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The Dog Days Should Be Over: The Inequality Between the Privacy Rights of Apartment Dwellers and Those of Homeowners with Respect to Drug Detection Dogs

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THE DOG DAYS SHOULD BE OVER: THE INEQUALITY
BETWEEN THE PRIVACY RIGHTS OF APARTMENT
DWELLERS AND THOSE OF HOMEOWNERS WITH RESPECT
TO DRUG DETECTION DOGS

ABSTRACT

Recent judicial opinions throughout the country have muddied the waters concerning the extent of privacy rights protected by the Fourth Amendment beyond the walls of an individual's home. More specifically, courts have drawn a distinction between an apartment dweller's privacy rights and the privacy rights of a homeowner concerning drug detection dogs. In *Florida v. Jardines*, the Supreme Court of the United States *held* the use of a drug detection dog on a front porch violates the homeowner's constitutional rights. In *State v. Nguyen*, the North Dakota Supreme Court followed the Eighth and other federal circuit courts to distinguish a common apartment building from a home. The *Nguyen* court *held* law enforcement officers' investigation using drug detection dogs in a secured common hallway was neither a trespass nor a violation of the expectation of privacy. This Note will discuss the history and extent of the Fourth Amendment's protections, the history of the use of dogs in investigation, and the Fourth Amendment protections concerning drug detection dogs. In addition, this Note will argue that both homeowners and apartment dwellers should enjoy equal privacy rights under the Fourth Amendment.

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I. INTRODUCTION

This Note will discuss the history and purpose of the Fourth Amendment, the role of drug detection dogs in law enforcement investigations today, and the inequality of Fourth Amendment protections concerning dog sniffs outside the door of homeowners versus individuals living in an apartment or multi-family dwelling. After examining Fourth Amendment protections of dog sniffs with respect to different living situations, this Note will advocate for equal constitutional protections for homeowners and apartment dwellers from warrantless searches involving drug detection dogs.

II. THE FOURTH AMENDMENT HISTORY AND PURPOSE

Over the past century, the United States Supreme Court has frequently considered the extent of the Fourth Amendment to the United States Constitution’s protection against unreasonable searches and seizures. The Fourth Amendment reads:

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.¹

This section will discuss the extension of Fourth Amendment protections beyond the walls of a home and the standards for Fourth Amendment protection.

A. CURTILAGE - FOURTH AMENDMENT EXTENDS BEYOND THE WALLS OF THE HOME

The concept of curtilage being within the constitutionally protected area of an individual's home originated under the open fields doctrine. The first relevant case concerning open fields and curtilage was *United States v. Hester*.² In *Hester*, the appellant was convicted of violating Prohibition statutes by concealing moonshine.³ The appellant claimed the search that led to his conviction violated his Fourth Amendment rights because law enforcement officers trespassed onto private property.⁴ The Court held that since the moonshine was in an open field, the search did not violate the Fourth Amendment.⁵ Writing for the majority, Justice Holmes birthed the open fields doctrine, stating, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Justice Holmes provided further support for the open fields doctrine by stating "[t]he distinction between [the open field] and the house is as old as the common law."⁶ However, he did not define open field or curtilage, which posed issues in the application of the new rules by courts and law enforcement.⁷

Shortly after *Hester*, the Court attempted to define curtilage in *Olmstead v. United States*.⁸ In *Olmstead*, the Court determined the degree of actual

1. U.S. CONST. amend. IV.

2. *Hester v. United States*, 265 U.S. 57 (1924).

3. *Id.* at 58.

4. *Id.* at 59 (explaining that "Examination of the vessels took place upon Hester's father's land.>").

5. *Id.*

6. *Id.*

7. *Id.*

8. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

physical intrusion would be the dispositive test in residential searches and seizures challenged under the Fourth Amendment.⁹ The Court declared only a “physical invasion of [an individual's] house “or curtilage” would fall under the scope of the Fourth Amendment.¹⁰

In 1984, after the Court decided *Katz*,¹¹ the open fields doctrine was revived in *Oliver v. United States*.¹² Rather than analyzing each open-fields case individually under the *Katz* “reasonable expectation of privacy” test, the Court implemented a bright line rule.¹³ This bright line rule stated that “an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.”¹⁴ The Court also determined the area “immediately surrounding and associated with the home,” also known as the curtilage, is “part of the home itself for Fourth Amendment purposes.”¹⁵ Thus, areas outside of the home and curtilage were determined to be per se excluded from the protection of the Fourth Amendment.¹⁶

Three years after the Court decided *Oliver*, the Court echoed the revitalization of the open fields doctrine in *United States v. Dunn*.¹⁷ The Court recognized that prior case law did not provide insight into determining where constitutionally protected curtilage ends and constitutionally unprotected open fields begin.¹⁸ Therefore, the Court set forth four factors for determining whether an area is constitutionally protected curtilage.¹⁹ The *Dunn* factors include (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken to protect the area from observation by people passing by.²⁰

B. STANDARDS FOR FOURTH AMENDMENT PROTECTIONS

Over the course of Fourth Amendment jurisprudence, the United States Supreme Court has utilized two theories to determine whether the Fourth Amendment applies. This section will discuss the common law trespass the-

9. *Id.* at 466.

10. *Id.*

11. *See infra* note 40.

12. *Oliver v. United States*, 466 U.S. 170 (1984).

13. *Id.* at 181.

14. *Id.*

15. *Id.* at 180.

16. *Id.* at 183-84.

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

18. *Id.* at 301.

19. *Id.*

20. *Id.*

ory that was the only test used until 1967. In addition, this section will discuss the “reasonable expectation of privacy” test announced in 1967 in *Katz v. United States*.

1. Common Law Trespass Theory

In 1928, the common law trespass theory was introduced in *Olmstead v. United States*.²¹ In *Olmstead*, federal officers obtained information via an intercepted phone conversation regarding a possible violation of the National Prohibition Act.²² Importantly, the federal agents who intercepted the phone conversation did not enter the defendant’s premises.²³ Rather, the agents tapped the conversations from the basement of a large office building and on public streets.²⁴ The majority of the Court took a literal approach to the text of the Fourth Amendment, and held that only a “physical invasion of [an individual’s house ‘or curtilage’] constituted a Fourth Amendment search.”²⁵ The phone wiretaps were installed on public lines outside the defendant’s property; thus, the wiretaps were not a physical intrusion.²⁶ Accordingly, the Court determined the federal agents did not violate the defendant’s Fourth Amendment rights.²⁷

After *Olmstead*, several cases followed the common law trespass theory, including *Goldman v. United States*, *On Lee v. United States*, and *Silverman v. United States*. First, in *Goldman*, government agents obtained evidence after installing a detectaphone in the wall of the defendant’s office.²⁸ The Court found there was no physical trespass; thus, the search did not violate the Fourth Amendment.²⁹ Next, in *On Lee*, a wired informant working for the government entered the defendant’s store and engaged him in conversation.³⁰ During the conversation, the defendant made incriminating admissions that were heard and testified to by a government agent.³¹ Subsequently, the defendant challenged the testimony as violating his Fourth Amendment

21. *Olmstead*, 277 U.S. at 466.

22. *Id.* at 456.

23. *Id.* at 457.

24. *Id.*

25. *Id.* at 466 (stating “The Fourth Amendment . . . [is not] violated . . . unless there has been an official search and seizure of [an individual’s] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”).

26. *Id.*

27. *Olmstead*, 277 U.S. at 466.

28. *Goldman v. United States*, 316 U.S. 129, 131-32 (1942), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

29. *Id.* at 134-35.

30. *On Lee v. United States*, 343 U.S. 747, 749 (1952).

31. *Id.*

rights.³² The Court held there was no physical trespass because the informant entered with the defendant's consent and the information was transmitted to an agent outside the shop.³³ Therefore, the defendant's Fourth Amendment rights were not violated.³⁴ Finally, in *Silverman*, the police gained consent from an adjacent building's owner to use as an observation post to investigate whether the defendant's premises was the headquarters of a gambling operation.³⁵ In the observation post, the officer installed a "spike mike" listening device that was wedged in the heating duct of the defendant's house.³⁶ After officers testified to the defendant's incriminating statements at trial, the defendant argued the testimony violated his Fourth Amendment rights.³⁷ The Supreme Court held the means by which law enforcement procured the statement was a "physical penetration" into the defendant's premises.³⁸ Thus, the physical intrusion constituted a violation of the defendant's Fourth Amendment rights.³⁹

Six years after *Silverman* was decided, the Supreme Court announced a new Fourth Amendment standard in *Katz v. United States*.⁴⁰ This standard will be more thoroughly discussed in the next section. Many people thought *Katz* did away with the common law trespass test as discussed by the *Rakas v. Illinois* Court.⁴¹ The *Rakas* majority said:

[i]n the course of repudiating the doctrine derived from *Olmstead v. United States*, . . . the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.⁴²

However, in 2012, forty-six years after the Supreme Court decided *Katz*, Justice Scalia wrote for the majority in *United States v. Jones*.⁴³ In *Jones*,

32. *Id.*

33. *Id.* at 751.

34. *Id.*

35. *Silverman v. United States*, 365 U.S. 505, 506 (1961).

36. *Id.*

37. *Id.* at 508.

38. *Id.* at 509.

39. *Id.* at 511-12.

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

41. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

42. *Id.* (citations omitted).

43. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

the defendant was under investigation for suspicion of trafficking narcotics.⁴⁴ In the process of the investigation, law enforcement procured a warrant authorizing them to attach a Global Positioning-System (GPS) tracking device to the defendant's vehicle to monitor his movements within ten days.⁴⁵ After the expiration of the warrant, law enforcement attached the device while the defendant's car was parked on a public street.⁴⁶ The trial court applied the *Katz* "reasonable expectation of privacy" test and denied the defendant's motion to suppress.⁴⁷ The defendant appealed asserting the unwarranted attachment of the GPS device violated his Fourth Amendment rights.⁴⁸ The Court applied the common law trespass test to determine the placement of the GPS device on the defendant's car was a physical intrusion on his property; thus, it was a Fourth Amendment search.⁴⁹ Further, the Supreme Court held even though the Court had gone away from using the physical intrusion standard for some time, the *Katz* test of "reasonable expectation of privacy" supplemented, but did not replace, the common law trespass test.⁵⁰

2. Reasonable Expectation of Privacy

Until the latter half of the twentieth century, the Court required a physical intrusion or common law trespass for a Fourth Amendment violation. However, in 1967, the Court did away with this approach and determined physical intrusion was not required for a Fourth Amendment violation.⁵¹ In *Katz*, law enforcement attached an electronic eavesdropping device to the outside of a telephone booth.⁵² The conversations picked up by the device contained information that led to the petitioner's arrest and were permitted to be introduced at trial.⁵³ Both parties argued the *Olmstead* constitutionally protected area approach, but the Court disregarded the approach.⁵⁴ Rather, the majority stated "the Fourth Amendment protects people, not places."⁵⁵

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 949.

49. *Jones*, 132 S. Ct. at 954.

50. *Id.* at 953 ("[W]e do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." (also see *Knotts* and *Kyllo* discussing the supplementary nature of the *Katz* test rather than the replacement of the common law trespass test.)).

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

52. *Id.* at 348.

53. *Id.*

54. *Id.* at 349-50.

55. *Id.* at 351 ("[T]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this

More specifically, the Court declared that the proper analysis centers on whether the search or seizure “violate[s] the privacy upon which [the petitioner] justifiably relied.”⁵⁶ Accordingly, what a petitioner would justifiably expect to preserve as private constitutes a constitutionally protected area subject to Fourth Amendment protections, even if it is publicly accessible.⁵⁷ The Court determined that for the purposes of Fourth Amendment protection, a constitutionally protected area need not be private property that the government must physically intrude to gain access.⁵⁸

The current standard did not originate in the majority opinion. Rather, in his concurrence, Justice Harlan described the well-known twofold “reasonable expectation of privacy” requirement.⁵⁹ Thus, to be considered a “search” for Fourth Amendment purposes, the government must both (1) exhibit an actual subjective expectation of privacy, and (2) the expectation must be one that society is prepared to recognize as reasonable.⁶⁰ It is important to remember, the *Katz* test of “reasonable expectation of privacy” did not replace the common law trespass test; rather, it provided an additional avenue to determine whether an area is constitutionally protected.⁶¹

III. DOG SNIFFS IN INVESTIGATIONS

Law enforcement’s use of dogs originated in Belgium in 1899.⁶² Over fifty years later, in 1957, the first successful organized canine unit was implemented in the United States.⁶³ Shortly after, in 1970, the United States Customs Service began using dogs to detect drugs.⁶⁴ Since then, drug detection dogs have become commonplace in the United States.⁶⁵ Dogs can be trained to detect and alert authorities to the presence of heroin, marijuana,

case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” (internal citations omitted)).

56. *Id.*

57. *Katz*, 389 U.S. at 353.

58. *Id.*

59. *Id.* at 360-61 (J. Harlan concurring).

60. *Id.* at 361.

61. *Id.* at 953 (“[W]e do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.” (also see *Knotts* and *Kyllo* discussing the supplementary nature of the *Katz* test rather than the replacement of the common law trespass test.)).

62. Shannon R. Hurley-Deal, *State v. Fisher: Canine Sniffs – Who Let the Dogs Out?*, 26 N.C. CENT. L. J. 47, 47 (2003).

63. *Id.*

64. *Id.*

65. *Id.* at 51.

cocaine, and other drugs.⁶⁶ In fact, in the United States, drug detection dogs have proven so successful, they are employed in many airports, bus stations, and border locations.⁶⁷

Dogs are useful to law enforcement because of their exceptionally powerful olfactory sense, also known as sense of smell.⁶⁸ Dogs have up to three hundred million olfactory receptors compared to six million in humans.⁶⁹ Put another way, “[i]f laid out, the surface area of a dog’s olfactory cells would cover a space equivalent to the skin area of the dog’s body. In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.”⁷⁰ Thus, proportionally speaking, the portion of a dog’s brain devoted to smell is about forty times greater than that of a human brain.⁷¹ Throughout the United States, the “play-reward” method is widely used to train drug-detection dogs.⁷² The Supreme Court of Oregon described the commonly used method in *State v. Foster*⁷³ stating:

The dogs are trained to detect heroin, cocaine, methamphetamine, and marijuana. Initially, the handler exposes the dog to a training aid such as a tennis ball that has been submerged in the drug and familiarizes the dog with the odor by playing with it. Then the trainer hides the ball, and the dog learns to sniff it out. Next, the trainer hides the drug rather than a tennis ball. When the dog finds the drug, it is rewarded by being allowed to play with a favorite toy.⁷⁴

The dogs and their handlers are then tested to determine if they are sufficiently accurate to become certified.⁷⁵ The court in *Foster* described the testing procedure as follows:

66. Judyth Sassoon, *Canine Substance Detection*, ENCYCLOPEDIA.COM (June 26, 2017, 6:48 PM), <http://www.encyclopedia.com/history/united-states-and-canada/us-history/detection-dogs>.

67. *Id.*

68. *Id.*

69. Peter Tyson, *Dogs’ Dazzling Sense of Smell*, (Oct. 2012), <http://www.pbs.org/wgbh/nova/nature/dogs-sense-of-smell.html>.

70. Hurley-Deal, *supra* note 62, at 51.

71. Peter Tyson, *supra* note 69.

72. *See State v. Foster*, 252 P.3d 292, 295 (Or. 2011).

73. *Id.* (The *Foster* court looked to the training of drug-detecting dogs to determine whether the dog in question in the case was adequately trained in comparison to the commonly used “play-reward” method).

74. *Id.* (quoting *State v. Foster*, 225 P.3d 830, 835 (Or. Ct. App. 2010)).

75. *Foster*, 252 P.3d at 295.

After the dog and the handler have worked together for a significant period of time, they are eligible for testing . . . [T]he test involves [testing the dog's ability to detect the presence of drug-scented items in two rooms, three vehicles, seven packages, and an open area. To prevent handler cuing and to force the teams to perform under stress, the handler does not know how many items, if any, the dog should alert to on each deployment.] Each environment may have up to three drug packages hidden in it, or may have none at all. The environments also have distractors, such as dirty clothing and urine. [To pass the portion of the test in rooms and vehicles, a dog must have at least a 90 percent accuracy rate. For the packages and open area, the dog must be 100 percent accurate.] Approximately 25 percent of the dogs fail the test. If a dog passes the test, it is certified for one year and must complete the test again to be recertified.⁷⁶

The constitutionality of using drug detection dogs in law enforcement has been challenged in state and federal courts.⁷⁷ Notably, in *United States v. Place* the Supreme Court found dog sniffs of the exterior of luggage to be constitutional.⁷⁸ In *Place*, drug enforcement agents detained the defendant at an airport and used a drug detection dog to sniff his luggage.⁷⁹ The Court found a brief seizure of the luggage to perform a dog sniff was appropriate and did not amount to a Fourth Amendment search because it did not involve physically opening or exposing the defendant's items.⁸⁰ In addition, the Court noted the sniff was solely designed to reveal the presence of contraband.⁸¹ Therefore, the Court concluded the sniff was not a Fourth Amendment search.⁸²

Many years later, in 2005, the Supreme Court was faced with another case concerning a warrantless drug detection dog search in *Illinois v. Caballes*.⁸³ In *Caballes*, law enforcement conducted a lawful traffic stop of the respondent's vehicle for speeding.⁸⁴ While the first state trooper wrote out a warning ticket for the defendant, a second trooper arrived on the scene with his drug detection dog and walked the dog around the respondent's car.⁸⁵ The

76. *Id.*

77. *Id.*

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

79. *Id.* at 699.

80. *Id.* at 707.

81. *Id.*

82. *Id.*

83. *Illinois v. Caballes*, 543 U.S. 405, 405 (2005).

84. *Id.* at 406.

85. *Id.*

dog alerted to the presence of marijuana in the respondent's trunk.⁸⁶ Subsequently, the troopers searched the trunk, found marijuana, and the respondent was convicted with a drug offense.⁸⁷ The Supreme Court granted certiorari to determine whether the Fourth Amendment required reasonable, articulable suspicion to justify a dog sniff of a vehicle during a lawful traffic stop.⁸⁸ The Court held the dog sniff did not implicate legitimate privacy interests because it was performed on the exterior of the car during a legitimate traffic stop.⁸⁹ The Court determined “[a]ny intrusion on respondent's privacy expectations [does] not rise to the level of a constitutionally cognizable infringement.”⁹⁰

In sum, with respect to drug detection dogs, prior to *Florida v. Jardines*, the U.S. Supreme Court has held that dog inspection of luggage in an airport and dog inspection of an automobile during a lawful traffic stop do not violate the *Katz* “reasonable expectation of privacy” standard. Thus, dog sniffs, in the contexts listed above, are not searches under the scope of the Fourth Amendment. The next section will discuss the *Jardines*⁹¹ case, where the Court first considered the application of prior dog sniff decisions in the context of the home.

IV. FOURTH AMENDMENT PROTECTIONS OF DRUG DOG SNIFFS IN HOMES AND APARTMENTS

The protection of the Fourth Amendment varies depending on an individual's living situation. Per case law, homeowners have been given more constitutional protection than their apartment dwelling counterparts concerning the area outside their door.⁹² This section will look at the legal background of homeowner's Fourth Amendment rights as discussed by the Supreme Court in *Florida v. Jardines*. Additionally, this section will discuss the current law surrounding Fourth Amendment protections of individuals living in apartments and multi-family dwellings.

A. HOMEOWNER'S RIGHTS: *FLORIDA V. JARDINES*

One year after *Jones*, the Supreme Court was faced with a similar Fourth Amendment argument in *Florida v. Jardines*.⁹³ In *Jardines*, law enforcement

86. *Id.*

87. *Id.* at 406-07.

88. *Id.* at 407.

89. *Caballes*, 543 U.S. at 409.

90. *Id.* at 409.

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

92. Compare *Jardines*, 133 S. Ct. at 1409 with *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (holding no reasonable expectation of privacy in an apartment hallway).

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

took a drug detection dog to the defendant's front porch without a warrant.⁹⁴ The dog positively alerted officers to the presence of drugs.⁹⁵ Subsequently, law enforcement used the information to procure a warrant to search the home, during which they found illegal drugs and charged the defendant accordingly.⁹⁶ The trial court suppressed the evidence finding it was a warrantless search in violation of the Fourth Amendment.⁹⁷ On appeal, the Supreme Court agreed, holding the front porch was constitutionally protected curtilage,⁹⁸ officers did not have an implied license to be there with drug detection dogs,⁹⁹ and law enforcement physically intruded on the constitutionally protected area in violation of the defendant's Fourth Amendment rights.¹⁰⁰

In the Court's finding that the porch was curtilage, it did not reach an analysis of the *Dunn* factors.¹⁰¹ Rather, the Court looked to the *Oliver* Court's standard, which states "[w]hile the boundaries of the curtilage are generally 'clearly marked,' the 'conception defining the curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience.'"¹⁰² Thus, the Court determined the front porch is undoubtedly curtilage because it is an area where it is obvious that "the activity of home life extends."¹⁰³

After determining the front porch was curtilage, the Court looked to whether the officer acted reasonably, or if it was an unlicensed physical intrusion.¹⁰⁴ The Court discussed that a police officer without a warrant "may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"¹⁰⁵ While the Court recognized this implied warranty, it drew a line expressing there is no "customary invitation" to introduce "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence."¹⁰⁶ Therefore, the Court determined the officer's conduct was beyond the scope of the license implied to an individual seeking to utilize the porch to attempt an entry.¹⁰⁷

94. *Id.* at 1413.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1415.

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

100. *Id.* at 1417-18.

101. *Id.* at 1414-15.

102. *Id.* at 1415 (quoting *Oliver v. United States*, 466 U.S. 170, 182, n.12 (1984) (internal quotations omitted)).

103. *Id.*

104. *Id.* at 1415.

105. *Jardines*, 133 S. Ct. at 1416 (citing *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

106. *Id.*

107. *Id.* at 1417.

Accordingly, the Court determined law enforcement's conduct was an unlicensed intrusion on a constitutionally protected area, the defendant's curtilage, which was a similar situation to *Jones*.¹⁰⁸ Thus, the Court reiterated the holding in *Jones* stating "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'"¹⁰⁹ The Court determined the officer's use of drug detection dogs to investigate the home on the front porch is a "search" within the scope of the Fourth Amendment in violation of the defendant's constitutional rights.¹¹⁰

Justice Kagan, along with Justice Ginsburg and Justice Sotomayor, concurred with the majority decision, and provided an analysis of the *Jardines* case on privacy grounds.¹¹¹ Justice Kagan determined the search was unreasonable under both a property and privacy analysis.¹¹² She stated the *Kyllo v. United States* Court established a "firm" and "bright" rule that is applicable in this case.¹¹³ The standard reads: "[w]here as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."¹¹⁴ Justice Kagan determined drug detection dogs are not "in general public use" and the dogs were used to "explore details of the home that they would not otherwise have discovered without entering the premises."¹¹⁵ Therefore, Justice Kagan argues absent a warrant or exigent circumstance, the search is unreasonable under a privacy analysis.¹¹⁶

B. APARTMENT DWELLER'S RIGHTS

Unlike homeowners, there is no set standard for Fourth Amendment protection of the area outside the door of individuals living in apartments or multi-family dwellings. This section will discuss the federal circuit split on the issue. Additionally, this section will discuss two cases relevant to North

108. *Id.*

109. *Id.* at 1414 (citing *United States v. Jones*, 565 U.S. 400, at 406 n.37 (2012)).

110. *Id.* at 1417-18.

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

112. *Id.* at 1418-19.

113. *Id.* at 1419.

114. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27 (2001) (holding a search is unreasonable when law enforcement committed no trespass, but used a thermal-imaging device to detect heat emanating from a private home)); *see also* *United States v. Karo*, 468 U.S. 705, 717-18 (1984) (holding warrantless beeper-assisted surveillance inside a home is unreasonable).

115. *Jardines*, 133 S. Ct. at 1419 (Kagan, J. concurring).

116. *Id.* at 1419-20.

Dakota law concerning Fourth Amendment protections in common hallways of multi-family dwellings: *State v. Nguyen* and *United States v. Matthews*.

1. *Federal Circuit Split Regarding the “Reasonable Expectation of Privacy” in Common Areas of Multi-Family Dwellings*

The Federal Circuits are split concerning whether there exists an objectively reasonable expectation of privacy in common areas of multi-family dwellings. The Majority view does not recognize a reasonable expectation of privacy in the common areas for tenants in an apartment or multi-family dwelling.¹¹⁷ On the other hand, the Minority view recognizes such a right under certain circumstances discussed below.¹¹⁸

The Majority view, consisting of the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, have consistently held that individuals living in multi-family dwellings do not have a reasonable expectation of privacy in the common or shared areas.¹¹⁹ Most relevant, the Eighth Circuit has found no reasonable expectation of privacy exists in a duplex vestibule,¹²⁰ duplex hallway closet,¹²¹ multi-family dwelling basement storage locker accessible to all residents,¹²² the landing of a secure apartment building,¹²³ and a conversation taking place in a secure apartment building common hallway.¹²⁴ In addition, prior to the *Jardines* decision, other Circuits have found no legitimate expectation of privacy in a condominium parking garage,¹²⁵ common hallways of a secured apartment building,¹²⁶ and common areas of apartment buildings.¹²⁷ Also, many states, such as Tennessee, Illinois, Massachusetts, Minnesota, and Pennsylvania, have followed this view.¹²⁸

Alternatively, the Second and Sixth Circuit do not agree. The Sixth Circuit’s minority view has recognized a reasonable expectation of privacy in the hallway or common areas of an apartment when an officer enters without

117. *State v. Nguyen*, 2013 ND 252, 841 N.W.2d 676, 680.

118. *Id.* at 680-81 (citing *United States v. Carriger*, 541 F.2d 545, 550 (6th Cir. 1976)).

119. *Id.* at 680.

120. *See United States v. Mendoza*, 281 F.3d 712, 715 (8th Cir. 2002).

121. *See United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999).

122. *See United States v. McGrane*, 746 F.2d 632, 634 (8th Cir. 1984).

123. *See United States v. Luschen*, 614 F.2d 1164, 1173 (8th Cir. 1980).

124. *See Eisler*, 567 F.2d at 816.

125. *See United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976).

126. *See United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985); *United States v. Acosta*, 965 F.2d 1248, 1253 (3rd Cir. 1992); *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993).

127. *See United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991).

128. *Nguyen*, 2013 ND 252, ¶ 9, 841 N.W.2d 676.

permission and the building is locked.¹²⁹ The court stated, “[a]ny entry into a locked apartment building without permission, exigency, or a warrant is prohibited [by the Fourth Amendment].”¹³⁰ Additionally, the Second Circuit found there is a “heightened expectation of privacy inside [a] dwelling” and held the use of drug detection dogs in the hallway of a locked apartment building constitutes a Fourth Amendment search.¹³¹ The Minority view would afford Fourth Amendment protection to apartment dwellers from warrantless drug detection dog searches in the common hallways of the building similar to the protection afforded to homeowners under *Jardines*.

2. North Dakota Relevant Post *Florida v. Jardines* Cases

Recently, there have been two relevant cases decided concerning drug detection dogs in common hallways of apartments. The first, *State v. Nguyen*, was decided by the North Dakota Supreme Court. The second, *United States v. Matthews*, originated in Minnesota and was appealed to the Eighth Circuit Court of Appeals.

First, in *Nguyen*, law enforcement received a report of marijuana odor on the second floor of an apartment building.¹³² The controlled access apartment building had secured common hallways where personal property, like shoes, bikes, and door decorations, were present.¹³³ While investigating the apartment building, ununiformed officers caught the door behind a tenant of the apartment and brought in a drug detection dog to walk it through the second floor.¹³⁴ The dog was drawn to the defendant’s door and alerted to the presence of drugs.¹³⁵ The information from the dog was used to obtain a search warrant, and as a result, incriminating evidence was gathered.¹³⁶ The trial court granted the defendant’s motion to suppress, and the State appealed to the North Dakota Supreme Court arguing the use of a drug detection dog in secured apartment common hallways did not amount to an unconstitutional search.¹³⁷

The defendant argued the use of the dog was a physical intrusion into the defendant’s constitutionally protected area under *Jardines*.¹³⁸ The Court disregarded this argument because the common hallway outside of an apartment

129. See, e.g., *Carriger*, 541 F.2d at 550.

130. See *United States v. Heath*, 259 F.3d 522, 534 (6th Cir. 2001).

131. *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985).

132. *Nguyen*, 2013 ND 252, ¶ 2, 841 N.W.2d 676.

133. *Id.* at ¶ 3.

134. *Id.*

135. *Id.*

136. *Id.* at ¶ 4.

137. *Id.* at ¶ 6.

138. *Nguyen*, 2013 ND 252, ¶ 12, 841 N.W.2d 676.

is distinguishable from the area surrounding a home because of the much lower legitimate expectation of privacy in common hallways.¹³⁹ Thus, the common hallway is not within the curtilage of the defendant's apartment.¹⁴⁰ Ultimately, the Court looked to Eighth Circuit precedent establishing that the common hallways of multiple-family dwellings did not enjoy a reasonable expectation of privacy.¹⁴¹ Therefore, the Court determined the dog sniff in the defendant's apartment hallway was not an illegal Fourth Amendment search.¹⁴²

In *Matthews*, a recent Eighth Circuit Court of Appeals decision, law enforcement received a report implicating the defendant as a suspect in multiple crimes.¹⁴³ The defendant lived in a "large, secure apartment building, to which the owner had granted police all-hours access by placing a key in an outdoor box."¹⁴⁴ As a result, on two occasions, police went to the defendant's building with a drug detection dog to conduct a drug sniff in the common hallway.¹⁴⁵ The dog alerted to the officers the presence of drugs outside the defendant's apartment door.¹⁴⁶ The information from the dog sniff was used to procure a warrant to search the defendant's apartment where incriminating evidence was found leading to the defendant's indictment.¹⁴⁷ Subsequently, the defendant filed a motion to suppress, and the district court denied the motion.¹⁴⁸

On appeal, the defendant argued the positive alerts constituted "warrantless searches in violation of [the defendant's Fourth Amendment rights]" under *Jardines*.¹⁴⁹ The Court did not reach the question posed by the defendant's argument because binding precedent existed in the Eighth Circuit to which law enforcement could have reasonably relied.¹⁵⁰ Prior case law provided with respect to an officer's reasonable reliance on binding circuit precedent sanctioning such drug dog sniffs, "the exclusionary rule did not preclude the use of that evidence in search-warrant application."¹⁵¹ Thus, the

139. *Id.* at ¶ 13.

140. *Id.*

141. *Id.* at ¶ 9.

142. *Id.* at ¶ 13.

143. *United States v. Matthews*, 784 F.3d 1232, 1234 (2015).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Matthews*, 784 F.3d at 1235.

150. *Id.*

151. *Id.*

Court upheld the denial of the motion to suppress without reaching the question of whether the dog sniff was a Fourth Amendment search under *Jardines*.¹⁵²

V. ARGUMENT

After analyzing information applicable to the use of drug detection dogs near places of living, an inequality of constitutional protections for homeowners versus apartment dwellers exists. This section will discuss three reasons that the same constitutional protection that extends to the front porch of a home should apply to the common hallways of an apartment building. Therefore, warrantless searches would constitute a violation of the apartment dweller's Fourth Amendment rights.

First, there is a reasonable expectation of privacy in the common hallways of a secured apartment building, which satisfies the *Katz* standard and demands constitutional protection. Notwithstanding precedent in some jurisdictions that determined common hallways in apartment buildings do not have a reasonable expectation of privacy, a secured door that restricts access to an apartment building in and of itself demonstrates a reasonable expectation of privacy. The locked door serves as a barrier to accessing the building for non-tenants and uninvited guests. This shows a constitutionally protected interest in privacy and security by preventing strangers from meandering about the hallways, even police accompanied by drug detection dogs. Restricting access to the building is a reasonable demonstration of an expectation of privacy. Thus, the *Katz* standard has been satisfied, and a warrantless search of the area should be deemed unconstitutional.

Moreover, using drug detection dogs near the entrance of a dwelling should be presumptively unreasonable because they are not in general public use and are used to explore details of the dwelling that law enforcement could not perceive unassisted. In the *Jardines* concurring opinion, Justice Kagan analyzed the case using the "firm" and "bright" line rule announced in *Kyllo*. Under this analysis, *Kyllo* should directly apply to a warrantless search using drug detection dogs, regardless of the type of dwelling. The use of a dog trained to detect drugs should not be considered "in general public use" because of their unique training and ability to detect and respond to specific scents. In addition, law enforcement agents use the highly trained dogs to determine the existence of things that "would previously have been unknowable" but for the use of the drug detection dogs. Given the firm and bright line rule announced in *Kyllo*, the use of drug detection dogs on any dwelling,

152. *Id.* at 1235-36.

absent a search warrant or exigent circumstances, should constitute an unreasonable search in violation of the homeowner or apartment dweller's Fourth Amendment rights.

Finally, the common hallway of an apartment building should be considered curtilage, and in turn, should be protected similar to the constitutionally protected front porch in *Jardines*. An analysis of the *Dunn* factors should indicate the hallways of an apartment building, especially around the door frame, are curtilage. The *Dunn* factors include (1) the proximity to the home, (2) whether the area is included within the enclosure surrounding the home, (3) the nature of the area's use, and (4) steps taken to protect observation the area from observation by people passing by.¹⁵³

The first *Dunn* factor applies because the secured apartment hallway is right outside the entrance to the apartment. With respect to the second factor, the hallways are enclosed by the walls of the apartment building; thus, the hallways are within the area protected by the locked door which secures access to the building. The third factor applies because the nature of the area's use is first, foremost, and arguably exclusively to access apartment units. This is the same purpose as a front porch to a home. In addition, the area immediately outside an apartment door often contains personal items such as welcome mats and door signs facing the hallway. Thus, the nature of the area's use is similar to that of a porch, which has been deemed constitutionally protected curtilage. Finally, the fourth factor applies because there have been clear steps taken to prevent observation. The building is secured and restricts access to those who do not have keys; thus, the only people that have access to the common hallway are those who live there and their invited guests.

After analyzing the *Dunn* factors with respect to common hallways of secured apartment buildings, the common hallways should be considered curtilage. Therefore, following *Jardines*, the area should be constitutionally protected. This constitutional protection would provide equal privacy rights to the area directly outside the entrance to a living situation, no matter whether the individual chooses to live in an apartment or a detached home.

A deciding factor between an individual choosing between living in an apartment or a house should not be differing constitutional protections from drug-sniffing dogs. There is a reasonable expectation of privacy in the common hallways of a secured apartment building. Moreover, the area outside an apartment door should be considered constitutionally protected curtilage. Thus, the constitutional rights of both homeowners and apartment dwellers

153. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

to “retreat into [their] own home[s] and there be free from unreasonable governmental intrusion”¹⁵⁴ should apply equally.

VI. CONCLUSION

Overall, this Note explored the relevant Fourth Amendment jurisprudence that the Supreme Court and other courts have utilized in arriving at decisions concerning the constitutionality of drug-detecting dog sniffs. Such doctrines consist of the open fields doctrine, including the importance of deciphering the extent of a home’s curtilage, and the standards for Fourth Amendment protection, including the common law trespass test and the *Katz* “reasonable expectation of privacy test.” In addition, this Note explores the unique qualifications of law enforcement dogs and the Supreme Court’s prior case law regarding dog sniffs. Finally, this Note considers the inequality between homeowners Fourth Amendment protections under *Jardines*, and that of apartment dwellers concerning the areas outside their respective doors. It also advocates for equal constitutional protections for homeowners and apartment dwellers alike.

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154. *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

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