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## Knock and Talk No More

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# KNOCK AND TALK NO MORE

*Jamesa J. Drake*

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## KNOCK AND TALK NO MORE

*Jamesa J. Drake\**

The Supreme Court has set out a roadmap for challenging one of the most common and insidious police tactics used today: the knock-and-talk. The path is short and clear and it leads to the inescapable conclusion that the knock-and-talk—as it is actually employed in practice—is unconstitutional. Although the Court has yet to squarely consider the issue, some Justices have already taken pains to say, in *dictum*, that knock-and-talks are lawful.<sup>1</sup> Practitioners should not be dissuaded. What this faction of the Court describes is a highly romanticized—and utterly inaccurate—conception of what a knock-and-talk actually entails.<sup>2</sup> The sort of activity that these members of the Court envision is, unquestionably, constitutional; but it is also the exceedingly rare exception to what normally occurs.

No one doubts that the police may lawfully approach a home, stand at the threshold, and knock on the door in order to speak to the occupant. This is how some members of the Court define a knock-and-talk. But, that is a “false generalization” of what a true knock-and-talk involves.<sup>3</sup>

In practice, the phrase “knock-and-talk” is a catch-all to explain different iterations of police activity, all of which share the same attribute: one or more law enforcement officers approach a targeted residence with a predetermined plan to circumvent the warrant requirement and convince the homeowner to let them inside using tactics designed to undermine, if not completely subjugate, the homeowner’s free will.

For years, criminal defendants have argued to the lower courts that knock-and-talks coerce the homeowner into consenting to a search. This approach has had little success because voluntariness jurisprudence is notoriously bad. Now, there is another option that bypasses the voluntariness morass altogether.

Under the Court’s newly revived trespass theory, when the police engage in a true knock-and-talk, they violate the Fourth Amendment the moment they breach the curtilage with the purpose of obtaining information from within; by the time they reach the front door, the die is cast.<sup>4</sup> When given, the homeowner’s consent is

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1. See *Florida v. Jardines*, 133 S. Ct. 1409, 1423 (2013) (Alito, J., dissenting).

2. *Id.* at 1423 (“[P]olice officers do not engage in a search when they . . . engage in a ‘knock and talk,’ *i.e.* knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence.”); *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2001) (“When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.”).

3. *Jardines*, 133 S. Ct. at 1416 n.4.

4. *Id.*; *King*, 131 S. Ct. at 1858 (“[O]fficers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs.”); Brief for the United States as Amicus Curiae Supporting Petitioner at 22, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. 11-564), 2012 WL 1561150, at \*22. (“This analysis assumes that law enforcement officers have not violated the Fourth Amendment by arriving at [their] location . . . . If the police committed a constitutionally proscribed trespass or otherwise invaded a protected privacy interest before the dog sniff, even though the dog sniff is not a search, the police action would not be valid.”).

properly viewed as a non-attenuated fruit of this antecedent Fourth Amendment violation, leaving the police with no constitutional foothold to justify any resulting search.

This argument is made possible by the sweeping language in *Florida v. Jardines*.<sup>5</sup> In that case, the police breached the curtilage in order to gather probable cause evidence. The police brought a drug-sniffing dog onto the defendant's front porch and used the dog's "alert" to justify a search warrant.<sup>6</sup> The Court held that the implicit license that typically permits visitors, including the police, to approach the home does not permit them to breach the curtilage in the sole hope of discovering incriminating evidence.<sup>7</sup> "There is no customary invitation to do *that*," the Court explained.<sup>8</sup> A "search" for Fourth Amendment purposes occurred because the officers learned what they learned only by physically intruding on constitutionally-protected space: the home's front doorstep.<sup>9</sup>

In a knock-and-talk situation, the police breach the curtilage in order to "gather" the homeowner's consent, evidence that they then use to justify the decision to forego a warrant altogether. The implicit license that permits the police to approach the home in order to speak with the occupant does not also permit them to target a specific residence and execute a coordinated plan to sidestep the warrant requirement using tactics designed to wrest permission from the homeowner to come inside. There is no customary invitation to do *that*.

The starting point in the analysis is *Kentucky v. King*.<sup>10</sup> It provides essential context to the holding in *Jardines*.

#### I. *KENTUCKY V. KING*

*King* is billed as a case about police-created exigent circumstances, but it has much more interesting things to say about consent. The facts in *King* bear some resemblance to a knock-and-talk: multiple, uniformed officers approached a private residence, banged loudly on the door and eventually made their way inside. But the similarities end there.

In *King*, three uniformed officers entered the breezeway of an apartment complex around 10 o'clock at night in pursuit of a fleeing crack cocaine dealer.<sup>11</sup> They lost sight of the crack dealer, but as chance would have it, they smelled "a very strong odor of burnt marijuana" emanating from one of the nearby apartments.<sup>12</sup> So their focus shifted.<sup>13</sup> They "approached the door of that apartment."<sup>14</sup> The officers "banged" on the apartment door "'as loud as [they] could' and announced, '[t]his is the police' or '[p]olice, police, police.'"<sup>15</sup> The

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

6. *Id.* at 1413.

7. *Id.* at 1415-16.

8. *Id.* at 1416.

9. *Id.* at 1416-17.

10. *Kentucky v. King*, 131 S. Ct. 1849 (2011).

11. *Id.* at 1854.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (alteration in original) (citation omitted).

officers then heard sounds that led them “to believe that drug-related evidence was about to be destroyed”; they “announced that they ‘were going to make entry inside the apartment’”; and they kicked in the door.<sup>16</sup> The Court held that the police did not impermissibly create exigent circumstances because they did not engage or threaten to engage in conduct that violated the Fourth Amendment,<sup>17</sup> and it remanded the case to the lower court to decide whether the circumstances were truly exigent.<sup>18</sup>

In reaching that conclusion, the Court observed that “officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs.”<sup>19</sup> If consent is freely given, “[i]t makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.”<sup>20</sup> “When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.”<sup>21</sup> Banging loudly on the front door and yelling is “entirely consistent with the Fourth Amendment.”<sup>22</sup> The Court revisited this thinking in *Jardines*.

## II. *FLORIDA V. JARDINES*

Soon after *King*, the Court again considered the constitutionality of law enforcement activity on the doorstep of a private residence. In *Jardines*, the police received an unverified tip that the defendant was growing marijuana inside his home and members of a “joint surveillance team” were sent to investigate.<sup>23</sup> Two officers and a drug-sniffing dog approached the home.<sup>24</sup> As the dog approached the front porch, he “sensed one of the odors he had been trained to detect” and began exploring the area.<sup>25</sup> “After sniffing the base of the front door,” the dog signaled a positive alert for narcotics.<sup>26</sup> “On the basis of what [they] learned at the home, [the police] applied for and received a warrant to search the residence.”<sup>27</sup>

The case was “straightforward”<sup>28</sup> and “easy,”<sup>29</sup> the Court said. Here, the Court explained, “there is no doubt” that the officers entered the curtilage of Jardines’ home.<sup>30</sup> Because “the officers’ investigation took place in a constitutionally protected area,” the next question was “whether it was accomplished through an unlicensed physical intrusion.”<sup>31</sup> Curtilage (unlike the home itself, for example)

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16. *Id.* (citation omitted).

17. *Id.* at 1858.

18. *Id.* at 1863.

19. *Id.* at 1858 (citation omitted).

20. *Id.* Justice Alito’s opinion was joined by every member of the Court except Justice Ginsburg. *Id.* at 1853.

21. *Id.* at 1862.

22. *Id.* at 1863.

23. *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1414.

29. *Id.* at 1417.

30. *Id.* at 1415.

31. *Id.*

has a unique attribute: all sorts of people enter it all the time without the homeowner's express consent—"the Nation's Girl Scouts and trick-or-treaters," for example.<sup>32</sup> This includes the police, too. As the Court explained in *King* and reiterated in *Jardines*, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" <sup>33</sup> And so the issue boiled down to this: "[a]s it is undisputed that the detectives . . . [were] firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so."<sup>34</sup> The Court held that "[h]e had not."<sup>35</sup> There is no "customary invitation" to "engage in canine forensic investigation" around the home.<sup>36</sup>

The Court's use of the phrase "canine forensic investigation" is significant: a dog sniff is itself not a "search."<sup>37</sup> The dog's presence was important to the analysis because it objectively revealed that the officers' true purpose was to gather evidence in support of a search warrant. The concurring opinion makes much of the fact that a drug-sniffing dog is a "super-sensitive instrument . . . deployed to detect things . . ."<sup>38</sup> However, the majority opinion is not so narrowly understood. *Jardines*'s application is not limited to technological aids. Plenty of other factors can evince an officer's subjective intent to search.

### III. THE CONSTITUTIONAL SIGNIFICANCE OF "GATHERING EVIDENCE"

The holding in *Jardines* is straightforward. The Court's reasoning is not. The main difficulty is the apparent circularity of the Court's logic: the reasonableness of a search depends on whether the police had an implied license to enter constitutionally-protected space, which in turn depends on the purpose for which the police entered, and if the officers' purpose was to conduct a search, then their entry was unreasonable.<sup>39</sup>

Other portions of the opinion provide greater clarity. The Court repeatedly says that physically intruding onto the curtilage to "gather information,"<sup>40</sup> "trawl for evidence,"<sup>41</sup> or "gather evidence"<sup>42</sup> exceeds any license explicitly or implicitly permitted by a homeowner. The dissenting opinion likewise understands the majority's gravamen to be entry onto the curtilage to "gather evidence" or for "discovering information."<sup>43</sup>

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32. *Id.*

33. *Id.* at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)).

34. *Id.* at 1415.

35. *Id.*

36. *Id.* at 1416.

37. *Id.*; *Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 707 (1983).

38. *Jardines*, 133 S. Ct. at 1418.

39. *Id.* at 1416-17.

40. *Id.* at 1414-15.

41. *Id.* at 1414.

42. *Id.* at 1416-17.

43. *Id.* at 1424 (Alito, J., dissenting).

Without a doubt, this language is “dizzying because of its breadth”<sup>44</sup> and there is a very real possibility that conduct previously believed to be constitutional is no longer.<sup>45</sup> The opinion induces a strong, “the Court doesn’t really mean that, right?” reaction. Time will tell whether *Jardines*’ sweeping language has staying power.

The core of the opinion, however, is likely to endure. Importantly, the full Court agrees on the legal framework.

First, the sanctity of the curtilage is a mainstay of Fourth Amendment law.<sup>46</sup> As far as the scope and strength of Fourth Amendment protections are concerned, there is no distinction between the home itself and the curtilage surrounding the home.<sup>47</sup> *Jardines* reinforces that top to bottom.<sup>48</sup>

Lower courts have questioned whether apartment dwellers, who generally do not enjoy the exclusive use of common lobbies or hallways, have the same curtilage protections as residents of free-standing single-family homes.<sup>49</sup> This is significant for our purposes because apartments and multi-family units are not immune from knock-and-talks. Here again, practitioners should not be dissuaded. The small patch of property immediately in front of the door – *e.g.* the doorstep; where the police must physically stand in order to knock on the door – is unambiguously within the ambit of robust Fourth Amendment concern. As the Indiana Court of Appeals has astutely observed:

Individuals who live in apartments often hang decorations on outside doors and place doormats on the ground outside the door. Further, individuals who have apartments that exit immediately outside often place and keep personal items on their steps or porches. Simply because one lives in an apartment does not mean that he or she does not at all times occupy the space immediately outside of the apartment home. Thus, one who lives in an apartment also treats the area immediately outside his or her apartment home as his or her curtilage.<sup>50</sup>

The *Jardines* majority instructs that “[t]he front porch is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’”<sup>51</sup> The concurring and dissenting opinions agree on that point, too.<sup>52</sup>

Second, the full Court acknowledges that *Jardines* sits on a new, or at least,

44. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(g), at 20 (5th ed. Supp. 2013).

45. *Id.* at § 2.3(c), at 25.

46. See *United States v. Dunn*, 480 U.S. 294, 300-04 (1987).

47. “We . . . regard the area ‘immediately surrounding and associated with the home’—what our cases call the curtilage—‘as part of the home itself for Fourth Amendment purposes.’” *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

48. *Id.* at 1414-15; *id.* at 1422-23 (Alito, J., dissenting).

49. See, *e.g.*, WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(f), at 789 (5th ed. 2012) (“Whether considered from the perspective of the curtilage concept or the more modern justified-expectation-of-privacy approach, it is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single-family residence.”).

50. 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, 318 (2007) (quoting *Robertson v. State*, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000), *vacated on other grounds*, 765 N.E.2d 138 (Ind. 2002)).

51. *Jardines*, 133 S. Ct. at 1415 (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984)).

52. *Id.* at 1418 (Kagan, J., concurring); *id.* at 1421-23 (Alito, J., dissenting).

newly revived, branch of Fourth Amendment jurisprudence. Property rights played a non-trivial role in the resolution of early Fourth Amendment cases,<sup>53</sup> and to the surprise of many,<sup>54</sup> the Court purported to return to a so-called “trespass theory” in *United States v. Jones*.<sup>55</sup> In that case, the Court concluded that the placement of a GPS monitor on the undercarriage of a car constituted a “search.”<sup>56</sup> It reasoned that “when ‘the Government obtains information by physically intruding’” on constitutionally protected space, “a ‘search’ has ‘undoubtedly occurred.’”<sup>57</sup> We now know from *Jones* that Fourth Amendment protection depends on common-law trespass.<sup>58</sup> This is “the baseline”<sup>59</sup> and this approach is particularly apt when the police “‘engage in [a] physical intrusion of a constitutionally protected area.’”<sup>60</sup> *Jardines* is the first post-*Jones* application of the trespass test, and, not surprisingly, the full Court agreed that *Katz* was not the sole measure of Fourth Amendment protection for the home.<sup>61</sup>

Third, all of the members of the Court agree that the trespass test hinges on “background social norms”<sup>62</sup> and “shared social expectations”<sup>63</sup> about activity within the curtilage.<sup>64</sup> This defines the scope of an officer’s implicit license to enter.

All this agreement makes applying *Jardines* fairly straightforward. If the police were unambiguously within the curtilage, then the only remaining question is why they were there.

*A. The Police May “Approach the Home in Order to Speak With the Occupant”*

Of course, the Court does not unanimously agree about the scope of a homeowner’s implicit license to enter the curtilage.<sup>65</sup> To that point, the dissenting

53. Cf. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (2012). Professor Kerr argues that “no trespass test was used in the pre-*Katz* era. Neither the original understanding nor Supreme Court doctrine equated searches with trespass. *Jones* purports to revive a test that did not actually exist.” *Id.* at 68. Nonetheless, Professor Kerr notes that “[p]roperty traditionally had played a role in Fourth Amendment law, just as it continues to play a role today.” *Id.* at 87. “But it was never the exclusive test.” *Id.*

54. *Id.* at 68 n.5 (noting the fact that “‘the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test’ came as a surprise to every student and scholar of the Fourth Amendment.”) (quoting *United States v. Jones*, 132 S. Ct. 945, 952 (2012)).

55. *Jones*, 132 S. Ct. at 962 (Sotomayor, J., concurring).

56. *Id.* at 949.

57. *Jardines*, 133 S. Ct. at 1414 (quoting *Jones*, 132 S. Ct. at 950 n.3).

58. *Jones*, 132 S. Ct. at 949.

59. *Jardines*, 133 S. Ct. at 1414.

60. *Id.* (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)) (alteration in original).

61. *Jardines*, 133 S. Ct. at 1414.

62. *Id.* at 1416 (majority opinion).

63. *Id.* at 1419 (Kagan, J., concurring) (quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (1978)).

64. *Id.* at 1420-22.

65. But even on this point, there is some unanimity. All of the members of the Court agree that the implicit license has spatial (the police may not “veer from the pathway that a visitor would customarily use”) and temporal (the police may not “linger”) limitations. See, e.g., *id.* at 1422 (Alito, J., dissenting). The dissenters even suggest that nighttime entry onto the curtilage exceeds the homeowner’s implicit license. The majority does not engage on this point, but it is likely that they would agree, as well.

opinion has a number of interesting things to say about knock-and-talks and whether they fall within the implicit license afforded to the police. On the one hand, the dissenters, led by Justice Alito, helpfully observe that by the Court's logic, knock-and-talks fall outside the scope of an implicit license.<sup>66</sup> The dissenters remark that if entry onto the curtilage to gather evidence constitutes a search, "then a standard 'knock and talk' and most other police visits would likewise constitute searches."<sup>67</sup> "With the exception of visits to serve warrants or civil process," the dissenters observe, "police almost always approach homes with a purpose of discovering information. That is certainly the objective of a 'knock and talk.'"<sup>68</sup> They lament that "[t]he Court offers no meaningful way of distinguishing the 'objective purpose' of a 'knock and talk' from the 'objective purpose' of [the officers who entered Jardines's curtilage with a drug dog]."<sup>69</sup> The dissenters are correct.

On the other hand, the dissenters in *Jardines* find this incongruous with *King*. They argue:

As we recognized in *Kentucky v. King*, police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a 'knock and talk,' *i.e.*, knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence.<sup>70</sup>

Again alluding to *King*, the dissenters add that it does not matter whether "the objective of a 'knock and talk' is to obtain evidence . . . even damning evidence . . ."<sup>71</sup> Still, no Fourth Amendment problem presents.<sup>72</sup> The dissenters are wrong in this regard. *King* is not that broad.

Writing for the Court, Justice Scalia responds: "The dissent argues, citing *King*, that 'gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach.' That is a false generalization." He continues:

What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere purpose of discovering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment.<sup>73</sup>

The officers in *Jardines* ran afoul of the Fourth Amendment, Justice Scalia reiterates, because "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search."<sup>74</sup>

This exchange leads to an important conclusion. The entire Court agrees that the police may "approach the home in order to speak with the occupant" because

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66. *Id.* at 1424 (Alito, J., dissenting).

67. *Id.* .

68. *Id.*

69. *Id.*

70. *Id.* at 1423 (citation omitted).

71. *Id.*

72. *Id.*

73. *Id.* at 1416 n.4 (majority opinion) (citation omitted).

74. *Id.*

that conduct falls within the implied license.<sup>75</sup> This does not mean that the Court has sanctioned knock-and-talks.

*B. Trespass Theory at the Gut Level*

Viewed broadly, *Jardines* stands for the basic proposition that the police must behave in the same manner as any other visitor is expected to behave.<sup>76</sup> This gut level assessment is likely to strike an appropriate balance and the Court appears to encourage this approach.<sup>77</sup> This is good.<sup>78</sup> Instead of getting bogged down in the distinction between approaching the home in order to speak with the occupant (permissible), and approaching the home in order to discover information (impermissible), it is much easier to simply ask: Would most people find the officers' conduct offensive? In the case of a knock-and-talk, the answer is a resounding: yes!

With this legal framework in mind, it is now time to examine precisely what a knock-and-talk entails. Because Justice Alito misunderstands the technique, his suggestion that "police officers do not engage in a search when they . . . engage in what is termed a 'knock and talk'" is also wrong.<sup>79</sup>

Consider the Chief Justice of the Arkansas Supreme Court's definition: "[A] knock and talk is used to obtain consent by none too subtle intimidation, which further illustrates that it is not simply being used to ask questions at the door as anyone might do."<sup>80</sup> He describes the typical knock-and-talk scenario thusly: "Law enforcement may arrive either by driving up to the dwelling with multiple cars . . . or by stealth, walking through the property to arrive at the door without warning. Multiple officers may arrive for the knock and talk."<sup>81</sup> This is far different than what Justice Alito envisions.

IV. JUSTICE ALITO'S INACCURATE DEFINITION OF A KNOCK-AND-TALK

"Knock-and-talk" is a term of art. Justice Alito's definition, *e.g.* "knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence" which "will lead to the homeowner's arrest and prosecution,"<sup>82</sup> has not been endorsed by a majority of the Court, and rightly so. His definition is overbroad—"a false generalization"<sup>83</sup>—and ultimately, uninformative. Talking to citizens to gather new information is a cartoonish way to describe the act of policing, and no one seriously doubts that the act of merely speaking to a homeowner is permitted without a warrant.

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75. *Id.* at 1415-16, 1423.

76. *See supra* text accompanying note 32.

77. *Id.* at 1415 ("Complying with the terms of . . . traditional invitation does not require fine-grained legal knowledge; it is generally managed by the Nation's Girl Scouts and trick-or-treaters.")

78. Even with electronic research capabilities, there is little chance that overworked trial lawyers and judges will plumb the depths of the common law of trespass at the time of the Nation's founding to guide their assessment of the scope of an implicit license.

79. *Jardines*, 113 S. Ct. at 1423.

80. Jim Hannah, *Forgotten Law and Judicial Duty*, 70 ALB. L. REV. 829, 837 (2007).

81. *Id.* at 837.

82. *Jardines*, 133 S. Ct. at 1423 (Alito, J., dissenting).

83. *Id.* at 1416 n.4 (majority opinion).

The “[p]olice can, of course, acting in their protective capacity, respond to noise complaints, complaints of fights, etc., because these either do not involve criminal investigations focused on particular individuals or are justified by exigent circumstances.”<sup>84</sup> Likewise, the police may “canvass an area following a crime seeking out information from householders as to what they may have witnessed, since this investigation has not focused on a particular subject and they are not going, as far as they know, to his dwelling.”<sup>85</sup> And, obviously, “a police officer might approach one’s door to sell tickets to a policeman’s ball . . . in the same capacity as a salesperson might.”<sup>86</sup>

But none of these things resembles a true knock-and-talk, even under the best of circumstances. Certainly it is not what a knock-and-talk means to law enforcement.

It is worth pausing to note that Justice Alito’s misunderstanding of knock-and-talks might be forgiven. *Jardines* was the first time that any member of the Court had ever mentioned the term. Although the phrase appeared in the briefs submitted in both *King* and *Jardines*, none of the parties or amici in either case seriously attempted a definition.<sup>87</sup>

At its core, Justice Alito’s definition of a knock-and-talk overlooks all the reasons why police departments have so enthusiastically embraced the practice. Talking to citizens to gather information is what the police have done for ages. But knock-and-talks are something new and different; and they have caught on like wild fire.<sup>88</sup>

#### V. THE KNOCK-AND-TALK TASK FORCE

A knock-and-talk is “a technique employed with calculation to the homes of people suspected of crimes.”<sup>89</sup> Police use this technique “to gain access to a home without a search warrant by getting the occupant to consent to entry and search . . . . [K]nock and talk might more aptly be named “knock and enter,” because [that] is

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84. Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099, 1123 (2009).

85. *Id.*

86. *Id.* (quoting Griffin v. State, 67 S.W.3d 582, 594 (Ark. 2002) (Hannah, J., concurring)).

87. See Brief for the Commonwealth of Kentucky at 13, Kentucky v. King, 131 S. Ct. 1849 (2011) (No. 09-1272) 2010 WL 4624149 at \*13 (“One of the most common police investigatory procedures is a ‘knock and talk,’ in which officers lawfully approach a person’s home and engage them in conversation.”); Reply Brief for the State of Florida at 13, Florida v. Jardines, 133 S. Ct. 1409 (2013) (No. 11-564), 2012 WL 3132158 at \*13 (“Generally on-duty officers do not make house calls to chit-chat. The expected purpose of any ‘knock and talk’ would be to gather evidence via a conversation.”); Brief of The National Police Canine Ass’n & Police K-9 Magazine as Amici Curiae in Support of Petitioner at 3, Florida v. Jardines, 133 S. Ct. 1409 (2013) (No. 11-564), 2012 WL 1525673, at \*3 (without citation to any authority, describing a knock and talk as “where law enforcement officers are allowed to walk up to a house (being lawfully present) knock on the front door of a home, wait for an answer and have a consensual encounter with the home owner”).

88. Knock-and-talks are relatively new; “[p]rior to 1991, no appellate case ever used the phrase ‘knock and talk’ in reference to a consent search of a home.” H. Morley Swingle & Kevin M. Zoellner, “*Knock and Talk*” Consent Searches: *If Called By a Panther, Don’t Anther*, 55 J. MO. B. 25, 25 (1999).

89. Bradley, *supra* note 84, at 1104.

usually the officer's goal."<sup>90</sup>

There is no shortage of examples of a knock-and-talk in practice. For example, the Dallas Police Department has a "46-member knock-and-talk task force."<sup>91</sup> Task force members "rely mostly on neighbors' tips about unusual activity. Uniformed officers walk up to front doors and ask for permission to go inside. Police record the audio of the conversations to ensure that they have explicit consent to enter."<sup>92</sup> In this situation, "[n]iceness is the key."<sup>93</sup>

In Florida, the Orange County Sheriff's Office has an entire division, Squad Five, dedicated to performing knock-and-talks. This squad conducts an estimated 300 knock-and-talks each month.<sup>94</sup> The commander of Squad Five has refused media requests for an interview and has declined to explain precisely what it is that his agents do, but a veteran Orlando Police Department drug officer acknowledged that with a knock and talk, "you go for broke . . . ."<sup>95</sup>

That means sending out three to six plainclothes agents, some of whom may be wearing 'hit gear': vests or smocks, . . . an I.D. badge dangling from their necks and gun belts on their hips. The effect is twofold: Police want you to be intimidated enough to let them in, but they don't want to pose such a threat that suspects clam up.<sup>96</sup>

Other similar examples abound.

Knock-and-talks are not new to the lower courts.<sup>97</sup> Their opinions also shed light on what the practice actually entails. For example, in the Ninth Circuit, nine law enforcement officers knocked on the door "between three and seven times"; after an occupant opened the door, one of the officers explained, "we're here from the DEA" and "we know this house. There was drug-related activity before. We would like to come in and look around. Can we come in[?]"<sup>98</sup>

In the Fifth Circuit,

90. *Id.* at 1104-05 (alteration in original) (quoting *Hayes v. State*, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003)).

91. Tristan Hallman, *Dallas Police Are Finding Drug Houses by Walking up and Asking*, DALLAS MORNING NEWS, (Aug. 25, 2013, 11:14 PM), <http://www.dallasnews.com/news/crime/headlines/20130825-dallas-police-finding-drug-houses-by-walking-up-and-asking.ece>.

92. *Id.*

93. *Id.*

94. William Dean Hinton, *Knock and Talk*, ORLANDO WEEKLY, (Jan. 9, 2003), <http://www2.orlandoweekly.com/features/story.asp?id=2940>.

95. *Id.*

96. *Id.* In West Virginia, the Logan County Sheriff's Department and the U.S. 119 Drug Task Force launched "Operation Knock and Talk." The local radio station, WVOW, *The Voice of the Coalfields*, rather opaquely warned listeners: "Officers will approach residences known for drug activity and knock on the door to speak with individuals to obtain information and to let potential drug violators know there is a police presence looking for drug activity." *Operation Knock and Talk*, WVOW, THE VOICE OF THE COALFIELDS, <http://wvowradio.com/Article.asp?id=2782478&spid=37834> (last visited Sept. 26, 2014).

97. The cases cited in this paragraph were basically culled at random, with an eye towards geographic diversity, from a Westlaw keyword search for "knock and talk."

98. *United States v. Arreguin*, 735 F.3d 1168, 1171-72 (9th Cir. 2013) (alteration in original). The woman who opened the door then allowed the police to come inside and search. *Id.* The Ninth Circuit suppressed the subsequently-discovered evidence on the theory that it was not reasonable for the officers' to believe that the woman had actual authority to consent to a search of the premises. *Id.* at 1176-78.

[A] team of approximately eleven law enforcement officers, from various state and federal agencies, arrived to conduct a ‘knock and talk.’ A joint law enforcement task force had received reports of narcotics trafficking at the . . . residence, and the officers hoped to obtain consent to search the residence . . . . Three officers were assigned to secure the perimeter in the back of the house. Instead of positioning themselves outside the property line, however, the officers entered the fenced-in backyard through unlocked gates on the right and left sides of the house.<sup>99</sup>

In the Tenth Circuit, police officers received a tip about suspected drug activity at a particular residence. “Two of the officers approached the residence to conduct a ‘knock-and-talk.’ A woman answered the door. Officer Adkins introduced himself, showed his badge, and asked if he and the other officer could come in.”<sup>100</sup> After “[t]he officer explained the tip,” he asked the homeowner “if the officers could search the residence . . . .”<sup>101</sup>

#### VI. LOWER COURT DEFINITIONS OF A “KNOCK-AND-TALK”

Not surprisingly, the lower courts, which have a great deal of experience with knock-and-talk cases, have defined the phrase differently than Justice Alito. For example, the North Carolina Supreme Court has described a knock-and-talk as a “tactic” used by law enforcement when they “don’t have probable cause for a search warrant.”<sup>102</sup> Officers “proceed to the residence, knock on the door, and ask to be admitted inside.”<sup>103</sup> After “gaining entry, the officers inform the person that they’re investigating information that drugs are in the house. The officers then ask for permission to search . . . .”<sup>104</sup>

The Maryland Court of Appeals describes a knock-and-talk as a “procedure” whereby police officers “lacking a warrant or other legal justification for entering or searching” a home knock and identify themselves, “request entry in order to ask questions concerning unlawful activity in the area, and, upon entry, eventually ask permission to search the premises.”<sup>105</sup>

So, too, the North Carolina Supreme Court: law enforcement officers “approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband”;<sup>106</sup> the Iowa Supreme Court: “a ‘knock and talk’ . . . involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house”;<sup>107</sup> and the Michigan Court of Appeals: police “go to a suspect’s residence, engage the individual in a conversation, and

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99. *United States v. Rios-Davila*, 530 F. App’x 344, 345 (5th Cir. 2013). The court reasoned that the defendant lacked standing to challenge the search of the residence. *Id.* at 347.

100. *United States v. Lucas*, 477 F. App’x 486, 487 (10th Cir. 2012).

101. *Id.* The court upheld the search pursuant to the consent exception to the warrant requirement. *Id.* at 490.

102. *State v. Smith*, 488 S.E.2d 210, 212 (N.C. 1997).

103. *Id.*

104. *Id.* (adopting the trial court’s description of a knock-and-talk).

105. *Scott v. State*, 782 A.2d 862, 867 (Md. 2001).

106. *Smith*, 488 S.E.2d at 214.

107. *State v. Reinier*, 628 N.W.2d 460, 466 (Iowa 2001).

attempt to obtain consent to conduct a search.”<sup>108</sup>

Other courts have adopted similar definitions.<sup>109</sup> The point is, in a knock-and-talk situation, the police are doing much more than simply approaching the home in order to speak with the occupant.

## VII. WHY KNOCK-AND-TALK?

In order to better understand why a homeowner would not impliedly consent to becoming the subject of a knock-and-talk, it is worth considering why the police are so fond of the technique.

The popularity can first be attributed to the fact that knock-and-talks enable the police to enter a home without first establishing any modicum of suspicion—entry simply requires the homeowner’s consent—and it has become exceedingly difficult for criminal defendants to prevail when the prosecution relies on the consent exception to the warrant requirement.<sup>110</sup> As one scholar succinctly put it: “[c]onsent searches are the black hole into which Fourth Amendment rights are swallowed up and disappear.”<sup>111</sup> Once inside the home, the police might detect incriminating evidence in plain view<sup>112</sup> or pursuant to a protective sweep.<sup>113</sup>

Another reason might be the fact that, from the perspective of law enforcement, consent searches are simply easier and better than searches conducted pursuant to a search warrant: there is no administrative hassle, and they often enable an open-ended search with virtually no limits because unwitting citizens may not understand that they may stop or circumscribe a search already in progress.<sup>114</sup> It should surprise no one that the police would rather test their powers of persuasion on an average citizen than on a neutral and detached magistrate.

The overwhelming majority of police searches are justified by the consent exception to the warrant requirement,<sup>115</sup> and it stands to reason that the overwhelming majority of “consensual” residential searches are preceded by a knock-and-talk. For example, in Michigan, a knock-and-talk ends in a consensual

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108. *People v. Frohriep*, 637 N.W.2d 562, 564 (Mich. Ct. App. 2001).

109. *See, e.g., State v. Warren*, 949 So. 2d 1215, 1221 (La. 2007) (the police “approach the person suspected of engaging in illegal activity at the person’s residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items”); *State v. Flores*, 185 P.3d 1067, 1068 (N.M. Ct. App. 2008) (“[P]olice go to a suspect’s home in an attempt to gain his cooperation” including “seeking consent to search [a] Defendant’s home.”).

110. *See* John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1121 (2007) (“[T]he police understand that [courts almost never find consents to be bad] and thus have increasingly come to rely upon purported ‘consents’ as the basis upon which wholesale searches are undertaken without probable cause and upon no or minimal suspicion.”) (alteration in original) (quoting WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, §8.2 (4th ed. 2004)).

111. *Id.* at 1124 (alteration in original) (quoting Craig M. Bradley, *The Court’s Curious Consent Search Doctrine*, Trial, Oct. 2002, at 72, available at <http://www.atla.org/publications/trial/0210/sct.aspx>).

112. *See, e.g., Horton v. California*, 496 U.S. 128 (1990).

113. *See, e.g., Maryland v. Buie*, 494 U.S. 325 (1990).

114. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 31-33 (2008); LaFave, *supra* note 49.

115. *See, e.g.,* 1 Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure* § 16.01, at 261 (4th ed. 2006).

search eighty to ninety percent of the time.<sup>116</sup> Arkansas has a similar eighty percent “success” rate.<sup>117</sup>

In Independence, Missouri, “[p]olice officers simply walk up to the front door of a suspected drug dealer or manufacturer’s residence, inform the occupants they have received complaints about drug activity in the house, and ask permission to look around.”<sup>118</sup> “[R]esidents consent to a search in these circumstances approximately 80% of the time . . . it’s like shooting fish,” said one detective, bluntly.<sup>119</sup>

It is well beyond the scope of this article to explore why a homeowner might surrender her Fourth Amendment protections so readily.<sup>120</sup> That is to say, this article will not explore whether a knock-and-talk is coercive in the traditional sense, *e.g.*, the homeowner’s will to invoke constitutional protections is overborne by police conduct.<sup>121</sup> Suffice it to say, the argument has been tried. It fails more often than not.

Scholars have vigorously criticized the Court’s consent-exception jurisprudence as out-of-step with the realities of citizen-police encounters, at best, and intellectually dishonest, at worst. The Court’s seminal consent case, *Schneckloth v. Bustamonte*,<sup>122</sup> “was widely criticized when it was announced” and the decision is still highly criticized today.<sup>123</sup> Happily, the homeowner’s ability to refuse entry is irrelevant post-*Jardines*.

#### VIII. CONSENT AS A NON-ATTENUATED FRUIT OF AN ILLEGAL SEARCH

The argument is straightforward. It relies on the well-worn *Wong Sun* framework.<sup>124</sup> First, a defendant must establish an initial illegality, *e.g.*, entry into the curtilage in order to gather evidence, which itself constitutes a search. Then, she must demonstrate that her consent is a non-attenuated fruit of that initial illegality.

This latter step is inherently fact specific. But, in the typical knock-and-talk situation, the homeowner’s consent is given very soon after (in close temporal proximity) to the officers’ entry onto the curtilage, there are no intervening circumstances, and the purpose for which the officers enter is to (flagrantly) circumvent the warrant requirement.

In some jurisdictions, officers engaged in a knock-and-talk are required to give a *Miranda*-like warning to the homeowner, instructing that he or she is free to

116. Herbert Gaylord, *What Good is the Fourth Amendment? “Knock and Talk” & People v. Frohriep*, 19 T.M. COOLEY L. REV. 229, 229 n.5 (2002) (citing Brief for Appellant at 21, Frohriep (No. 96-008412-FH)).

117. Hannah, *supra* note 80, at 837 (citing *Griffin v. State*, 67 S.W.3d 582, 589 (Ark. 2002)).

118. Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 595 n.382 (1998) (citing Debbie Howlett, *Meth: ‘Drug of Choice in Midwest’ Easy-to-Concoct Drug Often Makes Users Turn Violent*, USA TODAY, Sept. 10, 1997, at A1).

119. Howlett, *supra* note 118, at A2.

120. For an excellent discussion of the issue, see Burkoff, *supra* note 110.

121. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973).

122. *Id.* at 218.

123. See Maclin, *supra* note 114, at 52 (collecting scholarly work).

124. *Wong Sun v. United States*, 371 U.S. 471 (1963).. See also *Florida v. Royer*, 460 U.S. 491 (1983); *Brown v. Illinois*, 422 U.S. 590 (1975)..

refuse to consent to search.<sup>125</sup> The burden of proving otherwise rests with the prosecution.<sup>126</sup> Similarly, after *King*, the police sometimes report smelling the odor of marijuana (or, in some cases, precursor substances for the manufacture of methamphetamine) once they find themselves standing in front of the door. This is not an intervening event or an event of any Fourth Amendment significance. The fact that the police have discovered potentially incriminating evidence during the course of an unlawful entry onto the curtilage does not somehow excuse the initial illegality. A “search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.”<sup>127</sup>

Establishing the initial illegality requires proving that the police entered the curtilage to gather evidence—the homeowner’s consent—in support of a search.<sup>128</sup> On a gut level, it requires proving that the officers behaved in a way that ordinary visitors would not. Demonstrating that the officers’ decision to seek the homeowner’s consent was preordained is helpful. Evidence that points in that direction abounds in the typical knock-and-talk scenario, including: (1) the presence of multiple officers—setting aside the issue of whether a show of authority evinces intent to induce the homeowner’s acquiescence to an entry or full-blown search, more than one officer is not required to obtain consent, but is required (and for safety reasons, probably recommended) in order to search an entire residence; (2) meetings or discussions in advance of the officers’ arrival at the house; (3) the immediacy with which the request to enter or search is made; (4) the absence of probable cause—a knock-and-talk serves no investigatory purpose if the police can obtain a warrant; if the police can obtain a warrant, then the only reason for a knock-and-talk is to avoid the warrant requirement;<sup>129</sup> (5) departmental data—specifically, the number of consensual residential searches that were preceded by an unannounced visit by a team of police officers; and (6) common police practice—an entire division devoted to nothing but knock-and-talks, or multiple (*e.g.* hundreds) of knock-and-talks conducted in a months’ time, evince more than carefree conversation between a homeowner and the police; as the State of Florida acknowledged in its *Jardines* briefing: “Generally on-duty officers do not make house calls to chit-chat.”<sup>130</sup>

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125. *See, e.g.*, *Hayes v. State*, 794 N.E.2d 492, 497-98 (Ind. Ct. App. 2003) (“[T]he better practice in conducting a knock and talk would be for the officer to identify himself and advise the occupant of his right to deny entry.”); *State v. Brown*, 156 S.W.3d 722, 730-31 (Ark. 2004); *State v. Ferrier*, 960 P.2d 927, 933-34 (Wash. 1998).

126. *Id.* at 604.

127. *United States v. Di Re*, 332 U.S. 581, 595 (1948).

128. *See, e.g.*, *Florida v. Jardines*, 133 S. Ct. 1409, 1416 n.4 (2013).

129. Bryan M. Abramoske, *It Doesn’t Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in “Knock and Talk” Investigations*, 41 SUFFOLK U. L. REV. 561, 569-70 (2008) (citing *United States v. Jones*, 239 F.3d 716, 721 (5th Cir. 2001)). The Court has posited many of reasons why the police might delay in seeking a warrant in lieu of further investigation. *See Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011). That is obviously true. But, whether the alternative is between executing a warrant and conducting a knock-and-talk (*i.e.* a very specific tactic), only one of the Court’s justifications rings true: “the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant.” *Id.*

130. Reply Brief for the State of Florida at 13, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. 11-564), 2012 WL 3132158, at \*13.

Having demonstrated that the officers' purpose for entering the curtilage is to gather evidence, a homeowner need not further prove that she did not impliedly license the entry. *Jardines* draws a bright line: The police have no license to "explore the area around the home in hopes of discovering incriminating evidence."<sup>131</sup> The inquiry then moves on to the *Brown* non-attenuation factors and, for practitioners and judges, the analysis should end there.

#### IX. HAS THE *JARDINES* COURT CORRECTLY IDENTIFIED SOCIETAL EXPECTATIONS?

As an academic exercise, it is worth considering whether the *Jardines* Court was correct. Is it true that homeowners do not grant an implicit license to the police to enter the curtilage for the sole purpose of gathering evidence in support of an eventual search? There is very little to guide the inquiry. The Court has suggested that the answer depends on "widely shared social expectations . . . [that] are naturally enough influenced by the law of property, but not controlled by its rules."<sup>132</sup> But that is not terribly helpful. One thing is certain: whether something is a *widely* shared social expectation "cannot reliably be answered solely from the comfort of one's armchair, while reflecting only on one's own experience."<sup>133</sup>

The Court has suggested that citizens have many reasons to prefer consensual searches to searches conducted with a warrant. One reason is that "[i]f the [consensual] search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified."<sup>134</sup> Another reason is that "a search pursuant to consent may result in considerably less inconvenience for the subject of the search . . . ."<sup>135</sup> "In a society based on law," the Court says, "the concept of agreement and consent should be given a weight and dignity of its own."<sup>136</sup> All that may be true. When the choice is between a search pursuant to a warrant and a search pursuant to consent, the Court may be correct. But, that is not the choice presented to homeowners in a knock-and-talk situation. When the choice is between a knock-and-talk and being left alone, it is safe to presume that citizens would prefer to be left alone. That comports with much of the Court's jurisprudence in other contexts.<sup>137</sup>

It also accords with basic notions of individual liberty. It is axiomatic that a citizen would rather keep to herself—particularly within the sanctity of her home—than submit to a baseless encounter with a police officer designed only to assuage the officer's hunch that she might be a criminal. Although it is by no means a perfect analogy, perhaps the most infamous modern-day example of the police trawling for evidence is New York City's Stop-and-Frisk Program.<sup>138</sup> "On over 2.8

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131. *Jardines*, 133 S. Ct. at 1416.

132. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006).

133. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002).

134. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

135. *Id.*

136. *United States v. Drayton*, 536 U.S. 194, 207 (2002).

137. *Cf. Carey v. Brown*, 447 U.S. 455, 469 (1980).

138. *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012).

million occasions between 2004 and 2009, New York City police officers stopped [people and] restrain[ed] their freedom, even if only briefly.”<sup>139</sup> Nearly ninety percent of the time, the police uncovered no criminal wrongdoing.<sup>140</sup> Suffice it to say, few of the people subjected to a forced encounter (a “seizure”) with the police—even one that ultimately ended without criminal incident—were agnostic about their experience. Rather, they formed a class, “well over one hundred thousand” in number, and they sued the City.<sup>141</sup> Of course, a homeowner—unlike the persons seized in New York City—could simply ignore the police when they knock on the door.<sup>142</sup> But, it would be utterly illogical to conclude that whether a police officer has trespassed into the curtilage depends on the homeowner’s presence of mind to ignore him.

There is also obvious intuitive support for the notion that a homeowner would not consent to any of the knock-and-talk scenarios detailed above. It is safe to presume that a homeowner who saw a group of citizens behaving in the manner of the officers in those cases would immediately lock the doors, shield the children, and—“well, call the police.”<sup>143</sup> The dissenting opinion in *Jardines* minimized the significance of the drug-sniffing dog by arguing that “common law allowed even unleashed dogs to wander on private property without committing a trespass.”<sup>144</sup> But, there is no common law tradition of knock-and-talks; this law enforcement tactic is entirely new, and, to an unsuspecting homeowner, highly disconcerting *by design*.

Knock-and-talks make a good number of lower courts queasy, too, which further suggests that there is no widely shared social custom to permit such activity. The Chief Justice of the Arkansas Supreme Court has expressed his unease with knock-and-talks, and he paints a very vivid picture of what they truly entail, much of which rebuts Justice Alito’s romanticized version of the practice. He writes: “[A]sking questions is often no longer necessarily the primary purpose of a knock and talk. Often it is not one officer, but two or more who approach the door. Many times, the intent in going to a citizen’s door is not to talk but to obtain consent to search.”<sup>145</sup> He continues by noting that “[l]aw enforcement utilizes the knock and talk in lieu of a warrant when they recognize that they do not have probable cause or reasonable cause to obtain a search warrant.”<sup>146</sup> His conclusion is that “[t]his misuse of a knock and talk causes concern that the protections against warrantless searches are being eroded.”<sup>147</sup> In 2002, the Arkansas Supreme Court agreed with him and “declared that its interpretation of the state constitutional provision on unlawful search and seizure no longer mirrored the interpretation of the United States Supreme Court on the Fourth Amendment” and “[t]his departure came

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139. *Id.* at 159.

140. *Id.* at 168.

141. *Id.* at 172.

142. *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011).

143. *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013).

144. *Id.* at 1424 (Alito, J., dissenting).

145. Hannah, *supra* note 80, at 837.

146. *Id.*

147. *Id.*

because of the ‘knock and talk.’”<sup>148</sup> After *Jardines*, states will no longer have to break with the United States Supreme Court to declare unconstitutional searches resulting from knock-and-talks.

Other courts, which are similarly not known for being overly sympathetic to criminal defendants, have also cried foul. In an opinion that gives detailed account of a purported knock-and-talk, the U.S. District Court for the Northern District of Texas rejected the idea that officers conducting a knock-and-talk simply sought out a consensual encounter with the occupants:

The court does not find credible the testimony that the entry onto Berry’s property was merely for the purpose of a permissible ‘knock and talk.’ The court determines that the conduct of the officers, who knew they lacked probable cause, reflects a plan or effort to arrest Berry without getting a warrant. The totality of the circumstances suggest a major operation. There were at least eight officers present. The officers carefully planned the operation, staked out their positions surrounding Berry’s house, and took cover positions. Four officers entered Berry’s patio and approached the front door. This is overkill for the stated purpose of a “knock and talk.”<sup>149</sup>

Lower courts, which have the greatest familiarity with the true nature of a knock-and-talk should be particularly receptive to the arguments made herein.

#### X. CONCLUSION

Knock-and-talks are a new law enforcement innovation, specifically designed and implemented to circumvent the warrant requirement. Because no homeowner grants an implicit license to the police to enter the curtilage for the sole purpose of undermining her constitutional rights, the officers’ presence on the front doorstep qualifies as a search for Fourth Amendment purposes. Any resulting consent will, in the mine-run of cases, be the non-attenuated fruit of this initial illegality. After *Jardines*, it is no longer necessary to argue that the homeowner’s consent was coerced; it is enough to demonstrate that the consent was tainted by the officers’ unlawful entry onto the curtilage. Justice Alito’s “false generalization” about what a knock-and-talk entails should not dissuade practitioners or lower courts. The police may knock-and-talk no more.

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148. *Id.* at 836 (citing *Griffin v. State*, 67 S.W.3d 582, 593 (Ark. 2002) (Corbin & Hannah, JJ., concurring)).

149. *United States v. Berry*, 468 F. Supp. 2d 870, 880 (N.D. Tex. 2006).