
Fourth Amendment — Trespass Test —
Florida v. Jardines

When and under what circumstances the Constitution allows the state to take police action within a home has developed as a fraught Fourth Amendment question.¹ Though the Fourth Amendment does not protect against observance of the home and its immediately surrounding areas from “public vantage point[s],”² use of certain tactics to ascertain activity *inside* the four walls of a home may be deemed impermissible without a warrant.³ Last Term, in *Florida v. Jardines*,⁴ the Supreme Court contributed further to this area of Fourth Amendment law by applying the trespass test from *United States v. Jones*⁵ to the use of a drug-sniffing dog outside a home on its front doorstep. The Court held that under *Jones*, the dog’s sniff constituted a Fourth Amendment search.⁶ The rigidity of the *Jones* test, which automatically makes physical trespass a de facto-unreasonable search, is in tension with the hallmark of Fourth Amendment inquiry — reasonableness — as well as with the Court’s longstanding use of balancing, rather than bright lines, to effectuate reasonableness inquiry.⁷ Applying that test to the facts of *Jardines* precluded a more robust balancing inquiry, including into the nature of the underlying crime. While Fourth Amendment jurisprudence generally does not distinguish

¹ For example, the Supreme Court has held that there is generally an exception to the Fourth Amendment’s warrant requirement for arrests. *United States v. Watson*, 423 U.S. 411 (1976). *But* there is an exception to that exception for the home: a warrant is required to make an arrest inside a home. *Payton v. New York*, 445 U.S. 573 (1980). *But* there is a further exception to that exception to that exception: in exigent circumstances, police may forego a warrant to arrest someone within her home. *Warden v. Hayden*, 387 U.S. 294 (1967). *But* there exists yet a further exception to that third-level exception: even in exigent circumstances, police have to get a warrant before arresting someone within her home for a minor offense. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

² *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see also id.* at 213–15 (holding that law-enforcement observation of marijuana plants growing in a home’s backyard from an aircraft flying “at an altitude of 1,000 feet, within navigable airspace,” *id.* at 209, did not constitute a Fourth Amendment search).

³ *See, e.g., Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that police use of thermal-imaging technology to observe heat emanating from indoor lamps used for marijuana cultivation constituted a search “presumptively unreasonable without a warrant”).

⁴ 133 S. Ct. 1409 (2013).

⁵ 132 S. Ct. 945 (2012).

⁶ *Jardines*, 133 S. Ct. at 1417–18.

⁷ *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“We have long held that the ‘touchstone of the Fourth Amendment is reasonableness.’ Reasonableness, in turn, is measured . . . by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” (citation omitted) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))).

among different types of crimes,⁸ there have been notable exceptions.⁹ Moreover, by applying *Jones*'s trespass test, *Jardines* reinforced the transsubstantive nature of the Fourth Amendment such that trespass via dog sniff will now be considered an unreasonable search regardless of the underlying crime. *Jardines* likely would have come out the same way had the Court considered the nature of the underlying drug crime; however, the inflexible *Jones* test might have prevented a different outcome had the underlying crime been one of violence, where a warrantless dog-sniff search might have been more reasonable.

After receiving an unverified tip that Joelis Jardines was growing marijuana in his home, a task force of Miami-Dade police and Drug Enforcement Administration (DEA) agents surveilled Jardines's home.¹⁰ Ascertaining that no one was home, two detectives brought a drug detection dog to the front door.¹¹ From outside the front door, the dog gave a "positive alert for narcotics."¹² That same day, the police department applied for, received, and executed a warrant to search Jardines's home on the basis of the dog's alert.¹³ The warranted search uncovered marijuana plants and Jardines was charged with "trafficking in cannabis."¹⁴

Jardines moved to suppress the marijuana plants at trial "on the ground that the canine investigation was an unreasonable search."¹⁵ The trial court granted the motion.¹⁶ A Florida appeals court reversed, holding that a dog sniff does not constitute a Fourth Amendment search because it "detects only contraband, and because no one has a 'legitimate' privacy interest in contraband."¹⁷ The Florida Supreme Court quashed the appeals court's decision and approved the trial court's ruling. It held (as relevant here) "that the warrantless

⁸ See William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001) ("Fourth Amendment law is transsubstantive Whether the police suspect a house shelters a murder weapon or a stash of marijuana, the standard is the same [T]he Fourth Amendment treats one crime just like another.")

⁹ *Id.* at 847 n.16 (citing *Welsh v. Wisconsin*, 466 U.S. 740, 746, 753 (1984), in which the Court held exigency to be based in part on the gravity of the underlying offense, and found no exigency where the underlying offense was noncriminal, and *People v. Sirhan*, 497 P.2d 1121, 1140-41 (Cal. 1972), in which the court found exigent circumstances due in part to the "enormous gravity" of the crime, *id.* at 1140, the assassination of a presidential candidate).

¹⁰ *Jardines*, 133 S. Ct. at 1413.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Florida v. Jardines*, No. F06-40839, 2007 WL 6913643, at *2 (Fla. Cir. Ct. June 13, 2007).

¹⁷ *Florida v. Jardines*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008). The court cited *Illinois v. Caballes*, 543 U.S. 405 (2005), in which use of a drug-detection dog sniff of a stopped car was at issue, and *United States v. Place*, 462 U.S. 696 (1983), in which the Court found use of a drug-detection dog to sniff airport luggage not to constitute a search.

'sniff test' . . . conducted at the front door of the residence . . . was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment,"¹⁸ and distinguished the case at hand from the dog-sniff cases cited by the appeals court, finding those cases inapplicable to the home.¹⁹

The U.S. Supreme Court affirmed, reviewing only the question of whether the use of the drug-sniffing dog constituted a Fourth Amendment search.²⁰ Writing for the majority, Justice Scalia²¹ described the case as "straightforward."²² He first established that the front doorstep was a constitutionally protected space, reasoning that "the right . . . to retreat into [one's] own home and there be free from unreasonable governmental intrusion' . . . would be of little practical value if the State's agents could stand in a home's porch . . . and trawl for evidence with impunity."²³ He cited *Jones* for the proposition that physical intrusions into the spaces and items enumerated as protected by the Fourth Amendment — "persons, houses, papers, and effects" — constitute Fourth Amendment searches.²⁴ That the police officers sought to gather information in an area "immediately surrounding [the] house" without express or implied permission of the owner²⁵ rendered their investigation such a physical intrusion and thus plainly a Fourth Amendment search.²⁶

The Court proceeded to conclude that the officers' behavior amounted to an unlicensed physical intrusion. Justice Scalia distinguished the officers' observation from that which they could have effectuated in a "public thoroughfare[]" without implicating the Fourth Amendment.²⁷ Indeed, some quantity of behavior on a front porch to which one was not invited is implicitly permitted.²⁸ However, "[t]here

¹⁸ *Jardines v. Florida*, 73 So. 3d 34, 55–56 (Fla. 2011).

¹⁹ *Id.* at 44–45. The court highlighted a key set of differences between dog sniffs of private residences and dog sniffs of airport luggage and stopped cars, as in *Place* and *Caballes*, respectively: "[A] 'sniff test' . . . conducted at a private residence does not *only* reveal the presence of contraband, . . . but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application." *Id.* at 49.

²⁰ *Jardines*, 133 S. Ct. at 1414.

²¹ Justice Scalia was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.

²² *Jardines*, 133 S. Ct. at 1414.

²³ *Id.* (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

²⁴ *Id.* (quoting U.S. CONST. amend. IV).

²⁵ *Id.* (noting that the curtilage has long "enjoy[ed] protection as part of the home itself").

²⁶ *See id.*

²⁷ *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)) (internal quotation mark omitted).

²⁸ *Id.* (describing the custom and tradition of homeowners as impliedly allowing visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave").

is no customary invitation” to bring a trained police dog into the curtilage of a home “in hopes of discovering incriminating evidence.”²⁹

Emphasizing the ease with which the Court decided the case, Justice Scalia explicitly cabined the analysis to property rights by declining to engage in discussion of Jardines’s reasonable expectation of privacy.³⁰ Instead, he noted that the fact that the officers “physically intrud[ed] on Jardines’ property to gather evidence [was] enough to establish that a search occurred”³¹ without delving into the privacy expectations that may have been at issue. Similarly, the case was so easily resolved under the property rights rubric that there was no need to explore whether dogs as odor detectors ought to be deemed technology “not in general public use”³² under *Kyllo v. United States*.³³ The beauty of the property rights rubric, Justice Scalia noted, is that it “keeps easy cases easy.”³⁴

Justice Kagan concurred.³⁵ Declaring that she “could just as happily have decided [the case] by looking to Jardines’ privacy interests” as by utilizing “a property rubric,”³⁶ Justice Kagan emphasized that “‘privacy expectations are most heightened’ in the home and the surrounding area,”³⁷ and that the “practical value”³⁸ of the right to such privacy would not withstand the threat of police officers’ “standing in an adjacent space and ‘trawl[ing] for evidence with impunity.’”³⁹ The key difference between how a privacy-based versus a property-based analysis would proceed, she argued, is that *Kyllo* had already resolved the privacy question: A drug-sniffing dog could be likened to a thermal-imaging device not in general public use, and the use of the dog’s ability to ascertain activity within a home could be determined previously impossible without physical intrusion.⁴⁰ The “‘firm’ and . . . ‘bright’ line at ‘the entrance to the house’” that the Court

²⁹ *Id.* at 1416.

³⁰ *See id.* at 1417 (responding to the State’s assertion that forensic investigation “by definition cannot implicate any legitimate privacy interest,” *id.*, by noting that “a person’s ‘Fourth Amendment rights do not rise or fall with the *Katz* formulation,” *id.* (quoting *United States v. Jones*, 132 S. Ct. 945, 950 (2012))).

³¹ *Id.*

³² *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)) (internal quotation mark omitted).

³³ 533 U.S. 27. In *Kyllo*, the Court held that government use of a “device that is not in general public use . . . to explore details of the home that would previously have been unknowable without physical intrusion” constitutes a search for purposes of the Fourth Amendment. *Id.* at 40.

³⁴ *Jardines*, 133 S. Ct. at 1417.

³⁵ She was joined by Justices Ginsburg and Sotomayor.

³⁶ *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

³⁷ *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

³⁸ *Id.* (quoting *id.* at 1414 (majority opinion)) (internal quotation marks omitted).

³⁹ *Id.* at 1418 (alteration in original) (quoting *id.* at 1414 (majority opinion)).

⁴⁰ *Id.* at 1419.

drew in *Kyllo* would thus govern, and the use of the dog would constitute a search.⁴¹

Justice Alito dissented.⁴² He would have held that the officers' use of the trained canine did not constitute a Fourth Amendment search. He began by arguing that the majority opinion was inconsistent with trespass law.⁴³ Systematically laying out the scope of the license recognized by the law of trespass,⁴⁴ he argued that the officers had not exceeded it, and that, generally speaking, the "implied license to approach the front door extends to the police."⁴⁵ Indeed, "[e]ven when the objective of a [police officer visit] is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies."⁴⁶ Justice Alito made the link to the facts of this case explicit: "[W]hen officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point."⁴⁷ That the Miami-Dade police and DEA agents' purpose was to gather evidence of activity within Jardines's home did not alter the conclusion that they acted within the scope of the license recognized by trespass law.⁴⁸

Justice Alito then criticized the concurrence's reasoning under a reasonable-expectation-of-privacy framework, underscoring the location of the officers and the dog's ability to detect the odor from the front porch: there was "no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that ema-

⁴¹ *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)). Justice Kagan also noted, in response to the dissent, that the fact that the "device" in use here was a dog rather than a piece of technology recently developed "cannot change the equation," *id.*, and that her analysis would still allow use of such devices in exigent circumstances, *id.* at 1420.

⁴² He was joined by Chief Justice Roberts and Justices Kennedy and Breyer.

⁴³ *Jardines*, 133 S. Ct. at 1420 (Alito, J., dissenting) ("The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence.")

⁴⁴ *Id.* at 1421–22. In particular, the license is generally limited spatially to the path leading to the front door, and temporally to the time of day visitors are customarily permitted to approach, *id.* at 1422 (insisting that the license generally does not extend to midnight visitors without express invitation), and to the time it takes to approach, see if anyone is home, and leave, *id.* at 1423 (contending that visitors may not "plop down uninvited to spend the afternoon in the front porch rocking chair"). The law of trespass has not differentiated among groups of people who may traverse the path to a front door, *id.* at 1422, and it has not required that such visitors knock or attempt to speak with the occupant, *id.* at 1423.

⁴⁵ *Id.* at 1423.

⁴⁶ *Id.* Justice Alito elaborated that police officers' "approach[ing] the front door of a residence" in order to "speak to an occupant for the purpose of gathering evidence," *id.* (citing *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)), known as a "knock and talk," *id.*, does not constitute a search.

⁴⁷ *Id.*

⁴⁸ Justice Alito noted that an officer who has approached a residence's front door for a "knock and talk" "may observe items in plain view and smell odors coming from the house." *Id.* at 1424 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

nate from the dwelling and reach spots where members of the public may lawfully stand.”⁴⁹ He also “would not draw a line between odors that can be smelled by humans and those that are detectable only by dogs.”⁵⁰ Assailing the concurrence’s application of *Kyllo*, he argued that the Court had already rejected the argument that drug-sniffing dogs are akin to thermal-imaging devices.⁵¹ He then noted that a *Kyllo*-based holding would reach considerably more conduct than will the Court’s holding. Since the officers in that case operated from a public street and thus did not trespass, applying *Kyllo* would mean that a drug-detection dog’s sniff would constitute an unreasonable search if the dog “alert[ed] while on a public sidewalk or in the corridor of an apartment building.”⁵² More troubling still, Justice Alito suggested, “the same would be true if the dog was trained to sniff, not for marijuana, but for more dangerous quarry, such as explosives or for a violent fugitive or kidnapped child.”⁵³

Justice Alito’s final point holds persuasive force unrecognized by the majority, the concurrence, or even perhaps by the dissent itself. Application of the Court’s holding, or of the concurrence’s privacy-based analysis, to a quest for evidence of a violent crime would ignore the balancing of costs and benefits required by a reasonableness standard.⁵⁴ A home search for a murder weapon may be more reasonable than a home search for marijuana plants: presuming the scope of the searches is similar, the cost in loss of privacy is similar across home searches, whereas law enforcement gains from capturing a murderer may be significantly greater than those from capturing a marijuana user or dealer.⁵⁵ A possible cure would have been to consider the nature of the underlying crime.

Though the two tests that the majority and concurrence endorsed — the *Jones* trespass test and the *Kyllo* device test, respectively — eschew robust reasonableness balancing in favor of bright lines, a reasonable balance may well have been struck in *Jardines*. Without weighing the state’s interest in prosecuting marijuana trafficking against *Jardines*’s interest in the sanctity of his home, requiring more stringent Fourth Amendment protection — finding narrower search power — may well have hit the right note where the underlying crime was narcotics trafficking rather than murder or kidnapping. The

⁴⁹ *Id.*

⁵⁰ *Id.* at 1425. Justice Alito reasoned that no one growing or manufacturing controlled substances reasonably calculates that her operation produces odors strong enough to be detected by dogs but not by humans. *Id.*

⁵¹ *Id.* (citing *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005)).

⁵² *Id.* at 1426.

⁵³ *Id.*

⁵⁴ See Stuntz, *supra* note 8, at 847.

⁵⁵ See *id.*

state's interests in preventing violent crime and protecting its citizens from physical harm are arguably greater than its interest in preventing marijuana dealing.⁵⁶ As applied to contexts involving differently balanced interests, the tests may not permit searches that would in fact be reasonable. Against the same property rights and privacy interests (those contiguous with a home), perhaps fewer procedural impediments should stand in the way of constitutionally searching the home for evidence of an underlying crime of violence.

Imagine that a child had gone missing six months earlier, presumed kidnapped, and that a police dog was trained to alert to her scent. Suppose that instead of growing marijuana, Jardines had kidnapped the child and held her captive in his home. After receiving an unverified tip, police and the trained canine approached the house and the dog alerted. The dog's alert could have provided a basis for exigent circumstances, allowing the police to enter on the spot and rescue the child, or for a warrant to return later to perform the rescue. Against the backdrop of these facts, had the Court applied either the bright-line physical intrusion test from *Jones* or the device-not-in-general-public-use test from *Kyllo*, evidence of the child's whereabouts would have been suppressed. Excluding such evidence would create a greater risk that the kidnapper would go free or have his conviction overturned. The bright-line tests, each established in cases arising from nonviolent drug crimes similar to that in *Jardines*,⁵⁷ may strike a balance acceptable to most citizens⁵⁸ as applied to the facts underlying those cases. They may not produce nearly as reasonable a result when applied to facts arising from violent-crime investigations. Rather, the bright-line tests would likely overprotect the individual's Fourth Amendment right, as they would effect the same result even when the stronger state interest in protecting against physical harm were weighed against the same property and privacy interests in the sanctity of one's home.

Scholars have noted the desirability and intuitive appeal of varying the permissiveness of the search by the severity of the underlying

⁵⁶ See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 29–32 (2011) (identifying “core . . . offenses that a reasonable person would deem most severe” as those involving violence, such as beating, planned killing, rape, and armed robbery, and citing general consensus in social science literature for support).

⁵⁷ In *Jones*, the underlying crime was drug trafficking, *United States v. Jones*, 132 S. Ct. 945, 946 (2012), and in *Kyllo*, it was cultivating marijuana, *Kyllo v. United States*, 533 U.S. 27, 30 (2001).

⁵⁸ The Supreme Court has recognized the salience of social science literature showing what most citizens find reasonable in this context. See Bellin, *supra* note 56, at 30 n.125 (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983), for the proposition that courts may judge the gravity of an offense by citing social science literature showing “widely shared views” as to the severity of various crimes).

crime,⁵⁹ as well as the benefits of Fourth Amendment reasonableness encompassing “the seriousness of the crime investigated.”⁶⁰ These arguments note that while the basic privacy interests of defendants typically remain similar regardless of the severity of the underlying crime, the gains that searches of private spheres can produce — in other words, the state’s interests — increase with the severity of the crime. As a result, “different benefits make for different balances”; as the gravity of the underlying crime varies, so too does the reasonableness of the search.⁶¹ Indeed, although the “transsubstantive nature” of Fourth Amendment jurisprudence has been described as “deeply engrained,”⁶² at times the Supreme Court has grounded its reasoning in the severity of the underlying crime.⁶³ The Court’s landmark decision in *Terry v. Ohio*⁶⁴ allowed a police action less intrusive than an arrest, a stop-and-frisk search, based on less than probable cause, but re-

⁵⁹ See, e.g., Stuntz, *supra* note 8, at 875 (“First, some crimes are worse than others. Second, the worst crimes are the most important ones to solve, the ones worth paying the largest price in intrusions on citizens’ liberty and privacy.”).

⁶⁰ Bellin, *supra* note 56, at 4; see also Stuntz, *supra* note 8, at 870 (“The Fourth Amendment says police must behave reasonably. Reasonableness involves a balance of individual interest against government need. A large factor in government need — perhaps the largest — is the crime the government is investigating. Any decent balance would take that factor into account.”).

⁶¹ Stuntz, *supra* note 8, at 847 (comparing O.J. Simpson’s case to that of Mr. and Mrs. Gates in *Illinois v. Gates*, 462 U.S. 213 (1983) — in which police searched a couple’s house and car for marijuana — and finding the losses of privacy arising from the home and vehicle searches similar across the two cases, but finding at the same time, “strikingly different” gains from the two searches — one having discovered a bloody glove and the blood of two murder victims, and one having discovered only a “local marijuana connection”).

⁶² Bellin, *supra* note 56, at 11; see also *id.* at 11–12 (collecting cases in which the Court’s Fourth Amendment rulings were reasoned irrespective of the substance of the underlying circumstances — cases in which the Court approved broad search and seizure power when the underlying crimes were relatively minor, such as *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (declining to limit seizure authority for the minor offense of driving without a seatbelt), and *Whren v. United States*, 517 U.S. 806, 816–19 (1996) (endorsing broad search and seizure power even for minor traffic violations), and a case in which the underlying crime was severe — homicide — but the Court scathingly rejected a warrantless search, *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

⁶³ See *id.* at 15–17 (collecting cases in which the Court gave crime severity a role in its Fourth Amendment reasonableness analysis, such as *Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that crime severity should be analyzed as an element of Fourth Amendment reasonableness); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding deadly force reasonable only if precipitated by threat of physical harm, or if “there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm”); and *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (holding unconstitutional the warrantless entry of a home despite exigent circumstances when the underlying crime was “relatively minor”); cf. *United States v. Hensley*, 469 U.S. 221, 228 (1985) (stating that the factors to balance may differ between those at issue in the investigation of past versus ongoing crimes because “the governmental interests and the nature of the intrusions involved in the two situations may differ”).

That the Court has considered the nature of the underlying crime in Fourth Amendment cases provides a rebuttal to the possible argument that no nonarbitrary basis exists for courts to meaningfully differentiate among criminal laws based on the severity of what they criminalize or on their normative importance.

⁶⁴ 392 U.S. 1 (1968).

quired that it “be strictly circumscribed by the exigencies which justify its initiation.”⁶⁵ Professor William J. Stuntz has described the theory governing *Terry* as grounded in a substantive underlying inquiry as to the nature of the crime at issue: “The theory was that robberies are associated with the use of guns; anything that gave the officer reason to believe a robbery might occur also gave him reason to believe the suspects might be armed,” and “given reasonable suspicion of a qualifying crime — the kind that is often associated with guns or knives — officers can both stop and frisk suspects.”⁶⁶ Thus, though emphasis on the severity of the underlying crime⁶⁷ would represent a departure from much of the Court’s Fourth Amendment jurisprudence, it would not be entirely disconnected from the line of reasoning supporting some of the Court’s key Fourth Amendment cases.

A possible drawback to greater search permissibility based on the underlying crime is the potential for police abuses. Controversy over the New York City Police Department’s (NYPD) stop-and-frisk policies, which critics argue target minorities, and the civil rights lawsuit challenging the policies provide a contemporary example.⁶⁸ Permitting more investigative leeway can lead to expansion of police authority that many view as unreasonable, and thus constitutionally problematic. Indeed, NYPD’s practices appear to have come quite unmoored from the original justification for stop-and-frisk searches in *Terry*.⁶⁹ Limiting the scope of permissible police action would limit the potential abuse accordingly. If the class of crimes for which warrantless dog-sniff searches were considered reasonable were circumscribed to sufficiently severe acts of violence, and if a sufficiently high level of

⁶⁵ *Id.* at 25; *see also id.* at 25–26.

⁶⁶ Stuntz, *supra* note 8, at 852.

⁶⁷ One way that courts could effectuate such emphasis would be to divide types of crimes broadly into categories of relative severity, as Professor Jeffrey Bellin has suggested, such as “‘grave,’ ‘serious,’ and ‘minor’ crimes.” Bellin, *supra* note 56, at 27; *see also id.* at 25–27. The advantages to broad categorizations are predictability and avoidance of the possible pitfall that all crimes end up being designated as severe. *See id.*; *see also* Stuntz, *supra* note 8, at 850 (arguing that too-fine distinctions would lead to the “practical impossibility” of learning or enforcing the law).

⁶⁸ U.S. District Judge Shira Scheindlin ruled the policies unconstitutional in August of this year. *Floyd v. City of New York*, No. 08 Civ. 1034, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); *see also* Bernard Vaughan, *NYPD’s ‘Stop-and-Frisk’ Practice Unconstitutional, Judge Rules*, REUTERS (Aug. 12, 2013, 4:48 PM), <http://www.reuters.com/article/2013/08/12/us-usa-newyork-police-idUSBRE97BoFK20130812>. Since then, the City Council has overridden Mayor Bloomberg’s veto to increase legislative oversight of the NYPD. J. David Goodman, *Council Reverses Bloomberg Veto of Policing Bills*, N.Y. TIMES, Aug. 23, 2013, at A1.

⁶⁹ Chris Francescani & David Ingram, *Justice Department Steps into NYC Stop-and-Frisk Lawsuit*, REUTERS (June 13, 2013, 3:16 PM), <http://www.reuters.com/article/2013/06/13/us-usa-newyork-stopandfrisk-idUSBRE95C15X20130613> (citing a study by the New York Civil Liberties Union showing that, in 2011, “police conducted more stops of black males between the ages of 14 and 24 than the total number of young black males living in New York City,” and that “[j]ust 1.8 percent of searches of minority suspects that year resulted in weapons seizures”).

certainty as to that level of violence⁷⁰ were required, the potential for abuse would likely be moderated.

Had the Court engaged in a substantive analysis of the underlying crime at issue in *Jardines* in evaluating the reasonableness of the use of the trained canine, it could have more naturally employed a balancing rather than a bright-line inquiry. The Court may sensibly have concluded that the intrusion of a dog's warrantless sniff-detecting activity within the four walls of the home, as balanced against the state's interest in preventing marijuana production, was indeed unreasonable. Whether the Court conceptualized *Jardines*'s interest as primarily property- or privacy-related, the interest would remain the same whether he had grown marijuana or kidnapped a child.⁷¹ The difference would have been in the state's interest in protecting citizens from marijuana versus from kidnapping, the latter of which would almost certainly be considered greater. Thus, in the vein of *Terry* and the Court's other decisions grounding reasonableness balancing at least in part in the nature of the underlying crime, had *Jardines* been suspected of kidnapping a child, the dog sniff from the front stoop may sensibly have been permitted without a warrant, even in the absence of exigent circumstances.

Considering the nature of the underlying crime in determining the constitutionality of a police investigative action would accord more naturally with totality-of-the-circumstances balancing than with a bright-line inquiry, and thus with a robust deliberation as to the reasonableness of the action. Though *Jardines*'s privacy interests perhaps reasonably balanced with law enforcement's interest in curbing marijuana trafficking, the Court's opinion further engrains the transsubstantive nature of Fourth Amendment inquiry. Professor Akhil Reed Amar has argued that a full-bodied balancing of a multitude of factors, including "privacy and secrecy," "bodily integrity," "personal dignity," as well as "popular sentiment," is the very stuff of Fourth Amendment reasonableness analysis.⁷² Adding the nature of the underlying crime to the list would follow in the footsteps of *Terry* and its progeny and would make room for a different, though similarly reasonable, outcome in circumstances involving violent crime.

⁷⁰ Cf. Stuntz, *supra* note 8, at 851 (proposing a threshold under which police would need probable cause to believe a fleeing suspect had committed a sufficiently violent crime before shooting him).

⁷¹ This is not to say that *Jardines* would be indifferent to a search of his home under one circumstance versus under the other; if he had committed both crimes and were given a choice, he may prefer a search turning up evidence of growing marijuana to one revealing evidence of kidnapping. Rather, the nature of the invasion, the intrusion into *Jardines*'s home, would have remained the same across the two cases.

⁷² Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098–99 (1998) (emphasis omitted).