2020

The Purpose Paradox: A Linguistic Dilemma Within Fourth Amendment Jurisprudence

Luke Belflower

Follow this and additional works at: https://open.mitchellhamline.edu/mhlr

Part of the Constitutional Law Commons, and the Fourth Amendment Commons

Recommended Citation
Available at: https://open.mitchellhamline.edu/mhlr/vol46/iss2/6

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
There may not be a more mysterious term in Fourth Amendment jurisprudence than “purpose.” In this context, purpose is generically defined as the reason or reasons an officer took certain action. It is understandable that courts would elect to focus heavily on an officer’s purpose. If we wish to deter bad actors and promote an egalitarian administration of justice, an officer’s motivation for acting should be critically important to an analysis of the constitutionality of that officer’s action. Yet, the United States Supreme Court has consistently held that the subjective purpose of a police officer is irrelevant under the Fourth Amendment, outside of the special needs or administrative inspection context. This potential paradox is perhaps most puzzling in the context of whether an officer has conducted an unconstitutional search in the curtilage of one’s home.

This article focuses on the meaning of the term “purpose,” and its relationship to searches conducted within the curtilage of one’s home under the Fourth Amendment. The analysis primarily focuses on three curtilage cases: one of which is a state case and the others are federal cases. There is a relative dearth of literature discussing purpose under the Fourth Amendment. The existing literature typically advocates for the Court to narrowly consider, or even rely upon, a government actor’s subjective

---

3 This article will analyze Florida v. Jardines, 569 U.S. 1 (2013); State v. Chute, 908 N.W.2d 578 (Minn. 2018); and then Devenpeck v. Alford, 543 U.S. 146 (2004).
motivation for taking certain actions. In contrast, this article does not dwell on the merits of whether considerations of a subjective purpose are preferable from a policy perspective.

Instead, it first broadly argues that the Supreme Court is consistent when it maintains that an officer’s subjective purpose for acting is irrelevant under the Fourth Amendment. The United States Supreme Court follows precedent and does not rely on, or even consider, an officer’s subjective purpose for acting. Objective evidence alone is used to determine an officer’s ostensible purpose. Therefore, the objective reasonableness of an officer’s actions is critical. Courts often appear to rely on an officer’s subjective purpose with its use of certain language. Nonetheless, that use simply creates a linguistic illusion of subjectivity. Objective evidence is key. Although the consideration of an officer’s subjective purpose would reduce the number of reprehensible government actors, objective evidence was—and appears to remain—the only evidence vital to the constitutionality of an officer’s actions. Ultimately, an officer’s subjective intent is irrelevant.

This argument leads to an additional, narrower one: purpose is innately subjective. Only the individual actor actually knows why he or she took action. The enunciation of an objective purpose is troubling. Reaching such a conclusion requires the analysis of objective evidence to determine an actor’s ostensible purpose. A court can say what an actor’s objectively determined purpose was. Yet, it cannot definitively say that it was the actor’s actual purpose. In fact, if the Court did determine the actor’s actual purpose, such a determination is constitutionally irrelevant. At the very least, courts currently use language that causes confusion and blurs the line between objective and subjective purposes in their analyses.

Therefore, the Court is inconsistent to the extent it created an “area” prong and a “purpose” prong for testing whether an unconstitutional search occurred in the curtilage of one’s home. The area where the officer conducted the investigation is useful for determining whether the officer’s actions were objectively reasonable and consequently constitutional. This area, however, is not dispositive as to the constitutionality of the officer’s

2 See Ashcroft, 563 U.S. at 740; Whren, 517 U.S. at 806; Horton, 496 U.S. at 138.
3 See Ashcroft, 563 U.S. at 740; Whren, 517 U.S. at 806; Horton, 496 U.S. at 138.
4 See Ashcroft, 563 U.S. at 740; Whren, 517 U.S. at 806; Horton, 496 U.S. at 138.
5 See Ashcroft, 563 U.S. at 740; Whren, 517 U.S. at 806; Horton, 496 U.S. at 138.
6 See Ashcroft, 563 U.S. at 740; Whren, 517 U.S. at 806; Horton, 496 U.S. at 138.
8 Id. at 10.
actions. The consideration of all objective evidence, including the area where the officer went, provides an answer to the critical question: whether the officer’s intrusion relates to a lawful reason for entering a home’s curtilage. The purpose prong, in particular, creates issues due to the innate, subjective nature of purpose. Therefore, if the Court desires to make an officer’s subjective purpose truly irrelevant, the two-prong test should be abolished and all references to an individual’s purpose should cease. It is superfluous and confusing if the objective reasonableness of the officer’s actions is critical. A test of objective reasonableness that analyzes whether the officer’s intrusion relates to a lawful reason for entering the curtilage is more manageable, mitigates potential uncertainty, and, in essence, is already in place.

II. PURPOSE, CURTILAGE, AND THE FOURTH AMENDMENT

Curtilage, the area “immediately surrounding and associated with the home . . . warrants the Fourth Amendment protections that attach to the home.” Whether a given area is considered curtilage is determined by a host of factors peripheral to the arguments posited in this article. In Florida v. Jardines, Detective Pedraja of the Miami-Dade Police Department was the recipient of an “unverified tip” that Jardines was growing marijuana in his home. Approximately one month later, the Department and the Drug Enforcement Administration dispatched a “joint surveillance team” to Jardines’ home. Detective Pedraja was a member of that team. There were no vehicles in Jardines’ driveway, and the ability to see inside Jardines’ home was nonexistent because the blinds were drawn.

Detective Pedraja watched the home for fifteen minutes prior to the arrival of Detective Bartlet, a “trained canine handler,” accompanied by the detective’s detection dog. The two detectives immediately proceeded to approach the home. As the detectives and the dog neared the front porch of Jardines’ home, the dog “apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest

---

12 Id.
15 Jardines, 569 U.S. at 3.
16 Id.
17 Id. at 3–4.
18 Id. at 3.
point source of that odor.”

Eventually, the dog sniffed the front door of Jardines’ home and sat down, which is "trained behavior" when the source of the odor is discovered. With this knowledge in hand, Detective Pedraja took leave and obtained a search warrant. The warrant was executed later that day, and its execution revealed marijuana plants.

Jardines was arrested and charged with drug trafficking.

Jardines subsequently moved to suppress the evidence on the basis that the search was unreasonable under the Fourth Amendment. While the trial court agreed, the Florida Third District Court of Appeals reversed. However, the Florida Supreme Court reversed the appellate court, approving the trial court's decision to suppress the evidence. The Florida Supreme Court reasoned that using the detection dog to investigate Jardines’ porch was a search under the Fourth Amendment unsupported by probable cause. Therefore, the warrant was invalidated, as information obtained from that illegal search was foundational to the warrant. The Supreme Court of the United States granted certiorari, “limited to the question of whether the officers’ behavior was a search within the meaning of the Fourth Amendment.”

The Court ultimately held the behavior was a search, relying on an approach that tacitly focused on the officers’ actions and their lack of relationship to the lawful conducting of a knock-and-talk. The Court also recognized that the public, including police officers, have a “traditional invitation,” that is, an implicit license to approach a “home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” As enunciated in Jardines, the scope of that license is

---

1 Id. at 4.
2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id. at 4–5.
11 Id. at 5.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id. at 12.
17 Id. at 8.
limited to a “particular area” and a “specific purpose.” The majority was perturbed by the introduction of a detection dog to the curtilage of Jardines’ home. Police officers, devoid of a warrant, may approach the front door of a home and knock on the door but may “do no more than any private citizen might do.” Prevailing social norms do not invite visitors to search the area upon arrival.

The State argued that Supreme Court precedent establishes that the subjective motivation of a police officer is constitutionally irrelevant under the Fourth Amendment. The Court was quick to contextualize that assertion, stressing precedent merely establishes that an “objectively reasonable” search will not be deemed unconstitutional simply because a police officer’s “real reason” for conducting a search is distinct from the “validating reason” for conducting the search. The Court provided the example of a black man who is pulled over for not wearing a seatbelt will have no recourse simply because the police officer’s subjective purpose for pulling the man over was the officer’s malice towards African-Americans. If the black man did fail to wear his seatbelt, that fact validates the officer’s decision to pull the man over regardless of the actual reason for which he was pulled over. Ultimately, the Court stressed that the precise question before it was whether “the officer’s conduct was an objectively reasonable search.”

A reasonable interpretation of the Court’s detailed opinion makes it seem as if the Court failed to abide by its own precedent. It also—whether, implicitly or not—made the officers’ subjective purpose relevant when determining the constitutionality of the officers’ actions. For instance, the Court specifically enunciated that there is no “customary invitation” to introduce “a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.” However, hopefulness relates to an individual’s feelings and perhaps, emotional state. That feeling is unique to the individual alone. The individual is the only person capable of experiencing that exact feeling at that exact moment. Although people

---

* Id. at 9.
* Id.

** Id. at 9.
** Id. at 10.
* Id.
** Id.
* Id.
* Id.
* Id.
* Id.

*See generally id.*
* Id. at 9.
can debate how an objectively reasonable person would feel in any given situation, the only person who actually knows how they felt, or why they acted, is the individual who experienced the feeling or acted in a certain way. If the officer hoped to discover such evidence, that seems to be a subjective consideration that contradicts the Court’s precedent. At the very least, the Court’s language has the tendency to confuse.

The foregoing is not the only language in Jardines that appears to create inconsistency and confusion. The fine line between an objective purpose and a subjective purpose is difficult to distinguish throughout the opinion. The Court stressed the “officers learned what they learned only by physically intruding on Jardines’ property to gather evidence.” Once again, the Court, by specifically referencing that the officers entered Jardines’ curtilage to “gather evidence,” makes it appear that the officers’ subjective motivation was vital to the Court’s inquiry. Such reference by the Court allows for the reasonable interpretation that it claims the subjective motivation of the officers was “to gather evidence.” If true, and such motivation was in fact relied on, the Court failed to follow precedent. It was unnecessary for the Court to say that the officers entered Jardines’ curtilage to complete such a task. This language tends to cause more confusion than clarity. Eventually, the Court held that the officers’ actions, including the use of the detection dog, constituted a search under the Fourth Amendment. The Court reasoned that the officers’ behavior “objectively reveals a purpose to conduct a search, which is not what anyone would think they had a license to do.” This statement should be interpreted as an assertion that the officers’ actions did not relate to a lawful purpose that allowed the officers to enter Jardines’ curtilage, that is, to conduct a lawful knock-and-talk.

Justice Alito’s dissent provides further insight into the confusion caused by the majority’s choice of language. Ultimately, Justice Alito takes a purely textual approach and argues the officers’ actions were nonintrusive and reasonable. Although his conclusion is not necessarily correct, Justice Alito’s approach is valuable as it forcefully disregards any consideration of the officers’ subjective purpose. Justice Alito clearly relies on objective evidence to conclude that the officers’ actions, including introducing the

---

"Id.
* Id. at 11.
* Id.
* Id.
* Id.
* Id. at 10.
* Id. at 16–26.
* Id. at 23–25.
detection dog to Jardines’ porch, simply were not violative of the Fourth Amendment. Those actions did not exceed the scope of the implied license. While this conclusion cuts at the heart of the protections afforded by the Fourth Amendment, the simplicity and precision of Justice Alito’s reasoning deserves attention.

Initially, Justice Alito argues the majority’s reliance on trespass principles is misguided and has no basis in Fourth Amendment jurisprudence. Specifically, Justice Alito is perplexed that the majority believed Detective Bartlett “committed a trespass because he was accompanied during his otherwise lawful visit to the front door . . . by his dog.” Dogs have a magnificent sense of smell, and as such, have been relied on by law enforcement officers for centuries in Anglo-American society.

The officer and his dog approached Jardines’ home via “the route that any visitor would customarily use,” specifically over “the driveway and a paved path.” The entire process of walking up the driveway and path to the front door, followed by the dog alerting, and concluded by walking back to the street “took approximately a minute or two.” After the strongest source of the odor was located on Jardines’ porch, the officer and the dog “immediately returned to their patrol car.”

Cumulatively, Justice Alito’s arguments support the same conclusion: the officer did not exceed the scope of the implied license to approach a home. This license assuredly has “certain spatial and temporal limits.” People, including police officers, may not, for example, loiter at the front door, approach the front door in the middle-of-the-night without permission, or “trapse through the garden, meander into the backyard, or take other circuitous detours.”

With these limitations in mind, Justice Alito shuns the notion that the officer’s subjective purpose for conducting an otherwise valid knock-and-talk can make that knock-and-talk constitutionally impermissible. Even when the purpose of such a knock-and-talk is “to obtain evidence . . . the

---

55 Id. at 26.
56 Id. at 22.
57 Id. at 16.
58 Id.
59 Id. at 16–17.
60 Id. at 17.
61 Id. at 18.
62 Id.
63 Id.
64 Id. at 19.
65 Id. at 19–20.
66 Id. at 21.
license to approach still applies.\footnote{Id.} Regardless, then, of the officer’s subjective purpose, “gathering evidence . . . is a lawful activity that falls within the scope of the license to approach.”\footnote{Id. at 22.} While this is disagreeable as a matter of policy, Justice Alito appropriately and affirmatively pronounces that he is in no way relying on the officer’s subjective purpose.\footnote{Id.}

Justice Alito finishes his discussion by highlighting the majority’s peculiar choice of language with regard to purpose.\footnote{Id.} What the majority meant by its conclusion that the officers’ actions objectively revealed a purpose to conduct a search puzzled Justice Alito.\footnote{Id.} What that means, he takes it, is that anyone with knowledge of the officer’s actions “would infer that his subjective purpose was to gather evidence.”\footnote{Id.} In other words, the objective facts available in the record allowed the fact-finder to make an artificial determination as to the government actor’s subjective purpose for acting. One could argue that if the former argument is true, the Court is inappropriately relying on the subjective motivations of the actor, regardless of whether that purpose is artificially determined using objective evidence.

Justice Alito’s argument appears meritorious on its face; however, it fails to take into account the fact that the majority’s purpose determination was completed by solely using the objective facts available. The term “purpose” creates perplexities that tend to mislead, yet the officer’s ostensible purpose was still determined objectively. In reality, the objective facts show the officer’s actions were unrelated to a lawful purpose that would allow the officer to enter Jardines’ curtilage to conduct a knock-and-talk. The majority’s purpose determination provided the answer as to whether the officer’s actions were reasonable, no matter how the result of such analysis was phrased.\footnote{See id. at 9-10.} Justice Alito also stressed that police officers, more often than not, primarily approach homes in order to gather evidence.\footnote{Id. at 21.} If an officer’s subjective purpose were relied on, most knock-and-talks would be constitutionally impermissible. However, the introduction of a trained detective dog across the breadth of Jardines’ porch does not in any way relate to conducting a permissible knock-and-talk.

If the dog accompanied the officer everywhere throughout his shift and simply sat at the front door upon reaching Jardines’ porch, perhaps the Court’s conclusion would have been different. Such action would arguably
relate to a lawful purpose for entering one’s curtilage, specifically a simple knock-and-talk. However, it is always unreasonable for a detection dog to accompany a police officer when intruding into the curtilage. Among their functions of patrolling, searching, and pursuing suspects, detection dogs have one principle purpose: to detect narcotics and other contraband. The implied license does not grant an officer a license to search the curtilage of a home in the absence of a warrant. Justice Alito essentially made an argument that, in contrast to the majority’s conclusion, the officer’s actions did in fact relate to a lawful purpose that allows an officer to enter one’s curtilage. Although his reasoning was phrased solely in terms of reasonability—that is, that the officer did not exceed the scope of the implied license to approach—Justice Alito relied on the path taken, the amount of time present on the porch, and the time of day to stress the officer acted constitutionally. While Justice Alito’s lack of concern for individual privacy is apparent, he did shed light on linguistic issues within the majority opinion.

However, there is light at the end of the tunnel. When discussing a concept as abstract as purpose, it is difficult to ensure that the entirety of an opinion lacks confusing phrases. Notwithstanding any potentially perplexing language, a detailed reading of Justice Scalia’s majority opinion alleviates any concern that the Court relied on the officer’s subjective purpose. As a result, the majority’s reasoning was consistent with precedent. It simply failed to articulate its conclusions in the most coherent fashion. Although it is arguable the majority failed to clearly rely on an objectively determined purpose, in reality, the officer’s subjective purpose was disregarded. The majority determined it was objectively unreasonable, and by extension, an unconstitutional search, to allow a police dog, with its acute sense of smell and thorough training, to repeatedly canvas the breadth of a home’s porch. Such action did not reasonably relate to a lawful reason that allows an officer

---


76 Jardines, 569 U.S. at 22.

77 See id.

78 Id. at 9.
to enter one’s curtilage and specifically, conduct a knock-and-talk.” There is a stark difference between the generic home visitor and a “canine forensic investigation.” Although the former may often be unwelcome, it is, at least, expected. In contrast, no reasonable person would expect, or find it reasonable to allow, a police officer to introduce a trained police canine to explore the breadth of his or her home’s curtilage.

The same reasoning applies regardless of the occupation of the individual entering the curtilage. Suppose an individual entered the curtilage of one’s home with a metal detector and began canvassing the curtilage. One could speculate as to that individual’s subjective purpose for taking such action, yet such speculation is irrelevant. The individual’s subjective purpose for intruding within the curtilage could be to steal property or to find a long-lost familial artifact. Neither purpose changes the fact that such action is objectively unreasonable, since such intrusion does not relate to a lawful purpose for entering one’s curtilage. In contrast, it would be lawful for an individual to approach the home’s front door, knock, wait briefly to be received, and ask for permission to use the metal detector in the homeowner’s curtilage. Ultimately, permission is required to roam around in someone’s yard in an attempt to discover items. Similar to the officer being accompanied by his trained canine, bringing a metal detector onto an individual’s property without consent creates the reasonable impression that the individual is not there for permissible reasons. Therefore, regardless of the person’s subjective purpose, such action would lead a reasonable homeowner to “well, call the police.”

III. MINNESOTA’S HIGH COURT THROWS ITS HAT IN THE RING

In State v. Chute, the Minnesota Supreme Court held that an officer conducted an objectively unreasonable search that violated the Respondent’s Fourth Amendment rights. The Court reasoned the officer’s actions exceeded the scope of permissible knock-and-talk procedure. The facts of Chute present a unique opportunity to analyze a state court’s handling of a curtilage issue and its accompanying purpose inquiry. The Minnesota Supreme Court appropriately determined that the officer’s actions were unreasonable in the absence of a warrant. How the Court reached its decision, however, deserves substantial attention in light of the

---

“Id.”

“Id.”

“Id.”

State v. Chute, 908 N.W.2d 578, 580 (Minn. 2018).

“Id.”

“Id.”
Jardines decision and the Supreme Court’s purpose enunciations more generally.

In Chute, an individual residing in a metropolitan suburb discovered that his pop-up tent camper had vanished, and he subsequently reported the apparent theft to the local police. In Chute, an individual residing in a metropolitan suburb discovered that his pop-up tent camper had vanished, and he subsequently reported the apparent theft to the local police. Several months later, the individual was out for a drive on a county road and noticed what appeared to be his camper nestled in defendant Chute’s backyard. After this discovery, the individual turned around and drove back in the opposite direction to “verify that it was his stolen camper.” The individual stated he was able to verify the camper was his own because of the distinctive characteristics of the camper. After making this verification, the individual informed the police.

The layout of Chute’s property deserves attention. Trees border the property’s west side, an obscuring fence flanks its east side, and a wetland is situated at its southern point. Chute’s home faces north and is located on the county road. The property has two driveways. One of the driveways, located on the west side of the property, is short, paved, and leads to a detached garage. An additional garage is located southwest of Chute’s home towards the rear of the property. The other driveway meanders along the property’s east side, is accessible from the county road, is unpaved, and loops around into Chute’s backyard. The district court found that the eastside driveway is “well-worn” and functions as a “turnaround or circle.” The camper was situated in the southeast corner of the property near the end of the unpaved driveway.

Shortly after receiving the tip, an officer was dispatched to the scene. From the end of the eastside driveway, while still on the county road, the officer “verified” the camper’s features mirrored the description stated in the police report created at the time of the alleged theft. After making this verification, the officer entered his squad car and drove approximately

---

* Id. at 581.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
* Id.
halfway down the eastside driveway. At this point, the officer was about 200 feet from the county road. The officer proceeded to exit his squad car and walk to the camper. After arriving at the camper the officer realized the camper’s vehicle identification number (VIN) and license plate were no longer present. Determined not to leave empty-handed, the officer called the camper’s manufacturer who informed him that a partial VIN was stamped on the frame of the camper. The officer located this partial VIN and determined the partial number was consistent with the VIN of the stolen camper. The officer then proceeded to enter the camper and discovered a personal item that belonged to the owner of the camper.

Upon verifying that the camper had been stolen, the officer intended to “make contact with the homeowner.” The officer “heard voices” emanating from the garage in the southwest corner of the home and decided he should attempt to make contact there. The officer knocked at the garage and was greeted by Chute. The officer requested and was granted permission to search the garage. The officer subsequently discovered a host of personal property that belonged to the same individual who owned the camper. After making this discovery, the officer requested permission to search Chute’s home. Consent was granted and more property belonging to the camper’s owner was found in Chute’s home.

Chute was charged with felony possession of stolen property, and he subsequently moved to suppress “all evidence found by police pursuant to a warrantless search” of his property. The district court denied Chute’s motion, concluding the officer was authorized to seize the camper because it was located on the eastside driveway, which was “implicitly open to the public to access [Chute’s] home.” Therefore, the officer “had a lawful right

---

100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id. at 582.
of access to the camper."\textsuperscript{116} Chute was ultimately convicted at trial.\textsuperscript{117} However, the district court did not make an explicit finding that the eastside driveway was within the curtilage of Chute’s home.\textsuperscript{118}

The state court of appeals reversed, stressing the officer did not have a “lawful right of access to the camper” located within the curtilage of Chute’s home.\textsuperscript{119} Under Minnesota law, “police with legitimate business may enter areas within the curtilage of the home if those areas are impliedly open to the public.”\textsuperscript{120} The legitimacy of an entry into one’s curtilage is determined by analyzing the “scope of the implied license” as articulated in \textit{Florida v. Jardines}.

Whether the scope of the implied license was exceeded, this article argues, is properly determined only by analyzing whether the officer’s actions related to a lawful purpose that would allow him to enter one’s curtilage. The court of appeals concluded the scope of the implied license was transcended, as the officer’s entry into the curtilage was conducted with “the purpose to conduct a search.”\textsuperscript{122} Further, the unlawful search of Chute’s curtilage tainted the subsequent search of Chute’s home.\textsuperscript{123}

The state filed a petition for review arguing the court of appeals erred by concluding the search of the camper was unlawful.\textsuperscript{124} The Minnesota Supreme Court’s first task was to consider whether the officer conducted a “trespassory search of Chute’s home when he entered the property to examine the camper.”\textsuperscript{125} To do so, the Court had to determine whether the camper was located within the curtilage of Chute’s home.\textsuperscript{126} If the camper was located within the curtilage, the officer is constrained by the Fourth Amendment.\textsuperscript{127} In contrast, if the camper was not located in the curtilage, it would be considered to be in “open fields,” and the Fourth Amendment would not govern the officer’s actions.\textsuperscript{128}

By using the phrase “to examine the camper,” the Court placed itself in danger of creating an analytical bind before it even began to explain its conclusions.\textsuperscript{129} Similar to the Supreme Court in \textit{Jardines}, the Minnesota

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.; see also State v. Chute, 887 N.W.2d 834, 843 (Minn. Ct. App. 2016).
\textsuperscript{120} Chute, 887 N.W.2d at 841 (citing State v. Crea, 233 N.W.2d 736, 739 (Minn. 1975)).
\textsuperscript{121} Id. (citing \textit{Florida v. Jardines}, 569 U.S. 1, 6–11 (2013)).
\textsuperscript{122} Chute, 908 N.W.2d at 582 (citing \textit{Chute}, 887 N.W.2d at 842).
\textsuperscript{123} Chute, 887 N.W.2d at 843–44.
\textsuperscript{124} Chute, 908 N.W.2d at 582.
\textsuperscript{125} Id. at 383.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 583–84.
\textsuperscript{128} Id. at 384.
\textsuperscript{129} Id. at 383.
Supreme Court was also at times careless with its language. For instance, it was misleading for the Minnesota Supreme Court to end the foregoing sentence with a consideration of whether the officer entered Chute’s property “to examine the camper.” Whether the officer’s actions related to the lawful conducting of a knock-and-talk was key, regardless of why the officer subjectively entered Chute’s property. Particularly, the location of the camper, and by extension, where the officer went on Chute’s property, was paramount. These considerations of location should be used to evaluate whether the officer’s actions related to a lawful purpose for entering Chute’s property.

The state understood the significance of location by arguing the camper was located too far away from Chute’s home to be protected by the Fourth Amendment. In other words, it was objectively unreasonable to believe the camper was contained within the curtilage of Chute’s home. Therefore, the Fourth Amendment did not constrain the officer’s actions regardless of his subjective purpose. Ultimately, after applying the Dunn factors, the Court concluded Chute’s backyard and the eastern, unpaved driveway were within the curtilage of Chute’s home. As a result, Chute was afforded Fourth Amendment protections for his camper.

The Court’s second task was to determine whether the officer had an implied license to enter onto the curtilage. Whether a landowner has granted another a license to enter onto his curtilage is a question of fact. The district court concluded that since an obvious, shabby pathway existed and two vehicles were parked near the camper, Chute had granted the public an implied license to access his curtilage to seek a backyard entrance to his home and garage. The Minnesota Supreme Court determined that

---

130 Id.
131 Id. at 584.
132 See id. at 585.
133 Id.
134 Id. at 584 (listing “four relevant factors to determine whether a disputed area falls within the curtilage: [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by”) (quoting United States v. Dunn, 480 U.S. 294, 301 (1987)).
135 Id.
136 Id.
137 Id.
138 N. States Power Co. v. Franklin, 122 N.W.2d 26, 30 (Minn. 1963).
139 Chute, 908 N.W.2d at 586.
since the record supported the district court’s conclusion, that conclusion
was not clearly erroneous. 139

The Court’s final task was to determine whether the officer exceeded
the scope of the implied license. 140 To do so, the Court relied on the test
enunciated in Jardines, taking pains to assert that, “we must determine the
officer’s purpose, objectively, for entering the curtilage.” 141 Although the
preceding phrase is misleading to the extent a true purpose can be
objectively determined, the Court appropriately relied on available objective
facts to determine the officer’s ostensible purpose. 142 That purpose,
determined via an analysis of the officer’s location and his actions, showed
the officer’s intrusion into the curtilage did not relate to conducting a knock-
and-talk, which is the lawful purpose allowing an officer to enter one’s
curtilage. 143 Specifically, the location of the camper required the officer to
“deviate substantially” from the path that would take him to the back of
Chute’s home or garage. 144 This, in conjunction with the officer’s rigorous,
lengthy inspection of the outside and inside of the camper, led the Court to
conclude that the officer exceeded the scope of the implicit license to
approach a home and conduct a knock-and-talk. 145 Hence, the Court’s
decision should have been a straightforward one when based on these two
persuasive pieces of objective evidence.

Unfortunately, the Court once again placed itself in linguistic limbo by
stating: “the evidence demonstrates that the officer’s purpose for entering
the curtilage was to conduct a search.” 146 However, the reason that an officer
actually entered the curtilage, whether to conduct a permissible knock-and-
talk or to conduct an illegal search, is constitutionally irrelevant or, at least,
should be according to Supreme Court precedent. 147 The relationship
between the officer’s intrusion and lawful purposes for entering the curtilage
is crucial. Similar to Jardines, the record here also objectively demonstrates
that the officer’s intrusion was exceedingly unrelated to conducting a
permissible knock-and-talk. 148 Fortunately, there is no subjective evidence in

---

139 Id.; see State v. Jenkins, 782 N.W.2d 211, 223 (Minn. 2010) (stating that the Court reviews
district court factual findings for clear error).

140 Chute, 908 N.W.2d at 586.

141 Id.; see also Florida v. Jardines, 569 U.S. 1, 10 (2013).

142 Chute, 908 N.W.2d at 586–87.

143 Id.

144 Id. at 587.

145 Id. at 586–87.

146 Id. at 587.

147 See, e.g., Ashcroft v. al-Kidd, 563 U.S. 73 (2011); Whren v United States, 517 U.S. 806
(1996).

148 See Chute, 908 N.W.2d at 381.
the record that demonstrates, or even lends credence to, the notion that the officer entered Chute’s property for the purpose of conducting a search.  

In other words, there is no statement or other evidence offered by the officer that demonstrates the officer subjectively entered the curtilage to conduct a search. This fact makes it easier to conclude that—although this Court’s choice of language occasionally has a subjective bent—the Court objectively determined that the officer took action unrelated to a lawful reason allowing the officer to enter Chute’s property, rendering the officer’s action unconstitutional.

Assuming such subjective evidence did exist, it would have been constitutionally impermissible to consider it when determining whether the officer exceeded the scope of the implied license to conduct a knock-and-talk. Appropriately, the officer’s ostensible purpose was determined objectively. These purpose determinations, however, cause more confusion than clarity. Nonetheless, the home and its surrounding areas should be entitled to the most stringent of privacy protections. The officer’s actions did not relate to a lawful purpose for entering the curtilage, and therefore, those actions were objectively unreasonable. The Minnesota Supreme Court precisely followed United States Supreme Court precedent. Although it occasionally composed an illogical phrase when enunciating its conclusions, the Minnesota Supreme Court correctly determined the officer’s actions were constitutionally impermissible.

IV. THE SUPREME COURT WANTS ANOTHER SHOT AT THE TITLE

In Collins v. Virginia, decided within three months of Chute, the U.S. Supreme Court granted certiorari to consider whether “the automobile exception of the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein.” In that case, an orange and black-colored motorcycle had been observed committing several traffic infractions. One investigating police officer visited the defendant’s Facebook page, where he found pictures displaying the motorcycle in question at the top of the

---

149 Id.
150 Id.
151 Id. at 587; see also Garza v. State, 632 N.W.2d 633, 639 (Minn. 2001); State v. Crea, 346, 233 N.W.2d 736, 739 (Minn. 1975).
152 Chute, 908 N.W.2d at 587 (applying Florida v. Jardines, 569 U.S. 1, 10 (2013)).
153 Id. at 588.
155 Id.
The defendant’s driveway. The officer was then able to discover the location of the home in the Facebook pictures; he drove to the home and remained parked on the street. From there, the officer noticed what appeared to be the motorcycle located in the same position on the driveway as in the pictures underneath a tarp. The officer then intruded upon the property, approached the motorcycle, removed the tarp, and determined that the motorcycle looked identical to the one that had previously eluded him. After running the motorcycle’s license plate and VIN, the officer confirmed the motorcycle had in fact been stolen. The defendant was arrested for receiving stolen property after admitting the motorcycle had been purchased absent a title. The trial court subsequently denied the defendant’s motion to suppress the evidence obtained from the warrantless search of the motorcycle. Although the courts’ reasoning differed, both the Court of Appeals of Virginia and the Supreme Court of Virginia affirmed the lower court’s decision.

The U.S. Supreme Court was tasked with determining whether the automobile exception justifies a physical intrusion into the curtilage of one’s home. The answer to this question is “no.” Unfortunately, the Court again struggled to paint its analysis of the constitutionality of the officer’s actions with the appropriate stroke of objectivity. In other words, the Court appeared to consider the officer’s subjective purpose while analyzing the constitutionality of the officer’s actions. The Court went out of its way to reference that the officer’s stated purpose in removing the tarp from the motorcycle was “to investigate further.” Therefore, the officer’s subjective purpose was actually “to investigate further.” Why the Court felt it necessary to include this quote is paradoxical in light of its precedent. It is irrelevant whether the officer did in fact remove the tarp “to investigate

---

156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id. at 1668–69.
162 Id. at 1669.
163 Id.
164 Id. at 1671.
165 Id.
166 Florida v. Jardines, 569 U.S. 1, 10 (2013).
167 Collins, 138 S. Ct. at 1668.
168 Id.
169 Id.
Although such a statement makes it easy to conclude that the officer entered the defendant’s property for unlawful reasons, the statement is also inherently subjective. If one goes for a run to feel better, his or her subjective purpose for running is to feel better. If analyzed in a vacuum, the inclusion of this statement was inconsistent with precedent. Fortunately, however, it was extraneous and had no effect on the Court’s conclusions.

The Court’s apparent reliance on the officer’s statement is not the only example where the majority seemed to improperly consider, or at least attempted to discern, the officer’s subjective purpose in its opinion. Relying on Jardines, the Court stressed “[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.” Again, the inclusion of the phrase “to gather evidence” implies the officer’s subjective purpose for entering the curtilage was considered and helped lead the Court to conclude that the officer’s conduct was constitutionally impermissible. Yet, as will be shown, it was irrelevant why the officer actually entered the curtilage, and the Court understood this.

It would be a devastating blow to the protections afforded by the Fourth Amendment to allow an officer “to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search.” While the Court’s determination is not necessarily correct in that the officer’s actions were unconstitutional, that statement is again misleading. A true purpose cannot be determined objectively. The inclusion of such language, therefore, has a strong tendency to make the Court seem as if it is failing to follow its own precedent by relying on an officer’s subjective motivation. This statement implies that if the officer said he entered a house or curtilage for the purpose of having a cup of tea—or at least not to conduct a search—the officer’s actions are likely permissible. Yet, whether the officer’s actions were objectively related to a lawful purpose for entering the curtilage is controlling. This is true regardless of whether the officer subjectively acted for the purpose of conducting a search.

---


See id.

See id. at 1672.

See, e.g., Devenpeck, 543 U.S. at 153; Whren, 517 U.S. at 813 (1996); Horton, 496 U.S. at 138; Hicks, 480 U.S. 325 (1987).

The Court was not finished. Near the end of its opinion it stressed: “[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible.”

This statement implies that so long as the officer did not enter the curtilage absent a warrant for the purpose of conducting a search to obtain otherwise unattainable information, the officer’s actions were constitutionally permissible. This is simply not true. If anything, the lack of a warrant bolsters the objective unreasonableness of the officer’s actions. A proper analysis would not consider whether the officer entered the curtilage to obtain information not otherwise accessible. Instead, the focus would be on whether the officer’s intrusion into the curtilage related to a lawful purpose allowing one to enter the curtilage. Here, the officer’s actions were obviously unrelated to lawfully conducting a knock-and-talk.

Notwithstanding these choices of language, the Court objectively determined the actions of the officer were constitutionally impermissible in the absence of a warrant. The officer’s actions were objectively unreasonable. The officer’s subjective purpose for entering the curtilage was irrelevant. People have an “expectation of privacy in their property.”

It must be highlighted that most Fourth Amendment cases involve a defendant who has in fact committed some illegal action. Nonetheless, this fact must be separated from the analysis. A test of constitutionally permissible action affects everyone, not just those who undertook illegal activity.

Here, the officer did not conduct an appropriate knock-and-talk. The officer walked up the driveway and approached the parked, covered

---

176 Collins, 138 S. Ct. at 1675.
177 See, e.g., Devenpeck, 543 U.S. at 154; Whren, 517 U.S. at 813; Horton, 496 U.S. at 138; Arizona v. Hicks, 480 U.S. 325 (1987).
178 Collins, 138 S. Ct. at 1668.
179 Id. at 1671.
180 Id.
181 Id.
185 Collins, 138 S. Ct. at 1668.
motorcycle, and not Collins’ front door. As the Court noted, a legitimate visitor would only walk about halfway up the driveway, turn right, and go up the steps leading to the front porch. Instead, the officer trekked the entirety of the driveway. This action constituted an initial Fourth Amendment violation, as it was a physical intrusion unrelated to the lawful purpose of conducting a knock-and-talk. After arriving at the top of the driveway, which abutted the home, the officer removed the tarp covering the motorcycle and ran its license plate and VIN. The action of removing the tarp did not relate to conducting a lawful knock-and-talk. Moreover, the action of running the motorcycle’s license plate and VIN was an additional, unlawful physical intrusion that did not relate to conducting a lawful knock-and-talk.

Reasonable people expect that their property immediately adjacent to the home will remain free from intrusion. There was no attempt by the officer to reach Collins at the front door until the officer had confirmed his suspicion that the motorcycle was, in fact, stolen. Objectively, the officer’s actions were unreasonable. It did not matter what the officer’s subjective purpose was. Even though the officer stated he entered the curtilage “to investigate further,” the Court’s reasoning is best understood as an implicit enunciation that the officer’s actions did not relate to a lawful purpose for entering the curtilage, which would be to conduct a knock-and-talk. If the Court is committed to disregarding the officer’s true subjective purpose, the only inconsistency is any reference to an officer’s purpose at all.

It is again beneficial to analyze Justice Alito’s dissent. Ultimately, the inquiry of constitutionality broadly requires a determination as to the reasonability of the officer’s actions. Although Justice Alito’s conclusion is incorrect as to the reasonability of the officer’s actions, he presented a narrow determination to follow when analyzing the constitutionality of an officer’s actions. Specifically, Justice Alito immediately stressed: “[t]he Fourth Amendment prohibits ‘unreasonable’ searches. What the police did

186 Id.
187 Id. at 1671.
188 Id.
189 Id. at 1668.
190 Id.
191 Id. at 1671.
192 Id. at 1666 (citing Florida v. Jardines, 569 U.S. 1, 10 (2013)).
193 Id. at 1668–69.
194 Id. at 1668.
195 Id. at 1680.
196 Id. at 1682.
in this case was entirely reasonable.” Justice Alito’s arguments are best understood as assertions that the officer’s actions did not constitute an objectively unreasonable intrusion. If Justice Alito reached this conclusion here, it is difficult to imagine a factual scenario involving curtilage that Justice Alito would conclude is ever constitutionally impermissible.

Nowhere in the dissent does Alito reference the officer’s subjective purpose. Alito does not use language that is arguably subjective or explicitly consider any subjective evidence. The entire analysis is framed in terms of intrusiveness, which, as will be shown, is also constitutionally irrelevant. Specifically, Justice Alito notes the ready mobility of the motorcycle, the fact that the officer made a “short” walk up the driveway, a lack of damage to the home or curtilage, and the fact that the officer had probable cause to believe the motorcycle was stolen and had been involved in the commission of crimes. Justice Alito argues the Court’s conclusion does not “comport with the reality of everyday life.” In sum, Justice Alito’s dissent stressed the Court’s decision was “strikingly unreasonable.” Unlike in Jardines, however, the evidence relied upon by Justice Alito may relate to reasonableness generally. However, it only slightly relates to whether the officer’s actions related to the lawful conducting of a knock-and-talk. The record shows the officer’s actions obviously did not.

It is beneficial to conclude this discussion with thoughts on a commentator’s understanding of purpose. Professor Nirej Sekhon argues that all determinations as to an actor’s subjective purpose must be completed using objective evidence. Sekhon contextualizes this assertion by stating at its core, determining an actor’s purpose in this way equates to a “subjective test.” Each of these arguments is faulty, and they do not mesh with one another.

All determinations as to an actor’s subjective purpose need not be completed using objective evidence. Perhaps this is true in order to be constitutionally permissible. However, the former argument highlights evidentiary and linguistic issues that again cause problems for courts. Very rarely is there any truly subjective evidence in the context of the Fourth

**Notes:**

197. Id.
198. Id.
199. Id. at 1680–83.
200. Id. at 1681.
201. Id.
202. Id.
203. Id. at 1671.
205. Id.
Amendment. This does not mean an officer’s subjective purpose needs to be determined using objective evidence. Additionally, courts do not try to decipher an actor’s subjective purpose. Rather, courts use objective evidence to determine an apparent purpose. If an actor’s true subjective purpose needs to be deciphered, which is rarely possible anyway, the only evidence appropriate to make such a determination is subjective evidence. As for the latter argument, even if the former argument were true, such a test would not be subjective. The courts are apathetic as to what the actor’s true subjective purpose was. Perhaps the test is artificially subjective from the perspective that a purpose is always inherently subjective. Yet, to say such a test is “just” subjective glosses over the truly objective considerations of the courts. Again, these thoughts highlight the confusion that exists.

V. A MISCELLANEOUS CASE THAT HIGHLIGHTS THE LINGUISTIC DILEMMA

Before discussing why the two-pronged test of the constitutionality of action within curtilage should be superseded by a test of objective reasonability that analyzes whether the officer’s actions relate to a lawful purpose for entering one’s curtilage, it is useful to look at a case that analyzes purpose outside of the curtilage context. In *Devenpeck v. Alford*, the respondent was arrested and charged with violating Washington’s State Privacy Act after recording conversations he had with two police officers after being pulled over. At the scene, the respondent accurately protested his arrest, stating that a Washington Court of Appeals opinion allowed him to record “roadside conversations with police officers.” Believing the arrest to be lawful under Washington’s State Privacy Act, one officer instructed an accompanying officer to take the respondent to jail.

As it turns out, the respondent’s actions did not constitute a crime under Washington’s State Privacy Act. However, probable cause existed to arrest the respondent for impersonating and obstructing law enforcement officers. The Washington Court of Appeals held that the crimes of impersonating and obstructing law enforcement officers were not “closely
related" to the crime the respondent was arrested for.\textsuperscript{215} Additionally, the Court of Appeals also held it was objectively unreasonable for an officer to believe it was lawful to arrest the respondent for violating Washington’s State Privacy Act.\textsuperscript{216} Therefore, the arrest was unlawful. At its core, this is a mistake of law case. The question certified by the Supreme Court was “whether an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not ‘closely related’ to the offense stated by the arresting officer at the time of arrest.”\textsuperscript{217}

Relying on \textit{Whren}, the Court stressed the officer’s subjective purpose for conducting an arrest need not be that the person under arrest took action that gave rise to probable cause to arrest for the specific criminal offense.\textsuperscript{218} For example, imagine an officer sees a person take some action. The officer believes that action gives rise to probable cause that a specific crime has been committed. The officer proceeds to arrest that person on the basis that there is probable cause to believe that specific crime was committed. In other words, the officer’s purpose for arresting the person is that the person committed a specific crime. As events unfold, it turns out there actually was \textit{not} probable cause to believe that that specific crime was committed. Yet, there was actually probable cause to arrest the person for a crime distinct from the crime for which the person was actually arrested. If viewed objectively, the officer’s actions were justified, that is, if reasonable, the officer’s actions will not be invalidated.\textsuperscript{219}

Therefore, the Court held that a rule requiring the offense underlying an arrest to be “closely related” to the offense for which there is actual probable cause is inconsistent with the notion that the subjective purpose of an officer is irrelevant.\textsuperscript{220} The Court had no desire to make the subjective motivation of an officer relevant to the “lawfulness of an arrest.”\textsuperscript{221}

Justice Scalia provided an interesting and accurate perspective on the irrelevance of subjective purpose. He argued an officer’s subjective purpose for making an arrest, “\textit{however} it is determined (and of course subjective intent is \textit{always} determined by objective means), is simply no basis for invalidating an arrest.”\textsuperscript{222} This statement correctly asserts that regardless of whether or how a subjective purpose can be determined, such

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. at 148.
\item Id. at 153.
\item Id.
\item Id.
\item Id. at 154.
\item Id. at 154–55.
\end{enumerate}
\end{footnotesize}
determination is irrelevant.\textsuperscript{223} The point that matters is that any true or apparent subjective purpose is itself irrelevant.\textsuperscript{224}

Notwithstanding the preceding, although one can argue it is plausible to determine an apparent purpose using objective evidence, a purpose is innately subjective and cannot truly be determined objectively. Objective evidence can be evaluated as to the reasonability of an officer’s action, but it cannot be evaluated to definitively determine why someone actually acted. While Justice Scalia’s statement is correct from the perspective that the subjective intent of an actor is irrelevant, it also highlights the confusion and linguistic difficulties afflicting the courts handling these cases.\textsuperscript{225}

VI. THE TWO-PRONG TEST SHOULD BE ABOLISHED

In Horton v. California, the Supreme Court proclaimed that: “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”\textsuperscript{226} While the sole reliance on objective standards does not always lead to “evenhanded law enforcement,” to the contrary, the opposite is often true—objective standards are exceedingly more manageable than subjective ones.\textsuperscript{227} The degree of objective evidence available will always dwarf the subjective evidence available, if any of the latter even exists.\textsuperscript{228}

Therefore, if the Court is steadfast in its reliance on precedent, that is, the subjective motivations of an actor are irrelevant, all references to an individual’s purpose should cease. This is in light of the fact that the Court’s current analysis of purpose has the tendency to cause great confusion. The Jardines two-prong test,\textsuperscript{229} and particularly the purpose prong, should be abolished in favor of an objective test of reasonability that analyzes whether the officer’s intrusion within the curtilage is related to a lawful purpose and not the officer’s subjective purpose for entering the curtilage. In this context, a lawful purpose for entering one’s curtilage would be to conduct a permissible knock-and-talk. This test focuses heavily on the officer’s

\begin{itemize}
\item \textsuperscript{223} See id.
\item \textsuperscript{224} Id. at 153.
\item \textsuperscript{225} See, e.g., Florida v. Jardines, 569 U.S. 1 (2013); State v. Chute, 908 N.W.2d 578 (Minn. 2018); Collins v. Virginia, 138 S. Ct. 1663 (2018).
\item \textsuperscript{226} 496 U.S. 128, 138 (1990).
\item \textsuperscript{227} Id.
\item \textsuperscript{228} R. George Wright, Objective and Subjective Tests in the Law, 16 U. N.H. L. Rev. 121, 123 n.11 (2017).
\item \textsuperscript{229} Jardines, 569 U.S. at 9 ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.").
\end{itemize}
location within the curtilage. If the intrusion is unrelated to a lawful purpose for entering the curtilage, such action is unconstitutional regardless of why the officer actually went where they did within the curtilage. This test, of course, presumes no other exigencies are present.

This proposed test derives its logic from Arizona v. Hicks, in which Justice Scalia focused on why officers were justified in entering an apartment in relation to what one officer did after entering the apartment. The facts of Hicks deserve attention. On April 18, 1984, a bullet was fired through the floor of respondent’s apartment, striking and injuring a man in the apartment below. Police officers arrived and entered respondent’s apartment to search for the shooter, other victims, and weapons. Exigent circumstances and the community caretaker function justified the officer’s initial intrusion into the apartment. During the course of this search one officer discovered readily apparent expensive stereo equipment, which seemed out of place in the dilapidated dwelling. Since the officer had an inkling the equipment was stolen, he proceeded to read the equipment’s serial numbers and manipulating pieces, including lifting a turntable to view its underside. The officer reported the turntable’s serial number to his headquarters and was informed the turntable had been stolen. The officer immediately seized the turntable.

Justice Scalia focused on the manipulation of the equipment—specifically lifting the turntable to view its underside—as opposed to the recording of the equipment’s serial numbers. Such manipulation constituted a search separate from the search for the shooter, weapons, and any injured persons, which was “the lawful objective” of the officer’s entry into the apartment. Taking action distinct from the lawful “objectives of the authorized intrusion . . . did produce a new invasion of respondent’s privacy unjustified by the exigent circumstance that validated the entry.” The officer lacked probable cause to believe the equipment was stolen. In the absence of probable cause, Justice Scalia was unwilling to extend to

---

231 Id. at 323.
232 Id.
233 Id. at 324.
234 Id. (explaining the apartment was “squalid and otherwise ill-appointed”).
235 Id.
236 Id.
237 Id.
238 Id. at 324–25.
239 Id.
240 Id. at 325.
241 Id. at 326.
officers the power to search and seize an object during a search unrelated to the lawful purpose that justified the initial entry.\[242\]

Critically, the level of intrusiveness is not a factor to be considered in the analysis. In the Court’s dissenting opinion, Justices Rehnquist, O'Connor, and Powell were dismayed at Justice Scalia’s conclusion, focusing heavily on the fact that the officer’s conduct was not intrusive.\[243\] Specifically, the dissent was dissatisfied by the distinction between simply reading a serial number on an object and moving that same object a few inches in order to read its serial number.\[244\] Such a distinction arguably “trivializes the Fourth Amendment.”\[245\] Ultimately, if reasonable suspicion exists that an object in plain-view is evidence of a crime, the dissent believes a cursory inspection of such items—even one that involves moving those items—is a constitutionally permissible way of verifying such suspicion.\[246\] Justice Scalia stressed that a cursory inspection can never involve moving items; a visual inspection is all that is justified.\[247\] A “search is a search, even if it happens to disclose nothing but the bottom of a turntable.”\[248\]

The dissent’s support of an intrusiveness inquiry is problematic. Broadly, the test of intrusiveness creates the exceptional likelihood that court decisions will frequently be inconsistent. There is no way to adequately define what constitutes “too intrusive” in light of the vast array of factual scenarios.\[249\] For example, some people, including Justice Alito, believe deviating a few feet while walking up a driveway is completely nonintrusive; others disagree.\[250\] Regardless of the intrusiveness of such deviation, that deviation is obviously unrelated to conducting a lawful knock-and-talk. That is all that matters.

From a policy perspective, a warrant should be required when conducting searches in and around the home. If the officer had probable cause to believe stolen equipment was within the apartment, he would have needed probable cause to obtain a warrant to search and seize that equipment prior to entering the apartment.\[251\] The home is sacred and

\[242\] Id. at 327.
\[243\] Id. at 331 (Powell, J., dissenting).
\[244\] Id. at 332–33 (Powell, J., dissenting).
\[245\] Id. at 333 (Powell, J., dissenting).
\[246\] Id. at 335 (Powell, J., dissenting).
\[247\] Id. at 328.
\[248\] Id. at 325.
\[251\] See Hicks, 480 U.S. at 321.
deserves the most stringent protection. Justice Scalia’s conclusions in *Hicks* were beautifully simple and effectively translatable to the curtilage context. A test of whether an officer’s intrusion relates to a lawful purpose for entering the curtilage is an efficient way of determining the ultimate question: whether the officer’s actions exceeded the scope of the implied license to conduct a knock-and-talk and as a result, were unreasonable. This test is more manageable because it mitigates linguistic difficulties.

The final task of this article is to attempt to define when an officer’s intrusion fails to relate to a lawful purpose for entering one’s curtilage and, as a result, when an officer’s action exceeds the scope of the implied license. Any such definition, if employed, would require a rigorous case-by-case analysis of the factual circumstances. As mentioned, *Florida v. Jardines* defined the implicit license in this context as permitting all visitors to approach a home, knock, wait momentarily for an answer, and in the absence of an invitation to remain within the curtilage longer, to then leave. The “social norms” that invite a visitor to approach the front door of one’s home does not invite that same visitor to conduct a search upon arrival.

As previously argued, the actions of the officer’s in *Jardines*, *Chute*, and *Collins* were clearly unrelated to the lawful purpose of conducting a permissible knock-and-talk. They all involved officers who either ventured to an impermissible location within the curtilage, stayed an impermissible amount of time within the curtilage, employed impermissible devices or articles within the curtilage, or some combination of the three. Additionally, the time of day an officer enters the curtilage should be given considerable weight. The preceding pertinent facts comprise a non-exclusive list of relevant considerations. Depending on the context, other critical objective evidence may be available. In sum, a totality of the circumstances approach should be employed when determining whether the officer’s intrusion related to a lawful purpose for entering one’s curtilage and as a result, whether an officer’s action exceeded the scope of the implied license.

First, borrowing language from *United States v. Shuck*, a 2013 case arising out of the Tenth Circuit, a state agent may only approach a home using the “normal route of access” used by anyone visiting the home. Similarly, a visitor approaching the home should initially be required to

---

252 *Jardines*, 569 U.S. at 6.
253 See *Hicks*, 480 U.S. at 321.
254 *Jardines*, 569 U.S. at 8.
255 Id. at 9.
256 *Jardines*, 569 U.S. 1; *Collins v. Virginia*, 138 S. Ct. 1663 (2018); *State v. Chute*, 908 N.W.2d 578 (Minn. 2018).
257 *United States v. Shuck*, 713 F.3d 563, 568 (10th Cir. 2013).
approach the home’s front door in a linear fashion, as opposed to seeking out a homeowner in the backyard.\(^\text{258}\) Only in rare instances should a state agent or any visitor be allowed to seek out the homeowner in another location within the curtilage.\(^\text{259}\) The normal route of access will, however, necessarily vary depending on the factual context. Critically, this route of access does not condone deviations in course. For example, in *Jardines* the officer allowed his canine to move across the breadth of the homeowner’s porch, as opposed to simply approaching the front door in a linear path and remaining stationary in that location until being greeted by the homeowner.\(^\text{260}\) If the canine had refrained from transcending the breadth of the porch, and instead simply alerted upon reaching the front door, as noted, the result in *Jardines* may have been different.

Additionally, in *Collins v. Virginia*, the officer initially failed to approach the home’s front door at all. Only after deviating substantially from the path taken by a normal visitor did the officer attempt to reach the homeowner at the front door.\(^\text{261}\) Professor Wayne R. LaFave argues “[a]ny substantial and unreasonable departure from the area where the public is impliedly invited exceeds the scope of the implied invitation.”\(^\text{262}\) In contrast to LaFave’s argument that only substantial deviations are unreasonable, I, channeling Justice Scalia, argue *any* deviation unrelated to the lawful purpose of conducting a knock-and-talk is unreasonable and constitutionally impermissible. LaFave’s argument is dangerous from the perspective that it would minimize the protections afforded to homeowners under the Fourth Amendment. An officer should not have to deviate substantially to exceed the scope of the implied license. There is also a myriad of ways to interpret the meaning of a “substantial and unreasonable departure.” Such a test would increase the likelihood of inconsistent holdings. Ultimately, the license is to conduct a knock-and-talk; not to look around within the curtilage. In sum, the determination as to whether the state agent approached the home’s front door using the normal route of access, without deviations, is persuasive as to whether the state agent’s intrusion within the curtilage related to a lawful purpose allowing the state agent to intrude upon the curtilage.

Second, if the officer desires to conduct a knock-and-talk, the knock must be completed “promptly.”\(^\text{263}\) Once the knock is complete, the officer

\(^{258}\) See United States v. Wells, 648 F.3d 671, 679–80 (8th Cir. 2011).

\(^{259}\) Id.

\(^{260}\) *Jardines*, 569 U.S. at 3.

\(^{261}\) *Collins*, 138 S. Ct. at 1668.

\(^{262}\) WAYNE LAFAVE, SEARCH AND SEIZURE § 2.3(c), at 578 (2004).

\(^{263}\) *Jardines*, 569 U.S. at 8.
may only wait “briefly” for the homeowner to respond.\footnote{264} What these adverbs actually mean will be the subject of substantial argument depending on the circumstances. What is then required is an extremely narrow interpretation of these terms that leaves officers with little margin for error. The officer may not act lackadaisically. Rather, the officer must immediately and without delay knock on the homeowner’s door. Within a matter of moments, the officer will be aware of whether or not he will actually be greeted by the homeowner. If the homeowner does not greet the officer or give a sign that a greeting is pending, the officer must leave. Even the slightest action that extends the time it takes to conduct a permissible knock-and-talk should be sharply circumscribed. The justifications allowing ingress to the home do not comport with officer actions that attempt to expand the traditional invitation to approach the home. Any delay in conducting a permissible knock-and-talk is persuasive evidence that the officer’s intrusion was unrelated to a lawful purpose for intruding within one’s curtilage.

Third, an officer may not employ complementary devices or objects during a prospective knock-and-talk. The accompaniment of a detection dog is a clear example of what an officer should not be able to do while conducting a knock-and-talk. Such accompaniment, whether it concerns a detection dog, a metal detector, or a thermal scanner, inter alia, pertains to whether the officer’s intrusion within the curtilage relates to the purpose of conducting a lawful knock-and-talk. Bringing such devices or objects is persuasive evidence that the officer’s intrusion is unrelated to conducting a lawful knock-and-talk.

In contrast to my position as to the relevance of what accompanies the officer, Justice Scalia argues “[i]t is not the dog that is the problem, but the behavior that here involved use of the dog.”\footnote{265} The behavior Justice Scalia is referring to is the officer’s “snooping about” on Jardines’ front porch.\footnote{266} There is not a true distinction between the dog itself and the behavior that “involved use of the dog.”\footnote{267} Regardless, Justice Scalia is correct in that the critical question is not what the officer’s purpose was, but whether the officer’s actions, including being accompanied by a device or object, constituted an intrusion unrelated to the lawful purpose that justifies a knock-and-talk. Therefore, the officer’s purpose is irrelevant. For example, in \textit{Chute}, if the officer stated his purpose was to “snoop” about but did not deviate from the path to the house, the officer’s conduct would not have been unreasonable.\footnote{268}

\footnote{264} \textit{Id.}
\footnote{265} \textit{Id.} at 9 n.3.
\footnote{266} \textit{Id.}
\footnote{267} \textit{Id.}
\footnote{268} \textit{Id.}
\footnote{269} State v. Chute, 908 N.W.2d 578, 588 (Minn. 2018).
Finally, although it is difficult to precisely define the appropriate times an officer may approach a home, due in large part to varying daylight hours and shifting seasons, the officer may never approach the home to conduct a knock-and-talk after sunset or before sunrise. Such intrusions are not desirable, customary, nor respectful. Personal privacy and freedom of repose in one’s dwelling trumps an officer’s desire to ferret out potential criminal activity, unless a rare exigency exists. Although such late night or early morning intrusions are persuasive evidence that the officer’s intrusion is unrelated to the purpose of conducting a knock-and-talk, there are safety concerns as well. Such late night and early morning intrusions could cause the homeowner to panic. In comparison to knock-and-talks conducted in the daylight, “searches under the cover of darkness create a greater risk of armed response—with potentially tragic results—from fearful residents who may mistake the police officers for criminal intruders.” In sum, the preceding is a non-exclusive list of considerations that courts should make when determining whether an officer’s actions related to the lawful purpose of conducting a knock-and-talk, and as a result, were constitutional.

VII. CONCLUSION

The purpose of this article is two-fold. The first was to show that although courts often struggle linguistically in their discussions of purpose, these courts are not inconsistent when they proclaim the subjective intent of an officer is in fact irrelevant to the constitutionality of an officer’s actions. Particularly in the context of searches within curtilage and permissible knock-and-talks, the courts’ language causes confusion as to whether the subjective motivations of an officer truly are irrelevant. Notwithstanding these linguistic difficulties, courts rely solely on objective evidence to determine an officer’s ostensible purpose. In all three of the highlighted cases, courts determined the officer’s actions were objectively unreasonable. Although it was not explicitly stated, such determinations were due to the fact that the officers exceeded the scope of their implied license to knock-and-talk by taking action unrelated to conducting a lawful knock-and-talk.

Second, this article implores the U.S. Supreme Court to do away with the two-prong test concerning the constitutionality of searches within one’s curtilage as enunciated in Jardines. All references to an officer’s purpose cease in the hope that existing confusion is mitigated. As a substitute for the two-prong test, the Court should adopt a test that analyzes whether an officer’s actions are related to the lawful purpose that allows the

---

270 Id.
officer to legally enter one’s curtilage. This framework would rely on a nonexclusive list of objective considerations which include: (1) the officer’s location within the curtilage; (2) the amount of time the officer remained within the curtilage; (3) whether the officer entered the curtilage alone or was accompanied by another device or article; (4) and the time of day the officer entered the curtilage. However, no one fact should be dispositive. The totality of the circumstances is key. Such a test would mitigate existing confusion and uncertainty. Ultimately, my proposal entails a manageable test that allow courts to answer the critical question: whether the officer’s actions were objectively reasonable.
Mitchell Hamline Law Review
The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.
mitchellhamline.edu/lawreview

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu

https://open.mitchellhamline.edu/mhlr/vol46/iss2/6