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Fighting For Equal Protection Under The Fourth Amendment: Why "Knock-And-Talks Should Be Reviewed Under The Same Constitutional Standard As "Stop-And-Frisks"

Ian Dooley*

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Abstract

A knock-and-talk, like a stop-and-frisk, is a flexible investigatory tool that is used by law enforcement officials to subvert the Fourth Amendment’s warrant requirement.

KEYWORDS: Jardines, knock-and-talks

FIGHTING FOR EQUAL PROTECTION UNDER THE FOURTH AMENDMENT: WHY "KNOCK-AND-TALKS" SHOULD BE REVIEWED UNDER THE SAME CONSTITUTIONAL STANDARD AS "STOP-AND-FRISKS"

IAN DOOLEY*

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I. INTRODUCTION

A *knock-and-talk*,[1] like a *stop-and-frisk*,[2] is a flexible investigatory tool that is used by law enforcement officials to subvert the Fourth Amendment's warrant requirement.[3] Yet knock-and-talks, unlike stop-and-

* Staff Attorney, The Legal Aid Society, Criminal Defense Practice, Bronx, New York. Thank you to Professor Alafair Burke, Lillian V. Smith, and Shannon Griffin for their guidance and advice during the writing and editing processes.

1. State v. Land, 806 P.2d 1156, 1157 (Or. Ct. App. 1991).
2. Terry v. Ohio, 392 U.S. 1, 10, 16 (1968).
3. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 30; Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 26-27 (2014).

frisks, are not subject to the *reasonable suspicion* standard announced by the Supreme Court of the United States in *Terry v. Ohio*.[4] So, while police may not approach and detain an individual in the street absent at least reasonable suspicion that criminal activity is afoot,[5] police may approach that same individual in his home and knock on his door *without any suspicion of criminal activity at all!*[6] This absurd result has created much confusion and inconsistency in federal and state court decisions dealing with so-called knock-and-talk practices.[7]

Under current Supreme Court jurisprudence, an officer's *knock* on a citizen's door is *not* subject to Fourth Amendment scrutiny.[8] As such, police in many jurisdictions need not justify what would otherwise be considered a search or seizure under the limitations of the Fourth Amendment.[9] Further troubling is that some commentators and lower courts have mistakenly interpreted the Court's decision in *Payton v. New York*[10] to provide higher Fourth Amendment protection to a person safely tucked away in a private dwelling than a person walking in the street.[11] Such an interpretation, however, violates the Equal Protection Clause and Due Process Clause of the U.S. Constitution, where poor and minority individuals are less able to enjoy the protections of a safe and stable home[12] and where current rules governing knock-and-talks unequally protect wealthier individuals and families living in suburban and rural areas.[13] By failing to apply *Terry*'s reasonable suspicion standard to knock-and-talks, the Supreme Court has failed to provide equal protection of the law under the Fourth Amendment.[14]

Not only do knock-and-talks unfairly threaten America's poorest and minority citizens, but the runaway practice also increases the frequency of danger that police face while investigating suspected criminal activity.[15]

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4. 392 U.S. 1, 19–20, 27 (1968); United States v. Crapser, 472 F.3d 1141, 1146 (9th Cir. 2007); *see also* Drake, *supra* note 3, at 37.
5. *Terry*, 392 U.S. at 30.
6. *Crapser*, 472 F.3d at 1146; *see also* Drake, *supra* note 3, at 37.
7. Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1122 (2009); Drake, *supra* note 3, at 36.
8. *See* Florida v. Jardines, 133 S. Ct. 1409, 1415–16 (2013); U.S CONST. amend. IV; Drake, *supra* note 3, at 37.
9. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1415–16.
10. 445 U.S. 573 (1980).
11. U.S. CONST. amend. IV; *Payton*, 445 U.S. at 587, 589–90.
12. *See* U.S. CONST. amends. V, XIV; Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2002–03 (2009); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003); *infra* Section V.C.
13. *See* Carlis, *supra* note 12, at 2001–02; Slobogin, *supra* note 12, at 401–02; *infra* Section V.C.
14. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also* U.S CONST. amend. IV.
15. *See* Carlis, *supra* note 12, at 2002–03, 2009.

Attempts by lower courts to fit the Supreme Court's past search and seizure doctrines to the unique issues raised by knock-and-talks have resulted in a hodge-podge of rules, providing no clear guidance to police engaged in the course of their duties.[16] Consequently, knock-and-talks not only threaten the equal protection of the law guaranteed to all persons in the United States but also unnecessarily increase the exposure of police and citizens[17] to the dangerous circumstances that occur during unplanned and unwarranted intrusions into the home.[18] That being so, a straightforward rule is urgently needed to provide police and citizens with proper notice and guidance as to what are and what are not justifiable circumstances under which police may knock on the door of a private dwelling.[19]

Consider the following situation where police used a knock-and-talk to investigate a nineteen-year-old individual named Victor in his home under circumstances that would not have justified an investigation in the street. In Victor's case, three police officers decided to question the occupants of Victor's apartment because they saw a suspected drug dealer leave the apartment earlier that day.[20] The police knew Victor's mere association with the suspected dealer did not provide sufficient suspicion to obtain a warrant—or to justify a stop-and-frisk for that matter[21]—and yet the officers approached and knocked on the door of the apartment, intending to gather evidence and obtain consent to search the dwelling.[22] When Victor opened the door the officers immediately began questioning him about his association with the suspected dealer. As Victor stepped back from the doorway the officers moved inside the apartment[23] and began questioning

16. Bradley, *supra* note 7, at 1104, 1122.

17. *See* U.S. CONST. amends. IV, V, XIV; Carlis, *supra* note 12, at 2002–03; Slobogin, *supra* note 12, at 401–02. The designation of *citizens* to describe *persons protected by the Fourth Amendment* is used in this article for simplicity's sake, but is *not* intended to distinguish a person's right to the guarantees of the Constitution based on one's immigration status.

18. *See* Bradley, *supra* note 7, at 1104, 1122.

19. *See id.* at 1122.

20. This example is based on police and witness testimony provided during a 2014 suppression hearing in Bronx Criminal Court in New York. The suspected drug dealer had been arrested pursuant to a warrant earlier that day. The *Warrant Squad* was armed with various firearms, body armor, and a door-breaching tool called a *rabbit*.

21. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (concluding that reasonable suspicion is not satisfied by mere association with person for whom the police had probable cause to search, even when police had a search warrant for the premises).

22. *See id.*; United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996) ("The detectives ultimately decided to attempt a *knock-and-talk* procedure since they had determined that the information received from the anonymous caller was not of sufficient reliability to obtain a search warrant.").

23. Whether a homeowner stepping back from a confrontation with officers is actually inviting officers to enter the home is a common source of confusion and argument in

Victor's ninety-year-old, Spanish-speaking great-grandma![24] Great-grandma explained that she lived in the apartment with Victor and she showed the officer Victor's bedroom. Peering inside Victor's wardrobe, the officer noticed two small Ziploc bags of cocaine and a magazine clip for a handgun.

The officer returned to the living room and confronted Victor with this discovery, threatening Victor, telling him that she did not want his family to get in trouble for him and asking "where is the gun?" Victor admitted the drugs were his and told the officer there was a gun under the wardrobe. Victor was handcuffed and seated at the kitchen table while great-grandma was led into the bedroom by two officers and shown the magazine and the cocaine in the wardrobe. The officers handed her a consent-to-search form,[25] explained the purpose of the form, and asked her to sign it. She did not ask any questions; she just signed the form. A gun was recovered, and Victor was charged with possession of an unlicensed firearm.[26]

This Article argues that the series of events that led to Victor's unlawful arrest[27] should never have happened because Victor's right to be free from unreasonable searches was violated the moment police *knocked* on his door.[28] After the Supreme Court's decisions in *Kentucky v. King*[29] and *Florida v. Jardines*,[30] it is an officer's "objective purpose" for knocking on the door of a private dwelling that turns what would otherwise be a consensual encounter into a limited search.[31] And, under *Jardines*, when an officer approaches a home and knocks on the door for the purpose of gathering evidence, the officer acts with the objective purpose of completing a search.[32] This Article argues that a limited *search* within the meaning of

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the courts. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 12–15 (1948); *Miller*, 933 F. Supp. at 505–06.

24. One of the officers was a native Spanish speaker who began questioning the grandmother apart from the other two officers who were questioning Victor in English.

25. A consent-to-search form may be properly used by police to support the government's case that consent to enter and search a private dwelling was voluntary. *See* State v. Hernandez, 146 So. 3d 163, 168–69 (Fla. 3d Dist. Ct. App. 2014). Normally, however, the form should be signed before the officers begin a search. *See id.*

26. *See* N.Y. PENAL LAW § 265.01 (McKinney 2013), *previous version declared unconstitutional by* People v. Bounasri, 915 N.Y.S.2d 921 (N.Y. City Ct. 2011).

27. *See* U.S. CONST. amend IV; *infra* Section III.A. After the suppression hearing, the judge granted Victor's motion to suppress the evidence that was obtained through a warrantless entry into the home and coercive police behavior. *See Miller*, 933 F. Supp. at 502, 506. This Article argues that the judge's decision to suppress the evidence was correct, but the decision was based on the wrong reasons. *See id.* at 505–06.

28. U.S. CONST. amend. IV; *see also* Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); Kentucky v. King, 131 S. Ct. 1849, 1858–59 (2011); *infra* Parts III–V.

29. 131 S. Ct. 1849 (2011).

30. 133 S. Ct. 1409 (2013).

31. *King*, 131 S. Ct. at 1859; *Jardines*, 133 S. Ct. at 1416–17.

32. *Jardines*, 133 S. Ct. at 1414, 1417.

the Fourth Amendment occurred the moment the police knocked on Victor's door because the police knocked on his door with the objective purpose of completing a search.[33] And, while a knock-and-talk, like a stop-and-frisk, is a *limited* search[34] within the meaning of the Fourth Amendment, the police in Victor's case did not have the reasonable suspicion required under *Terry* to conduct such a search.[35] Furthermore, the Equal Protection Clause and the Due Process Clause of the Constitution[36] require courts to consider the lawfulness of knock-and-talks under the same reasonable suspicion standard that is applied to stop-and-frisks.[37]

Part II of this Article begins by defining knock-and-talks and by explaining how government officials employ the practice.[38] Part III discusses the myriad of rules applied by courts and offered by scholars to address the reasonableness and lawfulness of knock-and-talks.[39] Part IV explains the evolution of the Supreme Court's *search* doctrine and argues that a *search* within the meaning of the Fourth Amendment occurs when police conduct a knock-and-talk for the purpose of completing a search.[40] Part V argues that *Terry*'s "reasonable suspicion" standard[41] is the appropriate standard for determining whether a knock-and-talk is lawful because providing a private dwelling with a higher level of Fourth Amendment protection than a citizen in the street is a discriminatory

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33. U.S. CONST. amend. IV; *see also Jardines*, 133 S. Ct. at 1416–17 (concluding that a physical trespass by police was a search within the meaning of the Fourth Amendment when the officer's objective purpose was to conduct a search); Drake, *supra* note 3, at 27 (finding that a *search* occurs when police conduct a knock-and-talk "in order to *gather* the homeowner's consent, evidence that they then use to . . . forego a warrant altogether"); *infra* Section IV.C. Professor Jamesa J. Drake was counsel of record in *Kentucky v. King*. Drake, *supra* note 3, at 26 n.*.

34. *See Jardines*, 133 S. Ct. at 1416; Terry v. Ohio, 392 U.S. 1, 15–16 (1968). A limited search is subject to judicial scrutiny pursuant to the Fourth Amendment of the U.S. Constitution. U.S. CONST. amend. IV; *Terry*, 392 U.S. at 15–16. However, a limited search, unlike a full-blown search, is justified when police have a mere *reasonable suspicion* to believe criminal activity is afoot; rather than *probable cause*. *See Terry*, 392 U.S. at 24, 27.

35. U.S. CONST. amend. IV; *see also Terry*, 392 U.S. at 24.

36. U.S. CONST. amends. V, XIV.

37. *See Jardines*, 133 S. Ct. at 1423 (Alito, J., dissenting); *Terry*, 392 U.S. at 30 (allowing for limited searches and seizures of persons in the street, where the officer has a *reasonable suspicion* to believe criminal activity is afoot).

38. Herbert Gaylord, *What Good Is the Fourth Amendment? "Knock and Talk" &* People v. Frohriep, 19 T.M. COOLEY L. REV. 229, 229 (2002); *see also infra* Part II.

39. *See infra* Part III.

40. *See Jardines*, 133 S. Ct. at 1414 (citing to United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)); *infra* Part IV.

41. *See Terry*, 392 U.S. at 37 (Douglas, J., dissenting); *infra* Part V.

application of the Fourth Amendment.[42] Finally, in Part VI, this Article applies the reasonable suspicion standard to Victor's case and the most common factual circumstances arising from the use of knock-and-talks.[43]

II. WHAT IS A KNOCK-AND-TALK?

A knock-and-talk is a procedure used by law enforcement officers to knock on the door of a private dwelling in order to speak to the inhabitants when the officers do not have an arrest or search warrant.[44] Typically, a knock-and-talk is used for the purpose of: (1) providing or obtaining information on behalf of the public good,[45] (2) conducting a search,[46] (3) obtaining consent to enter,[47] or (4) making a warrantless arrest.[48]

As a matter of common sense, police officers have a right and a duty to knock on the door of a private dwelling when "they reasonably believe

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42. U.S. CONST. amend. IV; *see also Terry*, 392 U.S. at 37 (Douglas, J., dissenting); *infra* Part V.

43. *See infra* Part VI.

44. *See* United States v. Crapser, 472 F.3d 1141, 1143, 1146, 1148 (9th Cir. 2007); Gaylord, *supra* note 38, at 229. "*Knock-and-talk* is a procedure used by police when they lack probable cause to obtain a search warrant." Gaylord, *supra* note 38, at 229; *see also Jardines*, 133 S. Ct. at 1420, 1423 (Alito, J., dissenting) (defining a knock-and-talk as a warrantless knock on a citizen's door "for the purpose of gathering evidence"). Moreover, if the officers had a warrant, the procedure would be called a *knock and announce* made in anticipation of inevitable, lawful entry into the home. *See* Hudson v. Michigan, 547 U.S. 586, 589 (2006); Wilson v. Arkansas, 514 U.S. 927, 929–30 (1995).

45. *See Terry*, 392 U.S. at 22–23; Gaylord, *supra* note 38, at 230–31. For example, where an officer is informing residents of an impending natural disaster, or where an officer is canvassing a neighborhood in an effort to find a missing person, or a suspect who recently committed a violent crime and who may be hiding or lurking in a residential area. *See* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

46. *See* United States v. Johnson, 170 F.3d 708, 711, 718 (7th Cir. 1999) (discussing how police use knock-and-talks to attempt to gather evidence and gain consent to enter and search a dwelling without a warrant); Drake, *supra* note 3, at 29 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

47. Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R. 6TH 515, 515 (2006) ("*Knock and talk* is a procedure . . . typically [used] to obtain more information regarding a criminal investigation or to obtain consent to search where probable cause is lacking.").

48. Bradley, *supra* note 7, at 1099 ("Under *knock-and-talk*, police go to . . . residences, with or without probable cause, and knock on the door to obtain plain views of the interior of the house[s], to question the residents, to seek consent to search, . . . or to arrest without a warrant, often based on what they discover during the *knock-and-talk*."); *see also, e.g.*, Payton v. New York, 445 U.S. 573, 575–76, 601

that a person within is in need of immediate aid."[49] Additionally, officers engaged in "hot pursuit" of a fleeing suspect may follow the suspect onto private premises, even if they do not have a warrant, so long as probable cause exists to arrest the suspect.[50]

While such exigent circumstances may justify a warrantless intrusion into the home, a different analysis should be conducted when officers knock on a resident's door in order to investigate the occupants of the dwelling, to conduct a search, and to otherwise subvert the Fourth Amendment's warrant requirement.[51] It has become a common and popular practice among law enforcement officers to "approach a . . . residence with a predetermined plan to circumvent the warrant requirement and convince the homeowner to let them inside using tactics designed to undermine, if not completely subjugate, the homeowner's free will."[52] Police have increasingly employed the use of knock-and-talks as an "end-run around" the Fourth Amendment.[53] Often based on an anonymous tip[54] or second hand information from the public,[55]

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49. Mincey v. Arizona, 437 U.S. 385, 392 (1978) (emphasis added); Brigham City v. Stuart, 547 U.S. 398, 400, 402 (2006).

50. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

51. *See* U.S. CONST. amend. IV; *Warden*, 387 U.S. at 298; Gaylord, *supra* note 38, at 229–30. "The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV. Yet, "the very purpose of *knock-and-talk* is to thwart the need for probable cause and a search warrant, police circumvent the safeguards provided by the Fourth Amendment when they use this procedure . . . ." Gaylord, *supra* note 38, at 230.

52. Drake, *supra* note 3, at 26.

53. *Id.* at 34 ("[K]nock-and-talks . . . have caught on like wild fire.") (citation omitted); Marc L. Waite, *Reining in "Knock and Talk" Investigations: Using* Missouri v. Seibert *to Curtail an End-Run Around the Fourth Amendment*, 41 VAL. U. L. REV. 1335, 1335–36 (2007); *see also* Carroll v. Carman, 135 S. Ct. 348, 349 (2014); United States v. Hendrix, 664 F.3d 1334, 1337, 1339 (10th Cir. 2011), *cert. denied*, 135 S. Ct. 1002 (2015); United States v. Cisneros-Gutierrez, 598 F.3d 997, 1003 (8th Cir. 2010); Thorne v. State, No. CACR 02-820, 2003 WL 22021966, at *2–3 (Ark. Ct. App. Aug. 27, 2003); United States v. Reyes-Montes, 233 F. Supp. 2d 1326, 1331 (D. Kan. 2002); United States v. Hardeman, 36 F. Supp. 2d 770, 772–73, 777–78, 781 (E.D. Mich. 1999). This is by no means an exhaustive list: There are dozens of examples of officers using knock-and-talks for this purpose. *See generally* Kletter, *supra* note 47.

54. *See, e.g.*, United States v. Hatfield, 333 F.3d 1189, 1190 (10th Cir. 2003); United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013).

55. United States v. Johnson, 170 F.3d 708, 711 (7th Cir. 1999). For example, in *Johnson*, police conducted a knock-and-talk based on a property manager's report that drug activity was occurring in an apartment building. *Id.* The property manager did not base his report on first hand knowledge; however, rather his report was motivated by another citizen report that had been shared with him. *Id.*

police approach a home to conduct a knock-and-talk knowing they do not have enough information to obtain an arrest warrant.[56]

Police departments throughout the country have even designated entire task forces and divisions to conducting knock-and-talks.[57] For instance, in Florida, the Orange County Sheriff Department completed up to three hundred knock-and-talks per month, allowing officers to gather evidence and to obtain consent to enter and search a dwelling without a warrant.[58] And in Dallas, Texas, police have a "[forty-six]-member knock-and-talk" task force that investigates community members based "mostly on neighbors' tips about unusual activity."[59] Once police gain entry into the home they may gather any evidence that is in plain view,[60] or that is discovered during a "protective sweep."[61] There is no question that knock-and-talks facilitate unwarranted interactions between police and citizens, and unwarranted gathering of evidence in private dwellings.[62]

Despite the increased and aggressive use of knock-and-talks, the practice has gone largely unnoticed by even the Supreme Court for more than sixty years[63] and has seeped its way into accepted practice for police

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56. *See id.* ("[I]t was plain when the officers decided to check out [the] . . . complaint . . . that they could not have obtained a warrant based on the information they then had."); *Miller*, 933 F. Supp. at 502 ("Detective Sturm testified that they decided to perform [the knock-and-talk] because admittedly they did not have probable cause to obtain a search warrant.").

57. Drake, *supra* note 3, at 35.

58. *Id.*; *see also* Henry Pierson Curtis, *Cops' 'Knock-and-Talk' Tactic Draws Flak After Near-Fatal Shooting*, ORLANDO SENTINEL (Oct. 2, 2010), http://articles.orlandosentinel.com/2010-10-02/news/os-knock-and-talk-procedures-20100922_1_officers-show-doorstep-tactic; William Dean Hinton, *Knock and Talk*, ORLANDO WKLY. (Jan. 9, 2003), http://www.orlandoweekly.com/orlando/knock-and-talk/Content?oid=2260977.

59. Tristan Hallman, *Dallas Police Are Finding Drug Houses by Walking Up and Asking*, DALL. MORNING NEWS (Aug. 25, 2013, 10:51 PM), http://www.dallasnews.com/news/crime/headlines/20130825-dallas-police-finding-drug-houses-by-walking-up-and-asking.ece.

60. *See* Horton v. California, 496 U.S. 128, 131, 133–35 (1990).

61. United States v. Gould, 364 F.3d 578, 581, 586–87 (5th Cir. 2004) (citing Maryland v. Buie, 494 U.S. 325, 327 (1990)). In *Gould*, the Federal Court of Appeals extended the Supreme Court's holding in *Buie* to allow a protective sweep of premises where no arrest was yet made even though *Buie* was limited to searches incident to arrest. *Id.* at 584, 586–87; *see also* Maryland v. Buie, 494 U.S. 325, 327, 335 (1990); Bradley, *supra* note 7, at 1115.

62. *See Gould*, 364 F.3d at 589–90; Drake, *supra* note 3, at 34–35.

63. *See* Florida v. Jardines, 133 S. Ct. 1409, 1423 (2013); Johnson v. United States, 333 U.S. 10, 12 (1948); Drake, *supra* note 3, at 34. The first time the Supreme Court used the phrase *knock-and-talk* was in 2013 in *Jardines* even though the practice has existed since 1948. *Jardines*, 133 S. Ct. at 1423; *Johnson*, 333 U.S. at 12; Drake, *supra* note 3, at 34.

departments all over the country.[64] It was not until 1991 that the term knock-and-talk was first used by a court.[65] In *State v. Land*,[66] the Oregon Court of Appeals recognized an officer's use of a knock-and-talk where the officer, who was denied a search warrant, "went to defendant's home to obtain additional information and to 'get his consent to search.'"[67] The court noted the officer's use of a knock-and-talk but did not consider the lawfulness of the practice.[68] The Supreme Court and lower courts have attempted to grapple with the constitutionality of knock-and-talks but in doing so, have failed to consider whether the officer's actual act of *knocking* on the door was reasonable under the protections guaranteed to citizens under the Fourth Amendment.[69]

III. CURRENT RULES GOVERNING THE USE OF KNOCK-AND-TALKS

Although courts have recognized the knock-and-talk and given it a name,[70] courts have not considered the lawfulness of the act of *knocking* on the door of a private dwelling.[71] While courts have provided some recourse to citizens whose Fourth Amendment rights were violated *before* or *after* a knock-and-talk, courts have failed to explain what circumstances are necessary to justify police *knocking* on a citizen's door.[72] The Courts' reliance on existing *search* and *seizure* doctrine has created a patchwork of rules and case-by-case analyses, which fail to provide clear guidance to police officers conducting knock-and-talks.[73] The result is that police and citizens alike are unduly exposed to the dangerous and unconstitutional

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64. *See Jardines*, 133 S. Ct. at 1423; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); *Gould*, 364 F.3d at 590; Drake, *supra* note 3, at 34–35.

65. State v. Land, 806 P.2d 1156, 1157 (Or. Ct. App. 1991); Kate Schuyler, *Right-to-Refuse Warnings: A Minority's Crusade for Justice*, 38 U. TOL. L. REV. 769, 769 (2007). The case that first used the phrase knock-and-talk was *State v. Land*.

66. 806 P.2d 1156 (Or. Ct. App. 1991).

67. *Id.* at 1156.

68. *Id.* at 1158.

69. *See* U.S. CONST. amend. IV; Kentucky v. King, 131 S. Ct. 1849, 1858–61 (2011); Schuyler, *supra* note 65, at 769.

70. Drake, *supra* note 3, at 41 ("Knock-and-talks make a good number of lower courts queasy . . . .").

71. *Id.*; *see also King*, 131 S. Ct. at 1862; United States v. Dunn, 480 U.S. 294, 305 (1987); United States v. Hatfield, 333 F.3d 1189, 1193–95 (10th Cir. 2003).

72. *See* U.S. CONST. amend. IV; Drake, *supra* note 3, at 41–42.

73. *See King*, 131 S. Ct. at 1857; Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001). "But, we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . ." *Atwater*, 532 U.S. at 347; *see also* U.S. CONST. amend. IV; *King*, 131 S. Ct. at 1861 (rejecting the test offered by respondent as *nebulous and impractical*).

interactions that result from unwarranted and unplanned intrusions into the home.[74] The inadequacy of current rules governing knock-and-talks has forced the Supreme Court to reconsider its Fourth Amendment jurisprudence and to develop a new rule that analyzes an officer's *objective purpose* for knocking on a citizen's door.[75] A brief review of how courts have applied past search and seizure rules to knock-and-talks is necessary to understand the inevitable development of the objective purpose rule.[76]

A. *Knock-and-Talks and Unlawful Seizures*

Courts and scholars considering the constitutionality of knock-and-talks have largely focused on whether—*after* the knock on the door—the interaction between the officer and the citizen is an unreasonable *seizure*.[77] The most common issues raised in this context are whether consent to enter and search the premises was voluntary,[78] whether the citizen would have felt free to disregard the police intrusion,[79] and whether the jurisdiction in question applies—or should apply—a rule requiring police to warn citizens of their right to refuse entry or consent to search.[80]

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74. *See* United States v. Johnson, 170 F.3d 708, 712 (7th Cir. 1999); Curtis, *supra* note 58 (discussing a misunderstanding between a police officer and a citizen during a knock-and-talk, which led to the officer shooting the homeowner in the face). In *Johnson*, for example, an attempted knock-and-talk turned into an unexpected scuffle with an armed suspect when the citizen opened the door just as the officer moved to knock on the door. *Johnson*, 170 F.3d at 712. The police momentarily lost control of the suspect and the gun. *Id.*

75. *King*, 131 S. Ct. at 1858–59; *Johnson*, 170 F.3d at 715.

76. *See generally* Kletter, *supra* note 47.

77. *See* United States v. Hatfield, 333 F.3d 1189, 1193, 1195 (10th Cir. 2003); Gompf v. State, 120 P.3d 980, 986–87 (Wyo. 2005); Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 313 (2005) ("To the extent that courts have addressed the constitutionality of the knock-and-talk, it has primarily been in the context of whether . . . police . . . [conducted] a *seizure* . . . such that the occupant . . . would not feel free to decline the officers' request to enter . . . or otherwise . . . terminate the police encounter."); Kletter, *supra* note 47 (providing a 121 page comprehensive American Law Report of state and federal cases addressing knock-and-talks, where twenty of thirty-four sections are devoted to knock-and-talks as possible *seizures*).

78. *See* Kletter, *supra* note 47 (providing a comprehensive review of state and federal case law addressing the coerciveness and reasonableness of a knock-and-talk encounter).

79. *See id.*

80. *Id.* (providing a comprehensive review of state and federal courts that have considered and rejected or accepted a requirement that police advise citizens of their "right to refuse, revoke, or limit consent to enter or search when conducting [a] knock and talk").

The most likely reason officers conduct a knock-and-talk is to obtain consent to enter and search a dwelling when they do not have a warrant.[81] Judicial analysis of this practice considers whether consent to search or enter a dwelling was voluntarily given or whether consent was coerced against the occupant's will.[82] Courts ask whether the citizen would have felt free to disregard the officer, whether the officer was incessant and overbearing in his or her tactics or questioning of the citizen,[83] and whether the interaction between the police and citizen ultimately resulted in a *seizure*, subject to scrutiny under the Fourth Amendment.[84]

However, judicial analysis under consent and coercion doctrines has produced limited and ambiguous results with respect to knock-and-talks.[85] As Professor Drake recently wrote, "[f]or years, criminal defendants have argued to the lower courts that knock-and-talks coerce the homeowner into consenting to a search."[86] "This approach has had little success because voluntariness jurisprudence is notoriously bad."[87] Even though some courts recognize that "any knock and talk is inherently coercive to some degree,"[88] consent and coercion rules fail to mitigate the constitutional issues raised by knock-and-talks.[89] Rather than asking whether police had a justifiable reason to knock on a citizen's door to begin with, these rules analyze what happened

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81. Waite, *supra* note 53, at 1367 (finding the "goal in using the *knock and talk* is to gain consent to search, and thereby alleviate the need for a search warrant"); *see also* Scott v. State, 782 A.2d 862, 867 (Md. 2001); State v. Land, 806 P.2d 1156, 1156 (Or. Ct. App. 1991) ("When the judge declined to sign the warrant, [the officer] went to defendant's home to obtain additional information and to 'get his consent to search.'"); Drake, *supra* note 3, at 37 ("The overwhelming majority of police searches are justified by the consent exception to the warrant requirement, and it stands to reason that the overwhelming majority of *consensual* residential searches are preceded by a knock-and-talk.").

82. *See* Kletter, *supra* note 47.

83. Florida v. Bostick, 501 U.S. 429, 434 (1991) (concluding that whether a *seizure* has occurred depends on whether the citizen would have felt free to terminate the encounter); United States v. Charles, 29 F. App'x 892, 896–98 (3d Cir. 2002) (determining the lawfulness of a knock-and-talk by considering the interaction between the police and defendant after the knock on the door).

84. *See, e.g.*, United States v. Spence, 397 F.3d 1280, 1282–83 (10th Cir. 2005).

85. Bradley, *supra* note 7, at 1122 (finding that knock-and-talks have "led to widespread confusion among the courts as to precisely which police behaviors are acceptable and which are prohibited"). *See generally* Kletter, *supra* note 47 (providing 121 pages of state and federal case annotations, with no clear consensus in how best to address the knock-and-talk phenomena).

86. Drake, *supra* note 3, at 26.

87. *Id.*

88. State v. Ferrier, 960 P.2d 927, 933 (Wash. 1998).

89. *See id.* at 934.

after police intruded into a citizen's privacy.[90] Consequently, there is an increase in the unpredictable and dangerous circumstances that develop when police conduct unplanned and unwarranted intrusions into an individual's home.[91]

For instance, a homeowner in Central Florida, concerned about reports of recent escapees from a local jail, answered an early morning knock on his front door carrying a *shotgun*.[92] The *police officer* knocking on the door shined a high-intensity flashlight in the homeowner's eyes. The homeowner claimed the light startled him, causing him to accidently discharge the shotgun, which caused no injury.[93] The officer responded by drawing his own weapon and shooting the homeowner in the face![94] Undoubtedly, knocking on an individual's door unannounced, without a plan, and without a warrant "is inherently dangerous for . . . officers and . . . residents" alike.[95]

Not only is knocking on someone's door without a warrant dangerous for police and residents, but the practice is also innately coercive in nature.[96] For example, in Victor's case discussed in the introduction, Victor and his great-grandma were subjected to overbearing police tactics when armed police immediately began questioning Victor about his involvement in drug activity, when police began questioning his great-grandma, and when great-grandma watched her grandson be handcuffed and placed under guard by police in her home. This all occurred *before* the police asked ninety-year-old great-grandma to sign the consent-to-search form! In Victor's case, the judge concluded that the Fourth Amendment's protections were not triggered until after Victor opened the door.[97] Only after the three officers made face-to-face contact with Victor were the officers' actions analyzed to determine whether they used unduly coercive tactics to gain entry into the home, to elicit a statement from Victor and to obtain consent from great-grandma to search the premises.[98] This is the most

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90. *See* Drake, *supra* note 3, at 26–27.
91. *See id.* at 34–37.
92. *See* Curtis, *supra* note 58.
93. *Id.*
94. *Id.*
95. *Id.*
96. Kletter, *supra* note 47.
97. U.S. CONST. amend. IV. This is often the trigger point for courts to begin analyzing the lawfulness of the police intrusion. *See, e.g.*, United States v. Thomas, 430 F.3d 274, 276 (6th Cir. 2005); United States v. Spence, 397 F.3d 1280, 1283 (10th Cir. 2005); United States v. Charles, 29 F. App'x. 892, 896–97 (3d Cir. 2002).
98. *See* People v. Gonzalez, 347 N.E.2d 575, 579 (1976) (holding consent must be voluntary in order to authorize a warrantless search); New York v. Harris, 495 U.S. 14, 20 (1990) (holding that statements taken during custodial interrogation are unlawful unless

common method of analysis for courts determining the lawfulness of knock-and-talks.[99]

However, cases that determine the legality of a police intrusion only after the door is open are not really knock-and-talk cases at all because they are only concerned with the resulting exchange between the officers and citizens, and not the *knock* that made the interaction possible.[100] By assessing police action only after a citizen opens the door, courts are effectively sanctioning the practice of knock-and-talks.[101] The difficulty of assessing knock-and-talks under current consent and coercion rules has forced some courts to attempt to deal with knock-and-talks under the Supreme Court of the United States' curtilage doctrine.[102]

B. *Knock-and-Talks and the Curtilage Doctrine*

Whether an officer's act of knocking on the door of a private dwelling constitutes a *search* within the meaning of the Fourth Amendment has not been directly addressed by the Supreme Court of the United States or lower courts.[103] Instead, courts have analyzed the lawfulness of officers' actions *before* the knock on the door under the Supreme Court's curtilage doctrine.[104] The curtilage doctrine considers the "area 'immediately surrounding and associated with the home' [as] 'part of the home itself for Fourth Amendment purposes.'"[105] For example, a front porch[106] or attached garage[107] would be part of the curtilage of the home.[108] The open field, on

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warnings were provided to the defendant, pursuant to the requirements of *Miranda v. Arizona*); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

99. *See generally* Kletter, *supra* note 47 (providing a comprehensive report of state and federal cases that deal with knock-and-talks, the large majority of which are analyzed under consent and coercion doctrines).

100. *See* Kentucky v. King, 131 S. Ct. 1849, 1858–59; Drake, *supra* note 3, at 26 n.4. Aside from the exceptional case where the officer's manner of knocking—e.g., banging on the door—contributed to unlawful coercion or obfuscation of the occupant's free will. Drake, *supra* note 3, at 26–27.

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

102. *See Charles*, 29 F. App'x at 895.

103. Drake, *supra* note 3, at 26; *see also* U.S. CONST. amend. IV.

104. *See* United States v. Dunn, 480 U.S. 294, 307, 312 (1987) (Brennan, J., dissenting); Oliver v. United States, 466 U.S. 170, 180 (1984); Kletter, *supra* note 47.

105. *Jardines*, 133 S. Ct. at 1414 (citing *Oliver*, 466 U.S. at 180).

106. *Id.* at 1415 ("The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'") (citing *Oliver*, 466 U.S. at 182 n. 12).

107. *Dunn*, 480 U.S. at 308 (Brennan, J., dissenting) ("[C]urtilage includes all outbuildings used in connection with a residence, such as garages, sheds [and] *barns* . . . connected with and in close vicinity of the residence.") (quoting Luman v. State, 629 P.2d

the other hand, is made up of certain outlying properties as distinct from the home and the curtilage.[109] Thus, a homeowner's adjacent pastureland[110] or barn that is detached and removed from the home[111] is not considered part of the home for Fourth Amendment purposes.[112] Ultimately, courts consider whether a citizen had a reasonable-expectation-of-privacy "in the areas traversed by the police" before they knocked on the citizen's door.[113] In other words, courts are only asking whether police trespassed upon a homeowner's actual home or curtilage.[114] If not, a person's private property is part of an open field, which is not protected by the Fourth Amendment.[115] Under the curtilage doctrine, courts do not consider the lawfulness of the actual act of knocking on the door.[116]

Focusing on the path and methods taken to achieve the knock-and-talk, rather than the knock itself, is problematic in a number of ways.[117] First, courts are forced to engage in a nuanced and ambiguous analysis of specific factual circumstances, providing no real guidance or notice to citizens, police, or judges as to what is and what is not an unlawful search.[118] Courts get bogged down analyzing how tall a fence was, how far a driveway was from a neighbor's house, whether a "no trespassing" sign was clearly visible, whether police smelled the odor of marijuana before or after seeing a no trespassing sign, and so on.[119] The result is a patchwork of jurisprudence, where courts languish over issues like the size of shrubs,[120] rather than whether police were constitutionally empowered to approach the citizen's home and knock on the door.[121] Like the consent and coercion doctrines used to analyze whether a seizure occurred and was lawful, analysis under

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1275, 1276 (Okla. Crim. App. 1981)); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 596 (6th Cir. 1998).

108. *Jardines*, 133 S. Ct. at 1415; *Dunn*, 480 U.S. at 308 (Brennan, J., dissenting); *Daughenbaugh*, 150 F.3d at 596.

109. *See Dunn*, 480 U.S. at 308 (Brennan, J., dissenting).

110. *See, e.g., Hatfield*, 333 F.3d at 1190–91 (10th Cir. 2003).

111. *See, e.g., Oliver*, 466 U.S. at 173.

112. *Id.*; *see also* U.S. CONST. amend. IV.

113. *See* Kletter, *supra* note 47.

114. *See id.*

115. Leonetti, *supra* note 77, at 299; *see also* U.S. CONST. amend. IV.

116. Leonetti, *supra* note 77, at 301.

117. *See generally* Dunaway v. New York, 442 U.S. 200 (1979); United States v. Hall, No. 97-30296, 1998 WL 382722 (9th Cir. 1998); State v. Johnston, 839 A.2d 830 (N.H. 2004); State v. Friedli, No. 50191-7-I, 2003 WL 22173063 (Wash. Ct. App. Sept. 22, 2003).

118. *See, e.g., Hall*, 1998 WL 382722, at *2–3.

119. *See id.*; *Friedli*, 2003 WL 22173063, at *3.

120. *Johnston*, 839 A.2d at 833.

121. *See id.* at 833–34.

the curtilage doctrine fails to provide clear guidance for police during the dangerous course of their duties.[122]

A second major problem with addressing knock-and-talks only through the curtilage doctrine is that the doctrine only protects homeowners who have a defined curtilage.[123] "One of the difficulties in the application of the [curtilage doctrine] to urban areas is [the] epistemological reliance upon a suburban conceptual framework."[124] Consequently, urban apartment dwellers have less protection under the Fourth Amendment than their suburban and rural counterparts, because they do not have a buffer of curtilage protecting their home.[125] In Victor's case, for instance, the Court's curtilage doctrine would not have provided any protection from the police intrusion, because the police were lawfully standing in the hallway when they decided to approach his door.[126] This "analytical loophole" has encouraged the increased use of knock-and-talks in dense urban areas and apartment complexes.[127]

The problem is particularly acute in public housing units, where police may patrol the hallways of multi-storied apartment complexes and where each door is exposed to the common hallway.[128] One glaring example of the dangers produced by this practice is provided by the unlawful police killing of Akai Gurley in Brooklyn, New York on November 20, 2014.[129] In that case, New York Police Department ("NYPD") Officer Peter Liang had his weapon drawn during a warrantless patrol of a public housing unit when the gun discharged into a dark stairway, causing a bullet to strike twenty-eight-year-old Gurley in the chest, killing him.[130] While Gurley's death

122. *Dunaway*, 442 U.S. at 212–14; Leonetti, *supra* note 77, at 311, 313–14. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect . . . and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213–214.

123. Andrew Eppich, *Wolf at The Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 129–30, 132–33 (2012); *see also* Leonetti, *supra* note 77, at 311.

124. Leonetti, *supra* note 77, at 311.

125. Eppich, *supra* note 123, at 131–32; *see also* U.S. CONST. amend. IV.

126. *See* Kentucky v. King, 131 S. Ct. 1849, 1854, 1863 (2011) (finding knock-and-talk reasonable where police had lawfully entered the breezeway of an apartment complex in pursuit of a suspected narcotics dealer, and where police detected the odor of marijuana emanating from the door they chose to knock on). Police had just executed a lawful search warrant five doors down the hall from Victor's apartment.

127. *See* Leonetti, *supra* note 77, at 311.

128. *See* J. David Goodman, *Police Patrols in the Projects Draw Scrutiny*, N.Y. TIMES, Dec. 16, 2014, at A1.

129. *See* Michael Wilson, *City Officer's Errant Shot Kills Unarmed Man*, N.Y. TIMES, Nov. 22, 2014, at A1.

130. *Id.*; *see also* J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015),

occurred in the stairway of the public housing unit, rather than a common hallway, so-called "vertical patrols" also permit officers to patrol the hallways of the multi-storied buildings.[131] This allows police to easily access the doorways of residents in public housing, increases knock-and-talks, and leads to excessive, unwarranted encounters between police and citizens.[132] Clearly, "[r]esidents of public housing face harsh police tactics absent from more affluent communities,"[133] which "undermines efforts at community policing and has the potential to harm the population [knock-and-talks] supposedly protect[]."[134]

Poorer citizens are unequally exposed to unwarranted police intrusion in their home because analysis under the curtilage doctrine fails to consider the lawfulness of the actual police act of knocking on the door of a private home.[135] The constitutional conundrum created by knock-and-talks cannot be resolved through the curtilage doctrine.[136] Like the consent and coercion cases discussed above, it is a misnomer to consider this line of cases as knock-and-talk cases at all.[137] In *Kentucky v. King*, the Supreme Court set up the adoption of a new rule to address knock-and-talks, one that turns on an officer's objective purpose for knocking on the door.[138]

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http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html?_r=0; Thomas Tracy, et. al., *Officer Peter Liang Found Guilty of Manslaughter in Fatal Shooting of Akai Gurley in Brooklyn Housing Development*, N.Y. DAILY NEWS (Feb. 12, 2016), http://www.nydailynews.com/new-york/nyc-crime/nypd-peter-liang-guilty-fatal-shooting-akai-gurley-article-1.2528827.

131. N.Y.P.D PATROL GUIDE, PROCEDURE NO. 212-60 (Aug. 1, 2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg212-60-interior-vertical-patrol-housing-authority-bldgs.pdf. "Uniformed members of the service shall frequently inspect the interior of Housing Authority buildings on assigned posts as follows . . . [p]roceed to top floor of building, . . . [p]atrol each floor, staircase, and hallway within the building from the top floor to the ground floor." N.Y.P.D. PATROL GUIDE, PROCEDURE NO. 212-60, *supra* note 131. "During [vertical] patrols, police officers conduct floor-by-floor sweeps of public housing buildings and systematically question those they encounter . . . [causing] disparity . . . in the hallways and foyers of our nation's public housing." Carlis, *supra* note 12, at 2002. "When officers conduct a *vertical patrol*, they walk through and do a sweep of the hallways, stairwells, rooftops, and landings, to ensure the building is safe and that no one is trespassing or engaging in criminal activity." Clair MacDougall, *NYPD Sued over Housing Project "Vertical Patrols"*, HUFFINGTON POST (July 15, 2010, 6:16 PM), http://www.huffingtonpost.com/clair-macdougall/nypd-sued-over-housing-pr_b_648259.html.

132. *See* Leonetti, *supra* note 77, at 311–12.

133. *See* Carlis, *supra* note 12, at 2002.

134. *See* Eppich, *supra* note 123, at 119.

135. *Id.* at 131–32.

136. Drake, *supra* note 3, at 38–42 (advocating for a rule that prohibits police trespass onto curtilage when the purpose of their trespass is to gather evidence).

137. Kletter, *supra* note 47, at 535–60 (considering dozens of cases analyzed under the curtilage doctrines as knock-and-talk cases).

138. Kentucky v. King, 131 S. Ct. 1849, 1857–59 (2011).

C. Kentucky v. King *and the Development of the Objective Purpose Rule*

The Supreme Court's decision in *Kentucky v. King* highlighted the deficiencies in current knock-and-talk jurisprudence, and laid the groundwork for a new rule that analyzes an officer's *objective purpose* for knocking on a citizen's door.[139] However, even though the Court's decision in *Kentucky v. King* was probably the closest the Court has come to squarely addressing the constitutionality of knock-and-talks, the decision was not about a knock-and-talk.[140] Like the cases decided under the seizure and curtilage doctrines above, *Kentucky v. King* did not directly address the lawfulness of an officer's act of *knocking* on the door.[141] In *Kentucky v. King*, probable cause of criminal activity existed *before* the police knocked on the door, and exigent circumstances justified the police action that took place *after* the knock on the door.[142] While the constitutionality of knock-and-talks was not before the Court, *Kentucky v. King* set up the development of the objective purpose rule, limiting warrantless police action to that which "any private citizen might do."[143]

In *King v. Commonwealth*,[144] police had set up a "buy bust" operation where they "arranged for a confidential informant to purchase crack cocaine from a 'street level' dealer."[145] Following a controlled buy, police set out running after the suspected dealer who had moved quickly into a breezeway of an apartment complex.[146] The police entered the breezeway just in time to hear a door shut.[147] Not knowing which apartment the suspect had entered, the police followed the smell of burning marijuana to the door on the left at the end of the breezeway—the suspect had entered the door on the right.[148] They knocked on the door, announcing "police, police, police."[149] Immediately following the knock on the door, the officers heard people moving around inside the apartment, which led them to believe "that

139. *Id.* at 1858–61.

140. *Id.* at 1853–54, 1862; *see also* Drake, *supra* note 3, at 27 ("The facts in *King* bear some resemblance to a knock-and-talk: [M]ultiple, uniformed officers approached a private residence, banged loudly on the door and eventually made their way inside. But, the similarities end there.").

141. *See King*, 131 S. Ct. at 1862; United States v. Dunn, 480 U.S. 294, 305 (1987); United States v. Hatfield, 333 F.3d 1189, 1194–95 (10th Cir. 2003).

142. *See King*, 131 S. Ct. at 1858, 1863.

143. *Id.* at 1859, 1862.

144. 302 S.W. 3d 649 (Ky. 2010), *rev'd*, 131 S. Ct. 1849 (2011).

145. *Id.* at 651.

146. *Id.*

147. *Id.*

148. *Id.*

149. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 651.

drug-related evidence was about to be destroyed."[150] The officers "kicked in the door" and entered the apartment, finding King and two others smoking marijuana.[151] The officers eventually gained entry into the apartment across the hall, finding the "suspected drug dealer who was the initial target of their investigation."[152]

In rendering its decision, the Court did not directly address the lawfulness of knock-and-talks,[153] because that was not the question before the Court.[154] The question considered by the Court was whether police may rely on exigent circumstances to complete a warrantless entry into a home, when the "exigency was 'created' or 'manufactured' by the conduct of the police."[155] The exigency in *Kentucky v. King*—police belief that drugs were being destroyed—was created when the police knocked on King's door and announced their presence.[156] The Court concluded that the warrantless entry into the home to prevent the destruction of evidence was reasonable, because "the police did not create the exigency by engaging [in] or threatening to engage in conduct that violates the Fourth Amendment."[157]

Thus, the rule announced by the Court concerned whether the officers' actions leading up to, and including the knock on the door, violated the Fourth Amendment.[158] Yet, there was no question in *King v. Commonwealth* that the officers were justified in following the suspect into the breezeway after the suspect sold drugs to a confidential informant.[159] Further, once police detected the odor of marijuana emanating from King's door, the officers had probable cause to believe criminality was afoot in King's apartment, and were thus justified in knocking on his door.[160]

The Court did not directly consider the lawfulness of knock-and-talks because the officers undoubtedly were justified in approaching and knocking on the door, and because the act of knocking on the door, *by itself*,

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150. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 651–52.
151. *King*, 131 S. Ct. at 1854; *King*, 302 S.W.3d at 652.
152. *King*, 131 S. Ct. at 1855; *King*, 302 S.W.3d at 652.
153. *See King*, 131 S. Ct. at 1854; Drake, *supra* note 3, at 27.
154. *King*, 131 S. Ct. at 1854, 1858, 1862–63.
155. *See id.* at 1853–54, 1857.
156. *Id.* at 1857–58.
157. *Id.* at 1858; *see also* U.S. CONST. amend. IV.
158. *King*, 131 S. Ct. at 1854; *see also* U.S. CONST. amend. IV.
159. *King*, 131 S. Ct. at 1862–63; *see also* United States v. Valez, 796 F.2d 24, 28 (2d Cir. 1986) (finding probable cause to follow and arrest suspect after suspect was observed selling narcotics to undercover officer).
160. *King*, 131 S. Ct. at 1854, 1865 (Ginsburg, J., dissenting) ("[T]he smell of marijuana seeping under the apartment door into the hallway . . . gave the police 'probable cause . . . sufficient . . . to obtain a warrant to search the . . . apartment.'") (quoting *King*, 302 S.W.3d at 653); *see also Valez*, 796 F.2d at 28; *infra* Part IV (advocating for a mere reasonable suspicion standard for reviewing knock-and-talks).

was "no more than any private citizen might do."[161] In other words, the police were lawfully empowered to approach the door and knock because they had probable cause to justify both actions.[162] The act of knocking on the door did not convert the police action from lawful to unlawful under the Fourth Amendment, because knocking on a citizen's door, in and of itself, is "no more than any citizen might do."[163] *Kentucky v. King* set up the objective purpose rule that was expressly adopted by the Court in *Jardines*.[164] Consequently, it is the officer's objective purpose for knocking on the door of a private dwelling that demonstrates whether their act of knocking was "more than any private citizen might do."[165]

IV. THE OBJECTIVE PURPOSE RULE

In recent years the Supreme Court has made significant changes to what it considers a search within the meaning of the Fourth Amendment.[166] Beginning in 2012, the Court's decision in *United States v. Jones*[167] drastically altered federal search jurisprudence, reviving the once cast aside *trespass* doctrine.[168] Thereafter the *reasonable-expectation-of-privacy* test announced in *Katz v. United States*[169] was merged with the trespass doctrine from *Jones*.[170] As a result of this merger, and recalling the Court's reasoning in *Kentucky v. King*,[171] a search has occurred when an officer's trespassory act exceeds what "any . . . citizen might do."[172] And, after the Court's 2013 decision in *Jardines*, whether an officer's trespassory act is "more than any citizen might do" depends on the officer's *objective purpose* for completing the act.[173] After *Kentucky v. King*, *Jones*, and *Jardines*, a search within the meaning of the Fourth Amendment occurs when an official's trespassory act

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161. *King*, 131 S. Ct. at 1862.
162. *See id.*
163. *Id.* at 1861–62; *see also* U.S. CONST. amend. IV.
164. Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); *King*, 131 S. Ct. at 1862.
165. *Jardines*, 133 S. Ct. at 1416 (quoting *King*, 131 S. Ct. at 1862).
166. *See* U.S. CONST. amend. IV; *e.g.*, United States v. Jones, 132 S. Ct. 945, 949–50 (2012).
167. 132 S. Ct. 945 (2012).
168. *Id.* at 946, 950, 953 (concluding that "the [g]overnment's physical intrusion on an *effect* for the purpose of obtaining information constitutes a *search*").
169. 389 U.S. 347 (1967).
170. *Jones*, 132 S. Ct. at 952; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
171. *Jones*, 132 S. Ct. at 952; *King*, 131 S. Ct. at 1861–62; *see also supra* Section II.C.
172. *King*, 131 S. Ct. at 1862.
173. Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013); *King*, 131 S. Ct. at 1862.

was accompanied with an objective purpose to conduct a search because that is "more than any . . . citizen might do."[174] And thus, a search has occurred, within the meaning of the Fourth Amendment, when an officer knocks on the door of a private dwelling for the purpose of conducting a search.[175] A brief review of the evolution of the Court's search doctrine is crucial for understanding the implications of the *objective purpose* rule.[176]

A. *What Is a Search Within the Meaning of the Fourth Amendment?*

The two guiding principles of the Supreme Court's search doctrine are clear.[177] Under the Fourth Amendment a search occurs when the government:

(1) invades a subjective expectation of privacy that society recognizes as reasonable[178] or

(2) physically intrudes on constitutionally protected areas.[179]

In *Katz*, the Court concluded the government could not, without a warrant supported by probable cause, listen and record an individual's conversations in a public phone booth, even though the electronic recording device employed by the officials "did not happen to penetrate the wall" of the booth.[180] In holding that physical intrusion or trespass by government officials was not necessary to trigger the Fourth Amendment's protections, the Court held that a search occurs when the government invades a subjective expectation of privacy that society recognizes as reasonable.[181] The so-called "reasonable-expectation-of-privacy" test announced in *Katz* was echoed in *Kentucky v. King*, where the Court reasoned that police may act without a warrant so long as their conduct is "no more than any . . . citizen might do."[182] The *reasonable-expectation-of-privacy* test remained the law of the land from 1967 until 2012.[183]

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174. *King*, 131 S. Ct. at 1861–62; *Jones*, 132 S. Ct. at 952; *Jardines*, 133 S. Ct. at 1416; *see also* U.S. CONST. amend. IV.

175. *See* U.S. CONST. amend. IV; Drake, *supra* note 3, at 26–27.

176. *See Jones*, 132 S. Ct. at 949–50, 952.

177. *See id.* at 1414, 1416–17; *Jones*, 132 S. Ct. at 950; Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

178. U.S. CONST. amend. IV; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

179. U.S. CONST. amend. IV; *Jones*, 132 S. Ct. at 951 (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

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

181. *Id.* at 361 (Harlan, J., concurring); *see also* U.S. CONST. amend. IV.

182. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see also* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011).

183. *See Jones*, 132 S. Ct. at 952; *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

In 2012, the Court readopted the once cast aside "trespass" doctrine, creating a Fourth Amendment rule dependent on clear physical lines.[184] In *Jones*, the Court decided that the *reasonable-expectation-of-privacy* test relied upon by courts since *Katz* merely supplemented the citizen's absolute right to be free from "physical restraint or trespass" on their property.[185] Justice Scalia, writing for the majority, determined that physical trespass was the type of invasion specifically contemplated by the Framers of the Constitution.[186] "When 'the Government obtains information by *physically intruding*' on persons, houses, papers, or effects, 'a *search* within the original meaning of the Fourth Amendment . . . undoubtedly occurred.'"[187] After the Court's "no more than any private citizen might do" language in *Kentucky v. King* and its revival of the trespass doctrine in *Jones*, it was only a matter of time before the Court would adopt a *search* rule that depended on an officer's *objective purpose* for physically trespassing on a constitutionally protected area.[188] That time came in 2013, in the Court's decision in *Jardines*.[189]

B. Florida v. Jardines: *The Objective Purpose Rule*

In *Florida v. Jardines*, the Supreme Court held that an officer's right to approach a private dwelling is limited by the officer's "specific purpose."[190] Although police may approach a home without a warrant in hopes of speaking to its occupants, "*because that is 'no more than any private citizen might do'* . . . . whether the officers had an implied license to enter . . . *depends upon the purpose for which they entered.*"[191] Again

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184. *Jones*, 132 S. Ct. at 952.

185. *Id.* at 950 (concluding that a physical trespass by police on an individual's effects is a *search* when conducted for the purpose of obtaining information, and that at the bottom, "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)); *see also Katz*, 389 U.S. at 360 (Harlan, J., concurring).

186. *Jones*, 132 S. Ct. at 949; Bond v. United States, 529 U.S. 334, 338–39 (2000) (finding the core right protected by the Fourth Amendment to be the citizen's right to be free from unwarranted physical contact or trespass by government officials); *see also* U.S. CONST. amend. IV.

187. *Jardines*, 133 S. Ct. at 1414 (quoting *Jones*, 132 S. Ct. at 950 n.3) (alteration in the original) (emphasis added); *see also* U.S. CONST. amend IV.

188. Kentucky v. King, 131 S. Ct. 1849, 1862 (2011); *see also Jones*, 132 S. Ct. at 949; Drake, *supra* note 3, at 30–31 (explaining how *Jones* set up the Court's decision in *Jardines*, which was the "first post-*Jones* application of the trespass test").

189. *Jardines*, 133 S. Ct. at 1417–18.

190. *Id.* at 1416–17. In *Jardines*, police used a drug-sniffing dog to search the defendant's porch for evidence of drugs. *Id.* at 1413.

191. *Id.* (emphasis added) (internal citations omitted).

writing for the majority, Justice Scalia concluded that when police trespassed on private property, an unreasonable search occurred when, instead of acting as any citizen normally would, "their behavior objectively reveal[ed] a purpose to conduct a search, which [was] not what anyone would think he had license to do."[192] Thus, whether a search within the meaning of the Fourth Amendment occurs depends on an officer's objective purpose for trespassing on a constitutionally protected area.[193]

The Court's adoption of an *objective purpose* rule is no surprise when for decades the Court has designated government action as reasonable or unreasonable based on an official's objective purpose for taking the action.[194] Under the Court's "special needs" doctrine, for instance, the reasonableness of government action depends on officials' "primary purpose" for taking the action.[195] Similarly, in cases where the state set up roadblocks or checkpoints, the Court consistently determined the reasonableness of the government action based on the government's objective purpose for temporarily detaining the commuters.[196] And of course in *Jones*, the Court held that "the [g]overnment's *physical intrusion* on an *effect for the purpose of obtaining information* constitutes a *search*."[197] The objective purpose rule announced in *Jardines* was thus an inevitable development in the Supreme Court's Fourth Amendment jurisprudence.[198]

Importantly, the *objective purpose* rule announced in *Jardines*[199] is distinct from the *subjective intent* rule rejected by the Court in *Whren v. United States*.[200] In *Whren*, the Court held that the "constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations

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

193. *Id.* at 1417–18; *see also* U.S. CONST. amend. IV.

194. *See Jardines*, 133 S. Ct. at 1416–17; United States v. Jones, 132 S. Ct. 945, 950 (2012).

195. *See* Ferguson v. City of Charleston, 532 U.S. 67, 73, 76, 83–84 (2001) (finding that involuntary drug testing of pregnant women constituted an unlawful search where the primary purpose was investigating suspected criminal activity and testing for drugs); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 606, 634 (1989) (finding random urine tests of train workers after train accident reasonable because, *inter alia*, the main purpose of the tests was not enforcing criminal law).

196. *See* Illinois v. Lidster, 540 U.S. 419, 419, 427 (2004) (distinguishing *Edmond* because the primary purpose of the checkpoint was not to investigate individual motorists, but to ask passengers "for help in providing information about a crime in all likelihood committed by others"); City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (concluding that drug interdiction checkpoints were invalid where the *primary purpose* of the checkpoint was for general crime control).

197. *Jones*, 132 S. Ct. at 946 (emphasis added).

198. *See Jardines*, 133 S. Ct. at 1416–17; *see also* U.S. CONST. amend IV.

199. *Jardines*, 133 S. Ct. at 1416–17.

200. 517 U.S. 806, 813 (1996).

of the individual officers involved."[201] In *Whren*, it did not matter—for Fourth Amendment purposes—whether police were discriminatorily motivated to stop the citizen so long as the police also had an *objectively reasonable purpose* for making the stop.[202] In *Jardines*, Justice Scalia acknowledged "that the subjective intent of the officer is irrelevant" to a Fourth Amendment determination of reasonableness[203] and that there is no question that a "stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason."[204] A defendant's Fourth Amendment challenge to a traffic stop, for example, will fail if his or her only argument is that "the officer's real reason for the stop was racial harassment."[205]

Under the objective purpose rule, the question "is precisely *whether* the officer's conduct was an objectively reasonable search."[206] Whether the search was reasonable "depends [on] whether the officers had an implied license to enter the [property], which in turn depends upon the *purpose* for which they entered."[207] In *Kentucky v. King*, for instance, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because, although the officer's objective purpose was to conduct a search, the officer had an "implied license"[208]—supported by probable cause—to approach and knock on the door.[209] The lawfulness of the *knock* itself was never at issue.[210] In *Jardines*, the Court did not have the opportunity to rule on the reasonableness of the knock on the door because the officer's conduct violated the Fourth Amendment before the officer "applied for and received a warrant to search the residence."[211] The officer's objective purpose converted what would have been a reasonable trespass by any other citizen into a search within the meaning of the Fourth Amendment.[212] Similarly in Victor's case, the officer did not have a lawful reason to approach and knock on the door. In such circumstances, the question is whether the officer was

201. *Id.*
202. *Id.*; *see also* U.S. CONST. amend. IV.
203. *Jardines*, 133 S. Ct. at 1416; *see also* U.S. CONST. amend IV.
204. *Jardines*, 133 S. Ct. at 1416.
205. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1416.
206. *Jardines*, 133 S. Ct. at 1416–17.
207. *Id.* at 1417.
208. *Id.*; Kentucky v. King, 131 S. Ct. 1849, 1860, 1862–63 (2011).
209. *King*, 131 S. Ct. at 1860, 1862–63.
210. *See id.* at 1862–63.
211. *Jardines*, 133 S. Ct. at 1413, 1415–16; *see also* U.S. CONST. amend. IV.
212. *Jardines*, 133 S. Ct. at 1415–18; *see also* U.S. CONST. amend. IV.

empowered to *knock* on the door, which in turn depends on the officer's objective purpose for knocking.[213]

C. *The Objective Purpose Rule and Knock-and-Talks*

After *Kentucky v. King*, *Jones*, and *Jardines*, a search within the meaning of the Fourth Amendment occurs when an officer trespasses on a constitutionally protected area for the purpose of conducting a search.[214] While the *Jardines* Court did not directly address the lawfulness of knock-and-talks, the Court "set out a roadmap for challenging one of the most common and insidious police tactics used today: the knock-and-talk. The path is short and clear, and it leads to the inescapable conclusion that the knock-and-talk—as it is actually employed in practice—is unconstitutional."[215]

The Court did not directly address knock-and-talks in *Jardines*, because like in *Kentucky v. King*, *Jardines* was not specifically about a knock-and-talk but rather was about a search that preceded the issuance of a search warrant.[216] The Court has, however, repeatedly protected the purpose doctrine as applied to knock-and-talks even before *Jardines*.[217] In *Kentucky v. King*, the Court concluded that police might knock on a citizen's door without a warrant when their conduct was already supported by probable cause because "they do no more than any private citizen might do."[218] In *Jardines*, the Court affirmed that when an officer approaches and knocks on the door of a home without a warrant but is with his or her child who is a "Nation's Girl Scout" or "trick-or-treater," the homeowner cannot cry foul because the homeowner must expect such behavior.[219] Yet, an officer's implied license to trespass on private property is limited to his or her

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213. *See King*, 131 S. Ct. at 1862–63.

214. *Jardines*, 133 S. Ct. at 1415–18 (holding officer's conduct as a search where "[his] behavior objectively reveal[ed] a purpose to conduct a search"); United States v. Jones, 132 S. Ct. 945, 949–50 (2012); *King*, 131 S. Ct. at 1862; *see also* U.S. CONST. amend. IV.

215. Drake, *supra* note 3, at 26; *see also Jardines*, 133 S. Ct. at 1415–16.

216. *Jardines*, 133 S. Ct. at 1413 (The case was focused on the use of a drug-sniffing dog to conduct an olfactory search of the home's curtilage.); *King*, 131 S. Ct. at 1853–54.

217. *See Jardines*, 133 S. Ct. at 1416; *King*, 131 S. Ct. at 1856, 1862.

218. *King*, 131 S. Ct. at 1862.

219. *See Jardines*, 133 S. Ct. at 1415–16.

> Complying with the terms of . . . traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

Id. (quoting *King*, 131 S. Ct. at 1862).

objective purpose for being there.[220] In other words, an officer may approach a home and knock on the door—for the purpose of gathering evidence[221]—if:

(1) they have sufficient suspicion to justify the knock on the door;[222]

(2) they are aware of an exigency that justifies the intrusion;[223] or

(3) they have a warrant supported by probable cause.[224]

Thus, if an officer approaches a home and knocks on the door for the purpose of conducting a search, the knock on the door will be unconstitutional unless one of these three justifications can be met.[225] Of course, if the officer is acting as any citizen might, such as collecting money for a local baseball team or selling Girl Scout cookies, then the officer's actions need not be justified.[226] When an officer knocks on a citizen's door, it is the officer's objective purpose for knocking that may convert the knock into a search within the meaning of the Fourth Amendment.[227]

The Court should not only measure the officer's actions leading up to the knock on the door under the curtilage doctrine, but the Court should determine the lawfulness of the knock itself for at least two reasons.[228] First, as discussed in Section B of Part III., current rules governing an officer's conduct before the knock on the door are inadequate to protect urban apartment dwellers from unreasonable intrusions.[229] Those who live in multi-story apartment complexes, such as in Victor's case[230] and in *Kentucky v. King*,[231] do not enjoy the buffer of Fourth Amendment protection provided by the Supreme Court's curtilage doctrine.[232] This concern is particularly significant in public housing units, where police freely patrol the hallways of

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220. *Jardines*, 133 S. Ct. at 1416–17.

221. *See King*, 131 S. Ct. at 1860; Drake, *supra* note 3, at 26–27 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

222. *See* Terry v. Ohio, 392 U.S. 1, 10–11 (1968); *infra* Part V (arguing that *Terry*'s reasonable suspicion standard is the appropriate standard for reviewing the lawfulness of knock-and-talks).

223. *King*, 131 S. Ct. at 1853–54; *see also supra* Part II (describing exigent circumstances that justify a warrantless intrusion).

224. U.S. CONST. amend. IV.

225. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1416–17; *King*, 131 S. Ct. at 1860; *Terry*, 392 U.S. 10–11.

226. *See Jardines*, 133 S. Ct. at 1415–16.

227. U.S. CONST. amend. IV; *see also Jardines*, 133 S. Ct. at 1416; *supra* Section III.B.

228. *See Terry*, 392 U.S. at 19–20; Leonetti, *supra* note 77, at 310, 316–17, 320.

229. Leonetti, *supra* note 77, at 310, 319–20; *see also supra* Section III.B.

230. *See supra* Part I.

231. Kentucky v. King, 131 S. Ct. 1849, 1851 (2011).

232. *See* U.S. CONST. amend. IV; *King*, 131 S. Ct. at 1863; Leonetti, *supra* note 77, at 310; *supra* Sections I, III.B.

the apartment buildings and where poor and minority citizens are unfairly exposed to knock-and-talks.[233] The rule proposed in this Article would be supplemental, not superseding, to a court's analysis under the curtilage doctrine.[234]

Second, the knock on the door provides an unambiguous point from which courts may determine whether the surrounding circumstances reasonably justified the government intrusion.[235] The Supreme Court has consistently endeavored to advance straightforward Fourth Amendment rules, which provide clear guidance to police officers carrying out the course of their duties.[236] "Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged."[237] For both officer and citizen safety, it is important to provide a clear rule designating the door of the home as constitutionally protected property.[238] A clear rule thus would be: A search within the meaning of the Fourth Amendment occurs when police *knock* on the door of a private dwelling with the *objective purpose* of completing a search.[239]

However, the knock in the knock-and-talk, like the frisk in a stop-and-frisk, is not a "full-blown"[240] search within the meaning of the Fourth Amendment.[241] The knock on the door is a *limited* search within the meaning of the Fourth Amendment.[242] Because knock-and-talks conducted

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233. *See* Leonetti, *supra* note 77, at 311; *supra* Section III.B.

234. *See* Leonetti, *supra* note 77, at 298–99, 316–17, 319.

235. *See* Terry v. Ohio, 392 U.S. 1, 20–21 (1968) ("[I]t is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'") (citing Camara v. Mun. Ct. of S. F., 387 U.S. 523, 534–35 (1967)).

236. *See* U.S. CONST. amend. IV; Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001); New York v. Belton, 453 U.S. 454, 458 (1981).

> Often enough, the Fourth Amendment has to be applied on the spur—and in the heat—of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

Atwater, 532 U.S. at 347; *see also* U.S. CONST. amend. IV.

237. *Belton*, 453 U.S. at 458; *see also* U.S. CONST. amend. IV.

238. *See Belton*, 453 U.S. at 458; Payton v. New York, 445 U.S. 573, 590 (1980); *Terry*, 392 U.S. at 19–20; Leonetti, *supra* note 77, at 310.

239. *See* U.S. CONST. amend. IV; Florida v. Jardines, 133 S. Ct. 1409, 1416, 1423 (2013); *Payton*, 445 U.S. at 590; *Terry*, 392 U.S. at 19–21.

240. *Terry*, 392 U.S. at 8.

241. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1423; Leonetti, *supra* note 77, at 311–12.

242. *See* U.S. CONST. amend. IV; *Jardines*, 133 S. Ct. at 1423; Leonetti, *supra* note 77, at 311–12.

for the purpose of completing a search are a limited search, their constitutionality should be measured under *Terry*'s reasonable suspicion standard.[243]

V. *TERRY V. OHIO*'S REASONABLE SUSPICION STANDARD AND KNOCK-AND-TALKS

The lawfulness of knock-and-talks should be reviewed under the same standard as stop-and-frisks.[244] The Supreme Court's decision in *Terry* shows how the same legal and policy concerns that arose from stop-and-frisks are at issue when dealing with knock-and-talks.[245] Further, important in understanding the legality of knock-and-talks is the Court's decision in *Payton*.[246] While *Payton* provides clear guidance about how the Fourth Amendment protects individuals *inside* their homes, the decision should not be interpreted as providing *heightened* protection for the home.[247] Interpreting the Fourth Amendment to provide more protection to the home than the person would result in an unequal and discriminatory application of the law.[248] Knock-and-talks should be reviewed under *Terry*'s reasonable suspicion standard, in order to provide equal protection under the Fourth Amendment, and to avoid violating the Due Process Clause and Equal Protection Clause of the Constitution.[249]

A. Terry v. Ohio*'s Reasonable Suspicion Standard*

In 1968, the Supreme Court of the United States adopted a new reasonable suspicion standard to address a limited search-and-seizure of a person in the street.[250] In dealing with so-called stop-and-frisks, the Court concluded that there is period of time between an officer's initial hunch of wrongdoing and a "technical arrest" or "full-blown search," which required an intermediate standard to determine the reasonableness of the officer's actions.[251] The Court reasoned that the central inquiry under the Fourth Amendment is whether the "governmental invasion of a citizen's personal

243. *See Terry*, 392 U.S. at 27; Leonetti, *supra* note 77, at 311–12.
244. *See Jardines*, 133 S. Ct. at 1423; *Terry*, 392 U.S. at 8, 19–20; Leonetti, *supra* note 77, at 311–12.
245. *See Terry*, 392 U.S. at 8–16.
246. Payton v. New York, 445 U.S. 573, 589–90 (1980).
247. *Id.*; *see also* U.S. CONST. amend IV.
248. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 30–31.
249. *Terry*, 392 U.S. at 31; *see also* U.S. CONST. amends. IV, V, XIV.
250. *Terry*, 392 U.S. at 30.
251. *Id.* at 19, 27, 30–31.

security" was reasonable under the circumstances.[252] Addressing the need for "an escalating set of flexible responses,"[253] the Court held that a stop-and-frisk—or *Terry* stop—may be reasonable, so long as the officer could point to "specific and articulable facts" to demonstrate a reasonable suspicion that criminal activity was afoot.[254]

The Court was clear, however, that the reasonableness of a stop-and-frisk was limited to the "scope [of] the circumstances which justified the interference in the first place."[255] For example, the frisk in a stop-and-frisk is limited to a pat down of the outer surfaces of the suspect's clothing, which allows officers to conduct a limited search for weapons.[256] The officer may not grope, explore, or otherwise manipulate the suspect's clothing.[257] A stop-and-frisk is a *limited* search-and-seizure within the meaning of the Fourth Amendment, which is allowed under a lesser standard of suspicion than specifically delineated in the Constitution.[258]

The reasonable suspicion standard articulated in *Terry* provides the bright-line rule needed to clarify knock-and-talk jurisprudence.[259] Federal appellate courts have recognized the application of *Terry*'s reasonable suspicion standard in a knock-and-talk scenario.[260] For example, the United States Court of Appeals for the Ninth Circuit concluded in *United States v. Crapser*[261] that a knock-and-talk "was a *Terry* stop supported by reasonable suspicion."[262] The court disagreed with the defendant's contention that "a

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252. *Id.* at 19–20; *see also* U.S. CONST. amend. IV.
253. *Terry*, 392 U.S. at 10, 30 (reviewing the government's argument).
254. *Id.* at 21, 30–31.
255. *Id.* at 20.
256. *Id.* at 8, 30.
257. *See* Minnesota v. Dickerson, 508 U.S. 366, 378 (1993).
258. *See* U.S. CONST. amend. IV; *Terry*, 392 U.S. at 10, 16–18, 27.
259. *See Terry*, 392 U.S. at 21–22; United States v. Crapser, 472 F.3d 1141, 1146 (9th Cir. 2007) (quoting United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000)).
260. *See e.g.*, *Crapser*, 472 F.3d at 1147; United States v. Jones, 239 F.3d 716, 720 (5th Cir. 2001) ("Federal courts have recognized the *knock-and-talk* strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity."); United States v. Tobin, 923 F.2d 1506, 1511 (11th Cir. 1991) (finding that "[r]easonable suspicion cannot justify the warrantless search of a house . . . but it can justify the agents' approaching the house [and knocking on the door] to question the occupants.") (citations omitted).
261. 472 F.3d 1141 (9th Cir. 2007).
262. *Id.* at 1147. In that case, police had stopped a motorist, and in the course of the traffic stop discovered a pressure cooker, which they suspected had been used to manufacture methamphetamine. *Id.* at 1143. When they questioned the motorist about the cooker, the motorist stated the cooker belonged to someone else and gave the police the name of the individual and the motel address where he could be found. *Id.* The name given by the motorist matched the name of a person with an outstanding warrant for arrest. *Id.* Police went to the motel "to try to *knock-and-talk* [their] way into obtaining consent to search the [motel]

Terry stop cannot occur at a person's residence."[263] The court reasoned that although "police must have a warrant in order to arrest a suspect inside [the] home," a knock-and-talk supported by reasonable suspicion is lawful because "a suspect's decision to open the door exposes him to a public place, and the privacy interests [of the home remain] protected."[264] The reasonable suspicion standard is fitting to address knock-and-talks because, like stop-and-frisks, knock-and-talks are a flexible investigatory tool used by law enforcement when they do not have probable cause to arrest an individual, but when they do have a *specific and articulable* reason to believe criminal activity is afoot.[265]

Like a stop-and-frisk, a knock-and-talk results in more than a "mere 'minor inconvenience and petty indignity,'"[266] but less than a full-blown search.[267] As in a stop-and-frisk, a police officer approaching a home to conduct a knock-and-talk will often be acting on a tip from a member of the community or based on the officer's personal observations.[268] Like an officer conducting a stop-and-frisk, an officer conducting a knock-and-talk will often not have enough information to obtain an arrest warrant.[269] The knock-and-talk, like the stop-and-frisk, is an intermediate level of intrusion where the officer should have at least an articulable reason to believe criminality is afoot before they intrude on a citizen's privacy and security.[270]

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room", and to confirm that the named individual was the same person named in the warrant. *Crapser*, 472 F.3d at 1143.

263. *Id.* at 1148 (internal quotations omitted).

264. *Id.*

265. *See* Terry v. Ohio, 392 U.S. 1, 8, 21, 27, 30 (1968); *Crapser*, 472 F.3d at 1147–1148.

266. *Terry*, 392 U.S. at 10 (quoting People v. Rivera, 201 N.E.2d 32, 36 (N.Y. 1964)).

267. *Id.* at 19, 26.

268. *Compare* Navarette v. California, 134 S. Ct. 1683, 1686, 1688 (2014) (vehicle stop based on anonymous tip), United States v. Arvizu, 534 U.S. 266, 268, 270–71 (2002) (vehicle stop based on police observation), *and* Florida v. J.L., 529 U.S. 266, 268 (2000) (street encounter prompted by anonymous tip), *with* Kentucky v. King, 131 S. Ct. 1849, 1854 (2011) (knock-and-talk based on police observation), *Crapser*, 472 F.3d at 1143 (knock-and-talk based on information obtained during traffic stop), United States v. Hatfield, 333 F.3d 1189, 1190 (10th Cir. 2003) (knock-and-talk based on anonymous tip), United States v. Miller, 933 F. Supp. 501, 502 (M.D.N.C. 1996) (knock-and-talk based on anonymous tip), *and* State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013) (knock-and-talk based on anonymous tip).

269. *See King*, 131 S. Ct. at 1862.

270. *See Terry*, 392 U.S. at 21, 30 (concluding that officer must be able to point to specific and articulable facts to demonstrate a reasonable suspicion that criminal activity was afoot).

As is the case in stop-and-frisks, the scope of an officer's ability to intrude via a knock-and-talk should be limited.[271] Officers with reasonable suspicion to believe criminality is afoot amongst the occupants of a particular dwelling may knock on the door for the purpose of completing a limited search.[272] However, whether an officer's search may continue further depends on what evidence is revealed by the initial search.[273] After the officer knocks on the door, the occupants may choose to open the door, or they may choose to go about their business.[274] Unlike in the case of a stop-and-frisk, the officer completing a knock-and-talk may or may not gain access to the individual they seek, because the house, like the individual, is specifically protected in the text of the Fourth Amendment.[275] Thus, just as a frisk cannot go beyond the limited scope of its purpose, an officer conducting a knock-and-talk may not compel a further inquiry where the officer's initial search—knock on the door—does not reveal any further evidence of criminality.[276] So, while a *search* occurs the moment an officer knocks on the door of a private dwelling for the purpose of conducting a search,[277] it is a limited search that must be supported only by a reasonable suspicion of criminality.[278]

B. Terry v. Ohio *and* Payton v. New York

At least one commentator has argued, as did the defendant in *Crapser* that *Terry*'s reasonable suspicion standard cannot apply to knock-and-talks because the home is entitled to a heightened level of Fourth Amendment protection under the Supreme Court of the United States' decision in *Payton*.[279] These arguments, however, misunderstand the

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271. *See* Florida v. Jardines, 133 S. Ct. 1409, 1416–17 (2013) (limiting scope of officer's intrusion to *implied license* for being there); *Terry*, 392 U.S. at 19–20 (limiting scope of stop-and-frisk to *circumstances which justified the interference*).

272. *Terry*, 392 U.S. at 29–30.

273. *Id.* at 10, 30 (allowing initial search for weapons, and if weapons are found the police may conduct a full-blown search).

274. *King*, 131 S. Ct. at 1862.

275. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses . . . shall not be violated . . . ."); *King*, 131 S. Ct. at 1854, 1856; *Terry*, 392 U.S. at 10.

276. *See King*, 131 S. Ct. at 1856, 1862; *Terry*, 392 U.S. at 19–20.

277. Florida v. Jardines, 133 S. Ct. 1409, 1414–16 (2013).

278. *See id.* at 1415–16; *King*, 131 S. Ct. at 1856, 1862.

279. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 576, 586–87 (1980); *Terry*, 392 U.S. at 19–20; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, *supra* note 7, at 1117–18, 1120–22 (relying on *Payton* to conclude that knock-and-talks should not be permitted absent a warrant supported by probable cause).

fundamental rule announced in *Payton*.[280] The unquestionable holding of *Payton* is that police are prohibited "from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[281] In *Payton*, police attempted to conduct a knock-and-talk, but when there was no answer they pried their way into the home and seized evidence lying in plain view.[282] In the accompanying case, *Riddick v. New York*, the police successfully conducted a knock-and-talk and seeing the subject of their investigation beyond the opened door, entered and arrested him without a warrant.[283] The Court held that both warrantless arrests in the home violated the Fourth Amendment and that the recovered evidence should be suppressed.[284]

Payton is about defining Fourth Amendment boundaries and "protect[ing] the physical integrity of the home."[285] *Payton* does not, however, provide special protection to the lumber and rock that make up an individual's home.[286] When police have probable cause but no warrant to arrest an individual secreted in their home, they may not arrest that individual in their home and use evidence recovered from inside the home.[287] Put differently, police armed only with probable cause *may* arrest an individual in their home, but any evidence obtained *in the house* will be suppressed and inadmissible against the defendant.[288] However, if for example, police complete a warrantless arrest of a suspect inside his home and then take the suspect outside, any statements made by the suspect *outside* the home may be admissible.[289] Thus, the person inside the home, like the person in the street, may be subjected to a warrantless arrest.[290]

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280. *See Payton*, 445 U.S. at 576, 602–03; *Terry*, 392 U.S. at 19–20; *Crapser*, 472 F.3d at 1148; Bradley, *supra* note 7, at 1117–18, 1120–22.

281. *Payton*, 445 U.S. at 576, 602–03.

282. *Id.* at 576–77.

283. *Id.* at 578.

284. *Id.* at 577–79, 603; *see also* U.S. CONST. amend. IV.

285. New York v. Harris, 495 U.S. 14, 17 (1990); *see also* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 576.

286. *See Harris*, 495 U.S. at 18; *Payton*, 445 U.S. at 590.

287. *See Payton*, 445 U.S. at 576, 577 n.5, 603.

288. *See id.* at 576–77.

289. *See Harris*, 495 U.S. at 21. The case assumes the statements were otherwise lawfully obtained. *Id.* at 20; *see also* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

290. *See Harris*, 495 U.S. at 18, 20–21; United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding that warrantless arrest of individual in public was valid).

Contrary to opinions that *Payton* was about providing a heightened level of protection in the home,[291] *Payton* was about preventing "breach of the entrance to an individual's home" without a warrant.[292] *Payton* answered a "narrow question."[293] *Payton* provided clear lines to police and citizens about how the Fourth Amendment protects individuals *inside* their homes.[294] The home is not entitled to a heightened standard of protection; rather, the home is simply another container—albeit, one entitled to equal Fourth Amendment protection as the person—from which an individual may secrete himself or herself from the investigatory arm of the government.[295] Because the home and the person are entitled to equal protection under the Fourth Amendment, the home should be scrutinized under the same level of suspicion as the person.[296] *Terry*'s reasonable suspicion standard should apply to knock-and-talks.[297]

C. *Equal Protection*

Terry's reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection and Due Process Clauses of the Constitution.[298] This subpart assumes—for the sake of argument and illustration—that the Supreme Court provided heightened protection to the home in *Payton*.[299] Certain Supreme Court dicta have run amuck, resulting in some courts and commentators providing more protection to the person's *castle* than to the person himself.[300] Regardless, *Terry*'s reasonable suspicion standard must govern knock-and-talks because any other interpretation of *Payton* and *Terry* would result in an unequal and discriminatory application of the Fourth Amendment's protections.[301]

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291. *See Payton*, 445 U.S. at 576, 586–87; Terry v. Ohio, 392 U.S. 1, 19–20; United States v. Crapser, 472 F.3d 1141, 1148 (9th Cir. 2007); Bradley, *supra* note 7, at 1117–18, 1120–22 (arguing that knock-and-talks are unlawful because of the *sanctity of the home*).

292. *Harris*, 495 U.S. at 17–18; *Payton*, 445 U.S. at 589–90.

293. *Payton*, 445 U.S. at 582; 589–90.

294. *Payton*, 445 U.S. at 589–90 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."); *see also* U.S. CONST. amend. IV.

295. *See* U.S. CONST. amend. IV (providing equal protection for persons and houses); *Payton*, 445 U.S. at 589–90.

296. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589.

297. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968).

298. *See* U.S. CONST. amends. V, XIV; *Terry*, 392 U.S. at 19–20.

299. *Payton*, 445 U.S. at 586–87.

300. *See id.* at 596–97; United States v. Watson, 423 U.S. 411, 424–25 (1976).

301. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 576, 598; *Terry*, 392 U.S. at 8–10.

Payton has stood for the proposition that unwarranted searches and seizures inside a home bear heightened scrutiny[302] while searches and seizures of a person are protected by a lesser standard.[303] Even Justice Scalia—who was known for his originalist and strict textual approach to interpreting the Constitution[304]—concluded that, "when it comes to the Fourth Amendment, the *home is first among equals*."[305] However, that is a counterintuitive conclusion for an originalist or textualist like Justice Scalia to make, where *persons* are *literally* first among equal rights delineated in the Fourth Amendment.[306] "The right of people to be secure in their [1] persons, [2] houses, [3] papers, and [4] effects, against unreasonable searches and seizures, shall not be violated . . . ."[307] If any Fourth Amendment right is entitled to heightened protection, it should be the right protecting persons, not houses.[308]

Moreover, much of the text in *Payton*, which suggested a heightened protection for the home, was conclusory and based on an overly strained reading of the Fourth Amendment.[309] For example, at one point in its opinion, the Court took the liberty of omitting certain text from the Fourth Amendment in order to support its proposition:

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302. *Payton*, 445 U.S. at 588–90; *see also* Illinois v. McArthur, 531 U.S. 326, 336 (2001) (concluding that a seizure of an individual in the street is less intrusive than entering his home).

303. *See Watson*, 423 U.S. at 424–25 (holding that warrantless arrest of individual in public was valid); *Terry*, 392 U.S. at 9–10 (allowing police to stop and frisk a person in the street based on mere reasonable suspicion).

304. *See* United States v. Jones, 132 S. Ct. 945, 949–50 (2012). Justice Scalia resurrected the trespass doctrine based on his interpretation of what the Framers of the Constitution intended the Fourth Amendment to protect against. *Id.* at 950 n.3 ("Our task, at a minimum, is to decide whether the action in question would have constituted a *search* within the *original* meaning of the Fourth Amendment. Where, as here, the Government obtains information by *physically intruding* on a constitutionally protected area, such a search has undoubtedly occurred.") (emphasis added). Prior to *Jones*, it was widely accepted that the *reasonable expectation of privacy* test from *Katz* had replaced the trespass doctrine. *See id.* at 952; Katz v. United States, 389 U.S. 347, 353 (1967).

305. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013); *see also* U.S. CONST. amend. XIV.

306. U.S. CONST. amend. IV; *see also Jardines*, 133 S. Ct. at 1414.

307. U.S. CONST. amend. IV.

308. *See id.* This Article does not argue that the person is entitled to a heightened level of Fourth Amendment protection. *See id.* However, if the Framers had any intention to rank the Fourth Amendment's protections, it seems more logical that they would have ranked the most important right first, rather than assuming that the Supreme Court of the United States would understand the second listed right as most important. *See id.* This Article presumes that each right in the Fourth Amendment is entitled to equal protection. *See id.*

309. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 588–90 (1980).

> "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[310]

Perhaps the Court would have been correct that the Fourth Amendment *unequivocally* establishes that the home is entitled to a heightened level of protection if the right to be secure in houses was the *only* right guaranteed under the Fourth Amendment.[311] In other words, the home would unequivocally be entitled to heightened protection if the Fourth Amendment were written the way the Court chose to write it in the passage above, citing only *houses* as being protected.[312] There is no provision in the Constitution or elsewhere in American law, however, that allows the Supreme Court of the United States to chop up the Constitution and to claim that people are entitled to less protection than property.[313]

If *Payton* is read with *Terry* in this way, it is clear that at least in certain circumstances, the Supreme Court has written out probable cause protections for citizens that were originally guaranteed by the Constitution, leaving only the home protected by the laws provided by the Framers.[314] If this is the case, then the Supreme Court has mistakenly but nonetheless, "pursuant to a policy,"[315] provided individuals who can afford a home or private dwelling with *more* protection under the Fourth Amendment—than those who reside in the street, or than those who are forced more often into the street because of the circumstances they face at home.[316]

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310. *Payton*, 445 U.S. at 589–90 (alterations in original) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

311. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90.

312. *See* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90.

313. *See generally* U.S. CONST.

314. *See* U.S. CONST. amend IV; *Payton*, 445 U.S. at 589–90; Terry v. Ohio, 392 U.S. 1, 11, 15–16 (1968).

315. Floyd v. City of New York, 283 F.R.D. 153, 162, 178 (S.D.N.Y. 2012) (certifying class of defendants alleging discriminatory application of *stop-and-frisk* practices against NYPD officers); *see also* U.S. CONST. amend. IV; *Payton*, 445 U.S. at 589–90; *Terry*, 392 U.S. at 11, 15–16. *Policy* is defined as a "definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." *Policy*, MERRIAM-WEBSTER (11th ed. 2003).

316. Slobogin, *supra* note 12, at 401.

> As a result [of the Supreme Court Fourth Amendment jurisprudence], people who live in public spaces—for instance, the homeless who reside in boxes—and people who have difficulty hiding or distancing their living space from casual observers—for instance, those who live in tenements and other crowded areas—are much more likely to experience unregulated government intrusions.

Id.

If the Supreme Court has indeed provided higher Fourth Amendment protection for the home than the person, then the Court has promulgated a rule that violates the Equal Protection and Due Process clauses of the Constitution.[317] A heightened Fourth Amendment standard for the home will result in an unequal and discriminatory impact on impoverished[318] and minority populations.[319] Poverty is more likely to exist amongst minority populations,[320] and of course poor people are more likely to be homeless than their more affluent counterparts.[321] Black people are more likely to be homeless than white people,[322] and white people are more likely to own a home than black or Hispanic people.[323] Accepting a heightened standard of protection for the home may disproportionally increase the risk that minority

317. *See* U.S. CONST. amends. IV, V, XIV.

318. *See* U.S. CONST. amend. IV; Slobogin, *supra* note 12, at 401–03. While the Court has not held *per se* that discrimination against poor people is unconstitutional, it "has found wealth-based classifications in violation of the equal protection guarantee when they deprive poor people of fundamental rights and interests . . . ." DAVID G. SAVAGE, THE SUPREME COURT AND INDIVIDUAL RIGHTS 446 (5th ed. 2009); *see also* Boddie v. Connecticut, 401 U.S. 371, 374, 380–81 (1971) (invalidating state statute that denied access to courts for purpose of obtaining divorce unless individual could pay mandated fee); Mayer v. City of Chicago, 404 U.S. 189, 193 (1971) (applying *Griffin* to appeal); Williams v. Illinois, 399 U.S. 235, 241 (1970) (ruling that states cannot hold indigent prisoners in prison beyond maximum sentence in order to work off unpaid fines); Gideon v. Wainwright, 372 U.S. 335, 340, 342–43 (1963) (finding due process violation when state refused indigent defendants court-appointed attorneys); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (denying indigent defendants free copies of trial transcript violated due process).

319. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013), *aff'd*, 770 F.3d 1051 (2d. Cir. 2014); Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991).

320. CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 14 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf (finding in 2010 that 27.4 percent of blacks and 26.6 percent of Hispanics lived below poverty, compared 9.9 percent of non-Hispanic whites).

321. *See* INST. FOR CHILDREN, POVERTY & HOMELESSNESS, INTERGENERATIONAL DISPARITIES EXPERIENCED BY HOMELESS BLACK FAMILIES 1 (2012), http://www.icphusa.org/filelibrary/ICPH_Homeless%20Black%20Families.pdf.

322. *Id.*

> Black persons in families make up 12.1[%] of the [United States] family population, but represented 38.8[%] of sheltered persons in families in 2010. In comparison, 65.8[%] of persons in families in the general population are white, while white family members only occupied 28.6[%] of family shelter beds in 2010.

Ralph da Costa Nunez, *Homelessness: It's About Race, Not Just Poverty*, CITYLIMITS (Mar. 5, 2012), http://citylimits.org/2012/03/05/homelessness-its-about-race-not-just-poverty.

323. Tami Luhby, *Whites Get Wealthier, While Blacks and Hispanics Lag Further Behind*, CNN (Dec. 15, 2014, 7:27 AM), http://money.cnn.com/2014/12/12/news/economy/wealth-by-race-pew. "Only 47.4 % of minorities were homeowners in [2013]. But 73.9 % of whites owned homes." *Id.*

populations will be unconstitutionally searched and seized by officers of the law.[324] Moreover, such a policy may increase the risk of violence occurring in the street, which will place police and civilian life at unnecessary risk.[325]

Like the stop-and-frisk program that was held discriminatory and unconstitutional in *Floyd v. City of New York*,[326] the Supreme Court of the United States' heightened protection for homes is "centralized and hierarchical."[327] Lower federal courts are bound to follow the Court's decision in *Payton*,[328] and like the NYPD officers in *Floyd*, lower court performance is subject to review and evaluation by the Court.[329] Like the stop-and-frisk policies at issue in *Floyd*, the policy of heightened protection in the home is delineated through a "chain of command" with the Supreme Court being at the command end of the chain.[330] The Supreme Court acts as

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324. *See* Maclin, *supra* note 319, at 245. "NYPD stops-and-frisks are significantly more frequent for [b]lack and [h]ispanic residents than they are for [w]hite residents, even after adjusting for local crime rates, racial composition of the local population, police patrol strength, and other social and economic factors predictive of police enforcement activity." Floyd v. City of New York, 283 F.R.D. 153, 168 (S.D.N.Y. 2012).

325. *See* Maclin, *supra* note 319, at 258. The Supreme Court has failed to "confront . . . the anger and mistrust that surrounds encounters between black men and police officers." *Id.* at 248.

> This is what the law is supposed to be; black men, however, know that a different *law* exists on the street. Black men know they are liable to be stopped at anytime and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata regardless of their level of education and whatever their job status or place in the community.

Id. at 253. Not much has changed since 1991 when Professor Maclin wrote the article. Adam Chandler, *Eric Garner and Michael Brown: Deaths Without Indictments*, THE ATLANTIC (Dec. 3, 2014), http://www.theatlantic.com/national/archive/2014/12/eric-garner-grand-jury-no-indictment-nypd/383392. Consider, for example, the 2014 in-the-street killings of Eric Garner and Michael Brown in Staten Island, New York and Ferguson, Missouri, respectively; coupled with the subsequent in-the-street slayings of NYPD police officers Wenjian Liu and Rafael Ramos in Bedford-Stuyvesant, New York. *Id.*; *see also* Benjamin Mueller & Al Baker, *Two Officers Ambushed, Are Killed in Brooklyn*, N.Y. TIMES, Dec. 20. 2014, at A1.

326. 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013), *aff'd*, 770 F.3d 1051 (2d Cir. 2014).

327. *Id.* at 658–60 (finding that NYPD violated plaintiffs' Fourth and Fourteenth Amendment rights, where the "NYPD [was] deliberately indifferent to officers conducting unconstitutional stop-and-frisks," where unconstitutional practices "were sufficiently widespread [to have] . . . the force of law", and where plaintiffs established a policy of racial profiling and indifference to the discriminatory application of stop-and-frisk).

328. Payton v. New York, 445 U.S. 573, 602–03 (1980).

329. *Floyd*, 283 F.R.D. at 165, 173 (finding NYPD policy considering that "'[u]niformed members . . . who do not demonstrate activities . . . or fail to engage in proactive activities . . . will be evaluated and their assignments re-assessed.'").

330. U.S. CONST. art. III ("The judicial [p]ower of the United States, shall be vested in one [S]upreme Court, and in such inferior Courts as the Congress may from time to

a centralized source, which makes decisions that lower courts are obligated to follow[331] and which promulgates rules governing the policing of citizens.[332] In short, increased protection for the home and diminished protection for those in the street is a direct consequence of centralized policies established by the Supreme Court.[333] There is no doubt, after all, that it was the Supreme Court that started, or at least sanctioned, the stop-and-frisk policy back in 1968.[334]

This Article does not argue that the Supreme Court has acted with discriminatory intent.[335] Rather, if the Court indeed provided heightened protection to the home, then the Court has made a mistake and failed to consider the broader, discriminatory applications of its rulings.[336] The Court would have allowed its decision in *Payton* to stand for something more than it was originally intended,[337] and the resulting impact of *Payton* is an unequal and discriminatory application of the Fourth Amendment.[338] *Terry's* reasonable suspicion standard should apply to knock-and-talks because applying a higher probable cause standard would violate the Equal Protection Clause and Due Process Clause of the Constitution.[339]

A brief consideration of how the reasonable suspicion standard would apply to Victor's case and typical knock-and-talk scenarios is useful for understanding how *Terry's* application to knock-and-talks would

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time ordain and establish."); *Floyd*, 283 F.R.D. at 163 ("'The NYPD functions through a chain of command.'").

331. U.S. CONST. art. III, § 1; *see also Floyd*, 283 F.R.D. at 164 ("'To be sure, NYPD's department-wide policies generate from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department wide-policies.'").

332. *E.g.*, Terry v. Ohio, 392 U.S 1, 10–11 (1968) (creating a prophylactic rule to govern stop-and-frisks).

333. *Floyd*, 283 F.R.D. at 166; *see also* Illinois v. McArthur, 531 U.S. 326, 336 (2001).

334. *See Terry*, 392 U.S. at 10–11.

335. *See generally Terry*, 392 U.S. 1 (1968); *supra* Sections V.B–V.C.

336. *See* Payton v. New York, 445 U.S. 573, 585–86 (1980). This would not be the first time; after all, the Court made a ruling that resulted in the discriminatory application of the Constitution's protections. G.M. Leasing Corp. v. United States, 429 U.S. 338, 338, 354–55 (1977) (requiring a warrant based on probable cause before the Internal Revenue Service ("IRS") could enter a *business* and seize tax documents); Wyman v. James, 400 U.S. 309, 310, 318 (1971) (allowing a warrantless search of a welfare recipient's *home*); *see also* Plessy v. Ferguson, 163 U.S. 537, 544, 548, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (resulting in almost one hundred years of segregation and discriminatory application of the Fourteenth Amendment's protections); Slobogin, *supra* note 12, at 403.

337. *See Payton*, 445 U.S. at 579, 585–90; *supra* Section V.B.

338. *Payton*, 445 U.S. at 585–90; Slobogin, *supra* note 12 at 403; U.S. CONST. amend. IV.

339. U.S. CONST. amend. V, XIV; *Terry*, 392 U.S. at 10–11.

streamline judicial decision-making processes and provide equal protection under the law.[340]

VI. APPLYING THE REASONABLE SUSPICION STANDARD TO KNOCK-AND-TALKS

In order to show "reasonable suspicion," police must be able to point to "specific and articulable facts" to demonstrate "that criminal activity was afoot."[341] Reasonable suspicion is determined by considering the "totality of circumstances."[342] An anonymous tip will not normally be enough to satisfy reasonable suspicion, absent specific "indicia of reliability."[343] However, if an anonymous tip is accompanied by the "correct forecast"[344] of "not easily predicted" movements, reasonable suspicion may be satisfied.[345] Often, a single element of suspicious behavior or circumstances will not be enough to satisfy reasonable suspicion.[346] For example, presence in a "high crime area" by itself will not support reasonable suspicion to perform a stop-and-frisk or knock-and-talk.[347] Yet, the smell of marijuana alone traced to a particular source will substantiate reasonable suspicion, if not probable cause, to believe criminal activity is afoot.[348] Significantly, a person's association with another person for whom police have probable cause to believe is involved in criminality is *not* enough to demonstrate reasonable suspicion.[349]

Ultimately, the "central inquiry" under the Fourth Amendment is whether the "governmental invasion of a citizen's personal security" was reasonable under the circumstances.[350] Where a search has occurred, courts

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340. *See Terry*, 392 U.S. at 10–11; *infra* Part VI.

341. *Terry*, 392 U.S. at 21, 30.

342. United States v. Arvizu, 534 U.S. 266, 273 (2002); *see also* Adams v. Williams, 407 U.S. 143, 148 (1972).

343. Navarette v. California, 134 S. Ct. 1683, 1688 (2014); Florida v. J.L., 529 U.S. 266, 269 (2000).

344. *J.L.*, 529 U.S. at 269.

345. *Id.*; Alabama v. White, 496 U.S. 325, 332 (1990).

346. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000).

347. *Id.* ("An individual's presence in [a *high crime area*] . . . standing alone, is not enough to support a reasonable, particularized suspicion [of criminal activity]").

348. Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting) (finding the smell of marijuana emanating from behind a closed door sufficient to demonstrate probable cause); United States v. Charles, 29 F. App'x. 892, 895–96 (3d Cir. 2002); United States v. McCullough, No. 92-30423, 1994 WL 171170, at *1 (9th Cir. May 5, 1994); State v. Friedli, No. 50191-7-I, 2003 WL 22173063, at *3 (Wash. Ct. App. Sept. 22, 2003).

349. *Ybarra*, 444 U.S. 85, 91–93 (1979) (concluding that reasonable suspicion is not satisfied by mere association with a person for whom the police had probable cause to search, even when the police had a search warrant for the premises).

350. Terry v. Ohio, 392 U.S. 1, 19; *see also* U.S. CONST. amend. IV.

are required to consider the reasonableness of the search by balancing the scope of the invasion of the citizen's right to be left alone, against the government's interest in effectuating the search.[351] If the court deems the search unreasonable, then the search violated the Fourth Amendment, and any evidence obtained pursuant to the unlawful search may be inadmissible against the arrestee.[352] Thus, if an initial knock-and-talk is an unlawful search, then any non-attenuated fruits of that search, including consent to search the home, are inadmissible against the citizen in court.[353]

In Victor's case, the police would not have had reasonable suspicion to knock on Victor's door. The police in that case had seen Victor with someone who they later had probable cause to arrest. Based on that information alone, the police approached Victor's home with the objective purpose of completing a search.[354] Thus, at the moment the officer knocked on Victor's door, a search within the meaning of the Fourth Amendment occurred.[355] Police did not have the requisite suspicion to knock on Victor's door because Victor's mere association with a suspected criminal was not enough to substantiate reasonable suspicion.[356] There was no other evidence of criminality provided by police or Victor's great-grandmother at the suppression hearing.[357] Therefore, Victor's family should not have suffered the embarrassment and intimidation of the police intrusion into their home, and the police should not have been subjected to the danger that lurks in unplanned, unwarranted exchanges with citizens secreted in their homes.[358] Under *Terry's* reasonable suspicion standard, the police in Victor's case should never have knocked on his door, and all evidence was properly suppressed.[359]

In *King*, on the other hand, the officers had reasonable suspicion to believe criminal activity was afoot in King's apartment when they smelled marijuana emanating from inside his apartment door.[360] Significantly, a

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351. *Terry*, 392 U.S. at 20–22.

352. Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* U.S. CONST. amend. IV.

353. Drake, *supra* note 3, at 38–39; Brown v. Illinois, 422 U.S. 590, 604–05 (1975).

354. *See* Drake, *supra* note 3, at 26 (concluding that police act with the purpose of conducting a search when their action is taken against the person or property of a private citizen in an effort to gather evidence).

355. *See supra* Part III.

356. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

357. *See supra* Part VI.

358. *See* United States v. Johnson, 170 F.3d 708, 710, 718 (7th Cir. 1999).

359. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

360. Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (finding the smell of marijuana emanating from behind a closed door sufficient to demonstrate probable cause).

large portion of knock-and-talk cases involves the smell or site of marijuana, marijuana plants, or related paraphernalia.[361] Yet, the mere smell or site of marijuana no longer constitutes reasonable suspicion of criminal activity in some states, and other state executives have taken steps to limit the criminality of the drug.[362] Nevertheless, in *Kentucky v. King* the officers were empowered to follow the suspect into the breezeway because they had probable cause to believe he had purchased illegal narcotics.[363] When the officers arrived at the door they smelled the odor of marijuana and were thus justified in knocking on the door.[364] However, if what occurred in *Kentucky v. King* occurred in Oregon or Colorado today, the mere smell of marijuana would not have justified police knocking on King's door, King's arrest would have been deemed unlawful, and all evidence gained pursuant to that knock-and-talk would have been suppressed.[365]

In addition to marijuana and related paraphernalia, anonymous tips lead to a significant number of knock-and-talks.[366] Determining whether an

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361. *E.g.*, United States v. Hampton, 134 F. App'x 943, 944 (7th Cir. 2005); United States v. Banks, No. CRIM.7:04 CR 00090, 2004 WL 2491616, at *1 (W.D. Va. Nov. 4, 2004); Edens v. Kennedy, 112 F. App'x. 870, 873 (4th Cir. 2004); United States v. Hatfield, 333 F.3d 1189, 1193 (10th Cir. 2003); United States v. Charles, 29 F. App'x. 892, 894 (3d Cir. 2002); United States v. Hall, No. 97-30296, 1998 WL 382722, at *1 (9th Cir. 1998); United States v. McCullough, 24 F.3d 251 (unpublished table decision), No. 92-30423, 1994 WL 171170, at *1 (9th Cir. May 5, 1994); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013); State v. Felker, 819 N.E.2d 870, 872 (Ind. Ct. App. 2004); State v. Dwyer, 14 P.3d 1186, 1187 (Kan. Ct. App. 2000); State v. Green, 598 So. 2d 624, 626 (La. Ct. App. 1992); People v. Galloway, 675 N.W. 2d 883, 886 (Mich. Ct. App. 2003); People v. Pemberton, No. 238522, 2003 WL 1795551, at *2 (Mich. Ct. App. Apr. 3, 2003); State v. Cothran, 115 S.W.3d 513, 517 (Tenn. Crim. App. 2003); Duhig v. State, 171 S.W.3d 631, 634 (Tex. App. 2005); State v. Friedli, No. 50191-7-I., 2003 WL 22173063, at *1 (Wash. Ct. App. Sept. 22, 2003); State v. Graffius, 871 P.2d 1115, 1116–17 (Wash. Ct. App. 1994); Kletter, *supra* note 47, at 536.

362. *See* Joel Rose, Brooklyn DA Shifts Stance on Pot, but That Won't Impact NYPD, NPR (July 12, 2014, 9:04 AM), http://www.npr.org/2014/07/12/330761032/brooklyn-da-shifts-stance-on-pot-but-that-wont-impact-nypd. *But see* ALASKA STAT. § 17.38.010 (2015); COL. CONST. art XVIII § 16; 2015 Or. Laws 18; WASH. REV. CODE. § 69.50.360 (2015). This argument is based on the fact that Colorado, Washington, Oregon, and other states have passed laws legalizing and regulating the use of marijuana. COL. CONST. art. XVIII § 16; WASH. REV. CODE § 69.50.360; 2015 Or. Laws 18; ALASKA STAT. § 17.38.010. Other state actors have taken executive action to limit the criminality of marijuana. *See, e.g.*, Rose, *supra* note 362.

363. Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).

364. *Id.*

365. Terry v. Ohio, 392 U.S. 1, 10, 30 (1968).

366. *See, e.g.*, Edens v. Kennedy, 112 F. App'x. 870, 872 (4th Cir. 2004); United States v. Hatfield, 333 F.3d 1190, 1190 (10th Cir. 2003); State v. Able, 742 S.E.2d 149, 150 (Ga. Ct. App. 2013); Chenault v. Commonwealth, No. 2004-CA-000463-MR, 2005 WL 119875, at *1 (Ky. Ct. App. 2005); Traylor v. State, 817 N.E.2d 611, 614 (Ind. Ct. App.

anonymous tip is sufficient to provide reasonable suspicion of criminality requires courts to consider the totality of circumstances.[367] Police conducting a knock-and-talk should have to verify the veracity of anonymous tips they receive before they proceed with a knock-and-talk.[368] This extra layer of Fourth Amendment protection may be particularly important to residents who live in states like Texas and Florida where police have entire knock-and-talk taskforces dedicated to responding to tips provided by community members.[369] Under the reasonable suspicion standard, the citizen in their home, like the citizen in the street, will be less vulnerable to government intrusions that were initiated by mistaken or malicious allegations made by neighbors and other community members.[370]

An officer acting on a mere *hunch* will not be empowered to approach a home and knock on its door for the purpose of gathering evidence.[371] An officer will have to have a specific, articulable reason for approaching a home to conduct a knock-and-talk.[372] Police will not be able to conduct a knock-and-talk merely because an individual in a home was seen associating with a criminal suspect.[373] The smell, sight, or verified report of marijuana continues to provide sufficient reason for police to conduct knock-and-talks in most states, but the practice is not allowed in a growing number of states.[374] Police will have to verify the reliability of anonymous phone tips that make up a significant number of police leads that result in knock-and-talks.[375] Finally, police task forces dedicated to knock-and-talks will not be able to knock on doors at random, and task force members will have to do a minimum amount of work to verify tips provided by members of the community.[376] Applying the reasonable suspicion standard to knock-and-talks will prevent government officials from conducting suspicion-less searches of private dwellings.

2004); People v. Galloway, 657 N.W.2d 883, 886 (Mich. Ct. App. 2003); State v. Green, 598 So. 2d 624, 625–26 (La. Ct. App. 3d Cir. 1992).

367. *See* Navarette v. California, 134 S. Ct. 1683, 1688 (2014); United States v. Arvizu, 534 U.S. 266, 273 (2002); Florida v. J.L., 529 U.S. 266, 270 (2000); Adams v. Williams, 407 U.S. 143, 148 (1972).

368. *See J.L.*, 529 U.S. at 269; *Navarette*, 134 S. Ct. at 1688.

369. *Terry*, 392 U.S. at 20; *see also* U.S. CONST. amend IV.

370. *See J.L.*, 529 U.S. at 269, 272.

371. *Terry*, 392 U.S. at 26; Drake, *supra* note 3, at 26; *see also supra* Parts II–III.

372. *Terry*, 392 U.S. at 21, 30.

373. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

374. *See supra* notes 360–62 and accompanying text.

375. *See* Navarette v. California, 134 S. Ct. 1683, 1688 (2014); *J.L.*, 529 U.S. at 266, 269.

376. Drake, *supra* note 3, at 35; *see also* Curtis, *supra* note 58; Hallman, *supra* note 59.

VII. CONCLUSION

The Supreme Court should apply the same standard of review for knock-and-talks as stop-and-frisks in order to avoid an unequal and discriminatory application of the protections guaranteed by the Fourth Amendment and in order to provide for citizen and police safety.[377] After the Court's decisions in *Kentucky v. King* and *Jardines*, a search within the meaning of the Fourth Amendment must have occurred when the police knock on the door of a private dwelling with the *objective purpose* of completing a search.[378] Yet, a knock-and-talk, like a stop-and-frisk, is a *limited* search utilized by police during the intermediate phase of an investigation and thus, should be subjected to the same *reasonable suspicion* standard.[379] It is critical for the Court to review knock-and-talks under *Terry*'s reasonable suspicion standard because courts and commentators have mistakenly interpreted the Court's decision in *Payton* to provide heightened Fourth Amendment protection for the home.[380] Coupled with the increased practice of knock-and-talks, this confusion has resulted in an unequal and discriminatory application of the Fourth Amendment, where poor and minority citizens are particularly vulnerable to knock-and-talks.[381]

Furthermore, the Court is obligated to set rules that limit the ambiguous and dangerous circumstances that arise when police knock on a citizen's door without knowing what is behind the door, without a plan, and without a warrant.[382] In order to provide clear rules for police[383] and in order to ensure officer and citizen safety,[384] the Court should engage in an initial assessment of whether an officer was constitutionally empowered to knock on a citizen's door.[385] Rather than focusing on knock-and-talks as leading to unlawful *seizures*, unplanned and unwarranted police and citizen interaction should be limited by reviewing the lawfulness of knock-and-talks as *searches* that occurred the moment police *knocked* on the citizen's door.[386]

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377. *See* U.S. CONST. amend IV.
378. *See* U.S. CONST. amend IV Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013); Kentucky v. King, 134 S. Ct. 1849, 1859 (2011).
379. *See* Terry v. Ohio, 392 U.S. 1, 15–17 (1968).
380. *See* U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 603 (1980); *Terry*, 392 U.S. at 27, 30–31; Bradley, *supra* note 7, at 1117–22.
381. *See* U.S. CONST. amend. IV; Leonetti, *supra* note 77, at 310, 316–17, 320.
382. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 345–47 (2001); Bradley, *supra* note 7, at 1122; *see also* U.S. CONST. amend IV
383. *Atwater*, 532 U.S. at 347 (reasoning that police need clear rules to follow).
384. United States v. Hammett, 236 F.3d 1054, 1060 (9th Cir. 2001) (permitting police walk around of home in order to ensure officer safety).
385. *See id.*
386. *See* Terry v. Ohio, 392 U.S. 1, 15–16 (1968).

Allowing knocks-and-talks to evade judicial scrutiny not only threatens the equal protection guaranteed to each citizen under the Fourth Amendment and Fourteenth Amendment of the Constitution but also threatens the safety of police and citizens alike.[387] Knock-and-talks should be reviewed under the same standard as stop-and-frisks and whether that standard is met should be determined by the level of suspicion police had at the moment they knocked on the citizen's door.[388]

387. *See* U.S. CONST. amends. IV, XIV; *Hammett*, 236 F.3d at 1060.
388. *See supra* Part VII.