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The Uninvited Guest: The Unexpected Damage to Privacy from the Expansion of Implied Licenses

INTRODUCTION

In America, as the saying goes, a man’s home is his castle; it is the last bastion of privacy and security. However, every time we open our homes to guests, we voluntarily surrender some of our constitutional right to privacy in the home. By hanging a knocker and building a path to the front door, we implicitly invite strangers—salesmen, proselytizers, Girl Scouts, and even police officers—to come to our front door and speak with us. But how broadly should the courts interpret this constructive invitation? In State v. Grice, the Supreme Court of North Carolina went too far by mistaking a narrow invitation to knock for an invitation to explore nearly all areas of a property.

In Grice, two detectives acted on an anonymous tip that ultimately led them to the defendant’s rural private property. When the detectives arrived at the property, one went to the front door to knock while the other waited in the driveway. While standing in the driveway, one detective noticed marijuana plants growing in the defendant’s backyard. The detectives then seized the marijuana and later used the plants as evidence to convict the defendant landowner for manufacturing marijuana.

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1. See Jonathan L. Hafetz, “A Man’s Home Is His Castle?: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 WM. & MARY J. WOMEN & L. 175, 175–76 (2012) (“Despite the continuing erosion of [Fourth Amendment] protection in other places, including on the streets, in automobiles, at airports, and in schools, the home retains a special place in search and seizure law, and continues to symbolize a zone of privacy often beyond the reach of the modern regulatory state.”).

2. U.S. CONST. amend. IV.


5. See id. at 765, 767 S.E.2d 321.

6. In this Recent Development, references to Grice and the Grice court refer to the North Carolina Supreme Court decision, not the court of appeals or trial court decisions.


8. Id. at 755, 767 S.E.2d at 314–15.

9. Id. at 755, 767 S.E.2d at 315.

10. Id. at 755, 767 S.E.2d at 314–15.
Two years before \textit{Grice}, in \textit{Florida v. Jardines}, the U.S. Supreme Court firmly limited the activities and purposes for which police may approach a home while acting under an implied license. Yet in \textit{Grice}, the Supreme Court of North Carolina failed to define exactly what kind of guests and types of behavior homeowners permit when they impliedly grant a license to approach their home.

This Recent Development argues that, by failing to apply the restrictions set forth in \textit{Jardines} or even articulate the scope of the implied license, \textit{Grice} allows law enforcement officers to perform warrantless searches on constitutionally protected property. To avoid such intrusions, this Recent Development urges the courts and the North Carolina General Assembly to limit the scope of implied licenses to the standard established by \textit{Jardines}.

Analysis proceeds in five parts. Part I provides the background necessary to understand the implied license doctrine, plain view seizures, and the practice of “knock and talk” investigations. Part II discusses the facts of \textit{State v. Grice}. Part III demonstrates how the \textit{Grice} court failed to apply precedent by highlighting two flaws in the court’s interpretation of implied licenses: the effect of Detective Allen’s extended presence in Grice’s driveway and the implications of Detective Guseman’s approach of the side door rather than the front door. Part IV addresses the dangerous consequences of failing to apply precedent. These dangers include substantially expanding what law enforcement may do without warrants on private property, unmooring the implied license doctrine from its legal foundations, and eroding citizens’ freedom from wrongful search and seizure in their homes. Finally, Part V recommends three improvements that would bring North Carolina’s implied license doctrine in compliance with the Fourth Amendment and ensure the protection of homeowners’ privacy interests. If implemented, these suggested changes would alleviate the uncertainty surrounding the scope of the implied license in North Carolina.

12. \textit{Id.} at 1416 (“The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”).
I. IMPLIED LICENSES, “KNOCK AND TALKS,” AND PLAIN VIEW SEIZURES

A. An Introduction to the Issues: Implied Licenses and Plain View

A basic history of Fourth Amendment privacy protections and limits on search and seizure reveals how Grice exposes homeowners to potentially unconstitutional invasions of their privacy interests in the home. The issues at stake in Grice include the (1) underlying principles of the Fourth Amendment and the warrant requirement, (2) implied license doctrine, (3) police investigations under an implied license, and (4) plain view doctrine.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”14 This protection extends outside the walls of the home, to the curtilage, which is “the land or yard adjoining a house [usually] within an enclosure.” 15 The warrant requirement presumptively prevents the search or seizure of private property absent a warrant issued on probable cause, though exceptions exist.16 Two approaches have developed to identify when a Fourth Amendment violation has occurred. The first is the privacy-rights doctrine, originating with Justice Harlan’s concurrence in Katz v. United States,17 which relies chiefly on citizens’ reasonable expectations of privacy. 18 The second school of thought is property

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14. U.S. CONST. amend. IV.
16. See, e.g., Vale v. Louisiana, 399 U.S. 30, 34 (1969) (“[O]nly in ‘a few specifically established and well-delimited’ situations may a warrantless search of a dwelling withstand constitutional scrutiny[.]” (citation omitted) (quoting Katz v. United States, 389 U.S. 347, 357 (1967))); Katz v. United States, 389 U.S. 347, 357 (1967) (“Searches conducted without warrants have been held unlawful . . . .”); Jones v. United States, 357 U.S. 493, 497 (1958) (“It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a seizure without a warrant.”); Johnson v. United States, 333 U.S. 10, 13–14 (1948) (strongly suggesting a warrant requirement by stating that the “point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime”).
18. See id. at 360–61 (Harlan, J., concurring); see also Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 AM. CRIM. L. REV. 257, 267 (1984) (“In Katz, the Court overturned this property-based interpretation of the fourth amendment, and extended its coverage to unreasonable invasions of privacy regardless of how accomplished. From the unarguable premise that ‘the Fourth Amendment protects people not places,’ the Court reasoned that the relevant question should not be how, but whether
based, limiting Fourth Amendment protections to the home and other physical property—a privacy violation occurs only when a trespass on property occurs.19

A license is a revocable permission given by a land owner to others, allowing visitors to enter the owner's land and perform “some act or series of acts” that would otherwise constitute trespass.20 If an person is invited onto private property, she has an express license to enter the property—the same holds true for an officer, who would be permitted to enter even without a warrant.21 However, even when an officer does not have a warrant and is not expressly invited, he can sometimes rely on an implied license to enter the property.22 An implied license (in contrast to express permission) is not given verbally—it is “implied from the habits of the country[.]”23 Courts objectively analyze whether an implied invitation has been extended, based on local “custom and the appearance of things[.]”24

Additionally, the homeowner’s “expectation of privacy” reasonably limits the scope of permissible police conduct an implied license allows.25 The implied license doctrine is therefore intimately rooted not only in common law property rights but also draws on the homeowner’s reasonable expectation of privacy.26 Determining whether a reasonable expectation of privacy exists involves a two-part analysis.27 First, a person must have a “subjective” expectation of

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19. See, e.g., Florida v. Jardines, 133 S. Ct. 1409, 1412 (2013) (“When ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a search within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’” (quoting United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012))); Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that the Fourth Amendment is not implicated “unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”).

21. See Jardines, 133 S. Ct. at 1415.
22. Id. at 1415–16.
23. Id. at 1404, 1415 (quoting McKee v. Gratz, 260 U.S. 127, 136 (1922) (Holmes, J.)).
24. Id. at 1422 (Alito, J., dissenting) (quoting Crown Cork & Seal Co. v. Kane, 131 A.2d 470, 474 (Md. 1957)).
25. Bradley, supra note 3, at 1106.
26. See id.; see also Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (“[A] person has a constitutionally protected reasonable expectation of privacy.”).
27. See Katz, 389 U.S. at 361 (Harlan, J., concurring); 68 AM. JUR. 2D Searches and Seizures § 9 (2010).
privacy in the location that law enforcement seeks to search.28 Second, that expectation of privacy must be objectively "reasonable," meaning it is one that society recognizes and validates.29 For example, although an individual might subjectively believe that contraband left in the open on the front porch is private, most people would not objectively consider the visible front porch a place where the individual could reasonably expect privacy.

The plain view doctrine is an exception to the warrant requirement. The doctrine outlines three requirements for law enforcement to validly seize an item without a warrant.30 “First, the police officer must lawfully make an ‘initial intrusion’ or otherwise properly be in a position from which he can view a particular area.”31 Second, the item must possess some quality to make it immediately apparent to the officer that she may seize it.32 For example, contraband is readily identifiable.33 However, even readily identifiable contraband may not be seized under the plain view doctrine unless the initial intrusion onto the property is lawful.34 Furthermore, the doctrine “may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”35 Finally, the third element of the plain

28. See, e.g., Estate of Wasilchen v. Gohrman, 870 F. Supp. 2d 1115, 1130 (W.D. Wash. 2012) (holding that the subjective element of the privacy test can be met only if a subjective expectation is exhibited by the defendant’s actual conduct).

29. Katz, 389 U.S. at 361 (Harlan, J., concurring) (“[T]he expectation [must] be one that society is prepared to recognize as ‘reasonable.’”).


31. Brown, 460 U.S. at 737 (plurality opinion) (emphasis added) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971)). Lawful access to a location can be made by means of an implied license; police, like “newspaper boys, postmen, [and] Girl Scout cookie sellers[,]” have an implied invitation to enter private property via the front path, on their way to the residence’s primary entrance. State v. Corbett, 516 P.2d 487, 490 (Or. Ct. App. 1973).

32. Brown, 460 U.S. at 737 (plurality opinion) (“[I]t must be ‘immediately apparent’ to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.” (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971))). For example, items that are intrinsically illegal for private citizens to possess such as illicit drugs, explosives, or certain firearms are immediately apparent contraband. See id.

33. See, e.g., California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (holding that marijuana plants that officers observed from a public navigable airspace above a defendant’s property were adequate to establish the apparent nature of the plants as seizable).


35. Id. at 466.
view doctrine requires that the officer have a “lawful right of access” to the item itself.\textsuperscript{36} This right of access frequently springs from an exigency, such as a threat that the item will be removed or destroyed.\textsuperscript{37}

\textbf{B. Supreme Court Precedent}

The implied invitation\textsuperscript{38} is limited to actions that are customary and usual.\textsuperscript{39} As a result, the justification for the implied license is undermined when an officer’s behavior goes beyond what property owners would ordinarily tolerate from a visitor.\textsuperscript{40} In \textit{Florida v. Riley},\textsuperscript{41} Justice Brennan’s dissent articulated the principle that “[t]he simple inquiry whether [a] police officer had the legal right to be in the position from which he made his observations cannot suffice[.].”\textsuperscript{42} A court must also inquire whether the expectation of privacy in the area searched should be considered reasonable.\textsuperscript{43} The implied license is not an absolute privilege assured to police officers at every home. To the contrary, the license can be “limited or rescinded by clear demonstrations by the homeowners.”\textsuperscript{44}

The Supreme Court has accepted the practice of “knock and talks,” as within the scope of an implied license and thus as a valid reason to enter private property.\textsuperscript{45} The Fourth Amendment permits officers without a warrant to approach a home by the front path and knock on the door for the purpose of interviewing any resident who answers.\textsuperscript{46} “The license is limited to the amount of time it would customarily take [a visitor] to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.”\textsuperscript{47} However, the Supreme Court has yet to hold whether and under what circumstances police officers may conduct

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  \item \textsuperscript{37} Mincey v. Arizona, 437 U.S. 385, 393 (1978); \textit{Coolidge}, 403 U.S. at 464.
  \item \textsuperscript{38} That is, the invitation that the implied license extends to potential visitors. See \textit{Florida v. Jardines}, 133 S. Ct. 1409, 1415–16 (2013).
  \item \textsuperscript{39} \textit{Id.} at 1415–16 n.2.
  \item \textsuperscript{40} \textit{See id.} at 1416.
  \item \textsuperscript{41} 488 U.S. 445 (1989).
  \item \textsuperscript{42} \textit{Id.} at 460.
  \item \textsuperscript{43} Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
  \item \textsuperscript{44} State v. Grice, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015).
  \item \textsuperscript{45} \textit{Jardines}, 133 S. Ct. at 1423 (Alito, J., dissenting) (“As the majority acknowledges, this implied license to approach the front door extends to the police.”).
  \item \textsuperscript{46} \textit{Id.} at 1416 (majority opinion).
  \item \textsuperscript{47} \textit{Id.} at 1423 (Alito, J., dissenting).
\end{itemize}
knock and talks at entrances other than the front door.\textsuperscript{48} The Court had the opportunity to follow the Third Circuit’s strong stance on protecting homeowners’ privacy rights. In 2014, the Third Circuit held that the knock and talk exception “requires that police officers begin their encounter at the front door, where they have an implied invitation to go.”\textsuperscript{49} But the Supreme Court overturned that court’s holding.\textsuperscript{50}

\textit{Florida v. Jardines} illustrates both the shifting landscape of Fourth Amendment analysis and how the Court might address future knock and talk cases. In \textit{Jardines}, the Supreme Court held that the use of a police drug-sniffing dog on the front porch of a house was an unlawful search because the officers’ activity exceeded the scope of the implied license.\textsuperscript{51} \textit{Jardines} specified that only a limited scope of conduct is invited by the simple action of “hanging a knocker.”\textsuperscript{52} Actions that deviate meaningfully from this protocol (i.e., approaching the front door, knocking, and waiting briefly) or that are not “customary, usual, reasonable, respectful, ordinary, typical, [or] nonalarming” will exceed the scope of the implied license and thus violate the homeowner’s Fourth Amendment rights.\textsuperscript{53}

Moreover, \textit{Jardines} further limited the scope of a license “to a specific purpose.”\textsuperscript{54} While an officer may approach a home and knock, seeking an interview with the owner even if the officer lacks probable cause or warrant,\textsuperscript{55} entry made with any other motive does not fall within the implied license exception to the warrant requirement. Visitors, including police officers, are not “impliedly

\textsuperscript{50} \textit{Carroll}, 135 S. Ct. at 351–52 (holding that the Third Circuit erroneously relied on a previous opinion with respect to knock and talks and also overturning the denial of qualified immunity for the police officer).
\textsuperscript{51} \textit{Jardines}, 133 S. Ct. at 1415; see also Carol A. Chase, \textit{Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered}, 52 HOU S. L. REV. 1289, 1293 (2015) (“[T]he \textit{Jardines} majority opinion—after first reiterating the view that the home receives heightened protection under the Fourth Amendment—highlighted the fact that the protection granted to the home under the Fourth Amendment extends to the curtilage as well.”).
\textsuperscript{52} \textit{Jardines}, 133 S. Ct. at 1416.
\textsuperscript{53} \textit{Id.} at 1415–16 n.2; see also Brown v. State, 392 So. 2d 280, 281 (Fla. Dist. Ct. App. 1980) (discussing the U.S. Supreme Court’s rejection of Florida’s warrantless entry statute). In \textit{Brown}, police drove up a defendant’s driveway after they saw him on the porch. \textit{Brown}, 392 So. 2d at 282–83. Even though members of the public are generally permitted to walk up the driveway, police did so at 1:45 a.m., when “at that time of night at his back door, [the defendant] could expect privacy.” \textit{Id.} at 284.
\textsuperscript{54} \textit{Jardines}, 133 S. Ct. at 1416.
\textsuperscript{55} \textit{Id.} at 1415–16.
invited to enter the protected premises of the home in order to do nothing but conduct a search.\textsuperscript{56} This is essentially a property-based analysis that roots the inquiry in trespass law by asking whether the officers were properly on the private property.\textsuperscript{57}

\textit{Jardines} focused on whether police had a license to enter the property\textsuperscript{58} rather than whether the homeowners had a subjective expectation of privacy. This is unsurprising because \textit{United States v. Dunn}\textsuperscript{59} left the subjective expectation of privacy prong of the analysis largely impotent\textsuperscript{60}—even significant efforts and clear demonstrations of an intent to establish privacy did not invalidate the search.\textsuperscript{61} The \textit{Dunn} Court held that the defendant had not established a reasonable expectation of privacy in the area surrounding his barn even though officers had to cross a perimeter fence, multiple barbed wire fences, and a wooden fence in order to reach the barn.\textsuperscript{62} Justice Brennan correctly pointed out in his dissent that if \textit{Katz}'s expectation of privacy test were correctly applied, the Court would have found that the defendant expected a barn thus barricaded to be private and that society would agree that within such a fortress one could reasonably expect privacy.\textsuperscript{63} However, because the majority employed a property-based analysis, the fact that the barn was not sufficiently connected to the home meant that it did not enjoy the privacy protections that modern property rights analysis reserves largely for the home.\textsuperscript{64} \textit{Jardines} continued this trend by focusing on implied licenses, a property rights concept, although one intimately linked to society's expectations of privacy.\textsuperscript{65} The Supreme Court of North

\begin{itemize}
\item \textsuperscript{56} \textit{Id.} at 1416 n.4.
\item \textsuperscript{57} 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(f), at 62 (5th ed. 2012) (describing the \textit{Jardines} Court as eschewing "the \textit{Katz} 'privacy' approach in favor of a 'property-rights' analysis requiring a determination of whether the officer's entry upon the curtilage was outside the householder's 'implicit license' to visitors because of the officer's purpose").
\item \textsuperscript{58} \textit{Jardines}, 133 S. Ct. at 1418 (Kagan, J., dissenting) ("The Court today treats this case under a property rubric[.]").
\item \textsuperscript{59} 480 U.S. 294 (1987).
\item \textsuperscript{60} See \textit{id.} at 300–03 (analyzing only the factors that support an objective expectation of privacy in the curtilage and not analyzing the individual's subjective expectation of privacy).
\item \textsuperscript{61} \textit{Id.} at 303–05.
\item \textsuperscript{62} \textit{Id.} at 303.
\item \textsuperscript{63} See \textit{id.} at 317–19 (Brennan, J., dissenting). Brennan criticized the \textit{Dunn} majority's refusal to recognize "farmers' and ranchers' expectations of privacy in their barns and other outbuildings" as expectations society would recognize as reasonable, especially when "obvious efforts have been made to exclude the public." \textit{Id.} at 319–20.
\item \textsuperscript{64} \textit{Id.} at 302 (majority opinion).
\item \textsuperscript{65} LAFAVE, supra note 57, § 2.3(f), at 62–63.
\end{itemize}
Carolina followed Dunn and Jardines, abandoning the expectation of privacy analysis for the property-based approach. The Grice court was content, as was the U.S. Supreme Court in Jardines, to instead undertake a property rights analysis. Although following the Jardines analysis, the Grice court expanded the implied license doctrine to allow for a greater breadth of police investigative conduct than permitted by Dunn or Jardines.

C. North Carolina and Fourth Circuit Decisions

Precisely how implied license doctrine and related Fourth Amendment principles interact with and apply to different cases, including which entrances to the home law enforcement may approach and the precise limits of the implied license, remains unclear. Without describing exactly what is allowed during a knock and talk, the Fourth Circuit has emphasized that the knock and talk does not confer “the right to make a general investigation in the curtilage.”

There is no firm consensus on the degree to which knock and talks permit law enforcement to encroach on private property, and courts facing the issue have taken varying approaches. The Seventh Circuit once held that “the Fourth Amendment is not implicated when police officers approach [a] door in the reasonable belief that it is a principal means of access to the dwelling.” This does not mean that the approach to a front door is totally unprotected. Rather, a case-by-case analysis determines the existence of a privacy interest. The Fourth Circuit has held that in certain cases the curtilage of the home may retain a protected privacy interest depending on “the physical attributes of the house and its surrounding land.” Privacy interests are accordingly more robust in secluded or rural areas. For example, a homeowner might not have a reasonable expectation of privacy in an object on the front porch where a passersby on the street could see it, while nonetheless having a reasonable expectation of privacy in objects in the backyard because of the more private

68. See Bradley, supra note 3, at 1099.
70. United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981) (noting that expectation of privacy are heightened when a house is “screened by trees, is located in an isolated, rural area with entry provided by a dirt road posted ‘no trespassing’ ”).
71. See id.
nature of a backyard.\textsuperscript{72} Similarly, the Second and Ninth Circuits have found that areas of private property that are considered a “normal route of access” for anyone visiting the home, such as sidewalks or driveways, are considered only “semi-private,” as are objects located there.\textsuperscript{73}

The above concepts are essential to understanding the danger that the Supreme Court of North Carolina’s holding in \textit{State v. Grice} poses to homeowners’ Fourth Amendment rights. When determining whether a reasonable expectation of privacy exists, the homeowner’s expectation of privacy must be both subjective and recognized by society as objectively reasonable.\textsuperscript{74} Moreover, in order for an officer to make a plain view seizure of an item within Fourth Amendment protected property, the officer must have had lawful access to the area in which the item is located.\textsuperscript{75} Lawful access to make a plain view seizure can be provided by an implied license.\textsuperscript{76} Finally, an officer is impliedly invited and therefore permitted to approach the front door of a home, knock promptly, wait briefly to be received, and then leave.\textsuperscript{77} In \textit{State v. Grice}, these legal principles should have been carefully weighed to determine whether the officers lawfully accessed the area where they found contraband on Grice’s property and whether they unlawfully seized the contraband.

\section*{II. \textit{STATE V. GRICE}}

\subsection*{A. Facts}

In May 2011, Detectives Guseman and Allen received an anonymous tip that defendant Jerry Grice, Jr. (“Grice”) was growing marijuana.\textsuperscript{78} They intended to confirm this information by performing a knock and talk investigation at Grice’s residence.\textsuperscript{79} The detectives drove one-tenth of a mile down Grice’s dirt driveway and parked in the driveway behind defendant’s white pickup truck.\textsuperscript{80} Grice’s house

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\item \textsuperscript{72} Cf. \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
\item \textsuperscript{73} \textit{United States v. Hayes}, 551 F.3d 138, 146 (2d Cir. 2008); \textit{United States v. Magana}, 512 F.2d 1169, 1171 (9th Cir. 1975). \textit{But see United States v. Pineda-Moreno}, 688 F.3d 1087, 1091 (9th Cir. 2012) (“We recognize that \textit{United States v. Jones} . . . may also affect the vitality of . . . \textit{Magana}.”).
\item \textsuperscript{74} \textit{See supra} note 27–29 and accompanying text.
\item \textsuperscript{75} \textit{See supra} notes 36–37 and accompanying text.
\item \textsuperscript{76} \textit{See supra} note 21 and accompanying text.
\item \textsuperscript{77} \textit{See supra} note 45–47 and accompanying text.
\item \textsuperscript{78} \textit{State v. Grice}, 367 N.C. 753, 754, 767 S.E.2d 312, 314 (2015).
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.}
\end{itemize}
was in a rural setting, “basically by itself in a field.”\textsuperscript{81} Upon exiting the vehicle, the detectives encountered dogs and saw that the front door of the house was barricaded with “plastic wrap” and “furniture stacked on the front porch . . . .”\textsuperscript{82} After concluding that a side door on the house was being used as Grice’s main entrance to the house, Detective Guseman approached the side door to knock.\textsuperscript{83} After calming the dogs, Allen remained “off the porch in the driveway[,]” and while standing there, he could see into Grice’s backyard.\textsuperscript{84} At this point, Allen noticed several potted marijuana plants in buckets about fifteen yards away.\textsuperscript{85} The plants were located “to the rear and side” of an outbuilding that resembled a “homemade shed.”\textsuperscript{86} After visually verifying that the plants were marijuana, both detectives crossed the lawn into the backyard where they then seized the plants.\textsuperscript{87} The State later used the plants as evidence to convict Grice of manufacturing marijuana.\textsuperscript{88}

\section*{B. The Majority Opinion}

Chief Justice Martin delivered the Supreme Court of North Carolina’s opinion in \textit{State v. Grice}, holding that the implied license to approach Grice’s home made lawful the detectives’ entry into and presence on Grice’s property.\textsuperscript{89} The court justified this holding by a single invocation of \textit{Jardines}: “an implicit license . . . typically permits the visitor to approach the home by the front path.”\textsuperscript{90} The court further justified the seizure of marijuana by explaining that “[w]hen law enforcement observes contraband in plain view, no reasonable expectation of privacy exists, and thus, the Fourth Amendment’s prohibition against unreasonable warrantless searches is not

\begin{itemize}
\item \textsuperscript{81} \textit{Id.}; New Brief for the State at 4, State v. Grice, 367 N.C. 753, 767 S.E.2d 312 (2015) (No. 501PA12), 2012 WL 8700379, at *3.
\item \textsuperscript{82} New Brief for the State, \textit{supra} note 81, at 4; see also \textit{Grice}, 367 N.C. at 754, 767 S.E.2d at 314.
\item \textsuperscript{83} \textit{Grice}, 367 N.C. at 754–55, 767 S.E.2d at 314–15; see also New Brief for the State, \textit{supra} note 81, at 4.
\item \textsuperscript{84} New Brief for the State, \textit{supra} note 81, at 5; see also \textit{Grice}, 367 N.C. at 754–55, 767 S.E.2d at 315.
\item \textsuperscript{85} \textit{Grice}, 367 N.C. at 755, 767 S.E.2d at 315; see also New Brief for the State, \textit{supra} note 81, at 5.
\item \textsuperscript{86} New Brief for the State, \textit{supra} note 81, at 5.
\item \textsuperscript{87} \textit{Grice}, 367 N.C. at 755, 767 S.E.2d at 315; see also New Brief for the State, \textit{supra} note 81, at 5.
\item \textsuperscript{88} \textit{Grice}, 367 N.C. at 755, 767 S.E.2d at 315.
\item \textsuperscript{89} \textit{Id.} at 754, 762, 767 S.E.2d at 314, 319.
\item \textsuperscript{90} \textit{Id.} at 757, 767 S.E.2d at 316 (quoting Florida v. \textit{Jardines}, 133 S. Ct. 1409, 1415 (2013)).
\end{itemize}
violated." \(^{91}\) In fact, because the court held that no privacy interest can exist in an object found in plain view, the court found that no search occurred at all. \(^{92}\) The Grice court’s application of this bright-line rule precluded a more fact-specific, contextualized analysis of whether the defendant could reasonably expect the plants to be private.

Although the Grice court invoked Jardines to establish the implied license that justified the detectives’ entrance onto the defendant’s property, \(^{93}\) the quoted language only permits a law enforcement officer to approach a home’s front door. Jardines’s language furnishes no justification for the detective’s lingering on the driveway, entering the backyard, or approaching the side door. \(^{94}\) Accordingly, the Grice court did not fully consider law enforcement’s practice of knock and talk investigations or the appropriateness of officers approaching a side door when conducting such investigations. \(^{95}\) Further, the court did not investigate whether Grice had a subjective expectation of privacy in his backyard or if such an expectation was objectively reasonable. \(^{96}\) If the court had discussed or fully considered these well-established doctrines, the result of this case may have been different.

C. Justice Hudson’s Dissent

Justice Hudson’s dissent, however, touched on some of these issues and other potential problems with the plain view seizure of the marijuana plants in Grice’s backyard. \(^{97}\) She noted that an observation made by an officer who is “located outside of a constitutionally protected area and is looking inside that area” is engaged in a
“preintrusion” observation. 98 Observations of contraband made from a preintrusion standpoint are properly classified as “open view” and not “plain view” observations. 99 The substantive difference between “open view” and “plain view” observations is that an “open view” observation does not occur from within a Fourth Amendment protected area. Further, “open view” observations do not confer a right of access to the object absent exigent circumstances—they merely confer probable cause sufficient to obtain a warrant. 100 In Grice, because the contraband was located in a protected area—the backyard 101—and the detectives observed it while outside of the protected area, they had only an open view of the marijuana plants and therefore no right of access absent a warrant or exigent circumstances.

When an officer sees contraband in “open view”—i.e., from outside the protected area—only a warrant or exigent circumstances justifies entering the Fourth Amendment protected area. 102 Justice Hudson concluded that there were no exigent or suspicious circumstances in this case. 103 In her view, the only facts supporting an exigency were the chance that someone might be home and that the plants could in theory be removed or destroyed. 104 She found no indication that the plants would be destroyed or even that the detectives had made their presence known to anyone in the home. 105 Because there was no evidence that the plants would be destroyed, Justice Hudson found that there was no legitimate reason for the detectives to seize the plants without a warrant. 106 She reasoned that the detectives could easily have called in for a warrant, obtained one, and then returned to confiscate the property. As Justice Hudson implied, the majority’s holding sets a dangerously low bar for what

98. Id. at 767, 767 S.E.2d at 322; see also Ensor v. State, 403 So. 2d 349, 352 (Fla. 1981) (defining a preintrusion as when “the officer is located outside of a constitutionally protected area and is looking inside that area”).
99. Ensor, 403 So. 2d at 352.
100. Id. For a detailed explanation of the “plain view” doctrine, see Coolidge v. New Hampshire, 403 U.S. 443, 464–73 (1971).
102. Ensor, 403 So. 2d at 352; see also Taylor v. United States, 286 U.S. 1, 6 (1932) (holding that evidence of a possible crime “does not strip the owner of a building of constitutional guarantees against unreasonable search”).
104. Id.
105. See id. at 769, 767 S.E.2d at 323–24.
106. Id.
constitutes exigent circumstances and threatens to eliminate the warrant requirement in many cases.107

III. THE GRICE COURT'S EXPANSION OF IMPLIED LICENSE DOCTRINE

By failing to condemn or even analyze the detectives’ actions, the Grice court paid little heed to the Supreme Court’s principle that “an officer’s leave to gather information is sharply circumscribed when he steps off [public] thoroughfares and enters the Fourth Amendment’s protected areas.”108 In doing so, the Grice court handed down an overly generous interpretation of the scope of the implied license, the implications of which are troubling for the future of Fourth Amendment protection of the home.

The events in Grice transpired on Fourth Amendment protected property. In North Carolina, it is generally agreed that driveways, pathways, porches, lawns, and other areas that must be traversed in order to reach the front door of a private house are classified as “curtilage.”109 Those locations are, therefore, protected by the Fourth Amendment and may not be intruded on by law enforcement without a warrant or a valid exception.110 Such an exception might be an implied license or perhaps a direct invitation inside by the owner.111 Given the scope of Fourth Amendment protections, a court should be absolutely certain that an officer without a warrant has proper license to enter a property before the court allows any seizure of objects within the property. Unfortunately, the question received little attention from the Grice court.112 This is likely because the defendant did not contest the validity of the license at trial and neither statute nor case law clearly establishes the scope of implied licenses.113 In any case, the issue of implied licenses deserved greater analysis in this case.

107. Id. at 769, 767 S.E.2d at 323.
109. Grice, 367 N.C. at 759, 767 S.E.2d at 317 (“[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.” (quoting State v. Frizzelle, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955))). The Fourth Amendment doctrine of curtilage is vast and complicated and is beyond the scope of this Recent Development.
110. Id.
111. See Jardines, 133 S. Ct. at 1415 (explaining that visitors using an implied license do not have to leave if they have been invited to stay).
112. See Grice, 367 N.C. at 754–65, 767 S.E.2d at 314–21; supra Section II.B.
113. Grice, 367 N.C. at 757, 767 S.E.2d at 316.
This Part analyzes two major issues presented by Grice, each of which, if more fully considered by the Supreme Court of North Carolina, may have changed the court’s conclusion that the detectives were acting within the scope of an implied license: (1) the effect of Detective Allen’s extended presence in Grice’s driveway; and (2) the implications of Grice’s barricaded front door.

A. Detective Allen’s Extended Stay in the Driveway

The Grice court found that Detective Allen was properly on Grice’s land,114 even though Allen exceeded the traditional limits of the implied license—to approach the front door, knock, wait briefly to be received, and, if no one comes to the door, to leave.115 Rather than approaching the home by the front path and knocking promptly, Detective Allen, after calming some dogs that ran out to him, remained standing in the driveway instead of approaching the door.116 Further, while standing there, the detective scanned the house and curtilage and spotted the buckets containing marijuana.117 Whether conducting a search or merely loitering, Detective Allen’s actions were outside the scope of the implied invitation to a person who approaches the front door.118

Although the Grice court quoted Jardines, noting that “an implicit license typically permits the visitor to approach the home by the front path[,]”119 the court conducted no further analysis as to whether the detectives were properly on the defendant’s land. Admittedly, a factual finding may have shown that, in the defendant’s neighborhood, it is acceptable when two people are visiting together for one visitor to go to the door while the other visitor waits at a distance, but no such findings were made.120 Furthermore, the Grice court overlooked a qualification that Jardines made clear: “the scope of a license . . . is limited not only to a particular area but also to a specific purpose.”121 The facts suggest that Detective Allen did not intend to knock and obtain an interview with the resident of the

114. See supra Section II.B.
115. See Jardines, 133 S. Ct. at 1415.
117. Id. at 755, 767 S.E.2d at 315.
118. That is, “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.” Jardines, 133 S. Ct. at 1415.
120. See supra notes 38–53 and accompanying text (describing “custom” as the guiding principle of the implied license).
121. Jardines, 133 S. Ct. at 1416.
house; he remained in the driveway to look and observe. The Grice court may have overlooked this limit on the scope of the implied license because courts are generally hesitant to allow the validity of a search to hang on the “subjective intent of the officer.” But this principle should not apply to plain view seizures in this state. The North Carolina General Assembly only permits warrantless seizures of plain view evidence if the discovery is inadvertent—essentially requiring that the officer neither anticipate finding the evidence nor know its location in advance. Because the legislature has already determined that an officer’s subjective mental state is important to a search or seizure’s validity, it should be considered equally as important to the license analysis as well.

In Jardines, the Supreme Court instructed that “no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search,” but it did not address whether the customary invitation allows multiple officers to provide backup for an officer on the premises. Detective Allen may have overstepped the boundary of the implied license by waiting in the driveway, inspecting his surroundings, and looking into the backyard. However, it may well be that careful inspection of his surroundings was essential for Allen to properly support and protect his partner who was knocking on the door. It could additionally be argued that calming the dogs in the driveway was essential for police safety—though the record does not indicate that the dogs were aggressive.

Had the Grice court fully examined Detective Allen’s prolonged stay in the driveway, it is likely that the court would have found that Allen’s actions exceeded the scope of the implied license. At the very least, by analyzing Allen’s behavior, the court could have clarified

123. See, e.g., Jardines, 133 S. Ct. at 1416 (holding that subjective intent is irrelevant when a search is objectively reasonable); Horton v. California, 496 U.S. 128, 138 (1990) (holding that the requirement that an officer’s discovery of evidence in plain view be inadvertent is not an effective standard because “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer”).
124. See N.C. GEN. STAT. § 15A-253 (2013) (“If in the course of the search the office inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered.”).
125. See Horton, 467 U.S. at 138 (defining inadvertent discovery).
126. Jardines, 133 S. Ct. at 1416.
127. See id. at 1409–18.
128. See supra notes 54–57 and accompanying text.
that in North Carolina visitors are impliedly invited to linger in the driveway. Doing so would have allowed homeowners to better understand the limits of their privacy interests in their own property. It should also be noted that Detective Guseman, who actually intended to and did go up to the door and knock, did not notice the plants—likely because he was busy performing the legitimate purpose of his entry. 130 Lastly, even failing to examine the detective’s lengthy stay in the driveway, the court should have more fully considered whether the furniture obstructing the front door limited the scope of the implied license.

B. Furniture Barricading the Door and Detective Guseman’s Approach of the Side Door

The Grice court also neglected to consider whether the defendant created a reasonable expectation of privacy by limiting the scope of the implied license to enter his land. As previously discussed, a homeowner impliedly invites guests to enter his property by hanging a knocker. 131 But in Grice, the proverbial knocker certainly was not hung. On the contrary, the front door was barricaded with furniture and covered with plastic. 132 It seems troubling that even when a person has barricaded the door of his house, there was not even a whisper from the Grice court wondering if the implied license might have been revoked. By way of example, several circuits have held that a homeowner may limit the license and create a reasonable expectation of privacy on his curtilage by surrounding it with a fence and gate. 133 Nor did the Grice court consider the fact that there was no path or sign directing visitors to the driveway or to the side door, 134 which could suggest that Grice neither invited nor expected members of the public to be in the driveway or at the side door. 135 Perhaps no guest had ever discovered, much less attempted to use this side door at the end of a long, dirt driveway in a rural area. 136 By remaining

130. See id. at 755, 767 S.E.2d at 315.
131. Jardines, 133 S. Ct. at 1415 (“We have accordingly recognized that ‘the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.’” (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951))).
133. United States v. Jenkins, 124 F.3d 768, 773 (6th Cir. 1997) (holding that land surrounded on three sides by fences contributed to the finding of the area as protected by the Fourth Amendment); Fixel v. Wainwright, 492 F.2d 480, 484 (5th Cir. 1974).
134. Grice, 367 N.C. at 754, 767 S.E.2d at 314.
135. See id.
136. Id. at 754, 767 S.E.2d at 314.
silent, the court implied that even if the defendant could reasonably expect privacy in his backyard, that privacy interest was overborne by the legitimate state interest in seizing contraband, even in the absence of exigent circumstances.137 Because the front door was barricaded, Grice arguably directed visitors to the functioning side door. But if so, the court should have explained its analysis while also taking care not to hold that law enforcement may approach any or all doors and windows when the front door is unavailable.

Essentially, the Grice court conflated the first requirement of the plain view analysis—lawful access—with the third requirement—an immediately apparent right to seize the object.138 Even assuming that the detectives had a right to seize contraband, their search failed to meet the requirements of the plain view doctrine because the detectives did not have lawful access to the side of the house.

Even ignoring the implications of the barricade, the court should not have ignored that an implied license usually grants permission to approach only the front door.139 Because the detectives approached the side door in this case,140 the court should have paid greater attention to whether this conduct was proper. The local custom may well have permitted a visitor to go to a side door if the front door was blocked. The physical layout of the Grice property may have warranted using the side door. If the Grice majority had allowed the officers to approach the side door on either of these bases, the holding would be relatively narrow and fact specific. The opinion should have established that knocking on side doors, back doors, or windows is not appropriate in every case but must be specifically invited by the physical layout of the property or by local custom.

Given this confusion, Detective Guseman might have exceeded the scope of his invitation when he approached the side door. Different circuits have established different rules detailing when approaching side doors is appropriate. The Fourth Circuit allows officers to approach a door other than the front door only under certain circumstances, such as when a homeowner’s car is parked in the residence, but no one answers the front door.141 Other

137. Id. at 762, 767 S.E.2d at 319.
139. See Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013); cf. Lakin v. Ames, 64 Mass. (10 Cush.) 198, 220 (1852) (holding that licenses are created and also limited by the local customs).
140. See Grice, 367 N.C. at 754–55, 767 S.E.2d at 315.
141. See United States v. Bradshaw, 490 F.2d 1097, 1099–1100 (4th Cir. 1974).
jurisdictions have looser standards, allowing an officer to approach another door only when she reasonably believes that the side door is used as the primary entrance.\footnote{142} In \textit{Grice}, rather than approaching by the front path and knocking at the front door, Guseman went up the driveway, around to the side door,\footnote{143} possibly exceeding the spatial limits of the implied license.

The classification of the side door as the main entrance had a serious impact on the defendant’s privacy interests. But the court engaged in no inquiry as to whether this classification was warranted.\footnote{144} This is particularly troubling because scope of license issues are highly fact-bound inquiries with no apparent bright line rules. The court should have clarified these murky areas of the law. The \textit{Grice} court allowed the detectives to approach the side door because the detectives determined that the side door appeared to be the main entrance.\footnote{145} In many cases this standard will not be problematic, but the court should take care to ensure that an officer’s belief about which entrance is the main entrance is a reasonable one. Wholesale deference to an officer’s subjective beliefs would make it too easy to erode the protections of the home and its curtilage.

In sum, the \textit{Grice} decision is problematic due to its cursory analysis. The court started and ended its inquiry by finding that the officers’ initial presence on the property was for the purpose of conducting an interview.\footnote{146} Instead, the \textit{Grice} court should have continued the required fact-based inquiry. First, the court should have inquired whether the officers’ continued presence on the property fell within the implied license. Second, the court should have examined the officers’ actions after they realized the front door was barricaded and no one appeared to be home. The initial purpose of their presence—to conduct an interview—was mooted. Finally, the court should have found that the officers’ continued presence on the

\footnote{142. See, e.g., United States v. Garcia, 997 F.2d 1273, 1279–80 (9th Cir. 1993) (holding defendant’s Fourth Amendment rights were not violated when officers reasonably believed that the back door—a door readily accessible to the public—was the apartment’s main entrance); United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990) (upholding officers’ approach to a back door when the front door was inaccessible and the officers engaged in a legitimate effort to interview the defendant rather than attempting to observe whether unlawful activity was underway).}

\footnote{143. \textit{Grice}, 367 N.C. at 754–55, 767 S.E.2d at 314–15.}

\footnote{144. See \textit{id.} at 754–65, 767 S.E.2d at 314–21 (setting forth as an accepted fact that “the driveway led to a side door, which appeared to be used as the main entrance,” while ignoring the issue in the legal analysis).}

\footnote{145. \textit{id.} at 754–55, 767 S.E.2d at 314–15.}

\footnote{146. \textit{id.} at 758, 767 S.E.2d at 317 (“Here, the knock and talk investigation constituted the initial entry onto defendant’s property[.]”).}
property was for the purpose of finding contraband, an unlawful justification for encroaching on Fourth Amendment protected property.

*Jardines* stands for the proposition that the Constitution continues to limit officers to certain actions and purposes even after an officer initially enters property for the purpose of conducting an interview.147 This Recent Development urges that if officers undertake acts inconsistent with a legitimate purpose, courts should consider the scope of the implied license to be breached. If state courts do not fully analyze the actions of officers on a case-by-case basis, they simply cannot uphold the Constitution.

IV. CONSEQUENCES OF *GRICE*

By eschewing a case-by-case analysis and not confining police actions on private property to a fixed and limited protocol, the *Grice* court created a dangerous precedent for North Carolina. First, the decision permits an overly broad range of police actions—including generous exemptions for safety—to infringe on Fourth Amendment protections. Second, it allows officers to exceed specific, legitimate purposes, which encourages exploratory behavior. Third, it encourages violations of homeowners’ reasonable expectations of privacy.

A. Broad Range of Police Actions

If the law does not require police to adhere to a specific protocol while on private property, some deviations may be harmless, but others may be alarming, invasive, and unconstitutional. The risk of violating constitutionally protected property rights is too great to refrain from instituting a more stringent protocol. Justice Scalia noted in *Jardines* that “to spot [a] visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.”148 Allowing officers to lurk and loiter on the driveway and front porch, peering through windows for as long as they like, seriously threatens the privacy interests at the heart of the Fourth Amendment. When officers are given such freedom, all but the darkest corners of a home are in “plain view.”

This is no mere hollow prediction; in some jurisdictions this is becoming the reality. The Ninth Circuit has allowed police to walk

148. *Id.* at 1416.
completely around the house “for officer safety reasons” and to “attempt to locate someone with whom they could speak[.]”149 or to stand on tires to look over a fence into a person’s backyard.150 Similarly, the First Circuit has permitted police to go to the back of the house and peer in a kitchen window because the front door was inaccessible.151 Such privileges run contrary to the logical and legal basis of an implied license. Would a reasonable person, when deciding not to answer the door, expect a visitor to walk around the house peering in windows in an exploratory manner? Should society? If not, these actions likely violate the “reasonable expectation of privacy” described in *Katz* and *Jardines*, and should not therefore be permitted.152 An extension of licenses to engage in exploratory behavior on a homeowner’s property will devastate North Carolinians’ Fourth Amendment interests.

Perhaps it is necessary to provide police with broad discretion to decide how to carry out their duties, in order to allow them to perform their jobs safely. Officer safety is often used to justify actions that seemingly exceed the implied license, such as allowing officers to secure an area by circling a house153 or permitting Detective Allen to stand watch in the driveway to provide back-up for his partner.154 It is worth asking whether actions necessary for police safety should lie within the scope of the implied license. The court might have correctly reasoned that by building a path to his door, a homeowner implicitly licenses police (and other visitors) to approach his door in a reasonably safe way. On the other hand, a homeowner does not guarantee that all visitors will be protected from all injuries, and the police—like all others—must assume some minor risks when approaching private property. The Fourth Amendment does not permit protective sweeps of private property to be used as a substitute for a warrant, absent reasonably convincing evidence of a potential risk.155 If a police officer testified that it was safer for him to batter down the doors of a home and search every room and closet, such testimony alone would not defeat the Fourth Amendment requirement that searches and seizures be reasonable: “[Fourth

151. United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990).
152. See supra Section I.B.
153. See, e.g., *Hammett*, 236 F.3d at 1060 (allowing the officer to circle the house to locate another door out of concern for officer safety).
Amendment jurisprudence contemplates that protection of individual rights of privacy will be achieved at some cost to society’s interest in public safety. A balance can and should be achieved between safety and privacy interests.

B. Specific Purposes

*Jardines* requires that the scope of a license be limited to a specific purpose. Homeowners do not typically invite guests onto their property for the sole purpose of conducting searches. Seeing a stranger performing searches in one’s yard would greatly alarm a reasonable homeowner. Extending licenses for officers to perform searches that a homeowner would rarely if ever consent to therefore undermines the justification for the implied license. Under such a rule, an officer may enter not only to interview the resident but even to stand in the driveway casting his eyes about searching for contraband not visible from a public road. In *Grice*, Detective Guseman actually intended to approach the front door and knock; likely because he was busy performing the legitimate purpose of his entry, he did not notice the plants, though his partner, loitering in the driveway, did.

An officer’s intent meaningfully affects what she might find during a knock and talk. However, an officer should not need to shield her eyes so long as they are fixed on a legitimate purpose. Embracing a subjective standard that validates only those knock and talks performed with the legitimate purpose of an interview is in keeping with North Carolina precedent. It would constrain an officer’s activities to conduct that a homeowner would impliedly consent to and would reduce the privacy interests surrendered by the homeowner to the minimum required for the officer to do his job. Although subjective standards are difficult to apply—because it is easy for an officer to lie about why she went to a certain location and courts often defer to officer testimony—the specificity of the knock and talk protocol makes subjective intent relatively easy to discern. If the officer deviates from the path to the door, performs an unusual action, or delays unnecessarily, it will alert the court that the officer

156. United States v. Munoz-Guerra, 788 F.2d 295, 299 (5th Cir. 1986).
158. *Id.* at 1415–17.
160. See *id*.
161. *Id.* at 757, 767 S.E.2d at 316.
has also turned away from the legitimate purpose and therefore breached the implied license.

C. Homeowners’ Reasonable Expectation of Privacy

Lastly and perhaps most dangerously, the Grice court seems to treat implied license doctrine as an exception to the rule articulated in Jardines: Reasonable expectations of privacy may protect areas unprotected under the traditional property theory of the Fourth Amendment, but the absence of such expectations of privacy cannot negate Fourth Amendment protections “when the Government does engage in [a] physical intrusion of a constitutionally protected area.”\(^{162}\) Yet the implied license doctrine seems to permit seizures of property within plain view of the curtilage between a public street and the front door, precisely because there is neither a subjective expectation of privacy nor an objectively recognized privacy interest in such an area.\(^{163}\) Objectively low expectations of privacy do not subtract from Fourth Amendment protection of private areas, including the home; this baseline protection is all that guards the people against the government invading all areas of privacy by announcing Orwellian searches and surveillance.\(^{164}\) If searches like those performed in Grice or the Ninth Circuit cases mentioned were to become commonplace, Americans could suffer significantly

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164. See _Smith v. Maryland_, 442 U.S. 735, 740 n.5 (1979) (“Situations can be imagined, of course, in which Katz’s two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation’s traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.”); cf. Brian J. Serr, _Great Expectations of Privacy: A New Model for Fourth Amendment Protection_, 73 MINN. L. REV. 583, 583–87 (1989) (arguing the Supreme Court has favored law enforcement over privacy); _George Orwell_, 1984, at 211–12 (1949) (“A Party member lives from birth to death under the eye of the Thought Police. Even when he is alone he can never be sure that he is alone. Wherever he may be, asleep or awake, working or resting, in his bath or in bed, he can be inspected without warning and without knowing that he is being inspected.”).
diminished privacy in their backyards and homes.165 Everything not shuttered away behind curtain-drawn windows would be considered in plain sight.

V. RECOMMENDATIONS

To preserve and perhaps restore the privacy interests guarded by the Fourth Amendment, the Supreme Court of North Carolina and the North Carolina General Assembly should take four concrete steps to establish workable, safe boundaries for the protection of privacy in the home. First, North Carolina should adopt a “categorical approach” to privacy protections, as recommended by Justice Hudson’s dissent in *State v. Grice*;166 second, the State should establish a fixed and reasonable protocol to govern the actions of implied licensees, particularly law enforcement officers; third, the State should reemphasize *Katz*’s expectation of privacy analysis; and fourth, the State should limit the purposes for which an officer may enter Fourth Amendment protected property without a warrant. There could conceivably be many other standards that would serve this same purpose, but these recommendations are drawn from the principles and suggestions highlighted by Justice Hudson and various U.S. Supreme Court Justices as important.

A. Adopt a Categorical Approach to Privacy Protections

Adopting a categorical approach to privacy protections, as recommended by Justice Hudson’s dissent in *State v. Grice*,167 would increase privacy protections in North Carolina. Justice Hudson notes that an officer who is “located outside of a constitutionally protected area and is looking inside that area” is engaged in a “pre-intrusion” observation.168 A categorical approach would distinguish between “open view” and “plain view” observations. Observations of contraband made from a “pre-intrusion” standpoint are properly classified as “open view” and not “plain view” observations.169 The substantive difference between an “open view” and “plain view” observation is that an “open view” observation does not occur from within the Fourth Amendment protected area and does not confer a right of access to the object; instead, an “open view” observation

165. *See supra* notes 149–50.
167. *Id.*
168. *Id.* at 767, 767 S.E.2d at 322; *see Ensor v. State*, 403 So. 2d 349, 352 (Fla. 1981).
169. *Ensor*, 403 So. 2d at 352.
merely confers probable cause. When law enforcement sees contraband in “open view”—i.e., from outside the protected area—the law requires a warrant or exigent circumstances to justify entering the Fourth Amendment protected area.

As Justice Hudson noted in her dissent, applying the “open view” doctrine could transform the outcome of cases like Grice. The license by which the detectives entered the defendant’s land limited their lawful access to specific parts of the curtilage. This strongly suggests that until the officers spotted the plants in the backyard and left the driveway, there was no prior valid intrusion of that part of the curtilage. Consequently, absent exigent circumstances such an intrusion of the Fourth Amendment protected property would not be permitted under the “open view” doctrine.

B. Establish a Fixed Protocol

Establishing a fixed protocol for how licensees operate ensures that courts do not condone violating the Constitution. Under Jardines, certain extreme acts exceed the scope of an implied license; these include “peer[ing] into the house through binoculars,” investigating the curtilage with trained drug-detection dogs, and observing the home with a “thermal-imaging device.” Preventing officers from doing more than approaching the front door, knocking, and leaving if not invited to stay longer would go a long way toward preventing blatant violations of the license’s scope. When officers deviate from this protocol, courts should focus on whether such activity is customary in light of the “habits of the country[.]”

Allowing only those actions that are “customary, usual, reasonable,

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170. See id.
171. See Taylor v. United States, 286 U.S. 1, 6 (1932).
173. See Florida v. Jardines, 133 S. Ct. 1409, 1422 (2013) (Alito, J., dissenting) (“A visitor cannot tramp through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.”); see also, e.g., United States v. Wells, 648 F.3d 671, 679–80 (8th Cir. 2011) (refusing to permit knock and talks when police forgo the knock at the front door and proceed directly to the backyard); Robinson v. Virginia, 625 S.E.2d 651, 659 (Va. Ct. App. 2006) (en banc) (finding that the officer was within the implied license as he walked up the driveway of the defendant’s house).
174. See supra Section II.A.
175. LAFAVE, supra note 57, § 2.3(f).
176. Jardines, 133 S. Ct. at 1416 n.3.
177. Id. at 1417–18.
178. Id. at 1419.
179. Id. at 1415.
180. See id.
respectful, ordinary, typical, [or] nonalarming” would force police to conform more precisely to what homeowners expect and invite.

In the same vein, North Carolina could stand to learn from jurisdictions that recognize the limits of the implied license. Other jurisdictions limit the plain view (and open view) doctrine, particularly when officers “employ a particularly intrusive method of viewing.” Such jurisdictions recognize a number of factors for determining whether an officer exceeds an implied license, such as whether the officer acts secretly, the time of day that the entry occurs, and whether the officer actually attempts to talk with the resident. Employing these factors in the Fourth Amendment analysis—and continuing to recognize other factors when relevant—would allow a body of case law to develop that would guide officers in how to act on private property and instruct property owners on how much privacy they can expect.

C. Reemphasize the Katz Analysis

As previously explained, courts around the nation are shifting their emphasis from the person-centric expectation of privacy analysis espoused in Katz to an increasingly property-based analysis. This Recent Development suggests reversing this shift. The trend in legal reasoning culminating in Jardines (and even more so in Grice) overemphasizes property rights and divorces analyses of licenses from their proper basis: the reasonable expectation of privacy. Ever since Dunn, courts increasingly employ license analyses in lieu of the “reasonable expectation of privacy test.” Indeed, on paper, the two tests are strikingly similar. After all, if an action is allowed by the

181. Id. at 1416 n.2.

182. The difference between open view and plain view is that, in open view, the observation is made from outside rather than from within the Fourth Amendment protected area. State v. Grice, 367 N.C. 753, 767, 767 S.E.2d 312, 322 (2015) (Hudson, J., dissenting).


184. See, e.g., State v. Myers, 815 P.2d 761, 769 (Wash. 1991) (en banc) (listing seven factors used in determining whether an officer exceeded the scope of “open view”); State v. Seagull, 632 P.2d 44, 48–49 (Wash. 1981) (en banc) (finding that the officer was not acting secretly in approaching a house).

185. See supra Section I.B.


187. See supra Section I.B.
“habits of the country,”$^{188}$ it is almost certainly an action that “society is prepared to recognize as ‘reasonable.’”$^{189}$ But a property-based analysis largely confines Fourth Amendment protections to the home and curtilage and leaves objects left in barns, open fields, and certain other places unprotected, even if their owners and society could reasonably expect such things to be private.$^{190}$ Reemphasizing the Katz analysis would provide greater protection to privacy interests outside the home where both individuals and society consider it reasonable.

### D. Limit the Purposes of Implied Licenses

The courts could also shore up Fourth Amendment protections by limiting the purposes for which any person—including a police officer—may enter Fourth Amendment protected property. Jardines largely already requires this: “[t]he scope of a license . . . is limited not only to a particular area but also to a specific purpose.”$^{191}$ However, some courts may be tempted to reason that permitting an officer to enter Fourth Amendment protected property “for the purpose of a general inquiry or interview”$^{192}$ would also permit that officer to enter the property for the “purpose of discovering information.”$^{193}$ However, “discovering information” is a broader purpose than “discovering information by speaking to the occupant.”$^{194}$ The courts should closely supervise lower courts that attempt to permit searches made with a general intent to discover information. Societal expectations dictate the permissible purposes for approaching a home—usually to approach the front door only.$^{195}$ The Fourth Amendment limits knock and talks to this accepted custom.

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190. See supra notes 58–66 and accompanying text.
191. Jardines, 133 S. Ct. at 1416 (emphasis added).
192. State v. Lupek, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (quoting State v. Prevette, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599–600 (1979)). It should also be noted that once a legitimate purpose is extinguished, either by its achievement or frustration, the license is also extinguished. Cf. id. at 152, 712 S.E.2d at 920 (“Defendant repeatedly insists that Ms. Sweatt tried to shut the door on Deputy Carroll . . . . The trial court, however, found that Ms. Sweatt tried to shut the door only after Deputy Carroll was on the porch and had already seen the bong.”); State v. Prevette, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599 (1979) (“Entrance onto private property for the purpose of a general inquiry or interview is proper.”).
193. See Jardines, 133 S. Ct. at 1424 (Alito, J., dissenting).
194. See id. at 1416 n.4 (majority opinion) (“The dissent argues, citing King, that ‘gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach.’ That is a false generalization.” (citation omitted)).
195. Id. at 1415.
The above recommendations would help conform North Carolina’s rules for police conduct more closely to the strictures of the Fourth Amendment. Accordingly, homeowners would more fully enjoy the protections of the home and the Constitution, and police would not be impeded in carrying out their duties—for in many cases, not much more will be required of them beyond acquiring a warrant.

CONCLUSION

The dangers inherent in Grice stem from the decision’s lack of clarity and thorough analysis. Jardines establishes that there are limits to the scope of an implied license. The Grice court need not have precisely implemented the above suggestions, but the court had a duty to apply the principles handed down by Jardines in a more meaningful way. Unconstrained police information gathering cannot be excused by using implied license doctrine as a battering ram against Fourth Amendment protections.

Permitting invitees to engage in activities a guest never would and for purposes a homeowner would never condone contradicts the rationale underlying implied license doctrine. The people of North Carolina deserve a clearer answer to the question: by opening my home to guests, how much privacy do I give away? If Grice’s line of reasoning continues, the only way to revoke the implied invitation to police to circle the home, knock on every door and peer in every window, is to fortify the home with barricades, gates, and high fences. The home is a man’s castle, and if the Fourth Amendment does not defend it, homeowners may build walls, gates, and moats instead.

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196. See id. at 1417–18 (holding that an implied license does not allow the use of drug-sniffing dogs to conduct a warrantless search on a homeowner’s curtilage).

197. State v. Grice, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015) (“The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs.”).

198. See United States v. Jenkins, 124 F.3d 768, 773 (6th Cir. 1997) (holding that entering the yard by a gate or by climbing a fence constitutes a Fourth Amendment violation); Fixel v. Wainwright, 492 F.2d 480, 483 (5th Cir. 1974) (holding that officers violate the Fourth Amendment when they physically invade an area protected by a fence).

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