Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs

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I. INTRODUCTION

Privacy is fast becoming the most illusive aspect of life for Americans. The concept of the American way of life was built upon the right to be left alone. That right is currently threatened by both government and private entities. When it comes to government encroachment upon the right, we look to the Fourth Amendment to regulate and protect against unreasonable encroachments, and we look to the Supreme Court to define the Fourth Amendment's terms. For the past three decades, that Court has applied a cramped definition of "search," thereby excluding common government investigative techniques from the protection of the Fourth Amendment.\(^1\) One such application has excluded dog sniffs\(^2\) for illegal drugs from the term "search." With that leeway, police are utilizing dogs much more frequently to detect illegal drugs and in contexts never considered by the Court when it defined dog sniffs as being outside of the Fourth Amendment.

In 1983, the Supreme Court exempted dog sniffs from the reasonableness requirement of the Fourth Amendment.\(^3\) The Court stated that the dog sniff of a piece of luggage is not a search subject to the Fourth Amendment because a dog sniff is a limited intrusion capable

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1. See, e.g., Florida v. Riley, 488 U.S. 445, 450 (1989) (explaining that a hovering helicopter used to photograph defendant's backyard did not violate protected privacy interest); California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (holding that a fixed-wing airplane used to photograph defendant’s backyard did not violate protected privacy interest); Oliver v. United States, 466 U.S. 170, 182–83 (1984) (explaining that police entry onto fenced and posted field without a warrant does not intrude on a protected privacy interest even though entry may constitute a trespass); United States v. Knotts, 460 U.S. 276, 282 (1983) (holding that a beeper attached to an automobile to track the driver does not invade a legitimate expectation of privacy); Smith v. Maryland, 442 U.S. 735, 744–45 (1979) (holding that a person has no legitimate expectation of privacy in the telephone numbers dialed from that person’s home).

2. The word “sniff” connotes a canine sniffing the air and not touching or pawing the subject. As a result of their olfactory biology, drug dogs do much more than sniff; they place their snouts on subjects and are prone to paw at them as well. See Natural History Museum of Los Angeles County, Dogs, Form and Function, Smell, http://www.nhm.org/exhibitions/dogs/formfunction/smell.html (last visited Dec. 21, 2006). We have elected to retain the word “sniff,” because it is the word Justice O'Connor used in Place and continues to be used by courts.

only of accurately determining whether or not the luggage contains contraband. That statement was not central to the case. Although the luggage had been properly seized based on reasonable suspicion, the Court held that the extended detention of the piece of luggage was unreasonable. That the statements pertaining to dog sniffing were not central to the decision in Place is a fact that has been consistently ignored by the more than 2,000 cases citing to United States v. Place for its proposition about dog sniffs. Thus, a case seemingly limited to determining the limits of a seizure of a suitcase on less than probable cause has become the cornerstone of the categorical elimination of judicial oversight of police canine units. Today canine units operate almost without any legal controls, expanding a doctrine created only for luggage to the arbitrary use of dogs on vehicles, homes, and persons at the unlimited discretion of a police officer.

The Place doctrine is based on three specific principles attributed to a dog sniff that render it "sui generis": a dog sniff is a minimal intrusion; a dog only sniffs for the presence of contraband; and, by implication, a dog is highly accurate. In fact, a dog sniff fails on all three

4. Id. at 707.
5. Id. at 723 (Blackmun, J., concurring) ("Moreover, contrary to the Court's apparent intimation, an answer to the question is not necessary to the decision. For the purposes of this case, the precise nature of the legitimate investigative activity is irrelevant. Regardless of the validity of a dog sniff under the Fourth Amendment, the seizure was too intrusive. The Court has no need to decide the issue here." (citation omitted)).
6. See Milton Hirsch & David Oscar Markus, Fourth Amendment Forum: Drugs, Dogs, and Cars: Oh My!, CHAMPION, June 2005, at 48, 48 ("Accordingly, even if the drug sniff is not characterized as a Fourth Amendment search, 'the sniff surely broadened the scope of the traffic-violation-related seizure.' Now, dogs may be employed on our streets as they are employed at the airport." (footnote omitted)).
7. Place, 462 U.S. at 707 ("A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment.").
accounts, rendering the theoretical basis offered by Justice O'Connor meaningless.

In 2003, the Place doctrine resulted in a raid on a South Carolina high school in a small community known as Goose Creek. Captured on surveillance cameras, students were thrown to the ground by police officers and subjected to dog sniffs led by teams of administrators and police officers in an unsuccessful effort to root out the school's "drug problem."8 Twenty years of very limited judicial oversight of canine units is directly responsible for the violent intrusion of liberty and privacy in Goose Creek, a practice the Supreme Court has since validated when dog sniffs are applied to vehicles and homes.

In 2005, the Place doctrine stained the last stronghold of privacy when the Court summarily and without opinion applied the Place doctrine to the home in Florida v. Rabb.9 Without explanation, the Supreme Court applied a doctrine intended for impersonal luggage to the home, the locus of heightened Fourth Amendment protection as reemphasized merely four years earlier in Kyllo v. United States with broad statements such as the following: "At 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 government intrusion.'"10 Following the Supreme Court's summary reversal of Rabb, the Florida Court of Appeals reconsidered the issue and held its ground, again upholding the trial court's granting of the motion to suppress the warrant based upon the dog sniff of the defendant's home.11 The United States Supreme Court denied the state's petition for certiorari, letting the state decision stand seemingly in conflict with the Court's earlier summary reversal.

The purpose of this Article is to reexamine the analytical reasoning behind Justice O'Connor's conclusion that a drug dog is "sui generis." Part II of this Article revisits the Place decision and the case law which has extended Place. Part III examines the drug dog in terms of the accuracy of Justice O'Connor's three-prong analysis which served to place a dog sniff outside the reach of the Fourth Amendment. Parts IV, V, and VI examine whether dog sniffs of homes, students, and

10. Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). See also Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("In our tradition the State is not omnipresent in the home."); United States v. Karo, 468 U.S. 705, 714 (1984) ("At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.").
other persons—subjects historically deserving Fourth Amendment protection—should follow the Place doctrine. This Article concludes by suggesting that the Place analysis was based upon a foundation of sand, and not only should Place not be extended, it should be overturned, thereby allowing traditional Fourth Amendment standards to control the use of drug dogs.12

II. THE LAW

A. United States v. Place

Place involved police at two airports whose “suspicions” were aroused by the defendant’s behavior. When the defendant refused to consent to Drug Enforcement Agency (DEA) agents searching his suitcases at the second airport,13 agents at LaGuardia airport in New York seized the suitcases and informed the defendant they intended to obtain a search warrant. However, at the time of the seizure, there was no basis for probable cause and a warrant could not have been obtained. The agents removed the suitcases to Kennedy airport where they were sniffed by a drug-detection dog; the dog alerted positively to one suitcase and ambiguously to the other. The dog sniff took place on a Friday afternoon, and the agents held the bags until Monday when a search warrant was obtained. A search of the suitcase that had tested positively disclosed a large quantity of powder cocaine.14

First, the Supreme Court upheld the seizure of the suitcases on reasonable suspicion, extending Terry v. Ohio,15 which had allowed for a brief seizure of a person for investigative purposes where there are facts and circumstances (as opposed to inarticulate hunches) giving rise to reasonable suspicion that the suspect has committed or is about to commit a crime. The purpose of a Terry seizure is to confirm or dispel the suspicion. Terry also allows a limited pat-down search of the suspect where there is reasonable suspicion to believe that the

12. The authors appreciate that in times of increased national security the use of dogs trained to sniff for explosives presents a heightened special need which may justify bypassing ordinary Fourth Amendment procedures. The use of bomb sniffing dogs, which is a separate practice from dogs used to sniff for drugs, should be subject to less stringent requirements due to heightened circumstances. The use of the drug dog is the exclusive subject of this Article. See United States v. Beale, 674 F.2d 1327, 1331 n.5 (9th Cir. 1982) (“Whatever danger drugs may pose to society, to our knowledge no one has ever hijacked or blown up an airline with drug-type contraband.” (citation omitted)), vacated, 463 U.S. 1202 (1983).

13. He consented to a search of his checked luggage at the first airport, but the law enforcement officers did not conduct the search because his flight was about to leave. Place, 462 U.S. at 698.

14. Id. at 698–99.

suspect may be armed. The extension in *Place* allows a seizure on reasonable suspicion that the suitcase may contain evidence, entirely divorced from the protection of the police officer which girded the limited search in *Terry*. Further, the Court held that a brief seizure of the luggage to subject it to further investigation—here the drug dog—was permissible under *Terry*’s rationale of allowing a brief detention to confirm or dispel the reasonable suspicion. The Court held that the ninety-minute seizure of the defendant’s luggage was too long and hence unreasonable under the *Terry* standard.

However, Justice O’Connor, writing for the majority, went beyond the issues necessary to decide the case, unilaterally issuing a general

16. *Id.* at 27 (“Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” (citations omitted)).

17. See H. Paul Honsinger, Note, Katz and Dogs: Canine Sniff Inspections and the Fourth Amendment, 44 LA. L. REV. 1093, 1105-06 (1984) (“Even though *Terry* is specifically directed to stops of suspicious persons, there is support in the jurisprudence for extension of the subsearch principles to objects as well. Such an approach has several salutary effects. Placing sniffs under the regulation of the fourth amendment allows judicial scrutiny of their reasonableness. Courts could consider the nature and scope of the sniff, the particularity of the suspicion which promoted it, the social interest being protected, and the privacy interest being infringed upon. Courts would then be free to develop guidelines for regulating this activity, formulated in the laboratory of experience and based on the overriding requirement of reasonableness.”). *But see* David E. Steinberg, The Original Understanding of Unreasonable Searches and Seizures, 56 FLA. L. REV. 1051, 1061 (2004) (“The historical record strongly suggests that the Fourth Amendment was intended only to proscribe physical searches of residences where the search occurred pursuant to a general warrant, or without any warrant at all.”).

18. *Place*, 462 U.S. at 710 (“Although the 90-minute detention of respondent’s luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent’s luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics. We conclude that, under all of the circumstances of this case, the seizure of respondent’s luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place’s conviction must be reversed. The judgment of the Court of Appeals, accordingly, is affirmed.”).
approval of the use of drug dogs to sniff out contraband,19 based on broad and unsupported conclusions:

In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.20

There was no authority offered for the broad conclusions which have controlled the law for the past twenty-three years; moreover, the unsolicited decision of the issue has served to preclude it from ever being considered fully.

Concurring only in the result, Justices Brennan and Blackmun argued how unwise it was to decide an issue not properly before the Court without the benefits of briefs and arguments.21 Justice Bren-

19. Id. at 707 ("We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A 'canine sniff' by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authori-
ties something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." (citation omitted)).

20. Id.

21. Id. at 719 (Brennan, J., concurring) ("The Court also suggests today, in a discussion unnecessary to the judgment, that exposure of respondent's luggage to a narcotics detection dog 'did not constitute a "search" within the meaning of the Fourth Amendment.' In the District Court, respondent did 'not contest the valid-
ity of sniff searches per se. . . . ' The Court of Appeals did not reach or discuss the issue. It was not briefed or argued in this Court. In short, I agree with Justice Blackmun that the Court should not address the issue. I also agree with Justice Blackmun's suggestion, that the issue is more complex than the Court's discus-
sion would lead one to believe. As Justice Stevens suggested in objecting to 'un-
necessarily broad dicta' in United States v. Knotts, the use of electronic detection techniques that enhance human perception implicates 'especially sensitive con-
cerns.' Obviously, a narcotics detection dog is not an electronic detection device. Unlike the electronic 'beeper' in Knotts, however, a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human per-
ception. The use of dogs, therefore, represents a greater intrusion into an individu-
al's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices. I have ex-
pressed the view that dog sniffs of people constitute searches. In Doe [v. Ren-
frow], I suggested that sniffs of inanimate objects might present a different case. In any event, I would leave the determination of whether dog sniffs of luggage amount to searches, and the subsidiary question of what standards should govern
nan, while conceding that a drug dog is not an electronic detection device, demonstrated that its capabilities posed an even greater threat.

Unlike the electronic “beeper” in *Knotts*, however, a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual’s privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices.22

The Court has never since forthrightly addressed the issue of the nature of technology that the drug dog represents. In fact, the Court has repeatedly and rather ambiguously denied certiorari or failed to write an opinion when faced with cases which would force the Court to finally decide whether dogs should be considered technology and their proper role under the Fourth Amendment.23 The fact that the lower courts have been left with such limited direction from the Supreme Court indicates the Justices themselves may be unable to answer the important question, instead choosing to allow lower courts to decide on their own.

Justice Blackmun criticized the majority for its “haste to resolve the dog-sniff issue.”24 It is difficult to understand the Court’s eagerness to decide the issue without the benefit of having the issue formally briefed and argued. The year was 1983 and the war on drugs was an important political issue for President Reagan and Congress, with the federal government spending hundreds of millions of dollars to reduce the amount of cocaine and other drugs in the United

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22. Id. at 719–20.


24. Place, 462 U.S. at 721 (Blackmun, J., concurring). See also id. at 723–24 (“Regardless of the validity of a dog sniff under the Fourth Amendment, the seizure was too intrusive. The Court has no need to decide the issue here. As a matter of prudence, decision of the issue is also unwise. While the Court has adopted one plausible analysis of the issue, there are others. For example, a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion. Neither party has had an opportunity to brief the issue, and the Court grasps for the appropriate analysis of the problem. Although it is not essential that the Court ever adopt the views of one of the parties, it should not decide an issue on which neither party has expressed any opinion at all. The Court is certainly in no position to consider all the ramifications of this important issue. Certiorari is currently pending in two cases that present the issue directly. There is no reason to avoid a full airing of the issue in a proper case.” (citations omitted)).
States. Unwilling to face the potential public outcry if the war on drugs were slowed by the Court, Justice O'Connor may have added the dictum on drug dogs to reduce the existing barriers to prosecution and ease the traditional limitations on police officers. Although this is admittedly pure speculation, the failure in Place to allow the parties to at least brief the Court on the topic, failure of the Court to discuss lower court precedents on the issue, and Justice O'Connor's refusal to explain the source of her reasoning all allow for such speculation. The Court's continuing intentional silence on the matter of Justice O'Connor's sui generis claim only assures that such speculation will continue.

B. United States v. Jacobsen

The issues at play in Place tangentially arose again the following year. United States v. Jacobsen involved a package that had been damaged during shipment by a common carrier. In order to ascertain the amount of damage, the carrier opened the package, revealing four white bags of powder inside. The carrier immediately contacted federal agents who removed the bags, opened each of the four bags, and removed a trace of the white substance with a knife. A field chemical test revealed that the powder removed from the plastic bags was co-


26. See Peter Thornton, Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment, 1977 U. ILL. L. F. 1167, 1168 ("A Court must decide whether, as a matter of law, a given police practice is so intrusive that before conducting it police should be required to have probable cause and either to obtain a warrant or to demonstrate circumstances constituting a warrant exception. Faced with this all-or-nothing alternative, a court may be reluctant to hamper police work by imposing a warrant requirement in a borderline situation. . . . Courts have held, for example, that a given police practice did not constitute a search because police had good reason to engage in the investigation."); see also Jonathan Todd Laba, Comment, If You Can't Stand the Heat, Get Out of the Drug Business; Thermal Imagers, Emerging Technologies, and the Fourth Amendment, 84 CAL. L. REV. 1437, 1444–45 (1996) ("The Court's loosening of Fourth Amendment guarantees during the past twenty years is motivated, in part, by spiraling crime statistics, which in turn have directly resulted from the explosion in the drug trade. The Supreme Court has recognized both the paramount importance of combating the drug trade, and the tremendous obstacles that police face in confronting highly organized and hugely profitable drug operations. The fight against crime, and particularly the war on drugs, has led to intensified research into technologies intended to give law enforcement officers more powerful tools to detect criminal activity. Moreover, decreased defense spending has encouraged the conversion of military technologies for civilian law enforcement use. As the fight against crime has become more hi-tech, the courts have struggled to articulate a satisfying method for evaluating these technologies under the Fourth Amendment.") (footnotes omitted)).

caine. A second group of agents came and ran the test again, confirming that the powder was cocaine. Based upon the field tests, the agents obtained a search warrant for the final shipping address where more drugs were found. The defendants were then arrested for possession with the intent to distribute.\textsuperscript{28} The United States Court of Appeals for the Eighth Circuit held that the warrantless field test constituted a significant expansion of the earlier private search and that a warrant was required for the field test.\textsuperscript{29} The Supreme Court reversed.\textsuperscript{30}

The Supreme Court decision focused on the private-search doctrine. However, the Court again went beyond the issue required for the holding and decided that a field test which provides information only about whether the object tested is or is not contraband does not constitute a search.

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.\textsuperscript{31}

In reaching this conclusion, the majority opinion, authored by Justice Stevens, relied entirely upon \textit{Place}: "Here, as in \textit{Place}, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."\textsuperscript{32}

Justice Brennan, dissenting, saw the issues as more fundamental. He pointed out that the Court in defining the term "search" focuses entirely on what is "sought and revealed," "rather than on the context in which the information or item is concealed," the traditional Fourth Amendment question.\textsuperscript{33} He disputed the conclusion here and in \textit{Place} that a surveillance technique that identifies only the presence or absence of contraband is less intrusive than a technique that reveals the precise nature of an item regardless of whether it is contraband. But by seizing upon this distinction alone to conclude that the first type of technique, as a general matter, is not a search, the Court has foreclosed any consideration of the circum-

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.} at 111-12.
  \item \textsuperscript{29} United States v. Jacobsen, 683 F.2d 296, 299-300 (8th Cir. 1982).
  \item \textsuperscript{30} \textit{Jacobsen}, 466 U.S. at 126.
  \item \textsuperscript{31} \textit{Id.} at 123.
  \item \textsuperscript{32} \textit{Id.} at 124.
  \item \textsuperscript{33} \textit{Id.} at 137-38 (Brennan, J., dissenting).
\end{itemize}
stances under which the technique is used, and may very well have paved the
way for technology to override the limits of law in the area of criminal
investigation.34

Most importantly, Brennan keyed in on the real problem with the
Place–Jacobsen exemption from Fourth Amendment judicial over-
sight. He correctly faulted the majority's reasoning in both Place and
Jacobsen which led to this broad exclusion from the classification of a
search.

Although the Court accepts, as it must, the fundamental proposition that an
investigative technique is a search within the meaning of the Fourth Amend-
ment if it intrudes upon a privacy expectation that society considers to be rea-
sonable, the Court has entirely omitted from its discussion the considerations
that have always guided our decisions in this area. In determining whether a
reasonable expectation of privacy has been violated, we have always looked to
the context in which an item is concealed, not to the identity of the concealed
item. Thus in cases involving searches for physical items, the Court has
framed its analysis first in terms of the expectation of privacy that normally
attends the location of the item and ultimately in terms of the legitimacy of
that expectation.35

Finally, Justice Brennan predicted the logical outcome of Place and
Jacobsen, which is coming to fruition two decades later.

For example, under the Court's analysis in these cases, law enforcement of-
ficers could release a trained cocaine-sensitive dog—to paraphrase the California Court of Appeal, a "canine cocaine connoisseur"—to roam the streets at
random, alerting the officers to people carrying cocaine. Or, if a device were
developed that, when aimed at a person, would detect instantaneously
whether the person is carrying cocaine, there would be no Fourth Amendment
bar, under the Court's approach, to the police setting up such a device on a
street corner and scanning all passersby. In fact, the Court's analysis is so
unbounded that if a device were developed that could detect, from the outside
of a building, the presence of cocaine inside, there would be no constitutional
obstacle to the police cruising through a residential neighborhood and using
the device to identify all homes in which the drug is present. In short, under
the interpretation of the Fourth Amendment first suggested in Place and first
applied in this case, these surveillance techniques would not constitute
searches and therefore could be freely pursued whenever and wherever law
enforcement officers desire. Hence, at some point in the future, if the Court
stands by the theory it has adopted today, search warrants, probable cause,
and even "reasonable suspicion" may very well become notions of the past.
Fortunately, we know from precedents such as Katz v. United States and Olm-

34. Id.
35. Id. at 138–39. See also Amanda S. Froh, Note, Rethinking Canine Sniffs: The
Impact of Kyllo v. United States, 26 SEATTLE U. L. REV. 337, 356 (2002) ("Finally,
the Place rule has been criticized because it justifies the imposition on the indi-
vidual by focusing on the result of the search—illegal contraband. The Jacobsen
Court, in making a reference back to Place, claimed that persons engaging in
private illegal activity have relinquished their expectation of privacy with respect
to the illegal product. However, this is counter to the basic constitutional prin-
cle that what police find as a result of a search cannot play a part in determining
whether the search was justified. In other words, the ends do not always justify
the means, though the Place rule suggests differently where drug-sniffing dogs
are concerned.").
stead v. United States, that this Court ultimately stands ready to prevent this Orwellian world from coming to pass.\textsuperscript{36}

Unfortunately, Justice Brennan was only half right. The horrors he predicted have come true, but the Supreme Court has shown no inclination to undo the Orwellian world.

C. **Illinois v. Caballes**

Illinois v. Caballes\textsuperscript{37} raised the issue of whether the rule in \textit{Place} would apply to a dog sniffing an automobile during a lawful traffic stop. Underlying this question is the more basic principle of whether a police officer may expand a lawful traffic stop by questioning the motorist about unrelated offenses and seeking consent from the motorist to search the vehicle. In \textit{Ohio v. Robinette}, the United States Supreme Court found no fault with the routine expansion of lawful traffic stops, even one that involved a brief detention of the motorist beyond the time necessary to issue a warning for speeding.\textsuperscript{38} On the other hand, a \textit{Terry} stop allows police only to use the least intrusive means to confirm or dispel the suspicion which gave rise to the stop and may not be expanded to other matters absent at least reasonable suspicion about those other matters. Although Justice Ginsburg's dissent in \textit{Caballes} raises the issues that (1) a routine traffic stop is analogous to a \textit{Terry} stop,\textsuperscript{39} and (2) the stop must be "reasonably related in scope to the circumstances which justified the interference,"\textsuperscript{40} the \textit{Caballes} majority was no more concerned about the expansion of the scope of the inquiry than the Court had been in \textit{Robinette}. In summary, a lawful traffic stop exposes a motorist to inquiry about other crimes, including a dog sniff of the vehicle for illegal drugs, without

\textsuperscript{36} Jacobsen, 466 U.S. at 138 (Brennan, J., dissenting) (citations omitted). See also Laba, supra note 26, at 1472 ("Second, technology can shape, alter, and ultimately diminish citizens' privacy expectations over time. Once, individuals could reasonably expect that when they arrived home and closed their doors, the police would not be able to enter without a warrant. Now, technology-enhanced searches allow the police to sidestep such expectations. In an era when devices such as thermal imagers are common, citizens can no longer be assured that their seemingly private activities are actually private."); Paul St. Lawrence, Note, Kyllo: A Libertarian Defense Against Orwellian Enforcement, 1 GEO. J.L. & PUB. POL'Y, Fall 2002, at 155, 169 ("Limiting police surveillance to technology that does not enhance standard human sensory perception would not unduly burden law enforcement. Nor would it bind the police to the methods they employed in the 1780s. It would preserve the individual's freedom from unreasonable searches so that individual liberty will not be sacrificed to technological progress.").

\textsuperscript{37} 543 U.S. 405 (2005).

\textsuperscript{38} Ohio v. Robinette, 519 U.S. 33, 38-40 (1996).

\textsuperscript{39} Caballes, 543 U.S. at 420 (Ginsburg, J., dissenting) ("A routine traffic stop . . . is a relatively brief encounter and 'is more analogous to a so-called Terry stop . . . than to a formal arrest.'" (quoting Knowles v. Iowa, 525 U.S. 113, 117 (1998))).

\textsuperscript{40} Id. (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
any predicate for the expanded inquiry. The majority did indicate that the detention may not be unreasonably extended to accommodate the expanded inquiry or to facilitate the arrival of the drug dog to the scene of the stop.\textsuperscript{41}

Justice Stevens' majority opinion recycled the \textit{Place–Jacobsen} doctrine and concluded that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."\textsuperscript{42} He did, however, contend that there was nothing inconsistent between this decision and the 2001 decision in \textit{Kyllo v. United States}, which disallowed the use of a thermal imaging device on a home:

Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car.\textsuperscript{43}

Justice Souter, dissenting, finally raised one persistently ignored issue by challenging the assumption that drug dogs are nearly infallible. That unsubstantiated claim in \textit{Place} was finally addressed as Justice Souter produced high rates of dog error, noting that false positives had been measured and accepted by courts at 7\%, 12.5\%, and 60\%. Justice Souter pointed out that "the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."\textsuperscript{44} Furthermore, Justice Souter noted that false alerts are endemic due to the constant presence of cocaine on American currency. The enormous range has two distinct effects: it demonstrates that the dog cannot be considered "\textit{sui generis}" and it demonstrates even greater unreliability by individual dogs due to inconsistency. Without consistency, broad statements regarding the accuracy of drug dogs are patently false because individual dogs differ greatly in their abilities. Without such generalizations, the "accuracy of a drug dog" cannot be

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 407–08 (majority opinion); \textit{cf.} \textit{Pryor v. State}, 716 A.2d 338 (Md. App. 1998) (twenty-minute detention of motorist stopped for traffic offense while waiting for trained narcotics dog to be brought to the scene was unreasonable); \textit{see also} \textit{State v. Robinette}, 653 N.E.2d 695, 697–98 (Ohio 1995) ("When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure."). , rev'd on other grounds, 519 U.S. 33 (1996).
\item \textsuperscript{42} \textit{Caballes}, 543 U.S. at 410.
\item \textsuperscript{43} \textit{Id.} at 409–10 (quoting \textit{Kyllo v. United States}, 533 U.S. 27, 38 (2001)).
\item \textsuperscript{44} \textit{Id.} at 412 (Souter, J., dissenting).
\end{itemize}
measured beyond one individual dog, which cannot be the basis for sweeping statements about the accuracy of all dogs. Justice Souter concluded that once the dog's fallibility is recognized, it ends the justification in *Place* for treating the sniff as *sui generis.* He also stated that, "given the fallibility of the dog, the sniff is the first step in a process that may disclose ‘intimate details’ without revealing contraband, just as the thermal imaging device might do as described in *Kyllo v. United States.*" Finally, Justice Souter warned of the slippery slope that *Caballes* presents:

The portent of this very case, however, adds insistence to the call, for an uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search.

In the years between *Place* and *Caballes,* Justice Brennan's hope that the Supreme Court would step forward to halt the erosion of Fourth Amendment rights has not been fulfilled. Coupled with the ruling in *United States v. Whren* that a police officer's motivation for a stop or arrest is not subject to review if there is an objective basis for the stop (reasonable suspicion) or arrest (probable cause), the affirmation of the *Place* doctrine in *Illinois v. Caballes* allows police officers to lawfully stop a vehicle for any trivial violation and then subject that vehicle to a check by a drug dog. *Caballes* and *Whren* operate in tandem, allowing police to stop virtually any motorist and, by the use of a drug dog, check the motorist's car for drugs at the whim of a police officer, even if a reasonable police officer would not have stopped the car for such a trivial offense, or even if the real reason for the stop is

45. Id.
46. Id. at 413.
47. Id. at 410–11 (majority opinion).
49. See John F. Decker, Christopher Kopacz & Christina Toto, *Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois,* 36 Loy. U. Chi. L.J. 819, 869–70 (2005) ("Under the United States Supreme Court's decision, an officer conducting a routine traffic stop is never required to justify a sniff for narcotics with any suspicion whatsoever. A motorist stopped for failing to wear a seat belt or for driving with a burned-out registration light is subject to a canine sniff, even without any indication that the car contains illegal substances.").
50. See Whren, 517 U.S. at 813–14 ("Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of ‘reasonableness.’ They insist that the standard they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an ‘objective’ one. But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do
not the traffic violation but the race of the motorist. Where race is the motivation, the motorist may have an equal protection claim, but not a Fourth Amendment claim.

On the theory that every motorist commits multiple trivial traffic violations every time he gets behind the wheel, Whren allows a police officer to target a particular motorist—for good reason, bad reason, or no reason at all—and then wait until the motorist commits a traffic violation, thereby allowing the officer to stop the motorist's car. Whren even allows police to follow a car until the motorist commits the most insignificant traffic violation, thereby allowing the officer to

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51. Cf. United States v. Harvey, 16 F.3d 109, 113–14 (6th Cir. 1994) (Keith, J., dissenting) ("Harvey and his companions committed minor traffic violations. They drove three miles over the speed limit in a car which was missing a bumper and a headlight. Indisputably, probable cause existed to believe a traffic offense occurred. The problem, however, is the officer said he stopped the vehicle because the occupants were African-Americans. Officer Collardey testified if the occupants had not been African-Americans, he would not have stopped the car. Officer Collardey's improper motivation for the stop inserted an unconstitutional illegality into the stop. Applying the Ferguson test, because a minor traffic violation was present, the majority concludes Collardey's primary race-based motivation, although illegal, is irrelevant. Equal Protection principles absolutely and categorically prohibit state actors from using race to differentiate between motorists. Yet, the majority acquiesces to an officer's substitution of race for probable cause and essentially licenses the state to discriminate. Moreover, the majority states race-based motivation is irrelevant under these or any circumstances. Not only is the officer's race-based motivation relevant, it is patently unconstitutional.").

52. See Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 533 (6th Cir. 2002) ("The plaintiffs allege that Trooper Kiefer singled them out for inquiry into their immigration status on the basis of their Hispanic appearance during the course of a lawful traffic stop. The plaintiffs do not challenge the validity of their initial stop for a faulty headlight. Nor do they assert that the questioning exceeded the permissible scope of the stop under the Fourth Amendment. Nevertheless, as this court has recognized, 'the Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures.' Similarly, the Supreme Court, in Whren v. United States, confirmed that an officer's discriminatory motivations for pursuing a course of action can give rise to an Equal Protection claim, even where there are sufficient objective indicia of suspicion to justify the officer's actions under the Fourth Amendment: 'We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'") (quoting Whren v. United States, 517 U.S. 806, 813 (1996))).
make a legal stop. So long as there is an objective basis, Whren prohibits the reviewing court from examining the officer's true reasons for the stop. Under Whren, such a stop is lawful even though a reasonable officer would not have interfered with the motorist's liberty interest over such a trivial matter. Once pulled over, the motorist's car is subject to an examination at the officer's discretion. Since a drug dog sniff does not constitute a search, the officer need not provide a justification for summoning the drug dog.

Caballes only dealt with a legally stopped vehicle. As in Place, the object which was the subject of the drug dog sniff had been legally seized under Fourth Amendment standards. However, the Fourth Amendment analysis of the seizure is not essential to the doctrine. There is no limitation in either Place or Caballes that a drug dog can only be directed at objects or cars which have been seized and are therefore subject to a Fourth Amendment inquiry about the legality of the seizure. Police may direct a drug dog towards objects and vehicles which have not been seized. In the case of vehicles, police may walk a drug dog around vehicles that are legally parked or are stopped at traffic lights, so long as the dog sniff does not otherwise prolong the stop at the light. Once the dog alerts, under Caballes the officer has probable cause to prolong the stop and conduct a warrantless search.53

III. THE DRUG DOG

Maggie, a mixed-breed Benji-type dog, was the Katz family pet for eleven years. She was less a pet than a member of the family. We rescued her from the pound the day before her time there would have been up, something she always seemed to understand. When she died, my family, and others who knew her, grieved—we still grieve—as though we had lost a human member of the family. She was known in the family as “BDE” (Best Dog Ever), and my younger daughter said that Maggie ruined it for every future dog any family member would ever have.

No one who met Maggie ever felt threatened. In fact, in eleven years, she only met one person she did not like, and that was someone approaching Maggie and my wife as they were walking in the woods.

53. See Decker et al., supra note 49, at 870 (“Moreover, as Justice Ginsburg noted in her dissent, the Court’s decision clears the way for officers to sue the dogs in many other situations. For example, officers could walk trained dogs along parked cars or cars waiting at a stoplight, and a dog’s positive response would invariably justify the officers’ detention of the motorist to further investigate the presence of drugs. In addition, there is little in the Court’s opinion that would prevent officers from conducting dog sniffs along the exterior of garages or perhaps even residences. Finally, the decision may authorize dog sniffs of people in a wide variety of public places, such as schools, courthouses, and bus stations.”).
one predawn morning. Maggie’s response was a low growl and a nudge of my wife to another path. It was such an uncharacteristic reaction that my wife did not question Maggie’s instinct. Ordinarily, Maggie approached each new person as her newest best friend, someone else who would admire her and amazingly often get down and hug her. I once took Maggie to a first-year Criminal Law review session. She was absolutely thrilled. There were ninety new friends whom she immediately greeted one at a time, going from seat-to-seat and visiting with each student.

Why would we tell you about Maggie other than to pay tribute to the best dog ever? We have introduced Maggie to contrast her with the dogs used in this country to detect drugs. The drug dogs may be beautiful, but they are chosen more for their imposing size than for their beauty. Drug dogs are generally large work dogs, German Shepherds and Doberman Pinschers, who often intimidate those with whom they come in contact. While they may be lovable when at home with their handlers’ families, these dogs are not seeking human affection when they are on the job. While that may be acceptable when the dog is used to detect drugs in an inanimate object such as a package, a car, or a school locker, more and more often these dogs are being focused on humans, especially schoolchildren. Even the “passive alert” dogs will touch and poke with their nose parts of the bodies they are scrutinizing for drugs. One U.S. government website warns that a “potential down-side” of the use of guard dogs is that they may bite which “may result in significant criminal or civil liability.” Consequently, it is important to remember that drug dogs are not Maggies.

The Place doctrine that a dog sniff is not a search rests upon three premises: (1) that a dog sniff is a minor intrusion, (2) that a dog dis-

54. Some historical uses of police dogs include corralling and killing people in concentration camps, hunting escaped slaves, and breaking up civil rights protests. Eric Squire, History of Police Dogs and Military Dogs, http://www.geocities.com/eric-squire/articles/dogshist.htm (last visited Dec. 21, 2006); see also Homer D. Wampler, Jr. & Dee Wampler, The K-9 on Trial: Dogged Pursuit, 46 J. Mo. B. 381, 381 (1990) (“Since 1900, our canine friends have not always enjoyed the best job assignments in law enforcement. At the turn of the century, New York City police first used police dogs as a ‘first responder.’ Later visions of well-trained and ferocious German Shepherd war dogs appeared during World War II. In March 1965, the use of German Shepherds by Birmingham Police Chief, ‘Bull’ Conner, nipping the behinds of civil rights protesters, left an unfavorable impression. In Vietnam, many were used to sniff mines, alert soldiers to trip wires or enemy ambushes.”).


closes nothing other than whether the object of the sniff contains contraband or the person subject to the sniff is carrying contraband, and (3) that dogs are extremely accurate when discerning the presence of illegal drugs. As a result of these three characteristics, the Court held that the drug dog is \textit{sui generis}. The \textit{Place} doctrine is entirely dependent upon the accuracy of these three premises. However, Justice O'Connor's majority opinion in \textit{Place} failed to cite any authority for these conclusions. Moreover, in 2005, when the Supreme Court extended the \textit{Place} doctrine to dog sniffs of automobiles in \textit{Illinois v. Caballes} (as lower courts had anticipated for two decades), Justice Stevens' majority opinion again failed to proffer any authority, beyond \textit{Place} itself, for the accuracy of these conclusions. And again in 2005, in \textit{Florida v. Rabb}, the Court appears to have extended the \textit{Place} doctrine to homes when it summarily reversed a Florida appellate court decision, without briefing and without argument, simply remanding to the lower court to reconsider the case in light of the Supreme Court's decision in \textit{Caballes}. Consequently, this crucial doctrine stands with no support and without empirical data. Most importantly, its conclusions are wrong.

A. A Dog Sniff is Not a Minor Intrusion

In \textit{Place}, Justice O'Connor presumed that a dog sniff is a minor intrusion, which may be true when the intrusion involves an inanimate object similar to the suitcase involved in the actual case. However, the same cannot be said when the subject of a sniff is a home or a human being. The physiology of the dog prevents air from passing

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\item[57.] United States v. Place, 462 U.S. 696, 707 (1983).
\item[58.] Florida v. Rabb, 544 U.S. 1028 (2005).
\item[59.] \textit{See} Thornton, \textit{supra} note 26, at 1199 ("[T]he dog makes a more limited examination than the magnetometer in two senses: the animal causes the passenger no annoyance, inconvenience, or humiliation and discloses the presence only of contraband, not of innocent objects. Given the reliability of the method and the relatively limited nature of the intrusion, a court could reasonably hesitate to require police to obtain a warrant or even to have probable cause before initiating canine surveillance."); \textit{see also} Laba, \textit{supra} note 26, at 1469 ("As the Court recognized in \textit{Place}, a dog sniff is fairly unobtrusive because it only detects the presence or absence of contraband. It does not disclose an individual's brand of toothpaste, color of underwear, or type of reading material, all of which would be exposed if the police were to open and search a subject's luggage."); \textit{id.} at 1484 ("The intrusiveness inquiry is not limited to the physical penetration of objects or spaces. Also relevant is the degree to which the government inspection interferes with the subject's normal use of the property. In \textit{Riley}, the Court held that a helicopter flight over Riley's property was not a search because, among other factors, the helicopter caused 'no undue noise, and no wind, dust, or threat of injury.' Similarly, a dog sniff is less intrusive than a typical luggage search where an officer physically rummages through the contents of the luggage.").
\item[60.] \textit{See} Froh, \textit{supra} note 35, at 354 ("Most would agree that having a dog sniff a person for drugs would be intrusive and would probably subject the individual to
directly over its smell receptors when breathing normally because a dog's smell receptors are located in the back of its snout. This is why they "sniff" at the air or objects. The dog's habit of sniffing often causes its nose to come into contact with its target, a disturbing result when the subject is a person.

Moreover, there is a danger that the drug dog may bite the subject of the drug sniff. Drug dogs are trained to alert in one of two ways: aggressively or passively. An aggressive-alert dog scratches and/or bites at its target, while a passive-alert dog sits or lies down in the presence of its target. Obviously, only passive-alert dogs can be used to detect the presence of illegal narcotics on a person. However, a study in Florida of dogs used to apprehend criminal suspects showed a significant number of suspects, one in six, were bitten by dogs who were trained not to bite the suspect but only to bark to hold the suspect in place. This study raises sincere concerns about the use of passive drug dogs to smell people. Passive-alert dogs are likely to paw and shove their snouts on to the body of the person, and the danger that the dog will bite the subject can never be totally eliminated.

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61. Natural History Museum of Los Angeles County, supra note 2; see Honsinger, supra note 17, at 1104 ("In fact, a dog's sense of smell is roughly eight times more sensitive than that of humans . . . ."); see also Wampler & Wampler, supra note 54, at 381 ("Their [dogs'] keen sense of smell, by different estimates, has been held to be at least eight times more sensitive than a human's. The ability of dogs to detect the sense of humans, explosives, or drugs, is unquestioned if properly trained. An 'alert' or 'reaction' causes the dog to bark, whine, snarl, or paw in the area of the scent."); Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog, 85 Ky. L.J. 405, 408 (1996) ("A dog's nose is uniquely equipped to detect the faintest of odors. Dogs possess potentially billions of chemical receptors called olfactory cells. These receptors are located among large supports inside the dog's nose named turbinate bones. Turbinate bones form numerous cylindrical passages that allow air exposure to millions more cells than is possible with simple tubular nasal passages, such as those found in human beings. Laid out, the surface area of these cells would cover a space the area of the skin on the dog's body. In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.").


63. Mesloh, supra note 55.
B. A Trained Drug Dog Does Not Only Alert to Contraband

The linchpin of the *Place* doctrine that a dog sniff is not a search is that the dog only alerts to contraband, not to any lawfully possessed object in which a person may have a legitimate expectation of privacy.64 Putting aside Justice Brennan's argument that this approach turns the Fourth Amendment on its head by focusing on what is sought and found rather than where the search takes place,65 the legitimacy of the Court's approach depends upon whether in fact the dog is able to distinguish between contraband and noncontraband. The Court in *Place* offered no support for its conclusion that the dog could be so discerning, and it is not at all clear that such support exists.

Expanding the dog's abilities beyond those the Court expressly acknowledged in *Place*, some dogs are trained not only to alert to illegal drugs, but also to locate pharmaceuticals and alcohol, neither of which are intrinsically contraband.66 The dog is unaware if the subject may legally possess alcohol or whether that person has a lawful prescription for the pharmaceutical. However, as dogs do not use separate alerts to indicate for individual substances, the handler cannot discern whether the dog has alerted for potentially legal alcohol or prohibited heroin. In *Fitzgerald v. State*, the dog was trained to alert to Diazapam, the generic form of valium, one of the most commonly prescribed drugs in the United States.67 While this expansion of the dog's capabilities could be easily remedied by reverting to the original parameters of sniffing for only contraband, the intentional ignorance

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64. See Froh, *supra* note 35, at 355 (“The *Place* rationale is criticized also because its efficacy depends on the infallibility of the tactic; that is, in order not to invade a person's privacy, the well-trained dog must never falsely alert to a subject without contraband, or the field test must never indicate a false positive for cocaine. In reality, false alerts and false positives do occur, and no investigative tactic is foolproof. In the case of these tactics, when a mistake occurs, serious intrusions on the privacy of individuals could result. For this reason, some argue, drug-sniffing dogs should not be given carte blanche in society.”). But see Thomas H. Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 Ga. L. REV. 75, 89 (1976) (“Although both provide a method of perception several times more effective than the human sense replaced, canine sniffing, unlike electronic surveillance, is directed exclusively toward a particular illicit substance. Unlike wiretapping which, even in *Katz*-type situations where agents consciously attempt to minimize the intrusion, is 'almost inherently indiscriminate,' canine intrusion is highly discriminate. Any inaccuracy of the canine detective works in favor of the searchee, and the canine intrusion has none of the inhibitory effects of wiretapping.” (footnote omitted)).


of the courts has allowed dog handlers to operate without oversight, resulting in an expansion of *Place* beyond its original intentions.

Even with its superior sense of smell, it is not possible for a dog to distinguish the scent of all contraband from otherwise legal substances. Heroine is a derivative of opium. The odor in heroin which alerts the dog is acetic acid, a common substance used in pickles and certain glues. In addition, thirty-two legal prescriptions containing opioid compounds are currently prescribed by doctors. Further, some narcotics such as cocaine can be legally possessed. Even though prescription drugs do not have any odor when manufactured, once they are exposed to air the process of hydrolysis causes them to give off the odor of acetic acid, the same distinctive odor given off by heroin.

Courts are split as to whether an alert to methyl benzoate—which is the tell-tale odor of cocaine but is found in many legal products—is actually an alert to cocaine. The argument in favor is that a dog’s alert is probable cause because of the large concentration of methyl benzoate in cocaine which may not be matched by the same concentra-

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68. Telephone Interview with Dr. James Woodford, Ph.D, Chemist (July 11, 2005). Dr. Woodford is authorized to conduct testing of controlled substances in DEA-licensed laboratories.
70. See Gerald F. Uelmen, *Motions FYI: Illinois v. Caballes: Some Disturbing Questions*, *CHAMPION*, May 2005, at 38, 38 ("Narcotics drugs such as morphine, and even cocaine, can be lawfully possessed with a prescription. They are Schedule II substances under the Federal Controlled Substances Act. They can also be lawfully possessed by those who are licensed to dispense them.").
71. Telephone Interview with Dr. James Woodford, *supra* note 68.
72. ChemicalLand21.com, Methyl Benzoate, http://chemicaland21.com/arokorhi/specialtychem/finechem/METHYL%20BENZOATE.htm (last visited Dec. 21, 2006) ("Benzoic acid, a white, crystalline organic compound, is a family carboxylic acids. It has a carboxyl group bound directly to a benzene ring. Though it occurs naturally in some plants, it is commercially manufactured by the reaction of toluene with oxygen at temperatures around 200 C in the presence of cobalt and manganese salts as catalysts. Pure benzoic acid melts at 122 C and is very slightly soluble in water. It is widely used as a food preservative, normally as the sodium, potassium, or calcium salts and their derivatives especially in acid foods. Benzoate preservatives applications in foods, drugs and personal products are well established."); Methyl Benzoate, http://www.thegoodscentsmpany.com/data/rw1015011.html (last visited Dec. 21, 2006) (demonstrating that methyl benzoate is naturally present in bilberry, clove, cranberry, black currant, gardenia, jonquil, kiwi fruit, narcissus, tuberose, and ylang ylang, and is used as a perfume in bubble gum).
tion in legally possessed objects. However, the nature of methyl benzoate is that it is not stable when exposed to air; therefore, it dissipates quickly. Although cocaine emits the highest levels of methyl benzoate, it is soon reduced to levels consistent with legal products as methyl benzoate has a half-life of only ten to thirty days. Trainers are left with an interesting proposition: train drug dogs to alert to low levels of methyl benzoate and therefore falsely alert to many legal products, or only alert to high levels of methyl benzoate and therefore risk an increase in false negatives when cocaine is exposed to air for any significant amount of time. Further complicating the use of drug dogs to accurately locate cocaine, it is estimated that cocaine tracings can be found on more than 90% of American currency. Courts have held that a positive dog sniff on currency has “minimal evidentiary value” due to the endemic presence of cocaine on American currency. Thus, it is not altogether clear that a drug dog trained to alert to cocaine by detecting the smell of methyl benzoate is actually alerting to the presence of the illegal substance rather than one of the many lawful products containing a similar concentration of the same compound.

The same controversy surrounds the ability of a dog to discern marijuana or hashish, and its ability to distinguish the drug from legal objects which have the same odors, such as hemp products, and fir and juniper trees. Dr. James Woodford, an expert in the field of chemistry, contends that it is impossible to Pavlovian train dogs to detect marijuana because (1) there are more than sixty different odors for strains of marijuana and hashish, and (2) each component has a distinct and different odor. While the human nose is less sensitive than the canine nose, humans are able to reason that the odor of marijuana exists because of the human brain’s deductive capabilities. A dog is actually at a disadvantage because of its lack of deductive reasoning and increased olfactory capabilities, not allowing it to reason that the scent of marijuana is present due to the wide variety of marijuana odors. The scent may indeed be that of marijuana, but a dog’s

73. United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars ($30,670.00), 403 F.3d 448, 462 (7th Cir. 2005) (“In addition, the very ephemeral nature of the methyl benzoate byproduct of illicit cocaine makes it highly likely that Calhoun’s cash hoard was in very close proximity to large amounts of the drug within hours or days of Bax alerting to it.”).
77. Telephone Interview with Dr. James Woodford, supra note 68. However, the authors were allowed to test a drug dog in the Cleveland area to see if it would falsely alert to hemp soap or a pair of pants made out of hemp. The dog was uninterested in the hemp products.
78. Id.
nose is so exact that it could fail to alert due to a slight variation in odor and its inexperience with each of the sixty different odors for which it is sniffing.

C. A Well-Trained Dog is Not Extremely Accurate When Alerting to Illegal Drugs

The third rationale behind the doctrine in *Place*—the high degree of accuracy of a drug dog—raises three separate issues and problems: false-alert rates, dog certification, and handler error.

1. False-Alert Rates

Existing case law demonstrates that the false-alert rate among certified drug dogs varies greatly. Further, the assertion in *Place* that drug dogs are highly accurate was not supported by any authority or empirical studies; Justice O'Connor's majority opinion simply stated the conclusion as an established fact. In *Illinois v. Caballes*, Justice Stevens' majority opinion simply relied upon *Place* for the proposition that drug dogs are highly accurate. Thus the Court relied upon itself for that proposition, even though *Place* offered no evidence to buttress its conclusion.

Dissenting from the Court's opinion in *Caballes*, only Justice Souter offered support for his conclusion that "[t]he infallible dog . . . is a creature of legal fiction." 79 Relying on state and federal cases, Justice Souter listed instances where drug dogs were far from accurate: one dog had a 71% accuracy rate, 80 another dog falsely alerted four out of nineteen times while working for the postal service and 8% of the time over its career, 81 a dog that gave false positives between 7% and 38% of the time was accepted by a court as reliable, 82 and another had made between ten and fifty errors. 83 Justice Souter also took issue with the state's brief, which argued that dog sniffs are "generally reliable." Justice Souter noted that the state cited only to a report which "show[ed] that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search." 84 This evidence led Justice Souter to conclude

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80. *Id. at 412* (citing *United States v. Kennedy*, 131 F.3d 1371, 1375 (10th Cir. 1998)).
81. *Id.* (citing *United States v. Scarborough*, 128 F.3d 1373, 1378 & n.3 (10th Cir. 1997)).
82. *Id.* (citing *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001)).
83. *Id.* (citing *Laime v. State*, 60 S.W.3d 464, 476 (Ark. 2001)).
84. *Id.* (citing Reply Brief for the Petitioner at 13, *Caballes*, 543 U.S. 405 (No. 03-923); K. GARNER ET AL., DUTY CYCLE OF THE DETECTOR DOG: A BASELINE STUDY 12 (2001)).
that, "[i]n practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."85

Justice Souter's conclusion is based on a limited sample of data but is more factually based than the majority opinions in both *Place* and *Caballes*, which offered no data before crafting their specific exception to the Fourth Amendment. Unfortunately, most of the funded research in the area is not devoted to determining the percentage of false alerts, as no government agency using dogs is willing to fund research that may undercut its broad power devoid of oversight bestowed by *Place*. Instead, the funded research concentrates upon improving the effectiveness of drug dogs by eliminating "misses when drug dealers attempt to disguise a drug's odor with extraneous odors."86

Furthermore, the false-alert data is statistically misleading as a focus for determining whether a drug dog is accurate. Although most courts would commend a dog when it is 90% accurate, the 10% error rate is troubling when considering actual field conditions. The overwhelming majority of subjects in the field do not possess contraband, a fact most courts fail to appreciate when examining false-alert data. If 1 out of every 100 subjects possesses contraband, a dog operating at a 90% accuracy rate is 90% likely to positively alert to that specific criminal. However, a more complete understanding of the error rate demands acknowledgment of the number of false positives among the remaining ninety-nine individuals who are also sniffed by a drug dog. If the same dog is used on the remaining innocent individuals, the dog will continue to be only 90% accurate in its determination of the lack of contraband, allowing for ten false positives.87 Therefore, in a realistic field sample, one individual possessing contraband is discovered while ten innocent people are subjected to a complete search if the dog sniffs as accurately as 90%.88 As Justice Souter demonstrated in his

85. *Id*.
87. The authors have rounded the actual figure of 9.9 to 10.
88. See Fredric I. Lederer & Calvin M. Lederer, Admissibility of Evidence Found by Marijuana Detection Dogs, *Army Law.*, April 1973, at 12, 15, available at http://www.loc.gov/rr/frd/Military_Law/pdf/04-1973.pdf ("The fact that a dog can find only 10% of planted material only indicates that perhaps 90% of contraband holders will escape detection. Since the fourth amendment protects privacy, one should be more concerned over how many innocent people will have their privacy invaded. Thus the percentage of 'true' alerts to total alerts is important."); see also Bird, *supra* note 61, at 427 ("If a dog commits a false negative, and fails to alert to a person with drugs, the smuggler or other person in possession of drugs gets away. The cost of such a failure is that the narcotics are not removed from
dissent, courts have accepted accuracy rates far lower than 90%, tolerating far more false positives.

To reduce the number of innocent people being searched due to the false alert of a drug dog, an officer should be required to have some previous information regarding the individual that raises the suspicion that he may possess contraband. Such a policy would reduce the number of innocent people searched as a result of a false positive, as the sample would become more selective, thus increasing the likelihood that the members actually possess contraband.89

2. Certification as a Substitute for False-Alert Data

Compounding the issues surrounding false-alert rates is the marked disinterest demonstrated by many courts in the false-alert rate of drug dogs. As the Court's determination that a dog sniff is not a search is based upon a high degree of accuracy, lower courts should examine the accuracy rate of the dog involved in a particular case. A U.S. military court prior to Place held that probable cause on the basis of a dog sniff could only be established if the officer reviewing the probable cause is familiar with the details of the dog's training, certification process, and the track record.90 A military study of drug dogs about the same time also concluded that "there is no reason to believe that knowledge of the mere fact that a dog has graduated from a military drug-detection course will be held sufficient reason to accept a

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89. See United States v. Galloway, 316 F.3d 624, 631 (6th Cir. 2003) ("A canine alert, however, does not constitute probable cause in a completely random setting, such as an airport, because of its questionable accuracy."); see also United States v. Fernandez, 772 F.2d 495, 498 n.2 (9th Cir. 1985) (per curiam) ("[T]he mere fact that a dog has 'hit' on a piece of baggage or cargo does not, in the absence of any factors supporting its reliability, establish probable cause.").

90. See United States v. Ponder, 45 C.M.R. 428, 434-35 (A.F. Ct. Crim. App. 1972) ("The critical question here is what the commander knew about [the drug dog's] ability at the time he authorized the search. The record demonstrates convincingly that he knew very little . . . . On the other hand, the record clearly shows some of the things that the commander did not know. To illustrate, upon being examined by trial defense counsel, the commander admitted that he did not know or had not been advised of what exact training [the drug dog] had received; what standards or criteria were used to select dogs for marijuana detection training; what standards a dog was required to meet to have successfully completed the training course; or what record [the drug dog] had in finding marijuana prior to the day in question." (emphasis omitted)).
dog's reliability without further inquiry." Professor Wayne LaFave takes the position that "reliability" and "training" are not synonymous. Rather, LaFave suggests the following:

In light of the careful training which these dogs receive, an "alert" by a dog is deemed to constitute probable cause for an arrest or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband.

Thus the individual dog's track record and an examination of its certification are essential to determine the credibility of the dog's alert when deciding whether the dog's signal should constitute probable cause.

However, courts generally are disinterested in discovering the individual dog's error rate. In United States v. Venema, the Tenth Circuit held that the fact that the dog was a "trained, certified, marijuana sniffing dog" was sufficient to establish probable cause without knowledge of the particular dog's error rate. A determination of a dog's credibility is analogous to establishing the credibility of a police informant. In both cases, establishing credibility should demand consideration of the dog or informant's prior history, including not only the dog or informant's prior alerts or tips that led to the discovery of the specific evidence, but, of equal importance, the number of prior false-alerts or bad tips.
Often, courts are willing to accept assertions of the dog's training and certification as prima facie evidence of a dog's accuracy. An improved practice would be for the reviewing court to make an independent determination as to the adequacy of the training and the legitimacy of the certification process in order to protect defendants and require accountability of the government agency. If such a determination is outside the court's expertise, canine units should be required to certify with an independent third party capable of assessing and approving drug dogs at a level similar to the standards for other scientific evidence.

However, courts consistently refuse to examine the standards that are used in the certification process, allowing police canine units to utilize internal and private certification processes which have the potential to be abused to the degree of using untrained dogs and fraudu-

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96. United States v. Berry, 90 F.3d 148, 153 (6th Cir. 1996) ("We find that the information contained in the affidavit in this case was sufficient to establish the training and reliability of the drug-detecting dog. The affidavit's references to the dog as a 'drug sniffing or drug detecting dog' reasonably implied that the dog was a 'trained narcotics dog.' Further, the affidavit stated that the dog was trained and qualified to conduct narcotics investigations. . . . Contrary to defendant's suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability."); see also Venema, 563 F.2d at 1007 (holding that an affidavit in support of a search warrant need not describe the drug-detection dog's educational background and general qualifications with specificity to establish probable cause); United States v. Stanley, 4 F. App'x 148, 150 (4th Cir. 2001) ("Assuming, without deciding, that some evidence is necessary, we find Officer Amoia's testimony regarding his familiarity with the dog and its training sufficient to establish the dog's reliability in this case."); Hunter, supra note 94, at 98–99 ("The lack of defined standards means that a mere statement of the dog's training is trained is [sic] generally sufficient. Therefore, a minimal burden of production on the prosecution exists, making it difficult for the defense to challenge a prosecutor's claims of reliability. If defined standards existed, they would provide a framework upon which the defendant could challenge whether or not the particular detector dog and handler team complied with established procedures and requirements.").

97. See Bird, supra note 61, at 421 ("Reviewing judges should expect that a drug detection dog graduated from a formalized program. . . . Courts should expect that a training program includes much more than drug detection.").

98. Courts are reluctant to hold dog sniffs to the same strict requirements of a Frye hearing demanded of scientific procedures. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5(D) (3d ed. 2000) (citing People v. Brooks, 950 P.2d 649, 652 (Colo. Ct. App. 1997) (discussing the inapplicability of Frye to dog-tracking evidence, the court stated that such evidence "does not involve seemingly infallible scientific devices, processes, or theories."); People v. Roraback, 662 N.Y.S.2d 327, 331 (App. Div. 1997) ("[T]here is no scientific principle or procedure at issue here. The use of a trained canine is an investigative rather than a scientific procedure. Thus a Frye hearing was unnecessary . . . .").
lent certificates. While some external, third-party certifications do exist that could meet the requirements of most scientific research demands, the absence of judicial concern for the certification process creates no incentive for canine units to undertake these expensive third-party certifications.

In fact, the lack of concern has prompted one entrepreneur to create a "do-it-yourself" manual to train drug dogs. The ability to teach even the "amateur" to train a "certified" dog speaks volumes with regards to the limited training actually performed by dog trainers. Of even greater concern is that the entrepreneur has concluded that courts will not question his do-it-yourself training methods.

Russ Hess, the Executive Director of the United States Police Canine Association, "the oldest and largest organization to certify and set standards for service dogs in the world," admits his program is difficult, but also suggests that the stringent requirements are necessary to provide an accurate assessment of a dog's capability. His concerns with other certification programs include pass/fail ratings for dogs rather than accurate depictions of their performance.

There is no justification for the absence of a national uniform certification process for drug dogs as well as a national uniform certification process for dog certifiers. At present, neither option exists because courts are unwilling to inquire beyond the claim that a drug dog is certified.

3. Handler Error

Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior. Dogs are animals, replete with animal tendencies and instincts which the handler seeks to understand and control. Even the best training cannot entirely control these instincts.

There are two broad categories of handler error, both of which can be intentional or inadvertent. A handler can cause an error by influencing a dog's sniff or misconstruing a dog's reaction. A properly conducted dog sniff will allow the dog to operate without any influence.

99. Telephone Interview with Dr. James Woodford, supra note 68.
100. See http://www.hornbecks.net (last visited Dec. 21, 2006).
102. Id. at 2.
103. See Hunter, supra note 94, at 89 ("A detector dog requires a specially trained handler in order to be effective.").
104. See Bird, supra note 61, at 422 ("A handler must be able to properly interpret a canine's subtle signals. In fact, almost all erroneous alerts originate not from the dog, but from the handler's misinterpretation of the dog's signals.").
from its handler, sniffing a broad area for any odors it has been
trained to recognize. Such a search usually takes place very quickly,
with a fairly large area covered in a matter of seconds.

However, a trainer can influence a dog by causing it to linger over
an area for a longer period of time because the handler believes drugs
may be present.105 Dogs are social creatures who want to please their
handlers. Dogs are trained to consider sniffing for contraband a fun
activity, rewarded with treats and praise when they are successful.
When a handler forces a dog to linger in an area longer than usual, the
dog can ascertain that the handler believes contraband may be pre-
sent and therefore alerts in an effort to please its handler. Such an
alert is both a product of the dog's training and nature along with the
handler's undue influence.106

A drug dog is also susceptible to natural limitations that can be
accidentally misconstrued by a handler. A dog that is worked for too
long may be led to alert when in fact the dog is merely fatigued. The
dog's conduct which results from fatigue may be misconstrued as a
positive alert. The risk is particularly high if the drug dog is a passive
alert dog, a dog which alerts by sitting down or looking at its handler.
Studies suggest there is a natural limitation on the ability of the dogs
to sniff effectively.107

A dog is also extremely sensitive to the reactions of its handler, far
more than a handler may even realize.108 Dogs can alert as a result of
a handler's change in behavior. The dog may pick up signals, such as
the handler holding his breath a little longer when he believes drugs
may be present, shifting his weight, or slightly altering his com-
mands.109 As a result of this unintentional behavior, the alert be-
comes less the product of the dog and more the product of the
handler's subconscious signals. This effect becomes more pronounced
when dogs are certified in closed situations where the handler is
aware of the location of drugs. For example, if the handler is respon-
sible for placing a bag of marijuana in one of ten boxes, he is keenly
aware of its location. When he runs his drug dog among the boxes, his
subconscious cues could tip off the dog, resulting in a positive and ac-

105. Telephone Interview with Larry Myers, Assoc. Professor of Anatomy, Physiology

106. Id.

107. U.S. COAST GUARD, supra note 56; see also KELLY J. GARNE ET AL., AUBURN UNIV.,
INST. FOR BIOLOGICAL DETECTION SYS., DUTY CYCLE OF THE DETECTOR DOG: A

108. See Bird, supra note 61, at 424 ("Handlers must also know how to avoid 'handler
cues.' Handler cues are conscious or unconscious signals given from the handler
that can lead a detection dog to where the handler thinks drugs are located.
These voice or physical signals can compromise a dog's objectivity and impermis-
sibly lead the dog to alert at the suspected item or person.").

109. Telephone Interview with Larry Myers, supra note 105.
To eliminate this usurpation of the dog's ability to alert, government agencies should train and test dogs in double blind situations. However, few agencies undertake such rigorous testing because of the lack of judicial oversight resulting from the *Place-Jacobsen* doctrine.\(^{110}\)

An important part of a dog's training is that it continues to be trained over time. It is necessary that a dog be trained continually in order to both maintain accuracy and assess whether a dog continues to be accurate as it gets older. Proper training requires several hours per week to maintain accuracy, but many police units obtain certification and fail to maintain training. Furthermore, when many police units do continue training, drugs are placed in plausible locations easily located by a canine due to the repetitive nature of the exercise. The better practice is to randomize locations for narcotics to assure that dogs are being trained on their sense of smell rather than their memory of the previous exercises.\(^ {111}\)

The handler's interpretation of the dog's signal is not similar in kind to the drug test in *United States v. Jacobsen* which could be preserved and replicated at a later time. The field test in *Jacobsen* was repeated by a second group of federal agents to reduce the possibility of error. Even the thermal scanner utilized in *Kyllo* produced an image that allowed a judge to determine independently whether the image established probable cause to grant the warrant. Unlike the evidence in *Jacobsen* and *Kyllo*, the drug dog sniff occurs in a legal vacuum where the handler determines if the dog alerts and then testifies with certainty regarding the alert without any judicial oversight or requirement to reproduce the results of the sniff. The current doctrine allows the police to circumvent the need for probable cause by placing unquestioned reliance on the handler's testimony that a drug dog alerted.

In *United States v. Rivas*,\(^ {112}\) a federal court questioned a handler's conclusion, a rare occurrence, that his dog alerted when it "cast" to the defendant's truck. The court held that the cast did not constitute an alert and ordered the cocaine suppressed. When pressed at the suppression hearing, the customs agent that performed the search admitted that the dog did not alert to the presence of narcotics but testified that the dog cast a couple of times. A "cast" is when a dog does not strongly alert but rather temporarily stops and spends additional time at a certain point before continuing on its way.\(^ {113}\) While the court

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110. Id.
111. Id.
112. 157 F.3d 364 (5th Cir. 1998).
113. Id. at 368. In *Rivas*, the customs official testified that, from the points of entry that we have, the canines are assigned with the dog handlers, our canines that are aggressive, alert, which means
said that an alert provides probable cause for a search, it was unwilling to extend that recognition to a "weak" alert or casting.\textsuperscript{114} Handlers may be testifying that the dog alerted when, in fact, the dog merely paused or "cast." While this federal court actually questioned the dog's sniff and surrounding circumstances, such an examination is extremely rare. The lack of judicial oversight assures that handlers can push the bounds of what constitutes an alert.

IV. THE HOME

Even before the Supreme Court's decision in \textit{Kyllo v. United States},\textsuperscript{115} several other courts had recognized a distinction when a drug dog is used to detect contraband in a home, limiting \textit{United States v. Place} to objects outside of a home. Recognizing this distinction, the United States Court of Appeals for the Second Circuit, in \textit{United States v. Thomas}, reasoned that "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home."\textsuperscript{116} The court explained why \textit{United States v. Place} should not be applied to homes:

Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own

\textit{Id.} (internal quotation marks omitted).

\textsuperscript{114.} \textit{Id.} ("We hold that, in this case, the government has not met its burden. The government has not provided sufficient evidence that casting should always be deemed equivalent to an alert as a matter of law. It did not put on any expert testimony on what casting means, or what weight we should give it. The Customs official testified that he sought out the dog handler for his opinion as to why the dog had cast the vehicle, but defense counsel properly objected to his answer on the ground of hearsay. The government did not attempt to cure this lapse in its evidence by putting on the dog handler. In fact, the only evidence the government can rely on is the lay testimony by the Customs official that the difference between an alert and a cast is the difference between scratching and biting at an object, and temporarily stopping, giving part of the object 'minute attention' and continuing with the inspection. If anything, this evidence suggests that casting is too distantly related to an alert to create reasonable suspicion on its own as a matter of law. We thus conclude that in this case, the government has not satisfied its burden of proving it had a reasonable suspicion when the dog cast at Rivas' vehicle.").

\textsuperscript{115.} 533 U.S. 27 (2001).

\textsuperscript{116.} United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).
senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.\(^\text{117}\)

The Washington Supreme Court approached this subject in a similar manner, adopting the rationale that "a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection."\(^\text{118}\) This led a Washington Court of Appeals to hold that the use of a trained narcotics dog on the garage of a home constituted an unreasonable search under Washington's state constitution.

Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "'see through the walls' of the home." The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as Corky. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog "does expose information that could not have been obtained without the 'device'" and which officers were unable to detect by using "one or more of [their] senses while lawfully present at the vantage point where those senses are used." The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.\(^\text{119}\)

A. *Kyllo v. United States*

In *Kyllo v. United States*, a 5-4 majority of the Supreme Court reaffirmed the privileged position of the home in the Fourth Amendment hierarchy: "'At 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 government intrusion.'"\(^\text{120}\) With broad statements that

\(^{117}\) *Id.* at 1366-67 (citation omitted). See also *id.* at 1367 ("The Supreme Court in *Place* found only 'that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.' Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search. As the agent had no warrant, the search violated the Fourth Amendment. Hence, we conclude that the information gathered from the dog's alert may not properly be used to support the issuance of the search warrant of Wheelings' apartment." (quoting United States v. Place, 464 U.S. 696, 707 (1982))).

\(^{118}\) *State v. Young*, 867 P.2d 593, 600 (Wash. 1994).


\(^{120}\) *Kyllo*, 533 U.S. at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).
all details about the inside of the home are intimate and therefore pri-
vate, Justice Scalia, writing for the majority, held that the warrant-
less use of a thermal-imaging device aimed at a private home from the
street to detect the relative heat loss from the house was an illegal
search. Now just five years later, Kyllo could be transformed from a
broad decree reinforcing the Fourth Amendment’s protection of the
home, to a limited protection of the home from the use of relatively few
“not in general public use” high-tech devices. Just as the ringing en-
dorsement of individual privacy in Katz v. United States\textsuperscript{121} gave way
to a test that served to create limits on Fourth Amendment protection,
Kyllo stands to suffer a similar fate.

\textit{Kyllo} arose when a U.S. Department of the Interior agent became
suspicious that marijuana was being grown inside Danny Kyllo’s
home. Indoor growth of marijuana relies upon high-intensity lamps,
the presence of which may be inferred by measuring the amount of
heat emanating from the home. Thermal imagers detect infrared ra-
diation which is not visible to the naked eye, converting the radiation
into images based on relative warmth. The images demonstrated that
part of the roof and a wall in Kyllo’s home were warm compared to the
rest of the house, and furthermore, that Kyllo’s home was “substan-
tially warmer than neighboring homes in the triplex” which had been
scanned for comparison purposes.\textsuperscript{122} The images led the agent to cor-
rectly infer that Kyllo was growing marijuana in his home. Along
with utility bills and tips from informants, the images were presented
to a magistrate who issued a search warrant for Kyllo’s home. The
search uncovered a growing operation of more than 100 marijuana
plants.\textsuperscript{123}

The \textit{Kyllo} majority opinion is premised upon two postulates: (1)
that the home is the repository of the greatest Fourth Amendment
protection, and (2) that advanced technological devices should be lim-
ited so that they do not erode the protection of the home to a level
below that which existed when the Fourth Amendment was adopted
in 1791. The confusion caused by the \textit{Kyllo} opinion is that it is unclear
whether Justice Scalia’s emphasis was on protection of the home or
protection from high-tech devices, either of which results in the same
result in the case if used as the basis for the analysis. This lack of
clarity becomes critical when courts determine how to apply \textit{Kyllo} to
drug dogs used to detect the presence of marijuana and other con-
trolled substances in the home.

\textsuperscript{121} 389 U.S. 347 (1967).
\textsuperscript{122} \textit{Kyllo}, 533 U.S. at 30.
\textsuperscript{123} \textit{Id.}
1. Kyllo as Protecting Privacy in the Home

Justice Scalia said that "in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."124 Attempting to limit the protection to "intimate details," Justice Scalia said in response to the dissent, "would not only be wrong in principle; it would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.'"125 Therefore, he concluded that everything within the home is an intimate detail. This broad statement led the majority to reject the distinction offered in Justice Stevens' dissent between off-the-wall technology, such as the thermal imager which only measures waste escaping from the home, and through-the-wall technology, which allows police to see into the home. Rather, Justice Scalia explained, the distinction is meaningless because each method exposes the intimate details of the home.

While it may be difficult to refine Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.126

If Kyllo is primarily about protecting privacy in the home, it is difficult to justify a bright-line rule that distinguishes between some forms of technology and drug dogs that lead to the discovery of marijuana in the same home. If all details within the home are intimate, rendering the details of heat loss and the inference of marijuana intimate in Kyllo, and therefore subject to the Fourth Amendment, then the type of technology utilized should not be critical to the analysis. The crucial consideration should be the location of the evidence rather than the method utilized to discover it. Focusing on what is searched for, as Justice Brennan said, "is fundamentally misguided and could potentially lead to the development of a doctrine wholly at odds with the principles embodied in the Fourth Amendment."127

124. Id. at 37.
125. Id. at 38 (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)).
126. Id. at 34.
127. United States v. Jacobsen, 466 U.S. 109, 136 (Brennan, J., dissenting). See also id. at 136-37 ("Because the requirements of the Fourth Amendment apply only to 'searches' and 'seizures,' an investigative technique that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use. The prohibitions of the Fourth Amendment are not, however, limited to any preconceived conceptions of what constitutes a search or a seizure; instead we must apply the constitutional language to modern developments according to the fundamental principles that the Fourth Amendment embodies.").
2. State v. Rabb: Applying Kyllo to Drug Dogs

Rabb\textsuperscript{128} arose when the Broward County Sheriff’s office received information from a “confidential” source who wished to remain anonymous. Police initiated surveillance of the residence and then followed John Brown when he departed from the home and drove to the highway. After observing Brown making an “an improper lane change” and driving forty miles per hour in a fifty-five mile per hour zone, the police officers initiated a traffic stop.\textsuperscript{129} While Brown was moving across lanes to stop in the emergency stopping lane, the officers “observed him placing his hands under the drivers [sic] seat and make several overt motions.”\textsuperscript{130} Once the vehicle stopped, Brown was ordered out of the car for officer safety. While he was exiting the car, the officer observed “two cannabis cultivation books and one cannabis cultivation video on the front drivers [sic] seat of the vehicle in plain view.”\textsuperscript{131}

The officers proceeded to read Brown his rights, and he agreed to answer their questions. When an officer asked him if he had a cannabis-growing operation inside the residence, Brown evaded the question by telling the officer he was working on drywall in his home. The officer then asked him about the books and video tape of cannabis cultivation in the vehicle, and Brown responded “that he was just interested in cannabis cultivation.”\textsuperscript{132}

While the officers were questioning the defendant, a drug-detector dog, “Chevy,” alerted to the exterior of the vehicle. Chevy was then placed in the interior of the vehicle, alerting to the ashtray. A cannabis cigarette was retrieved from the ashtray and field tested positive. The defendant then asked to speak to a lawyer and the questioning was terminated. As he was being arrested and placed into a sheriff’s car, the defendant admitted that he had additional cannabis in his left shoe; the officers then removed two additional cannabis cigarettes from his shoe.

Less than an hour later, the detective involved in the automobile stop and Chevy walked up to the front door of the suspect’s residence where Chevy alerted. The affidavit seeking a search warrant indicated that the “alert was consistent with previous alerts when narcotics were located.”\textsuperscript{133} The affidavit also claimed that the detective and

\textsuperscript{129} Id. at 589.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 589–90. But see id. at 590 n.2 (“The affidavit indicated that the dog alerted at the door of Rabb’s residence. However, Detective Taranu testified that the dog tugged as he was walking along the street.”).
another officer also "could smell the odor of cannabis emitting from the residence." The dog alerted all along the street leading up to Rabb's residence, a fact that should have called into question the dog's accuracy in court. As the dog was in a continuously heightened state, it was at the officer's complete discretion to determine that the dog was alerting to Rabb's home as opposed to any other home along the street. Although Rabb is now clearly a dog sniff case, the dog alert to the home should not even have been essential to obtaining the warrant: the officer testified that he was able to smell marijuana emanating from the residence from his legal vantage point, rendering the dog's involvement extraneous.

The state sought and was granted a search warrant for the residence based upon the tip, the materials found in the vehicle and on defendant's person, and the dog alert on the residence. The search of the residence turned up a grow operation and sixty-four cannabis plants. A search of a safe found in the house also produced two MDMA tablets, Aprazolam tablets, and three cannabis cigarettes. Within the safe they also found identification evidence identifying the arrestee as James Rabb, not John Brown.

The trial court granted the motion to suppress concluding that "the use of the dog sniff of Rabb's house amounted to a warrantless search and could not support the issuance of the subsequent search warrant for Rabb's house." The Florida Court of Appeals affirmed, distinguishing United States v. Place.

In Place, the United States Supreme Court was not addressing the use of law enforcement investigatory techniques at a house, but rather only whether a dog sniff of luggage in a public airport constituted a search under the Fourth Amendment. The role of "place" in Fourth Amendment jurisprudence was instrumental in the decision in Place. The court continued with its play on words: "'Place' is no less key in the case at bar." The court keyed in on the special "constitutional protections afforded a house throughout the long history of the Fourth Amendment" and concluded:

134. Id. at 590.
135. Id.
136. Id. ("The trial court then undertook to determine whether there was sufficient lawfully obtained evidence to establish probable cause to obtain a search warrant for Rabb's house without the dog sniff, and concluded that there was not where '[t]here was no indicia of a marijuana grow house, i.e., covered windows, high pedestrian traffic, higher than normal use of electricity, etc.,' the informant's veracity was not established in the affidavit, and the marijuana in Rabb's car did not establish any illegal activities in his house.").
137. Id. at 592.
138. Id.
139. Id. at 591 ("Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that Kyllo v. United States controls the outcome of the case at bar." (citation omitted)). See also id. at 592 ("In United States v. Thomas,
We hold that the trial court did not err by granting Rabb's motion to suppress where the marijuana seized was initially discovered by a dog sniff at the exterior of his house. Based on the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of the dog sniff without a warrant constituted a search that was not permitted by the Fourth Amendment. Furthermore, absent the dog sniff, there was no independent lawful evidence establishing probable cause to issue a warrant, irremediably tainting the evidence obtained by the search of Rabb's house based on an invalid warrant. As a result, we affirm.\textsuperscript{140}

The United States Supreme Court was not convinced. The Court, without a single dissenter, summarily reversed the Florida court and remanded the case for further consideration in light of Illinois\textit{ v. Caballes.}\textsuperscript{141} Perhaps most puzzling, or possibly most revealing, is the Court's summary handling of the case without fully considering the continued viability of\textit{ Place} and\textit{ Caballes}, and the myths upon which the legal conclusion in\textit{ Place} rests, especially when the focus of the dog sniff is a home, the repository of the highest level of Fourth Amendment protection. Summarily reversing the case without opinion and with only a citation to\textit{ Caballes} is logically backward. This is a major Fourth Amendment decision affecting protection of the home. When narrowing the amendment's protection, the Court's justification for the erosion should be explained rather than merely citing to a case pertaining to an automobile where Fourth Amendment protection is least protected. The arguments in favor of allowing suspicionless dog sniffs of a vehicle have little relevance to a subject more historically protected, such as the home.

On remand from the United States Supreme Court, the Florida Court of Appeal pushed back and determined, again, that\textit{ Kyllo v. United States}, rather than\textit{ Caballes}, “controls the outcome of the case at bar.”\textsuperscript{142} The court concluded:

\begin{quote}
\textit{The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in\textit{ Kyllo}, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the}\\
\textit{house.}}
\end{quote}

757 F.2d 1359, 1366 (2d Cir. 1985), the Second Circuit compared the dog sniff of luggage in\textit{ Place} with that of an apartment, and concluded that ‘a practice that is not intrusive in a public airport may be intrusive when employed at a person’s home.’ The rationale for this conclusion is that ‘the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be “sensed” from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.’

\textsuperscript{140} Id. at 595–96.


house at all, or in this case, the fact that a dog's sense of smell crossed the “firm line” of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an “intimate detail” of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search.143

Then the court explained why the use of a drug dog on a home is analogous to the use of the thermal imager in Kyllo:

The use of dogs for investigation is a longstanding practice, but “the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.” Likewise, “thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye.” Although a drug detector dog's sense of smell may not be man-made, electronic technology, like the Agema Thermovision 210, its use might allow law enforcement to detect that which it otherwise could not detect with unaided human senses. Relying on Kyllo, we conclude that although the use of such sensory enhancement techniques to detect contraband subsequently seized by warrant may not amount to a search in a place such as a public airport, it does when intruding into a house to discern “intimate details.”144

Faced with the Florida Court of Appeal's resistance to the dictate that the case would be resolved simply by reference to Caballes, the United

143. Id. at 1184.

144. Id. at 1184–85 (citations omitted). See also id. at 1190–91 (“The dissent interprets Caballes much like it interprets Place, to stand for the proposition that a binary search, which reveals only the presence or absence of contraband, is never a search for purposes of the Fourth Amendment. This analysis is flawed and disturbing for two reasons. The first reason highlights the fundamental philosophical divide between the majority and the dissent in this case—in order to determine whether a search has occurred, we determine whether the place at which the search occurred was subject to a legitimate expectation of privacy while the dissent measures whether the item searched for was subject to a legitimate expectation of privacy. It is clear from the jurisprudential history of the Fourth Amendment that it is always considered in reference to a place. Furthermore, a slippery slope portends peril for privacy if the item searched for is the measuring stick. If determining whether law enforcement conduct constitutes a search is solely a function of whether the item searched for is illegal, whether that item be in a vehicle on a public highway or beyond the closed doors of an individual's castle, the Fourth Amendment is rendered meaningless. Nothing would deter law enforcement from marching a dog up to the doors of every house on a street hoping the dog sniffs drugs inside. If drugs are detected, then no search has occurred because there is no legitimate expectation of privacy in drugs and the Fourth Amendment is not implicated; if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Such an "ends justifies the means" approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment.”).
States Supreme Court elected not to reconsider the case when the state sought the Court's intervention a second time.\textsuperscript{145}

3. Fitzgerald v. State: Kyllo \textit{Inapplicable to Dog Sniff of Home}

The Maryland Court of Appeals also recognized the difference between a canine sniff of a package at an airport or of an automobile and that of the home but anticipated the Supreme Court's initial result in \textit{Rabb}: "[H]owever, we see no difference in their relationship to the Fourth Amendment. A K-9 scan alone constitutes neither an intrusive search in the traditional sense nor a seizure and thus, there are few Fourth Amendment implications."\textsuperscript{146} Consequently, the court concluded that "\textit{Place} [is] applicable to dog sniffs in general, independent of the object searched, because of the sniffs' narrow scope."\textsuperscript{147}

Police became suspicious of Fitzgerald in 2002 when information was received from an anonymous source that Fitzgerald and his girlfriend "regularly sold a high quality grade marijuana called 'Kind Bud,'" that they lived together in an apartment, and that they drove a pick-up truck.\textsuperscript{148} The police investigation confirmed the address where the couple lived and that Fitzgerald had a juvenile record for distribution of marijuana along with three burglaries.

The police brought a drug dog to the apartment house where Fitzgerald lived. The specific drug dog was trained to sniff for contraband and some items that could be legally possessed, such as Diazepam, a generic form of the prescription drug Valium.\textsuperscript{149} In the common hallway of the apartment house, the dog was led to scan four apartments, alerting only to Fitzgerald's. The court described an odd form of alert,\textsuperscript{150} which should have called the dog sniff into question.\textsuperscript{151} Shortly thereafter, the anonymous source notified the police again, alleging that Fitzgerald continued to sell "Kind Bud marijuana." A search warrant issued on this information led to the discovery of marijuana and other evidence of marijuana use and distribution.

Relying upon \textit{Place}'s determination that a dog is \textit{sui generis} and \textit{Jacobsen}'s determination that a test only to determine whether white powder was cocaine revealed nothing about noncontraband items, the


\textsuperscript{146} Fitzgerald v. State, 864 A.2d 1006, 1012 (Md. 2004) (internal quotation marks omitted) (quoting Wilkes v. State, 774 A.2d 420, 436 n.20 (Md. 2001)).

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} at 1008.

\textsuperscript{149} See supra note 66 and accompanying text.

\textsuperscript{150} Fitzgerald, 864 A.2d at 1008 n.2 ("At the suppression hearing, Officer Brian testified about how Alex communicates his detection of contraband: 'Okay. What Alex does is he sits there and I present to him, he sits there in that area, and what he does is he'll sit and he looks at me and that is his indication to me that he smells the presence of a narcotic.'").

\textsuperscript{151} See supra note 104.
court held that a drug dog does not intrude upon Fourth Amendment protected privacy because a holder of contraband can have no legitimate expectation of privacy in contraband.\textsuperscript{152} The court then concluded that "[e]ven a perfunctory reading of \textit{Kyllo} reveals that its standard does not apply to dog sniffs. \textit{Kyllo} is an opinion about the need to limit ‘advancing technology.’"

With this review of \textit{Kyllo}, it is clear that \textit{Kyllo} has no bearing on dog sniffs. First, a dog is not technology—he or she is a dog. A dog is known commonly as "man's best friend." Across America, people consider dogs as members of their family. The same cannot be said of cars, blenders, or thermal imagers.\textsuperscript{154}

4. \textit{The Supreme Court Fails to Bark When Considering Sniffs of the Home}

The Supreme Court's reversal of \textit{Rabb} cites to \textit{Caballes} for the proposition that a dog sniff of a car is not a search, apparently signaling the applicability of that conclusion to a home. \textit{Caballes} in turn relied upon \textit{Place} and \textit{Jacobsen}. The notion that a dog sniff is not a search emanated in \textit{Place} although it was dictum and not central to the outcome of the case.\textsuperscript{155} \textit{Place} was extended, as expected, to automobiles in \textit{Caballes}, and now seemingly to homes in \textit{Rabb}. Secondary support in \textit{Caballes} was found to exist in \textit{Jacobsen}.

\textit{Caballes} adopted the broadest reading of \textit{Place}: that "the use of a well-trained narcotics-detection dog—one that 'does not expose non-contraband items that otherwise would remain hidden from public view,' . . . generally does not implicate legitimate privacy interests."\textsuperscript{156} Thus, the Court concluded again that the canine sniff is \textit{sui generis}. The \textit{sui generis} label rests upon the following three rationales: (1) that the procedure is accurate, (2) that the procedure does not disclose anything protected under the Fourth Amendment, and (3) that the procedure is a limited intrusion that "does not rise to the level of a

\textsuperscript{152} Fitzgerald, 864 A.2d at 1017.
\textsuperscript{153} Id. at 1015.
\textsuperscript{154} Id.
\textsuperscript{155} See United States v. Place, 462 U.S. 696, 723 (Blackmun, J., concurring).
\textsuperscript{156} Illinois v. Caballes, 543 U.S. 405, 409 (2005) (quoting \textit{Place}, 462 U.S. at 707). See also \textit{Place}, 462 U.S. at 707 ("We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A ‘canine sniff’ by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.")
constitutionally cognizable infringement."\textsuperscript{157} We explained in Part III how none of the three rationales fit.

By seemingly extending \textit{Place} and \textit{Caballes} to the home, the Court has engaged in a sleight-of-hand trick unworthy of an amateur magician. Without explanation, the Court has extended a doctrine that was unsupported at its inception in \textit{Place} and not supported in \textit{Caballes} when extended to automobiles. Now, in a summary reversal, it is extended to homes.

It is possible that we have misread \textit{Rabb} and it stands for something other than extension of \textit{Place} and \textit{Caballes} to the home, but attempting to figure out what else it could stand for is a fairly hopeless exercise. The cryptic summary reversal accompanied by the reference to \textit{Caballes} leaves few plausible alternatives. Perhaps the Court was signaling that the lower court had misread \textit{Caballes}. However, such a conclusion makes no sense. Neither the Florida trial nor appellate courts questioned the legality of allowing a canine unit to sniff inside the lawfully stopped vehicle. The courts, however, ruled that the evidence of a small quantity of marijuana in the vehicle and on the defendant's person, coupled with books in the vehicle about cannabis cultivation, was not enough, without the dog sniff of the residence, to give probable cause to justify issuance of the search warrant for the house. Perhaps the Supreme Court differed with the state courts' probable-cause analysis, but if that is the basis for the summary reversal, the citation to \textit{Caballes} is meaningless and provides no guidance whatsoever. The only relevant factor remaining is the state trial and appellate courts' conclusion that the warrantless dog sniff of the home was an illegal search which could not serve as the basis for the subsequent search warrant. If the Supreme Court differed with that conclusion, its reference to \textit{Caballes} must stand for the proposition that a dog sniff—even of a home—is not a search. As set forth in the next section, such an interpretation reduces \textit{Kyllo} to little more than an empty shell.

\textbf{B. The Impact of \textit{Rabb} on \textit{Kyllo}}

If \textit{Rabb} extends the \textit{Place–Caballes} doctrine to the home, which seems to be the necessary conclusion of the Court's summary reversal, it cuts the heart out of \textit{Kyllo} and reduces Justice Scalia's peroration about the home to little more than a rhetorical flourish. If true, \textit{Kyllo} becomes merely an extension of Fourth Amendment protection for the home when the police employ advanced technological devices not generally available to the public.

Yet \textit{Kyllo} seemed to offer so much more. Justice Scalia's rejection of the technology used in \textit{Kyllo} because it was capable of disclosing,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{157} \textit{Caballes}, 543 U.S. at 409.
\end{enumerate}
\end{footnotesize}
"for example, at what hour each night the lady of the house takes her daily sauna and bath,"158 was hyperbolic simply to stress that all details of the home are intimate and deserving of protection: "[O]ur cases show, all details are intimate details, because the entire area is held safe from prying government eyes."159

The Rabb Court's apparent extension of Caballes to the home renders the supposedly unbending protection described in Kyllo meaningless. The primary focus becomes what the police are seeking rather than that they are seeking it from within a home. In deciding that the need to locate contraband outweighs the traditional protection accorded the home that Justice Scalia extols in Kyllo, the Rabb decision indicates a situational and inconsistent enforcement of Fourth Amendment rights by the Supreme Court. The fears that Justice Scalia voiced about future technology which will be able to see through walls, rather than read off-the-wall data as the thermal imager did in Kyllo, will be realized when an imaging device which only identifies a controlled substance is developed. By rejecting the distinction between off-the-wall and through-the-wall technology offered by Justice Stevens' dissent in Kyllo, Justice Scalia seemed to want to draw the line around the outside of the home, long before the possibility of through-the-wall technology exists, in order to provide substantive direction for future law enforcement and to create a prophylaxis to protect familial privacy in the home. How should courts reconcile this principle with the opposing principle that a device which only measures the presence or absence of contraband is not a search? Such a contest might result in reducing Kyllo to protecting only against the newest high-tech device until it is generally available, and even may allow its use in its infancy if the technology only identifies the presence or absence of contraband.160

Under the Supreme Court's standard, the more sui generis, high-tech thermal imager would be unavailable, but the low-tech, less accurate dog sniff would be an option for law enforcement. If the reasonable innocent person who possesses no contraband in her home were given the choice between the thermal imager and the dog, the choice would be simple—she would choose the high-tech device that is much less likely to create a false positive leading to a search, the device which the police may not use.

159. Id. at 37.
160. Another possible alternative analysis is that the Court in Rabb did not dispute the Florida court's conclusion that a dog sniff of a home is a Fourth Amendment intrusion but did disagree with the Florida court's conclusion that such an intrusion does not require a search warrant. However, the Supreme Court's reference to Caballes does not lend support for such an interpretation.
After the Kyllo decision, a federal district court in Indiana concluded that Kyllo validated the Second Circuit's holding in Thomas. The court in United States v. Jackson held that police use of a drug-sniffing dog at the door of a suspect's residence was a search that required probable cause and a search warrant. The court went on to point out the full implications of the government's argument in the case:

Under the government's theory in this case, the police would be free to walk drug-sniffing dogs from door to door through a neighborhood, and to obtain a search warrant for any home where the dog indicated an odor of a controlled substance. And of course, a top-to-bottom search of a home for controlled substances, which can be concealed almost anywhere, can be an extremely thorough intrusion into a home. When one keeps in mind the fact that the police reported that the dog in question here alerted to a vehicle and the home, and that both were searched without finding a trace of controlled substances, the potential for abusive and unreasonable searches is especially evident.

The district court in Jackson even attempted to apply the technology analysis of Kyllo to the drug dog:

This reasoning applies directly to the "sense-enhancing" use of a specially trained dog. Dogs with such training are not in "general public use" (which refers to the general public, not to police forces, which often use such dogs to detect drugs). The information such a dog can provide about the interior of the home would not otherwise be obtained without a physical intrusion into the home. The court sees no constitutional distinction between the use of specially trained dogs and sophisticated electronics from outside a home to detect activities in or contents of the home's interior.

The Jackson court attempted to provide the judicial protection of Fourth Amendment rights sought by Justice Brennan in his dissent in Jacobsen, but the Jackson court's general and specific analyses clearly did not resonate with the Supreme Court. The Court's cryptic decision in Rabb seems to authorize police to walk drug dogs near every home and through every apartment house without any predicate, exposing Americans in their homes to police surveillance and to full searches of those homes based upon accurate alerts, false alerts, or alerts to substances that are not inherently contraband, substances which may or may not be legally possessed.

V. DOG SNIFFING OF SCHOOLCHILDREN

An integral part of America's war on drugs the past thirty years has been the country's war on its children. Drug dogs, though only one tool in the arsenal of that war, have been an important and frequently used weapon. American society only seems to question such

162. Id. at *3.
163. Id. at *5.
164. Id. at *3.
tactics when we are informed of an egregious incident where overzealous school administrators and police officers, in an attempt to crack-down on a perceived drug problem, engage in conduct which is so extreme that it is completely disproportional to the existing problem it seeks to remedy. Drugs are a serious issue in our schools; however, by extension, existing case law permits police and administrators to subject all students to exposure to sniffing and pawing dogs which should be reserved for only those where at least reasonable suspicion exists, or for all in only a true emergency situation.

One such incident occurred on November 5, 2003, when police staged a drug raid at the Stratford High School in Goose Creek, South Carolina. Police burst into the school with guns drawn and forced students to the floor, handcuffing some, while drug dogs sniffed the students' backpacks, lockers, and bodies for contraband. A school surveillance camera showed police waving their guns at students who were lying face down on the floor. Although police and school administrators continued to justify its necessity after the fact, no drugs or weapons were found during the raid.166 Obviously, the drug dogs were only one factor in the Goose Creek story, and more details will be forthcoming as a result of class action civil rights suits filed after the raid. Goose Creek, however, is only the most recent egregious example of the widespread use of drug dogs sniffing not only inanimate objects in and around schools such as vehicles and lockers, but of students' persons.

A. The Existing Law

The Supreme Court has yet to specifically address the use of drug dogs on schoolchildren. The existing law has been evolving for over a quarter of a century but remains opaque enough to offer support for both sides of the issue. Even before the Supreme Court's unsupported dictum in United States v. Place that a dog sniff does not qualify as a search was assumed applicable to a spectrum of subjects, the issue of drug dogs being used in schools was already emerging. The Supreme Court denied a petition for a writ of certiorari in 1981 in Doe v. Renfrow,167 a federal civil rights law suit arising out of the use of trained German Shepherds who sniffed the bodies of each student, leaving in place the Seventh Circuit's decision upholding the practice.168 Before the practice of dog sniffing was exempted from Fourth Amendment coverage in Place, the Seventh Circuit's decision made it abundantly

clear that the Fourth Amendment's protection is mitigated in the classroom.

*Renfrow* was not dominated by the extreme violence that permeated the Goose Creek raid in 2003, but the facts are sufficiently troubling. Six teams composed of a school administrator along with a police-trained German Shepherd, its handler, and two uniformed officers conducted simultaneous raids on the junior and senior high schools in Highland, Indiana, a community not far from Chicago. The raids took place at the end of the first period, and students were ordered to remain seated in their first period classroom. They were required to remain seated for two and a half hours (an additional one and a half hours after the class ended) with their belongings in view and their hands on the desk. The students were not allowed to use the restrooms during this period unaccompanied. Police officers and school administrators patrolled the halls preventing students from leaving the schoolhouse. Media representatives were invited in and permitted to watch what unfolded, exacerbating the public nature of the process for students subjected to the raid.169

Justice Brennan, dissenting from the denial of certiorari, wrote that "[w]hile school officials acting *in loco parentis* may take reasonable steps to maintain a safe and healthful educational environment, their actions must nonetheless be consistent with the Fourth Amendment."170

Justice Brennan reported that "[t]he dogs were led up and down each aisle of the classroom from desk to desk, and from student to student. Each student was probed, sniffed, and inspected by at least one of the fourteen German shepherds detailed to the school."171 Justice Brennan then elaborated on the experience:

> When the search team assigned to petitioner's classroom reached petitioner, the police dog pressed forward, sniffed at her body, and repeatedly pushed its nose and muzzle into her legs. The uniformed officer then ordered petitioner to stand and empty her pockets, apparently because the dog "alerted" to the presence of drugs. However, no drugs were found. After petitioner emptied her pockets, the dog again sniffed her body and again it apparently "alerted." Petitioner was then escorted to the nurse's office for a more thorough physical inspection.

> Petitioner was met at the nurse's office by two adult women, one a uniformed police officer. After denying that she had ever used marihuana, petitioner was ordered to strip. She did so, removing her clothing in the presence of the two women. The women then looked over petitioner's body, inspected her clothing, and touched and examined the hair on her head.172

> No drugs were found, and the girl was allowed to dress and return to class. Apparently, the drug dog alerted to petitioner because she

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170. *Id.* at 1022.
171. *Id.* at 1023.
172. *Id.* at 1023–24.
had been playing earlier that morning with her own dog that was in heat.\textsuperscript{173} The dogs alerted to more than fifty students during the raid, but only fifteen high school students and no middle school students actually possessed drugs or drug paraphernalia, a less than forty-percent accuracy rate. Five high school students (three boys and two girls) were strip searched. Four middle school girls were strip searched, and no contraband was found.\textsuperscript{174}

The district court held that requiring the students to remain in the classroom an additional hour and a half was not a seizure, and that the entry of school officials into the classrooms accompanied by the drug dogs and police officers was not a search.\textsuperscript{175} Even if the students' continued presence in the room was required by school attendance rules, they certainly had no option but to submit to the dog sniff; they could not refuse to cooperate, which is the Fourth Amendment standard when leaving is not an option even though not imposed by police.\textsuperscript{176} The court analogized the presence of the dogs in the classroom to an administrator coming into the room for the purpose of observing a class.\textsuperscript{177} Suggesting the equivalency is to ignore the fact that one of the two situations carries the specter of being pawed and poked by a German Shepherd.

The dog acted merely as an aide to the school administrator in detecting the scent of marijuana. The dog handler interpreted the actions of the dog for the benefit of the school administrator. Bringing these nonschool personnel into the classroom to aid the school administrators in their observation for drug abuse is, of itself, not a search. . . . The presence of the canine team for several minutes was a minimal intrusion at best and not so serious as to invoke the protections of the Fourth Amendment.\textsuperscript{178}

\textsuperscript{173} Id. at 1024 n.1.
\textsuperscript{174} Id. at 1022.
\textsuperscript{175} Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979) ("[T]he presence of the uniformed police officer in the room, at the request of the school official and with the agreement that no arrests would occur as a result of finding any drugs upon students, did not alter the basic function of the school official's activities" in acting under the \textit{in loco parentis} doctrine.).
\textsuperscript{176} Cf. INS v. Delgado, 466 U.S. 210, 218 (1984) (employees who were subject to INS questioning about their immigration status were not detained even though they were not free to leave because of work rules; however, the agents' conduct gave the employees no "reason to believe that they would be detained if . . . they simply refused to answer").
\textsuperscript{177} See Jennifer Bradfield, Comment, Vernonia School District 47J v. Acton: A Step Toward Upholding Suspicionless Dog Sniff Searches in Public Schools?, 68 U. Colo. L. Rev. 475, 501–02 (1997) ("The Seventh Circuit, in Doe v. Renfrow, is the only circuit to have held that dog sniffs of schoolchildren are not searches. In Renfrow, the court reasoned that the presence of the dog and its trainer, at the request of school officials, served merely to aid the school administrator in detecting the scent of marijuana. In addition, the court reasoned that public school students experience various intrusions into their classroom environment, and the presence of the dogs for a few minutes was a minimal intrusion and therefore not significant enough to invoke the Fourth Amendment." (footnotes omitted)).
\textsuperscript{178} Renfrow, 475 F. Supp. at 1020.
Furthermore, the court held that the dog sniffing did not violate the protected privacy interest of the thirteen-year-old student because (1) "this was not a police action," (2) "students do not have a justifiable expectation of privacy that would preclude a school administrator from sniffing the air around the desks with the aid of a trained drug detecting canine," (3) "students in a public school do[ ] not fall within the meaning of Katz because of the very nature of public school education," and (4) "[a]ny expectation of privacy necessarily diminishes in light of a student's constant supervision while in school." In summary, the court concluded that a reasonable right to inspection is necessary to the school's performance of its duty to provide an educational environment and overcomes a student's very limited Fourth Amendment interests. The Seventh Circuit affirmed and accepted the reasons given in the district court's "scholarly opinion" which the court "adopted as [its] own." Dissenting Judge Swygert concluded that the majority's description of what happened was too benign because all 2,780 students at the school were subjected "to a humiliating search by police dogs."

179. But see New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) ("Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that '[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.' We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." (alteration in original) (citation omitted)).


181. Id. Note, however, that the district court held that the strip search of the student on the continued alert of the drug dog after the student emptied her pockets was unreasonable. Id. at 1024–25.


183. Doe v. Renfrow, 635 F.2d 582, 583 (7th Cir. 1980) (Swygert, J., dissenting from denial of rehearing en banc) ("The cases cited by the district court as holding that sniffing dogs do not constitute a search are totally inapposite because in those cases the dogs were sniffing inanimate and unattended objects rather than people. Here the intrusive probings by the dogs were in no sense mere observation of "physical characteristics . . . constantly exposed to the public," . . . [but] constituted the type of "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny.' We need not speculate afar about the psychological trauma suffered by the students during this mass search. The accusing finger of the police may well remain for a lifetime upon these young, impressionable minds. Had a warrant properly been sought, I am convinced that none could have issued consistent with the Fourth Amendment. The police and school officials neither possessed nor attempted to gain specific information about any particular student. There was also no information as to any particular drug or contraband transaction or event. Thus, all 2,780 students were under suspicion, and there was no known crime. A search under these conditions is unconsti-
The opposite position was taken by the Fifth Circuit in Horton v. Goose Creek Independent School District, in 1982. The school district, concerned about a growing drug and alcohol abuse culture in its schools, contracted with a security services firm that specialized in providing Doberman Pinschers and German Shepherds "trained to alert their handlers to the presence of any one of approximately sixty different substances, including alcohol and drugs," including over-the-counter and controlled substances. The school district informed elementary, junior, and senior high school students about the impending use of the dogs, calling into question whether they actually hoped to find any substances in the first place, which raises even more serious questions about the purpose of the exercise.

The dogs were taken to schools throughout the district on a random and unannounced basis where they sniffed student lockers and automobiles. The dogs were also taken "into the classrooms, on leashes, to sniff the students themselves." If the dog alerted its handler to the odor of a specific substance on a student's body, that student, after the dog had departed, was "asked" to leave the class and proceed to the administrator's office where the student was searched, although not strip searched. Two of the named plaintiffs triggered alerts. School officials questioned Sandra Sanchez and then rummaged through her purse without her consent. They found a small bottle of perfume in the purse which they returned to her. Robby Horton was told to empty his pockets; nothing incriminating was found. School officials then searched his socks and lower pants legs, again finding nothing.

The court of appeals held the dog sniffing of the student lockers and automobiles, objects that were unattended and in public view, not to be a search. However, directly contradicting the "situationally mitigated" interpretation of the Fourth Amendment offered by the Seventh Circuit, the court reasoned that the dog sniff of the students was a search.

The use of dogs to sniff the students, however, presents an entirely different problem. The dogs in the GCISD program put their noses right up against the children's bodies. The students' persons certainly are not the subject of lowered expectations of privacy. On the contrary, society recognizes the interest in the integrity of

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184. 690 F.2d 470 (5th Cir. 1982). This case is not to be confused with the situation that occurred in the town of Goose Creek, South Carolina, mentioned above. It is merely an odd coincidence that the school district involved here and the town in South Carolina are both named "Goose Creek."

185. Id. at 474. See discussion of non-contraband items supra note 66.

186. Id.
In 1999, *Horton* was endorsed by the Ninth Circuit in *B.C. v. Plumas Unified School District*, an especially interesting case because the facts are devoid of all violence and physical contact. The students of Quincy High School were required to exit their classrooms while walking past a drug-sniffing dog and its police handler stationed outside each classroom door. The dog, Keeshka, alerted to one of the students. The students were required to remain outside while the dog sniffed their belongings which the students were required to leave inside the classroom. After their belongings were subjected to the dog sniff, the students returned to the classroom once again passing by the dog, who again alerted to the same student. The student was removed from the classroom and searched. No drugs were found on that student or any other student. The facts recited by the court indicate that Keeshka never physically touched the students as they passed in and out of the classroom.

Reasoning that neither the Supreme Court nor the Ninth Circuit had directly addressed the issue of whether a dog sniff of a person is a search, the court relied upon its own 1984 precedent which recognized that the level of intrusiveness is greater when the dog is permitted to sniff a person than when a dog sniffs unattended luggage. The Ninth Circuit agreed with the Fifth Circuit in *Horton* that "close proximity sniffing of the person is offensive whether the sniffer be canine or human," concluding that "because we believe that the dog sniff at issue in this case infringed B.C.'s reasonable expectation of privacy, we hold that it constitutes a search."

Having decided that the dog sniff of a person is a search, the court went on to determine the reasonableness of that search and held that "the random and suspicionless dog sniff search of B.C. was unreasonable under the circumstances." The court reached that conclusion by balancing the nature and extent of the intrusion against the governmental interest sought to be advanced by the intrusion. Relying upon the district court's finding that the dog sniff was highly intrusive and that the record did not disclose that there was a drug problem, let alone a drug crisis, at Quincy High School, the court concluded that the search was unreasonable and therefore in violation of the Fourth Amendment. Thus, the court did not jump immediately to the conclusion that a warrant based upon probable cause was the constitutional

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187. *Id.* at 477-78 (footnote omitted).
188. 192 F.3d 1260 (9th Cir. 1999).
189. United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) (en banc).
191. *Id.*
192. *Id.* at 1268.
requirement, but indicated instead that reasonableness is a variable standard, and if the government interest is very high, for example if there were indications of a bomb plot or a “drug crisis” at Quincy High School, it might be reasonable to engage in random, suspicionless dog sniffs of the students. Absent such conditions, the Fourth Amendment reasonableness standard should demand more.

The practice of alerting students to an impending raid must be addressed, as it is both counterproductive on its own terms from one standpoint, and assures that the search is entirely gratuitous and therefore vindictive subjugation from another. While some may opine that the practice is more humane, allowing students to save themselves from a positive alert in school, the argument fails on its own terms as it does nothing other than stop students from bringing drugs to school that day or week.

The underlying hope behind conducting the raids should be to alert administrators to students’ drug problems and providing help to them, whether it is through internal or external assistance programs. Evidence of this intent is provided as schools will often provide immunity to students who are willing to voluntarily relinquish their contraband moments before the raid, offering to treat the problem internally rather than involve law enforcement. Schools should be commended for their commitment to the reform of their students when offering such protection before an immediately ensuing raid.

However, if the administration actually intends to find drugs, alerting the students to the impending raid days before practically assures that drugs will not be found. The cynical view of this type of warning is two-fold: the desire to reduce paperwork for the school and the desire to be able to report that the school is drug free to the community. Drug raids that are successful in discovering drugs inevitably provide bad press for schools; eliminating that possibility is a positive for everyone involved—everyone, of course, except the child who might benefit from the discovery of a suspected drug problem.

While the early warning may assure that drugs are not found on the students, it does not eliminate both the humiliation and fear the students suffer when subjected to the sniff of a drug dog. In fact, the humiliation and fear are the only actual products of a drug raid intended to fail in its discovery of contraband. The student is still subjected to a dog sniff; the dog may still falsely alert, and the student may still be subjected to a further search. In a drug raid intended to find nothing, the only remaining motivations are pure malice and good press, neither of which could meet the reasonableness requirement of the Fourth Amendment if the dog sniff of a person was deemed a
search. However, as the Court continues its expansion of the Place doctrine, it permits administrators to continue this malicious practice without the judicial oversight provided by the Fourth Amendment.

B. Arriving at a General Rule Pertaining to Dog Sniffs of Schoolchildren

Any reliance on United States v. Place to create a general rule that dog sniffing is not a search is misplaced. First, the discussion of dog sniffing in Place was gratuitous, never challenged by the defendant, never raised in the courts below, and not briefed by the parties. The discussion of the dog sniff was not necessary to the outcome of the case. In the absence of full preparation on this issue, the Court in Place made general comments about the nature and accuracy of dog sniffing which have been consistently repeated but which are not accurate.

Most importantly, Place involved the dog sniff of an inanimate object, not a person. That object, the defendant's suitcase, had already been seized on reasonable suspicion before it was subjected to the dog sniff. The sniff of the suitcase is more closely related to dog sniffing of parked automobiles and school lockers which were held not to be searches in Horton, and were distinguished from the sniff of the students' bodies by the Fifth Circuit. In Place, the dog sniff occurred out of the defendant's presence and was completely unrelated to a sniff of a person. Also important is that the situation in Place was not devoid of all Fourth Amendment oversight: the Court determined that prior to the sniff of the luggage authorities had reasonable suspicion to justify seizing the suitcase.

Schoolboards and officials are obligated to create a safe environment that is conducive to learning. The discovery of drug problems is a significant step in achieving this goal, and school officials may act in loco parentis to create such an environment. However, schoolchil-
Children are not without Fourth Amendment rights; they have a protected privacy interest in their persons and belongings while at school. That privacy interest may be diminished so that random, suspicionless drug testing may be allowed in certain limited contexts. However, random, suspicionless intrusions in the absence of a legitimate crisis situation, oblivious to the potentially traumatic effects upon students, is not proper in loco parentis conduct. Such behavior is equivalent to the worst possible parenting, creating an environment of hostility and distrust between students and faculty where education and personal privacy are sacrificed to the war on drugs. In loco parentis is a relationship meant to temporarily replace the family relationship; it should not be interpreted to inoculate the school from its duty to act as a reasonable parent.

Dog sniffing is not the benign, minimally intrusive act that most people imagine. The dogs chosen for the task are not selected simply because of their abilities to smell and be trained. Often German Shepherds and Doberman Pinschers are chosen because of their large size and the frightening effect they have on people. In each of the cases cited above, except for Plumas, the dogs made physical contact with some or all of the children, sometimes more than just slightly. Even in the Ninth Circuit case where no physical contact was reported, the children were required to pass close to the dog.

There is additional humiliation possible for students who are the subjects of false alerts from classmates who would not fully appreciate the rate of false positives; that humiliation is potentially devastating. The humiliation is compounded when a child is singled out after the dog alerts to that child. However, the case law demonstrates that dogs falsely alerted because of the scent of another dog in heat, against pupils.” (footnotes omitted); Margaret Beth Ditzler, Note, Dog Searches in Schoolrooms—State or Private Action?, 15 VAL. U. L. REV. 137, 144 (1980) (“The teacher derives authority from the ancient doctrine of in loco parentis, whereby the parent impliedly delegates authority to the teacher. In acting to discipline the student the teacher is merely operating as a parent, and does not come under the prohibitions of the fourth amendment. Although in loco parentis has been codified into public law in many states, theoretically any discipline used by the teacher stems from the parent. As the parent is outside the arm of government in the discipline of the child, so too should be the teacher.” (footnotes omitted)).

196. See Gardner, supra note 193, at 850–51 (“[T]here are reasons to regard intensive smelling of people, even if done by dogs, as indecent and demeaning. By coming into public, one may well assume the risk of happening to be smelled by other people or animals in the ordinary course of social life, but it is difficult to believe that one also assumes the risk of being intentionally and intensively smelled. It is a source of justifiable annoyance and outrage when one’s person is purposely smelled without consent by another or by a police dog in order to discover evidence constitutes a violation of the right to be free from indecent intrusions and therefore constitutes an unreasonable search under the fourth amendment.”).
perfume, and in one case for no discernible reason at all. The peer ridicule that a child could face in a school setting because of a dog’s false alert should not be ignored.\footnote{197}

In addition to the humiliation, the fear generated by some of these dogs should not be underestimated. A sizable percentage of people in this country fear dogs because of intensely personal experiences and historical abuses that are simply brushed aside in the name of law enforcement. A frightening experience from childhood may cause a person to fear dogs all his life. Furthermore, law enforcement has historically abused the use of canines against African-Americans. From the slave era when dogs were used to hunt down runaway slaves, to the Civil Rights Era where police in the South turned snarling dogs loose to control and disperse crowds gathered in peaceful protest, law enforcement has used dogs to terrorize black communities.\footnote{198} To ignore this history by subjecting minority children to suspicionless dog sniffing unnecessarily continues this painful tradition.

Exposing schoolchildren to random, suspicionless contact with large dogs without examining the reasonableness of the school administration’s decision is to ignore the Court’s teaching in \textit{T.L.O.} that schoolchildren have Fourth Amendment rights. To protect children from arbitrary dog raids such as that which occurred in Goose Creek, South Carolina, dog sniffs should be moved back within the protection of the Fourth Amendment to provide the proper judicial oversight for such a potentially invasive and easily abused procedure.

\section*{VI. DOG SNIFFING OF MOTORISTS AND PEDESTRIANS}

Although schoolchildren are most likely to be subject to a dog sniff of their bodies, it is a growing practice for police officers to use canines on motorists and pedestrians.\footnote{199} Even more egregious than subjecting a motorist whose car has been lawfully stopped to a drug dog is when a dog is directed randomly and without a prior lawful stop at a pedestrian on the street. The motorist stopped for a traffic offense will at least be able to mount a challenge to the stop of the vehicle and the

\footnote{197. See Ditzler, \textit{supra} note 195, at 149 (“While the need for a mass search within the school environment may be greater than the need for one outside the school, the emotional damage inflicted by a random search is extreme and may have unknown effects on the children.” (footnote omitted)).}

\footnote{198. See \textit{supra} note 54.}

\footnote{199. Cf. State v. Wallace, 812 A.2d 291, 302 (Md. 2002) (“If the K-9 had sniffed respondent, and specifically alerted to respondent, before the officer searched him, probable cause for the search might have existed. If the officers simply had Bosco sniff each of the passengers of the car prior to searching them, then probable cause might have existed to search any of the passengers who positively re-alerted the canine to contraband. This did not happen here.”). “The growth of K-9 units has become a ‘fad’ in many police departments.” Wampler & Wampler, \textit{supra} note 54, at 381.}
seizure of its occupants, where the same challenge is not available to the random pedestrian. When a pedestrian is approached by a police officer with a drug dog, under the Place doctrine and the present likelihood that the doctrine knows no limits, that person ordinarily would not be able to challenge the police officer’s decision to focus the dog’s attention on her person.

Prevailing Fourth Amendment standards, however, should suggest that a pedestrian is seized for purposes of the Fourth Amendment at the time she is approached by a drug dog. It is disingenuous to suggest that a reasonable person would feel free to walk away and disregard the officer and his dog; it is an interference with freedom of movement that should rise to the level of a seizure. In fact, if the pedestrian attempts to avoid the officer and dog, her conduct will likely precipitate further attention from the officer and enhance the probability that an officer will stop her. Under these circumstances, the government should be required to justify the reasonableness of the seizure. The special circumstances which exist at an airport and which might justify random, suspicionless encounters of this nature are usually absent when the encounter takes place on the street. In the absence of articulated and established special needs, the government should be required to demonstrate reasonable suspicion of wrongdoing to justify the officer directing the dog at a person.


201. Cf. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (“We conclude that a person is ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”); Terry v. Ohio, 392 U.S. 1, 16 (1968) (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”); 3 LAFAVE, supra note 92, § 5.1(a), at 4 (“[I]t is of great practical significance that the constitutional test for determining whether a seizure occurred is expressed in objective rather than subjective terms.”).

202. For an alternative formulation of this rule, compare United States v. Kelly, 302 F.3d 291, 293 n.1 (5th Cir. 2002) (“Although a canine sniff of an object, as opposed to a person, is normally not a search, this circuit has previously held that an up-close canine sniff involving contact with a person’s body is a search as defined in the Fourth Amendment.”), with United States v. Reyes, 349 F.3d 219 (5th Cir. 2003) (non-contact dog sniff of person is not a search).

203. See, e.g., United States v. Williams, 356 F.3d 1268 (10th Cir. 2004) (defendant changed direction when he saw officer and drug dog; police followed).

204. See Max A. Hansen, United States v. Solis: Have the Government’s Supersniffers Come Down with a Case of Constitutional Nasal Congestion?, 13 SAN DIEGO L. REV. 410, 426 (1976) (“In most situations, the use of a drug detection dog should be a search. This search should be unconstitutional unless there is some antecedent justification or an exception to the warrant requirement. Nevertheless
Ordinarily, absent the necessary facts to arouse reasonable suspicion, the seizure, a *Terry* stop, would be unreasonable. The dog sniff is the fruit of that illegal stop.

In *United States v. Williams*,205 an officer observed a person in a bus station presumably change directions when he saw the police entering the station. Determined to talk with that person, the police stopped Williams and directed their drug dog to sniff him. The drug dog placed her nose in the vicinity of the suspect's waist and groin area and then sat down, indicating the presence of drugs. The discovery of the drugs and resulting prosecution depended upon the legality of the dog's sniff and contact with the suspect. The solitary fact that the suspect may have tried to avoid the police is not sufficient to establish reasonable suspicion to justify a *Terry* seizure. *Illinois v. Wardlow* established that flight alone is not enough to create reasonable suspicion but is one factor that may be considered in the totality of the circumstances.206 In *Williams* there was no conduct that could be described as “headlong flight;” there was only a man who sought to avoid a police officer and his dog, for any number of reasons. Absent reasonable suspicion to support the seizure, the encounter between the dog and the suspect, if a seizure, violated the Fourth Amendment, and every action that followed resulted from the illegal seizure. The Tenth Circuit avoided that issue by finding no nexus between the dog alert and all that followed, choosing instead to fall back on the right of police to approach persons in public and ask for information and cooperation. The court saw no need to determine whether the presence of the drug dog changes the nature of a law enforcement officer's approach of a citizen and request for information since, according to the court, the dog sniff was not any additional incumbrance on the pedestrian.207 But of course, the introduction of the dog does change the

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205. 356 F.3d 1268 (10th Cir. 2004).

206. 528 U.S. 119, 124–26 (2000). *But see id.* at 124 (“Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”).

207. *Williams*, 356 F.3d at 1273 (“In sum, at the time the officers made the decision to request permission to search Mr. Williams's person, the fact that the dog had alerted made little or no difference in that decision . . . .”). *But see id.* at 1276 (McKay, J., dissenting) (“When, as in this case, a drug dog shoves its nose in a person's groin, and the person is told that the dog is searching for drugs, the notion that an innocent person would not feel constrained—but free to leave unmolested—strains my credulity. It seems to me that one would feel more restrained than if the officers had their guns drawn. Indeed, the frequent use of police dogs rather than guns tends to confirm the collective police judgment about the relative difference in intimidating effect. Add to that the real possibility that
very nature of the encounter. The Williams court equivocated on its responsibility to enunciate the relationship of the people and their government in this critical forum involving the use of drug dogs on persons.

Admittedly, labeling the encounter a seizure, as suggested here, is merely an attempt to avoid the consequences of Place and its progeny. Allowing a dog to sniff an inanimate vehicle without suspicion is categorically different than subjecting a person to a dog sniff of her body. The intrusion of the suspect's person by the dog, while possibly momentary, is of such magnitude that it is ludicrous to suggest it is not a search. It should be recognized for what it is, a search of the person, and should be subjected to the reasonableness command of the Fourth Amendment whether the subject of the dog sniff is a motorist who is lawfully stopped or a pedestrian on a thoroughfare.

Any time a person is subjected to a dog sniff it actually is a search, whether it is a schoolchild, a motorist, or a pedestrian. Developing a legal fiction to permit dog sniffs to remain outside the protection of the Fourth Amendment is a blatant attempt to provide law enforcement with a tool that can be easily abused, all the while sacrificing common sense. Whether a dog is sui generis or not, the dog is searching for contraband. The object of the search should not insulate the government from the protections of the Fourth Amendment. The Court's willingness to create categories of activities not subject to constitutional protection is not only a departure from common sense but also from traditional Fourth Amendment jurisprudence. The practice threatens to render the Constitution virtually meaningless in defining the line between individual autonomy and security and governmental interference.

To extend United States v. Place to the person would be a throwback to the worst days of the war on drugs when curtailment of Fourth Amendment precedents and guarantees appeared to be an acceptable means in a losing war effort. Those courts that insist that a dog sniff of the person is not a search disregard the physicality of the encounter the presence of a few $20 bills in an innocent person's pocket could produce a positive drug dog response, and I cannot but conclude that this encounter matured into a seizure before the defendant fled.

208. See Arthur S. Brown, United States v. Place: Is There any Room in this Place for a Sniffing Dog? A Look at this Place After Beale, 7 CRIM. JUST. J. 141, 151–52 (1983) ("It is important that the courts recognize that a brief dog sniff investigation is a minimal intrusion and cannot be construed as a search. However it is also crucial that the courts carefully consider what the narrow exceptions in the Fourth Amendment are, so as not to expand law enforcement practice beyond what is reasonable. . . . If courts are willing to protect society's compelling interest in identifying those who traffic in illicit drugs for personal profit, they must be willing to recognize that these interests are sufficiently substantial. The court cannot view society's interest as being independent to the investigative process.")
between man and drug dog and the fear such encounters are intended
to engender in their victims, instead placing their faith in a flawed
technology prone to bite innocent people and alert at the scent of other
dogs in heat. It is not science fiction to suggest that any Supreme
Court decision that extends the Place doctrine to the person likely will
result in the widespread use of drug dogs not merely at the country's
borders or at airports but on the streets of many cities. Such a rul-
ing would seriously mar the American people's belief that their Con-
stitution protects the security and privacy in their persons.

VII. CONCLUSION

The Place doctrine, exempting dog sniffs from all Fourth Amend-
ment requirements and standards, was built on a foundation of sand.
The underlying reasons offered for the doctrine, themselves totally un-
supported, turn out to be fictions. A dog sniff is not a minor intrusion
when applied to anything but an inanimate piece of luggage. Drug
dogs are not being used to distinguish between contraband and non-
contraband; drug dogs are being trained to signal the presence of alco-
hol and prescription drugs, neither of which is per se contraband, both
of which result in a potentially unwarranted search of the subject.
The accuracy rates of drug dogs vary tremendously, rendering broad
generalizations about near-perfect accuracy conceptually impossible.
Drug dog certification programs are seriously flawed as they are sel-
dom subject to outside oversight. False-alert rates are not generally
maintained and offered to courts to demonstrate accuracy, and false-
alert rates that are compiled are not compiled in double-blind tests—
the only way to assure fair testing.

These fictions should not be the basis for extending Place. Yet, in
the past two years, the Court has extended Place twice. First, the
Court approved suspicionless dog sniffs of cars for drugs. Then, in
a sleuth maneuver, the Court, without argument or opinion, summa-

209. Cf. Williams, 356 F.3d at 1276 (McKay, J., dissenting) ("These drug dogs are not
lap dogs. They typically are large, and to many ordinary innocent people, fear-
some animals. For decades, the images of the Sixties civil rights' protests have
impressed on our collective awareness the image of similar dogs, with handlers
holding their leashes, viciously attacking innocent protesters. This public con-
sciousness is reinforced by reports of leashed dog attacks like the one involved in
the recent nationally-tracked conviction of a California lawyer whose leashed dog
killed her innocent neighbor in the hallway of their apartment building. Televi-
sion news reports of police dogs being used to subdue suspects are common.").

210. See Hirsch & Markus, supra note 6, at 48 ("Justice Souter describes the Court's
decision as an 'open-sesame' for general searches, allowing officers to make suspi-
cionless and indiscriminate sweeps of cars in parking garages and pedestrians on
sidewalks. Officers could have dogs monitoring shopping malls, lengthy traffic
lights, and so on.").

rily reversed a lower court decision and seemingly extended Place to homes.212 The latter decision, which stands in complete contradiction to the Court's affirmation of the importance of protecting privacy of the home in Kyllo, was passed off without notice or discussion. The limitation on Fourth Amendment rights embodied in Place is too important to be extended without extensive consideration. Drug dogs have also been used on schoolchildren since before and after Place. The use of drug dogs on persons, especially children, raises concerns which should be forthrightly addressed. We have raised legitimate, serious doubts about the reasoning which led to the Place doctrine. Place should not be extended without reconsideration of the sui generis nature of drug dog testing. Reconsideration of that reasoning would not only make the Court hesitate to extend the doctrine to homes and to persons, but should lead the Court to reconsider the Place doctrine itself so that drug dog testing becomes recognized as a search subject to the Fourth Amendment's reasonableness standard.