

Motive and Suspicion: *Florida v. Jardines* and the Constitutional Right to Protection from Suspicionless Dragnet Investigations

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I. INTRODUCTION

I have previously argued that courts should consider the time, place, and manner of police intrusions onto the curtilage of private residences, including the common areas of hotels and apartment buildings, when determining whether the police have infringed upon residents' reasonable expectations of privacy and, therefore, performed a search for the purposes of the Fourth Amendment.¹ That proposal was intended to address, among other issues, the widespread practice of suspicionless "knock and talk" investigations not currently regulated by the Supreme Court's interpretation of the Fourth Amendment's prohibition against unreasonable searches and seizures.² I have also previously proposed a Fourth Amendment framework to reign in warrantless bulk data collection and its use in criminal investigations,³ suggesting that the distinction the Court first articulated in *Smith v. Maryland*⁴ between the "contents" of telephone conversations (and other

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¹ 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, 319 (2005), reprinted in THE FOURTH AMENDMENT: SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE (Cynthia Lee ed., 2011) [hereinafter Leonetti, *Curtilage*] (advocating the consideration of the time, place, and manner of entry, in the context of urban and suburban dwellings, in the determination of whether the area surrounding a small, single family home or individual unit in a multi-occupant dwelling is protected by the Fourth Amendment).

² See *id.* at 311–12 (arguing that the Supreme Court's epistemological reliance upon a suburban conceptual framework had encouraged the proliferation of canine sniffs and knock and talks in urban neighborhoods).

³ See Carrie Leonetti, *Bigfoot: Data Mining, the Digital Footprint, and the Constitutionalization of Inconvenience*, 15 J. HIGH TECH. L. 260 (2015) [hereinafter Leonetti, *Data Mining*] (positing that the sheer volume of information that the Government can collect (in the absence of individualized suspicion and the sophisticated algorithms that it uses to aggregate and analyze it) raises independent privacy concerns that themselves should trigger the protections of the Fourth Amendment).

⁴ *Smith v. Maryland*, 442 U.S. 735 (1979) (permitting the warrantless collection of Smith's telephone-usage details because it did not involve surveillance of the contents of his phone calls and he knowingly revealed the usage metadata to the phone company for billing purposes).

electronic data compilations) and their “metadata” loses its meaning in the context of the pattern analyses of large amounts of aggregated third-party data.⁵ These earlier proposals, however, focus on context-specific questions: whether the private approach to a residence is the equivalent of a public sidewalk out in front of it, or whether a consumer’s voluntary revelation of individual digital transactions to private third parties (credit-card companies, toll collectors, etc.) eviscerates any reasonable expectation of privacy that such individual may have in the mosaic derived from all of his/her digital data in the aggregate.

These earlier individual proposals share a broader, common theme, which is the subject of this Article: a desire to create a framework for constitutional protection against “dragnet” searches, i.e., large-scale investigatory sweeps that often are justified, at least in theory, as “consensual encounters” with the police, which the Court’s current jurisprudence suggests are not “searches” for the purposes of the Fourth Amendment. Traditionally, these dragnet investigations exist either outside of the framework that Justice Harlan’s concurring opinion in *Katz v. United States*⁶ set forth for searches (because courts find that they do not intrude upon areas in which individuals have an objectively reasonable expectation of privacy) or within some exception to the Warrant Clause of the Fourth Amendment, like the plain-view or consent doctrines.⁷ This Article addresses this entire category of cases, proposing that a dragnet sweep conducted for the purpose of criminal investigation is, and should be, constitutionally different than a random consensual encounter between the police and a citizen begun for some other purpose. The thesis of the Article is that courts should follow the Supreme Court’s lead in the recent case of *Florida v. Jardines*⁸ and take into consideration the investigatory motive of the police when they conduct large-scale dragnet searches, and find that such purpose may create a “search” in the same way that the Court has previously found in the context of the “special needs” doctrine that the *lack* of an investigatory motive on behalf of investigators can *preclude* one.

⁵ See Leonetti, *Data Mining*, *supra* note 3, at 291–92.

⁶ *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that Katz had a constitutionally protected reasonable expectation of privacy in an enclosed telephone booth and that electronic intrusion into a protected area was a search under the Fourth Amendment, presumptively requiring a search warrant).

⁷ See, e.g., *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [redacted]*, No. BR 13-109, at *7 (FISA Ct. Aug. 29, 2013) [hereinafter “Declassified FISC Opinion”] (Amended Mem. Op.) (on file with author).

⁸ *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

II. SEARCH AS A BIMODAL INQUIRY

Under *Ybarra v. Illinois*,⁹ the probable-cause requirement of the Fourth Amendment has two components: a quantum component and an individualization component. The police must have enough information (typically probable cause) to believe that a crime has occurred (the quantum of suspicion).¹⁰ When the search justified by that suspicion targets a particular individual(s), the necessary quantum of suspicion must focus on the searched individual(s) personally (individualization).¹¹

Historically, the Court has treated the quantum element of probable cause (or reasonable suspicion)¹² for a particular search as a bright line: either the police have “enough” evidence to constitute probable cause (or reasonable suspicion), or they do not. The Court has similarly treated the inquiry into whether a particular police investigatory practice invokes the protections of the Fourth Amendment in the first instance as a bright line: either an investigatory practice is intrusive enough (into a protected area)¹³ to be a “search,” or it is not. After *Katz*, the boilerplate rule is (or is supposed to be) that if the police intrude into an area in which an individual lacks an objectively reasonable expectation of privacy, it does not matter whether they were conducting a criminal investigation when they did

⁹ *Ybarra v. Illinois*, 444 U.S. 85 (1979) (holding that a search warrant, issued upon probable cause, giving police officers the authority to search the premises of a small public tavern and the bartender for narcotics did not justify the pat-down search and seizure from a tavern patron in the absence of a reasonable belief that the patron was involved in any criminal activity or armed or dangerous).

¹⁰ *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining the quantum of proof necessary to constitute probable cause as “a fair probability that contraband or evidence of a crime will be found in a particular place.”).

¹¹ *See Ybarra*, 444 U.S. at 91. *But see Maryland v. Pringle*, 540 U.S. 366 (2003) (holding that there was probable cause to suspect all three occupants of a moving vehicle individually of being in constructive possession of drugs and large quantities of cash found at different locations inside the vehicle, even in the absence of probable cause to believe that they were acting in concert); *Samson v. California*, 547 U.S. 843, 855 n.4 (2006):

The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court’s jurisprudence has often recognized that “to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,” we have also recognized that the “Fourth Amendment imposes no irreducible requirement of such suspicion.”

(quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560, 561 (1976)).

¹² *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (holding that the police could stop individuals if they could point to specific and articulable facts that reasonably warrant the stop and could perform a reasonable search for weapons if they had reason to believe that the individual was armed and dangerous).

¹³ In this context, “area” includes interests and activities and is not limited only to physical spaces. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

so. No reasonable expectation of privacy means no “search,” and thus, no Fourth Amendment protection, irrelevant of the subjective intent that the investigators possessed when they initiated their intrusion.¹⁴

These two bimodal inquiries (search/no search, sufficient cause/insufficient cause) combine to form a simple rule: a search requires probable cause (or whatever other quantum of suspicion is necessary to justify a particular investigatory practice); intrusions that fall short of being “searches” require no suspicion at all.¹⁵ In other words, the Court does not generally recognize a sliding scale, which imposes various degrees of suspicion relative to corresponding degrees of intrusion.¹⁶ As long as an investigative procedure is not a search as the Fourth Amendment defines that term, it does not matter how little suspicion the police have before engaging in it. They can direct it at an individual at random or even for reasons that are arbitrary or unfair; they are not limited to directing it at

¹⁴ See *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (“If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.”); *Whren v. United States*, 517 U.S. 806 (1996) (holding that the constitutional reasonableness of traffic stops did not depend on the actual motivations of the individual officers involved); *Horton v. California*, 496 U.S. 128, 138 (1990) (“The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure . . .”).

¹⁵ See, e.g., *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that taking DNA for identification purposes was not a search); *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (holding that the canine sniff of a stopped vehicle was not a search); *Bond v. United States*, 529 U.S. 334, 339 (2000) (holding that squeezing a bus passenger’s duffel bag to determine its contents was a search); *California v. Greenwood*, 486 U.S. 35, 43 (1988) (holding that the removal and inspection of Greenwood’s garbage was not a search); *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001) (holding that the use of a thermal-imaging device to detect the heat signature of Kyllo’s residential marijuana grow was a search); *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (holding that the aerial surveillance of the backyard of Ciraolo’s home was not a search); *United States v. Place*, 462 U.S. 696, 706–07 (1983) (holding that the canine sniff of luggage at the airport was not a search).

¹⁶ One exception to these general principles exists in the context of “special needs” searches, in which the Court usually engages in a balancing test, which weighs the intrusiveness of the search against the special need purporting to justify it. See, e.g., *Samson v. California*, 547 U.S. 843 (2006) (upholding parole searches in the absence of probable cause); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding a school district’s warrantless random urinalysis drug testing of student athletes because of the special, non-law-enforcement need to deter drug use in schools); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (upholding warrantless drug and alcohol testing of train operators involved in accidents or safety violations); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (upholding an administrative inspection of fire-damaged premises); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 535–38 (1967) (upholding an administrative inspection of residential premises for housing code compliance). As a doctrinal matter, in order to fit a search within the special-needs category, the police must lack an investigatory motive, at least as the primary reason for the search. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011). The arguably ironic result of this doctrine, in comparison to ordinary Fourth Amendment requirements of individualized suspicion and probable cause, is that special-needs searches are justified in part by the total lack of individualized suspicion with regard to a particular suspect.

suspects for whom they have some suspicion not rising to the level of probable cause or required to limit the intrusiveness of these non-search searches.¹⁷

III. THE ROLE OF “INVESTIGATORY MOTIVES” (OR THE LACK THEREOF) IN THE SEARCH INQUIRY

Despite sometimes breezy pronouncements to the effect that the investigatory motives of the police do not create a search, the Supreme Court has been consistent only in the inconsistency with which it has addressed the relevance of the motive of the police in determining whether a search has occurred for the purpose of the Fourth Amendment. This is partly because the subjective portion of the *Katz* inquiry focuses on the expectations of the suspect and the objective portion focuses on the normative desirability of the interest being invaded, but neither, at least formally, inquires into the state of mind of the police who conducted the investigation at issue. This inconsistency has tended to be one-sided: when the police lack an investigatory motive for a particular intrusive practice, that absence often renders the practice not a search for the purposes of the Fourth Amendment. On the other hand, only when the police have an investigatory motive in conducting a particular intrusive practice does the Court tend to revert to *Katz*'s focus on the subjective expectations of the target of the practice (and whether those expectations are objectively reasonable).¹⁸ For example, in *City of Ontario v. Quon*,¹⁹ the Court issued its usual boilerplate proclamation that the presence or lack of a criminal investigatory motive by the police was irrelevant to the question of whether an investigatory practice was a search for the purposes of the Fourth Amendment,²⁰ only to hold, under the specific facts and circumstances of the case, that a city police department's warrantless review of one of its officer's text messages on his department-issued cell phone was reasonable and did not violate the Fourth Amendment in part because the search was conducted for the purpose of reviewing the city's contract with its wireless service provider rather than with investigatory motives.²¹ The Court has fairly consistently relied on this inquiry into law-enforcement motives in situations involving “special needs” searches, finding that the lack of an investigatory motive can remove a police intrusion into

¹⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976).

¹⁸ See, e.g., *al-Kidd*, 131 S. Ct. 2074 (holding that the Attorney General's subjective intent in using the federal material-witness statute as a pretext to detain terrorism suspects against whom the evidence was insufficient to charge with crimes did not violate the Fourth Amendment as long as the detentions were objectively reasonable); *Whren v. United States*, 517 U.S. 806 (1996).

¹⁹ *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

²⁰ See *id.* at 2627 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613–14 (1989)).

²¹ See *id.* at 2632–33.

an otherwise constitutionally protected area out of the ordinary constraints of the Fourth Amendment (a warrant issued on the basis of probable cause).

These two lines of doctrine (treating the sufficiency of suspicion as a bimodal enough/not-enough inquiry, and the suspect-based *Katz* inquiry, which makes the motive of the police irrelevant to the question of whether an area or activity is, or ought to be, constitutionally protected), working together, are what largely authorize (or at least fail to prohibit) “dragnet” investigative techniques—i.e., investigations in which the police lack a “suspect,” but instead profile large numbers of individuals in an attempt to locate one. For the purpose of the probable cause/individualized suspicion dichotomy of this Article, “dragnet” searches are those in which the police typically have a great deal of general suspicion that a crime is afoot, but such suspicion is not yet individualized to a specific suspect or suspects.²² On the contrary, the purpose of the dragnet is to identify the suspect of a crime for whose existence the police already often have at least probable cause. For example, in a large-scale sweep of digital data to develop terrorism profiles, a DNA dragnet of a particular community,²³ or a knock-and-talk campaign in a “high-crime” neighborhood, the police know that there are terrorists, child molesters, and drug dealers committing crimes in the areas that are subject to investigation—they may even be investigating specific acts of terrorism, abuse, or drug distribution—but they do not know who the terrorists/molesters/dealers are. They only know generally where to look for them, based on established patterns of criminal behavior.²⁴ Traditionally, as long as the dragnet is not a “search” under *Katz*, the fact that it is conducted without individualized suspicion against a particular target (or is even a fishing expedition, without any suspicion whatsoever) does not change its constitutional status. The police are entitled to the

²² Cynthia Lee draws a similar distinction between what she terms the “programmatic purposes” of special-needs searches and “an individual officer’s purpose in engaging in a particular search.” Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 Miss. L.J. 1133, 1176 n.209 (2012).

²³ DNA dragnets do not fit neatly into the paradigm of the other dragnet searches contemplated by this Article because they tend to occur under circumstances involving more truly intelligent/knowing consent. When agents collect electronic records or approach the door of an apartment from its private, interior entryway, they are relying on a more constructive post-*Katz* conception of consent—because the digital consumers or apartment dwellers knowingly exposed their data or front porch to third parties, they have relinquished any reasonable expectation of privacy in them. In a typical DNA dragnet, on the other hand, officers approach targets under more *Bostick*-type circumstances, asking targets specifically to consent to DNA collection and analysis. See Amanda Ripley et al., *The DNA Dragnet*, TIME (Jan. 16, 2005), <http://www.time.com/time/magazine/article/0,9171,1018083,00.html> (describing DNA dragnets in which men were asked voluntarily to give their DNA without penalty for refusal). See generally *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that the Fourth Amendment permitted police to board a bus without reasonable suspicion of criminal activity and obtain consent from passengers at random to search their luggage after advising them of their right to refuse consent to search).

²⁴ See Ripley et al., *supra* note 23.

benefit of a lucky guess or even a stab in the dark, as long as they do not cross *Katz*'s reasonable-expectation-of-privacy boundary.

Courts have almost universally upheld warrantless police practices like the now longstanding “knock and talk” technique²⁵ against constitutional challenges, even though they occur by definition without any individualized suspicion, because their conduct does not rise to the level of a “search” under *Katz* and, therefore, the Fourth Amendment does not restrict their use.²⁶ The fact that these types of dragnet investigations are clearly motivated by a criminal investigatory purpose (i.e., the police are not collecting DNA to screen for genetic diseases to make treatment available to sufferers or knocking on hotel room doors to alert residences that the hotel is on fire) does not change the analysis under the Court's current Fourth Amendment jurisprudence. For people who have concern about the intrusiveness of these types of non-search searches, up until recently the Fourth Amendment offered little hope for their regulation.²⁷

²⁵ In a knock-and-knock investigation, the police target a particular building or neighborhood, typically one that they have identified as being high in crime generally or high in a particular type of crime under investigation (drug trafficking, prostitution, etc.). They approach private dwellings (houses, apartments, hotel rooms) in that area and ask the residents to consent to a search of their residences. See Leonetti, *Curtilage*, *supra* note 1, at 312 (describing the voluntariness concerns with “consent” in the context of knock-and-talk investigations). Any evidence of a crime that the residence search turns up is admissible in a subsequent criminal proceeding, assuming that the individual who consented to the search had the apparent authority to do so, because the search was consensual. See *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2013) (holding that the police did not need a warrant or any quantum of suspicion to approach a home and knock because doing so was “no more than any private citizen might do”).

²⁶ Usually, these non-search searches rely on the “consent exception” to the Fourth Amendment's warrant requirement. In both cases, the police approach a target without “seizing” him/her, in the sense of the Fourth Amendment, and ask the target to consent to the procedure (giving a DNA sample or allowing police to search a residence). The target can refuse; conversely, if the target agrees, s/he has “consented” to the search. When courts find these dragnet procedures to be unconstitutional, they almost universally do so on the ground that the consent in the procedure at issue was not voluntary or that the initial consensual encounter had become so onerous as to constitute a seizure under *Bostick* based on the unique facts and circumstances of the case. See, e.g., *United States v. Conner*, 127 F.3d 663 (8th Cir. 1997) (finding Conner's consent not to be voluntarily given when four police officers knocked on his motel room door, identified themselves as police, and demanded that he “open up”). They do not find that the initial approach and request themselves are searches and therefore require a warrant and probable cause to perform. See, e.g., *United States v. Cormier*, 220 F.3d 1103, 1110 (9th Cir. 2000) (holding that the police use of knock-and-talk procedure to gain access to Cormier's motel room was permissible and did not result in his seizure, vitiating his consent to the subsequent search of the room).

²⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 677 (O'Connor, J., dissenting) (“For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment.”).

IV. REINVIGORATING THE ROLE OF POLICE MOTIVES IN THE SEARCH INQUIRY

Two years ago, in *Florida v. Jardines*,²⁸ the Supreme Court dramatically broke with its recent tradition of refusing to permit the investigatory motives of the police to create a search where none existed before, and for the first time (at least for the first time to the benefit, rather than the detriment, of the target of an investigatory practice) recognized the relationship between the intent of the police in conducting an investigation and the reasonableness of the expectations of the suspect under *Katz*. In *Jardines*, the police responded to a tip that Jardines was growing marijuana in his home by bringing a trained drug-sniffing dog onto his porch to attempt to detect the odor of marijuana from inside the house.²⁹ When the dog “alerted” to the presence of drugs inside Jardines’s home, the police obtained a search warrant for the premises, using the results of the warrantless dog sniff as a vital component of the probable cause for its issuance.³⁰

In reaching its holding that the dog-sniff at issue was a search for the purposes of the Fourth Amendment, the Court relied in part on the fact that the police were “gathering information” from within the curtilage of Jardines’s home, and it found that the typical social invitation extended by the front walkway (and the reasonableness of Jardines’s subjective expectation of privacy therein) was related to the intent of the visitor.³¹ The Court reasoned:

An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.³²

The Court explained the relationship between the subjective intent of the police in conducting a particular investigation and the reasonableness of the suspect’s expectation of privacy in being free from such investigation as follows: “[W]hether the officer’s conduct was an objectively reasonable search. . . . depends upon whether the officers had an implied license to enter the porch, which in turn

²⁸ *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

²⁹ *Id.* at 1413.

³⁰ *Id.*

³¹ *Id.* at 1414–16.

³² *Id.* at 1416 (footnote omitted).

depends upon the purpose for which they entered.”³³ The Court concluded with the rather extraordinary statement that it “need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under *Katz*” because their physical intrusion “on Jardines’ property to gather evidence [wa]s enough to establish that a search occurred.”³⁴

V. REEXAMINING THE PLAIN-VIEW AND CONSTRUCTIVE-CONTEST DOCTRINES

As the majority of the Supreme Court repeatedly emphasized in its opinion, *Jardines* involved a physical trespass onto the curtilage of Jardines’ home.³⁵ Nonetheless, the Court’s analysis of the relationship between an investigatory purpose on the part of police and the scope of the social invitation extended by the front porch of the residence has interesting ramifications for other types of intrusions, particularly in the context of the overlapping consent,³⁶ plain-view,³⁷ and third-party doctrines.³⁸ Justice Sotomayor has recently called for a reexamination of the applicability of the plain-view and third-party doctrines in the context of high-tech surveillance in *United States v. Jones*,³⁹ but, rather than abrogating these doctrines, the majority’s reasoning in *Jardines* suggests a way that the plain-view and third-party doctrines could be modified to reign in dragnet searches without abandoning them in their entirety. What follows are examples of how a modified search inquiry could work in several contexts that posed problematic applications of the Court’s traditional *Katz* framework.

³³ *Id.* at 1417 (emphasis in original).

³⁴ *Id.* The Court ultimately reached its conclusion on trespass, rather than expectation-of-privacy grounds, but its finding of trespass (on a front walkway) was based on the motive of the drug investigators. *See id.*

³⁵ *See id.* at 1414.

³⁶ *See* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that the warrantless, consensual search of Bustamonte’s car during a traffic stop did not violate the Fourth Amendment because Bustamonte was not in custody at the time that he consented to the search and gave his consent voluntarily, even though the State offered no evidence that he did not realize that he could refuse).

³⁷ *See* *Horton v. California*, 496 U.S. 128, 141–42 (1990) (holding that the police could seize evidence in plain view, without a warrant, provided that they were in a legal vantage point when they saw it); *INS v. Delgado*, 466 U.S. 210, 217 n.5 (1984) (upholding agents’ warrantless encounters with employees during an immigration raid in a factory as consensual because agents were legally in the factory to begin with).

³⁸ *See* *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (“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)).

³⁹ *See* *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (suggesting that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties”).

A. Online Social Networks

Information posted on online social networks (OSNs) is a good example of the mismatch between the dragnet searches authorized by the plain-view and third-party doctrines, particularly as articulated in *Smith v. Maryland*, and the realities of the online sharing of information among friends and families. The rigid line between “private” and “shared” information that forms part of the central rationale of *Smith* does not make much sense in the context of a semi-private Facebook page.⁴⁰ Under *Katz*, the reasonableness of a user’s expectation of privacy in his/her Facebook page would depend, at least in part, on how high s/he set the security features for the page. A user whose Facebook page, in its entirety, is open to the general public likely has no reasonable expectation of privacy in its contents. This Article, however, is more concerned with users at the other end of the privacy-feature continuum, who set their privacy features so that the page is only accessible to a few friends and family members, or with users who believe that their Facebook pages are more private than they actually are because they do not understand the relationship between their friends’ privacy settings and third-party access to their own information.⁴¹ These individuals have revealed (or, in the case of the unsophisticated user, *knowingly* revealed) the contents of their pages to a limited group of third parties but have not made them available to the general public, in much the same way that telephone users make their usage details available to the telephone company but not the general public. The term “semi-private,” as it is used in this Article is intended to capture this idea of information accessible to some third parties but not the public generally.

While it is hard to imagine that one would have an objectively reasonable (or even a subjective) expectation of privacy in an online blog, an OSN post, to which there is neither purely private nor purely public access, is a harder situation to dismiss solely on the ground that the post is in plain view from a legal vantage point by at least some individuals. However, *Jardines*’s reasoning may point to a reasonable middle ground, if one analogizes a Facebook page to the front walk of a

⁴⁰ Facebook can be either a problematic or an emblematic example of the fallacy of a rigid distinction between private and public, particularly one that is based on an assumption-of-risk theory, because its privacy settings are both complicated to operate, *see* Kristin Burnham, *10 Most Misunderstood Facebook Privacy Facts*, INFO. WEEK (Nov. 21, 2013 9:06 AM), <http://www.informationweek.com/10-most-misunderstood-facebook-privacy-facts/d/d-id/898873> (describing Facebook’s complicated and constantly changing privacy features), and manipulable by a page’s owner, the result being that individual Facebook pages vary greatly in their level of privacy/publicity. *See* NATASHA WHITEMAN, UNDOING ETHICS: RETHINKING PRACTICE IN ONLINE RESEARCH 59 (2012) (characterizing Facebook as “semi-public” because its contents are “freely accessible” but “constrained by personalised privacy settings which enable users to set their own levels of visibility and openness” and documenting concerns that Facebook users do not understand its privacy settings).

⁴¹ *See, e.g.*, MARTIN DOWDING, PRIVACY: DEFENDING AN ILLUSION 74 (2011) (explaining how Facebook’s default settings are public and increasingly difficult for users to set to private).

residence. It is not a purely private space, in the sense that others are, in the case of Facebook, explicitly invited to enter, but that invitation is limited in scope. When a user posts on Facebook, Instagram, or Linked In, the post is intended as a social or business invitation, not an invitation to criminal investigation, in the same way that the front porch may beckon Girl Scouts selling cookies, mail carriers, or visiting neighbors, but not drug-sniffing police dogs.

B. *Data Mining*

A similar observation can be made more broadly about the data that consumers and other digital users reveal to third parties individually but do not intend to be combed through systematically in the course of a large-scale law enforcement investigation.⁴² A recently declassified opinion from the Foreign Intelligence Surveillance Court held that the bulk metadata collection in the NSA and FBI's infamous "Prism" program did not violate the Fourth Amendment because it was "squarely controlled" by *Smith*.⁴³ More recently, the *New York Times* has revealed that federal drug-enforcement agents have routinely been using *subpoenas* to access the bulk telephone records of Americans, a process of dragnet data collection whose "scale and longevity" is unmatched, even by Prism.⁴⁴ I have previously suggested that the metadata/contents distinction first advanced in *Smith* is meaningless and outdated in a modern, high-tech information society, and that it should not be applied to large-scale data mining because the process of mining and aggregating the data itself reveals new information about private patterns of behavior.⁴⁵

The limited-consent doctrine of *Jardines* suggests another reason that *Smith*'s contents/metadata distinction, and in particular the Court's blithe pronouncement that the revelation of such metadata to the phone company simply took its procurement out of the realm of searches under *Katz*, is overly simplistic in the

⁴² See, e.g., *United States v. Perrine*, 518 F.3d 1196, 1204–05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation."). See also *Rehberg v. Paulk*, 611 F.3d 828, 842–47 (11th Cir. 2010) (holding that email address metadata was not protected by the Fourth Amendment, under *Smith*); *United States v. Forrester*, 512 F.3d 500, 510–11 (9th Cir. 2008) (holding that the IP addresses that Forrester visited were not protected by the Fourth Amendment because he knowingly shared them with his internet service provider); *United States v. Phibbs*, 999 F.2d 1053, 1077–78 (6th Cir. 1993) (holding that defendant Rojas's credit-card statements were not protected by the Fourth Amendment because he knowingly shared the information contained in them with his bank).

⁴³ Declassified FISC Opinion, *supra* note 7, at 6.

⁴⁴ Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. TIMES, Sept. 2, 2013, at A1. The drug-enforcement program, called "Hemisphere," "covers every call that passes through an AT&T switch—not just those made by AT&T customers—and includes calls dating back 26 years . . ." *Id.*

⁴⁵ See Leonetti, *Data Mining*, *supra* note 3, at 292.

context of the larger scale mining of metadata and other semi-private information: the “consensual” revelation of individual bits of data to third parties by digital consumers is limited in scope by the purpose for which it is given (billing, provision of service, etc.), and that consent should not be construed as extending to collection during law enforcement investigations.

C. Knock-and-Talks

Perhaps the most difficult aspect of the majority’s reasoning in *Jardines* is reconciling it with *Kentucky v. King*,⁴⁶ which the Court decided only two terms earlier. As Justice Alito’s dissenting opinion in *Jardines* pointed out,⁴⁷ in *King*, discussing the plain-view doctrine, the Court explicitly rejected the suggestion that the investigatory motive of police officers observing incriminatory evidence in plain view would affect the initial question of whether the plain viewing occurred from a legal vantage point, proclaiming: “[I]t does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence.”⁴⁸

While the Court has never addressed the issue of dragnet knock-and-talk investigations, in *King*, it addressed the issue of a single, failed knock-and-talk approach to a private residence (failed in the sense that, rather than obtaining consent to enter and search the apartment, the knock triggered exigent circumstances that justified an entry without the consent of the occupants). In *King*, the police followed a suspected drug trafficker away from a “buy and bust” transaction with an undercover officer into the hallway of an apartment complex, where they lost him in one of two apartments in a dead-end corridor.⁴⁹ Since the police did not know which of the two apartments the suspect had disappeared into, they decided to knock on the door of one of the apartments from which they detected the smell of marijuana emanating.⁵⁰ When the police knocked on the door and announced their presence, the occupants of the apartment responded by moving around the apartment without responding to the police at the door, which the Court ultimately blessed as exigent circumstances dispensing with the warrant requirement of the Fourth Amendment.⁵¹ When the police entered the apartment,

⁴⁶ 131 S. Ct. 1849 (2011).

⁴⁷ See *Florida v. Jardines*, 133 S. Ct. 1409, 1423 (2013) (Alito, J., dissenting) (“Even when the objective of a ‘knock and talk’ is to obtain evidence that will lead to the homeowner’s arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach.”).

⁴⁸ *King*, 131 S. Ct. at 1858.

⁴⁹ *Id.* at 1854.

⁵⁰ See *id.*

⁵¹ See *id.* at 1854, 1856.

they discovered several occupants, including King, along with cocaine and marijuana.⁵²

While *King* ultimately involved the issue of whether the police could avail themselves of an exigency that their investigative choices played a role in creating, and involved an approach to an apartment for which the police already had at least some quantum of individualized suspicion (if not the requisite probable cause for a search warrant or warrantless entry),⁵³ the Court's rationale for upholding the initial knock on the door of the apartment in which King was later arrested would, presumably, apply equally to dragnet knock-and-talk investigations, initiated on the basis of no individualized suspicion. For example, the Court in *King* suggested that as long as the initial knock constituted a consensual encounter (i.e., a true knock, not the pounding of a battering ram), and as long as the police did not enter prior to the exigent circumstances arising, or demand entry, or threaten to break down the door if the occupants failed to open it voluntarily, the only search for the purposes of the Fourth Amendment is the one that occurs after the exigent circumstances have arisen.⁵⁴ The Court categorically declared, "officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."⁵⁵ It also declared: "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."⁵⁶

There are two ways that one could reconcile *King* and *Jardines*. The first is that *King* dealt with the plain-view doctrine while *Jardines* dealt with the plain-smell doctrine, but this distinction seems meaningless from both normative and descriptive perspectives. From a normative perspective, it is hard to imagine a reason why the "plain-sense" doctrines ought to distinguish among the different senses in resolving the doctrinal question of the role that an investigatory motive plays in the legality of the vantage point from which the senses of the police are first engaged. From a descriptive or empirical perspective, the Court has suggested that the plain-view doctrine applies equally to other senses (plain smell, plain

⁵² See *id.* at 1854.

⁵³ See *id.* at 1857–58.

⁵⁴ See *id.* at 1863.

⁵⁵ *Id.* at 1858.

⁵⁶ *Id.* at 1862.

touch, etc.)⁵⁷ and gave no indication in *Jardines* that it intended to abrogate or limit these other plain-sense doctrines.⁵⁸

The other possibility is that there is a meaningful constitutional distinction between a human and canine plain smell, but again, it is hard to imagine a normative rationale for that distinction as it bears on the question of whether the police may target a suspect in the first instance without a sufficient quantum of individualized suspicion, and the majority of the Supreme Court, in *Jardines*, seemed, as a descriptive matter, to reject that distinction in its rejection of the State's proposed analogous distinction between the warrantless high-tech surveillance prohibited by *Kyllo v. United States* and the low-tech dog sniff at issue in the case:

[W]e find irrelevant the State's argument (echoed by the dissent) that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in *Kyllo v. United States* that surveillance of the home is a search where '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*.' But the implication of that statement (*inclusio unius est exclusio alterius*) is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.⁵⁹

VI. SLIDING SCALES

Other commentators have proposed sliding scales for the Fourth Amendment, although they tend to focus on the relationship between some combination of the severity of the offense of investigation, the intrusiveness of the government investigative technique at issue, and the quantum of suspicion necessary to initiate the investigation. For example, Albert Alschuler has argued for a probable-cause standard that takes into consideration the "quantum of evidence" justifying a search, the "seriousness of the evil that a search or seizure might prevent," and "the extent to which this search or seizure would intrude upon privacy, liberty or

⁵⁷ See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); *Minnesota v. Dickerson*, 508 U.S. 366, 371 (1993) (holding that contraband detected through a warrantless "plain touch" during a pat-down search could be admitted in evidence). See also *United States v. Ventresca*, 380 U.S. 102 (1965) (upholding a search of a house based on warrant on agents smelling the odor of fermenting mash from the sidewalk in front of the house).

⁵⁸ See *Florida v. Jardines*, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring) ("Like . . . binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell).").

⁵⁹ *Id.* at 1417 (internal citations omitted).

property.”⁶⁰ Craig Lerner has proposed a sliding scale of probable cause that takes into account the gravity of the investigated offense and the intrusiveness of the proposed search as part of the reasonableness framework.⁶¹ Sherry Colb has similarly argued for a sliding scale that takes into consideration the seriousness of the offense under investigation and the severity of the governmental intrusion, with probable cause being sufficient for minor offenses but something more than probable cause being required for more serious governmental intrusions.⁶² Jeffrey Bellin has also proposed a sliding scale of required suspicion based on the severity of the crime of investigation.⁶³

The sliding scale proposed in this Article is a different one than those outlined in these other proposals. It draws a distinction between suspicion that a crime has occurred and individualized suspicion (that a particular individual(s) has engaged in such criminal activity). Rather than focusing on the level of government intrusion involved in a particular investigatory technique, it focuses on the existence and degree of *individualized* suspicion (as opposed to guilt by association), and reaches nearly the opposite conclusion of other scholars, proposing that the *greater* the suspicion of collective or non-individualized criminal activity, the *more* justification that should exist for the search of any given *individual*. In other words, rather than proposing a sliding scale for the quantum of suspicion that police may have with regard to a particular individual (probable cause, reasonable suspicion, a mere hunch), I propose a sliding scale for the bulk nature of the suspicion: from individualized suspicion, as the Court described it in *Ybarra v. Illinois*; to a targeted search of multiple individuals, for the purpose of narrowing a short list of suspects; to a fishing expedition whose purpose is to identify suspects in the first instance. Under my proposal, the dragnet would require more justification (in terms of reason to believe that a crime has occurred) than a more targeted search, in which there is at least some suspicion of the individual(s) being targeted.

This proposal is essentially the inverse of the special-needs doctrine. The balancing test of the special-needs doctrine has two primary components: (1) a lack of investigatory motive on behalf of the police; and (2) the involvement of areas of decreased reasonable expectations of privacy (schools, prisons, probation and parole, heavily regulated industries, public highways, airports and other borders), which combine to permit searches on less than the probable cause ordinarily

⁶⁰ Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 249–50 (1984).

⁶¹ See Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 417 (2006).

⁶² See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1673–77 (1998).

⁶³ See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011).

required by the Warrant Clause.⁶⁴ But what if these two components were reversed? Dragnet searches involve the opposite scenario: (1) strong investigatory motivation and (2) areas of decreased (but not *no*) expectations of privacy (e.g., noncoding DNA regions, front doors of apartments and hotel rooms, digital data knowingly revealed in individual points to third parties for specific purposes, observable facial characteristics). Dragnets, by their definition, also involve high percentages of actual innocence—the residents of “high-crime” neighborhoods who are not drug traffickers or Internet users who are not terrorists and who have, therefore, if anything, greater interest in their privacy.⁶⁵ In the same way that the “special needs” contexts justify less-than-full protection of the Fourth Amendment, dragnet searches, with their strong (but not yet individualized) investigatory motive, justify more-than-none.

VII. CONCLUSION

It is more than time for the Supreme Court to determine, in a systematic way, the role that the motives of the police should play in determining whether a search has occurred for the purposes of Fourth Amendment protections. As I have previously advocated, in another context: “If the lack of an investigatory motive . . . may be used to declare . . . an intrusion reasonable, it stands to reason that the presence of such an investigatory motive . . . would constitute a search for Fourth Amendment purposes.”⁶⁶

⁶⁴ See *Maryland v. King*, 133 S. Ct. 1958, 1981–82 (Scalia, J., dissenting) (explaining that the Court only permits special needs searches, without individualized suspicion, “when a governmental purpose aside from crime-solving is at stake”).

⁶⁵ Cf. *Minnesota v. Carter*, 525 U.S. 83 (1998) (holding that Carter had no legitimate expectation of privacy in an apartment that he was in solely for the purpose of packaging cocaine); *United States v. Caymen*, 404 F.3d 1196 (9th Cir. 2005) (holding that Caymen had no legitimate expectation of privacy in the contents of a computer hard drive that he obtained by fraud).

⁶⁶ Leonetti, *Curtilage*, *supra* note 1, at 309.