is fairly common in communities of all sorts." *Id.* The data support this view. According to one study, "21 percent [of welfare recipients] had used an illegal drug in the past," compared to thirteen percent of non-welfare recipients. Rukmalie Jayakody, Sheldon Danziger, Kristin Seefeldt, & Harold Pollack, *Substance Abuse and Welfare Reform*, NPC POLICY BRIEF (Nat'l Poverty Ctr.), Apr. 2004, at 1, 2, *available at* http://www.npc.umich.edu/publications/policy_briefs/brief02/brief2.pdf. Also, "33 percent of youths in families with incomes of less than $20,000 reported lifetime use of any illicit drug compared with 27 percent of youths in families with incomes of $75,000 or more." *Youth Substance Use and Family Income*, NSDUH REPORT, (Office of Applied Studies, Substance Abuse & Mental Health Servs. Admin.), Dec. 24, 2004, at 1, 2, *available at* http://oas.samhsa.gov/2k4/youthIncome/youthIncome.pdf.

174. Leonetti, *supra* note 27, at 298, 311.

175. Nationwide, in 2010, twenty-five percent of occupied housing units were in structures with at least two apartment units. *Table S2504: Physical Housing Characteristics for Occupied Housing Units: 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_S2504&prodType=table (last visited Mar. 20, 2012). Meanwhile, forty-one percent of poor households live in apartments. Robert Rector & Rachel Sheffield, *Understanding Poverty in the United States: Surprising Facts About America's Poor*, BACKGROUNDER (Heritage Found.), Sept. 13, 2011, at 1, 11, *available at* http://thf_media.s3.amazonaws.com/2011/pdf/bg2607.pdf.

176. THOMAS SOWELL, ECONOMIC FACTS AND FALLACIES 136, 138 (2008); THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 48–49, 52–53 (1995).

many—perhaps most—people will live in apartments, and will thus have lesser Fourth Amendment protection from intrusions into their homes.

Moreover, because people with lower incomes are more likely to live in cheaper housing (like apartments), many people's Fourth Amendment rights will ebb and flow according to the vicissitudes of the economy. During a recession, their Fourth Amendment rights could wither. Between 2001 and 2008, the national unemployment rate was never higher than 7.3 percent; but beginning in 2009, it has not fallen below 7.8 percent.[177] Median household income has fallen for three years in a row.[178] Meanwhile, from 2009 to 2010, the poverty rate increased from 14.3 percent to 15.1 percent,[179] with the largest increases in Nevada and Florida—two of the states hardest hit by the burst housing bubble.[180] In 2010, there were a "record 2.9 million foreclosures"; "Florida had the third highest foreclosure rate."[181] It seems likely that the percentage of Americans—especially Floridians—living in apartments will increase in the near future.

The Florida Supreme Court justifiably aspired to protect Floridians from the intrusion into their privacy threatened by warrantless dog sniffs. But the court forgot about the Fourth Amendment rights of apartment dwellers, a demographic that, at any given time, numbers in the millions, and to which many more—perhaps most—people belong at some point in their lives. The court left its task incomplete. The United States Supreme Court should adopt and complete that task by extending to apartments the protection that *Jardines* offers only to houses.

V. CONCLUSION

Jardines presented the Florida Supreme Court with an opportunity to rein in the practice of warrantless dog sniffs of the exteriors of homes. To reassert the citizens' Fourth Amendment rights, the court had to confront overwhelming precedent that deems dog sniffs to be non-searches, on the ground that dog sniffs are *sui generis* in that they reveal only

177. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/timeseries/lns14000000 (last visited Mar. 20, 2012).

178. Conor Dougherty, *Income Slides to 1996 Levels*, WALL ST. J. (Sept. 14, 2011), http://online.wsj.com/article/SB10001424053111904265504576568543968213896.html.

179. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & JESSICA C. SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 15 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

180. Lisa Lambert, *Recession Drove up Poverty Rates in Most States*, REUTERS (Sept. 26, 2011), http://www.reuters.com/article/2011/09/26/us-usa-states-poverty-idUSTRE78P5BE20110926.

181. Susanna Kim, *2010 Had Record 2.9 Million Foreclosures*, ABC NEWS (Jan. 13, 2011), http://abcnews.go.com/Business/2010-record-29-million-foreclosures/story?id=12602271.

contraband, which harbors no reasonable expectation of privacy. In holding that a dog sniff of the exterior of a house requires probable cause and a warrant, the court also found itself at odds with courts in a majority of jurisdictions. To sidestep United States Supreme Court precedent that a dog sniff is not a search, the Florida Supreme Court argued that a dog sniff of a home is not *sui generis* because it exposes the homeowner to a humiliating public spectacle. This standard finds no support in precedent.

Yet the Florida Supreme Court's argument is still defensible because a dog sniff is not in fact *sui generis*. Dogs themselves are fallible, and several other factors like residual odor detection and handler cuing can make them even less accurate. Moreover, the court had the advantage of vindicating the sanctity of the home—a powerful and time-honored ideal that continues to influence American jurisprudence through cases like *Kyllo*.

Nevertheless, the Florida Supreme Court left its task of preserving the home's sanctity incomplete. Once the court determined on that path, it should have extended Fourth Amendment protection against warrantless dog sniffs to apartments and similar dwellings, instead of reserving it to houses. Apartments are homes, too. Although apartments open onto common areas like hallways, these areas are merely analogous to houses' front porches and walkways. As the low privacy expectations attached to the latter areas did not prevent the court from holding that the heightened privacy expectation in the house itself protected it from warrantless dog sniffs, so too should the court have held that an apartment-home's similarly heightened expectation of privacy shielded it from these intrusions. The court's failure to include apartments within its *Jardines* holding leaves millions of citizens unprotected from the very practice that it sought to curtail.

Accordingly, when the United States Supreme Court hears *Florida v. Jardines*, it should confer Fourth Amendment protection from warrantless dog sniffs not just to people who live in houses, but to people who live in apartments as well.