HAS THE FOURTH AMENDMENT GONE TO THE DOGS?: UNREASONABLE EXPANSION OF CANINE SNIFF DOCTRINE TO INCLUDE SNIFFS OF THE HOME

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Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home

The United States Supreme Court has concluded that canine sniffs for drug detection purposes of luggage at an airport, United States v. Place, or of a lawfully-stopped vehicle, Illinois v. Caballes, are not “searches” under the Fourth Amendment based upon the limited intrusiveness and accuracy of this investigative tactic. In reliance on these holdings and on United States v. Jacobsen, a case that finds no legitimate expectation of privacy in possession of contraband, all federal Circuit Courts of Appeals, aside from the Second, have concluded that suspicionless canine sniffs of a private home should also be permitted. This article argues against the majority view, and concludes that a canine home-sniff is a “search” under the Fourth Amendment. Rather than focus on the unlawfulness of contraband possession in isolation, this article argues that Kyllo v. United States’ privacy-based analysis for sense-enhancing technology directed at the home should control when a detection dog is used to sniff out contraband located within a home. Under a privacy-based analysis, the heightened expectation of privacy afforded to the home and the intrusiveness of introducing a potentially dangerous, and to followers of some religions, unclean, police dog into the protected curtilage of a home renders the canine home-sniff a “search” within the meaning of the Fourth Amendment. Based upon Kyllo, this article argues that detection dogs are a “natural” technological aid to police investigation that implicate the same privacy concerns voiced in Kyllo when used to detect contraband inside a private home: (1) the potential advancement of sensing capabilities; and (2) the likely disclosure of noncontraband information. Therefore, this article argues that the canine sniff of a private residence is a search that, absent exigent circumstances, must be supported by a dog-sniff warrant.

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I. INTRODUCTION

The Fourth Amendment, and the personal rights which it secures, has a long history. At the very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion.¹

Police employ drug detection dogs in public locations, such as airports, as a quick means of determining whether luggage contains contraband.² In United States v. Place, the United States Supreme Court explained that use of drug detection dogs in a public location was not a “search” under the Fourth Amendment because of the accuracy and limited intrusiveness of the canine-sniff technique.³ The Place Court likely reached this conclusion because the background understanding of the day was that detection dogs were the ideal sensing-device because, in the rare case of a mistake, the dog’s error was actually a false-negative.⁴ Therefore, any detection-dog mistakes worked to the benefit of the luggage owner.

Despite questions after Place about the accuracy of drug-detection sniffs, the Court recently concluded that the canine sniff of a lawfully-stopped vehicle was not a “search.”⁵ The impact of the Caballes decision has been felt far beyond vehicle-sniffs, however. Lower courts have taken Place and Caballes as a signal that canine sniffs are per se nonsearches, and that

² See, e.g., Florida v. Royer, 460 U.S. 491, 506 (1983) (although no canine sniff was performed, Court seemed to recommend canine-sniff technique, observing that “[a] negative [result from a canine sniff] would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause”).
³ See United States v. Place, 462 U.S. 696 (1983) (observing that sniff of luggage located in “public place” was not “search;” explaining that “[w]e are aware of no other investigative procedure that is so limited in both the manner in which the information is obtained and in the content of the information revealed by the procedure”).
⁴ See infra notes 139-40, discussing Place era’s assumptions concerning detection dog accuracy.
⁵ Illinois v. Caballes, 543 U.S. 405 (2005). Caballes signaled both the on-going vitality of the canine sniff doctrine and represented, to the Caballes dissenters, a significant expansion of Terry because the shift in purpose from a lawful traffic stop into a drug investigation was not supported by reasonable suspicion that Caballes was transporting drugs in his vehicle. See 543 U.S. at 420-21 (Ginsberg, J., dissenting) (observing that “[t]he unwarranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment”) (footnote omitted).
therefore, it is permissible to conduct suspicionless canine sniffs of homes. This article challenges the legitimacy of that conclusion, and argues that a canine sniff of a private residence, a location that is afforded stringent Fourth Amendment protection, is a “search” within the meaning of the Fourth Amendment. In so arguing, this article swims against the proverbial tide. Aside from the Second Circuit, all federal circuit courts and district courts have concluded that a canine sniff of a private home is not a “search” within the meaning of the Fourth Amendment.

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6 Cf. Nina Paul & Will Trachman, Fidos and Fi-dont’s: Why the Supreme Court Should Have Found a Search in Illinois v. Caballes, 9 BOALT J. CRIM. L. 1, 38 (2005) (observing that “[g]iven the perhaps overzealous use of dog sniffs currently, the government could easily fall down the slippery slope of using dog sniffs regularly and anywhere”).

7 Compare United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) (finding warrantless canine sniff under apartment door a “search”) with United States v. Reed, 141 F.3d 644, 649-50 (6th Cir. 1998) (finding location of sniff “irrelevant”; no “search”); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997) (finding that canine sniff of common hotel corridor was not “search”); United States v. Lingenfelter, 997 F.2d 632, 639 (9th Cir. 1993) (disagreeing with Thomas); United States v. Colter, 878 F.2d 469, 474 (D.C. Cir. 1989) (same); United States v. Skylar, 721 F. Supp. 7, 14 (D. Mass. 1989) (finding no expectation of privacy for contraband hidden in home). The Second Circuit recently distinguished Thomas, but did not reject it or signal that it would reject Thomas if given the opportunity on appropriate facts. See United States v. Hayes, 551 F.3d 138, 146 (2d Cir. 2008) (finding Thomas “clearly distinguishable” because detection dog sniffed brushy area approximately 65 feet from back door of residence, not home itself). Virtually every state court which has considered the sniff-of-the-home issue under the Federal Constitution is in accord that a canine sniff is not a “search.” See, e.g., Fitzgerald v. State, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003) (finding no “search” based upon “binary nature of canine sniff inquiry: contraband ‘yea’ or ‘nay’? precludes the possibility of infringing any [legitimate] expectation of privacy”), aff’d, 864 A.2d 1006 (Md. 2004) (declining to decide “search” issue because reasonable suspicion to conduct home-snip was present); People v. Dunn, 564 N.E.2d 1054, 1056-57 (N.Y. 1990) (holding that canine sniff of home is not a “search” under Federal Constitution, but finding “search” under New York Constitution); State v. Smith, 963 P.2d 642, 647 (Or. 1998) (questioning Thomas); Rodriguez v. State, 106 S.W.3d 224, 228-29 (Tex. Ct. App. 1st Dist. 2003) (not a “search” under Federal Constitution). In contrast, State v. Rabb, 920 So. 2d 1175 (Fla. Ct. App. 4th Dist.), cert. denied, 549 U.S. 1052 (2006), stands alone in finding that a sniff of a private residence was a “search” under the Federal Constitution. In one other case, United States v. Jackson, the district court invalidated a search warrant issued in reliance on a positive canine sniff under a Kyllo-based privacy analysis; however, the decision may be distinguishable because the detection dog alerted on the back door of the residence, which the court did not view as a “public place.” United States v. Jackson, No. IP 03-79-CR-1H/F, 2004 WL 1784756, at *4 (S.D. Ind. Feb. 2, 2004).
This article explores the Court’s canine sniff cases, which along with *United States v. Jacobsen*, a case cited for the proposition that one has no legitimate expectation of privacy in contraband, have formed the basis for the majority’s conclusion that home-sniffs are not a search. This article argues that by mechanically applying *Place/Jacobsen* and emphasizing the routine nature and familiarity that people have with dogs, these courts artificially limit *Kyllo v. United States*, a case which bars warrantless use of non-routine sense-enhancing technology directed at the home. This article argues that *Kyllo*, not *Place/Jacobsen*, should control when a drug detection dog is used to gain information about the interior of a private residence.

To determine whether *Place/Jacobsen*, or instead *Kyllo*, should control the home-sniff issue, this article discusses the applicable cases in Section III. Three critical issues generated from the doctrinal analysis are then considered in Section IV. In Section IV(A), this article argues that *Place* and *Jacobsen*’s justifications, namely limited intrusiveness and accuracy, do not support extending the canine-sniff investigative tactic to a private home. The limited-intrusiveness justification fails because modern scientific research shows that detection dogs alert to lawful high vapor-pressure by-products and contaminants in the street drug, and cannot detect the low vapor-pressure ultrapure drug itself. Therefore, similar to the thermal imager’s detection of excessive heat in *Kyllo*, detection of these lawful substances allows police to infer that illegal contraband is also present. *Kyllo* teaches that when police-inferencing is made

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8 See 466 U.S. 109, 123 (1984) (observing that “[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy”).

9 The courts that apply the *Place/Jacobsen* line of cases in what this article argues is a mechanical way, themselves refer to their analysis as a “binary” inquiry. See, e.g., Fitzgerald v. State, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), aff’d, 864 A.2d 1006 (Md. 2004). These courts focus exclusively on the unlawfulness of contraband possession without any consideration of the circumstances under which the contraband is possessed. See id. (observing that “[i]f the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home”).

possible by sense-enhancing technology directed at the home, a “search” within the meaning of the Fourth Amendment results.

Place’s accuracy justification also fails in the home-sniff context. Drug detection canines are trained and certified by private vendors, which are not subject to uniform standards or federal requirements. No private agency trains or certifies drug detection dogs to conduct perimeter sniffs of homes. No reported data exists concerning the accuracy of drug detection dogs asked to sniff the exterior of a home. Scientific research reveals that an important factor in detection-dog accuracy is the dog’s ability to obtain close proximity to the scent source. Because drug detection dogs asked to perform a home-sniff are unable to gain close proximity, as is the case with luggage and vehicle sniffs, treating the home-sniff like the sniffs in Place and Caballes is scientifically unsupportable. The accuracy discussion in Section IV(A) therefore builds on Section II’s consideration of training, certification, and the physiological limitations of a canine sniff. Section IV(A) also argues that accuracy is further muddied in the home-sniff context because an increasing number of states have decriminalized medical marijuana, a medication that users typically use and store in their homes, and because entirely lawful medications and substances typically stored in the home, such as solvents, insecticides, and perfumes, have sufficient scent-similarities to contraband that a positive canine alert may be induced.

In Section IV(B), this article considers the heightened expectations of privacy associated with the home and whether introduction of potentially-dangerous, and clearly intimidating, drug detection dogs into the protected curtilage areas of a private home is intrusive such that the practice should be viewed as a “search” under the Fourth Amendment. The analysis in Section IV(B) also builds on the discussion in Section II, which describes the routine cross-training of drug detection dogs for criminal apprehension, or so-called “bite dog,” purposes. Therefore, large and aggressive dogs are typically selected for drug detection training. Because societal
understandings are an appropriate consideration in determining whether an expectation of privacy is legitimate,\textsuperscript{11} this article argues that our country’s long history of using dogs to intimidate racial minorities, and the offensiveness of dogs to followers of certain religions, must be considered when examining the intrusiveness that results from introduction of a police dog into the protected curtilage area of a private home.

In Section IV(C), this article argues that trained drug-detection dogs are “natural” technology, and when used to sniff a private residence, that \textit{Kyllo} should control. The Government itself labels detection dogs as “technology” in its project literature. Further, canine detection capabilities have been strengthened and enhanced through scientific research, innovative training tactics, genetics-based breeding programs and even cloning technology. As such, this article argues that drug detection dogs are “natural” technology that implicate the same concerns as those voiced in \textit{Kyllo}: (1) the potential advancement of sensing capabilities; and (2) the likely disclosure of noncontraband information. As a final thought, assuming that drug detection dogs are “technology,” Section IV(C) also considers whether these canines should be viewed as technology that is in "general public use” as referenced in \textit{Kyllo}.

\textbf{II. TRAINING AND CERTIFICATION OF DRUG DETECTION DOGS AND THE SCIENCE OF THE CANINE SNIFF}

\textit{Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and}

\textsuperscript{11} \textit{See, e.g., Rakas v. Illinois, 439 U.S. 128, 144 (1978) (observing that “[l]egitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society”).}
washes, hide him amidst a hundred men; I will yet pawn my scepter that the hound detects him.\textsuperscript{12}

As the above quotation suggests, dogs have been used as an adjunct to law enforcement for hundreds of years to assist in the location of fugitives.\textsuperscript{13} In modern times, canines are trained for a variety of purposes including drug detection, apprehension,\textsuperscript{14} explosives detection,\textsuperscript{15} cadaver detection,\textsuperscript{16} and agriculture detection.\textsuperscript{17} While not trained to be “all-purpose sniffers,”\textsuperscript{18} it is not unusual for drug detection dogs to be cross-trained as apprehension, or “bite,” dogs.\textsuperscript{19} Therefore, larger breeds, such as German Shepherds or Belgian Malinois,\textsuperscript{20} are often selected for drug

\textsuperscript{12} \textsc{Sir Walter Scott, The Talisman} (Archibald Constable and Co. 1825).

\textsuperscript{13} Bloodhounds, as well as other breeds of dogs, are used in trailing fugitives, missing persons, and criminals. \textit{See} Debruler v. Commonwealth, 231 S.W.3d 752, 758 (Ky. 2007).

\textsuperscript{14} Apprehension dogs are canines that are trained to locate and immobilize a suspect under circumstances where it would be difficult or dangerous for a human officer to locate the suspect or secure him. Apprehension dogs which have been trained in the “bite and hold” technique are trained to find the hiding human and immobilize him, typically by biting and holding onto the suspect’s arm. \textit{See generally} Jarrett v. Town of Yarmouth, 331 F.3d 140, 143 (1st Cir. 2003) (discussing apprehension-dog training and practices in context of qualified immunity issue).

\textsuperscript{15} Explosives detection dogs are trained to sniff out “explosives, radiological materials, chemical, nuclear or biological weapons.” \textit{6 U.S.C. § 1116(a)} (2009).


\textsuperscript{17} \textit{See} \textsc{Animal and Plant Health Inspection Serv., U.S. Dep’t of Agric.}, Pub. No. 1539, USDA’S DETECTOR DOGS: PROTECTING AMERICAN AGRICULTURE 1 (1996) (observing that “[t]he Beagle Brigade is a group of nonaggressive detector dogs and their human partners” that “search travelers’ luggage for prohibited fruits, plants, and meat that could harbor harmful plant and animal pests and diseases”), \textit{available at} \texttt{http://permanent.access.gpo.gov/lps19118/usdabb.pdf}.

\textsuperscript{18} Illinois v. Caballes, 543 U.S. 405, 423 (2005) (Ginsburg, J., dissenting) (observing that “[d]etection dogs for explosives . . . would be an entirely different matter [from the narcotics detection dog at issue in \textit{Caballes}]. Detection dogs are ordinarily trained not as all-purpose sniffers, but for discrete purposes”).

\textsuperscript{19} \textit{See, e.g.}, Deborah Palman, \textsc{K-9 Options for Law Enforcement} (observing that many “find and bite” dogs “are also cross trained to be detector dogs which locate drugs or other contraband”), \textit{available at} \texttt{http://www.uspacek9.com/training/enforcement.cfm} (last visited July 19, 2009).

\textsuperscript{20} \textit{See, e.g.}, \textsc{Tracy L. English, The Quiet Americans: A History of Military Working Dogs} 23 (2000) (noting that the United States Department of Defense Military Working Dog program prefers the Belgian Malinois breed because it shares many positive traits with the German Shepherd, including easy adaptation and “very good prey/kill instincts;” also noting that “[w]hile some referred to these dogs as ‘living weapons,’ the main purpose of the animals was deterrence”).
While explosives detection dogs are trained and certified under a federal program and certification standard, drug detection dogs are generally trained and certified by private vendors. For example, private vendors such as the United States Police Canine Association ("USPCA"), the National Narcotic Detector Dog Association ("NNDDA"), and the American Working Dog Association ("AWDA") offer training classes for canine handlers as well as certification of drug detection dogs based upon each association’s own internally-generated certification standards.

In comparing these certification programs, certain similarities, and therefore perhaps “minimum” requirements for drug detection canines emerge. All programs train drug detection dogs to search for marijuana and cocaine; certification for additional substances, such as heroin, methamphetamines, and opium, and certified derivatives of these narcotics, may be available.

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21 In contrast, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") exclusively uses Labrador retrievers as explosive detection canines. Sniffing Out Terrorism: The Use of Dogs in Homeland Security: Hearing Before the H. Subcomm. on Prevention of Management, Integration, and Oversight of the H. Comm. on Homeland Security, 109th Cong. 16 (2005) (statement of Special Agent Terry Bohan, Chief, National Canine Training and Operations Support Branch). Although “other breeds” could detect explosives, ATF uses only Labrador Retrievers because they are a “hearty, intelligent breed . . . possess a gentle disposition” which allows for them to be used in crowds and around children. Id. at 18.


Detection dogs are trained and certified based upon interior searches of buildings, not perimeter searches. This is not to say that the certification process entirely excludes outside areas. Some agencies offer certification for “open areas,” but it appears that this certification involves searches for drugs hidden on open locations, such as fields or forests. For purposes of the canine-sniff of a private home, the critical issues raised by unregulated canine sniff training and certification standards are significant. No private agency specifically trains or certifies detection dogs to search for contraband hidden within a building unless the dog is also permitted


28 For building searches under the AWDA standards, the canine must search the interior of a building consisting of no less than two rooms and having at least 1,000 square feet. See AWDA Certification, supra note 27. The NNDDA tests detection dog on its ability to find two stashes of each narcotic are hidden in a given area, which is “of indoor nature (building)” that is “no larger than one thousand . . . square feet.” See NNDDA, Training and Certification, supra note 27. The USPCA uses slightly different certification requirements. The location of the canine testing is limited to a vehicle and interior rooms. See USPCA Rulebook 2009, supra note 23, at 18. For the indoor test, the canine must search three furnished rooms, each measuring a minimum of two hundred square feet. Id.

29 For example, even fundamental issues seem unresolved within the industry, such as whether detection dogs should be trained and certified using street drugs, or instead, pseudo-scents, which are “legal chemicals with the same smell as illegal narcotics.” See United States v. Broadway, 580 F. Supp. 2d 1179, 1192 (2008) (for definition of pseudo-scent). Compare United States v. $30,670.00, 403 F.3d 448, 461 (7th Cir. 2005) (finding unimportant that detection canine was trained with both actual cocaine and pseudococaine, because dog “was actually trained to detect and alert to the odor of methyl benzoate emanating from the cocaine and pseudococaine, not the odor of cocaine per se – which is impossible to detect . . . due to its anesthetic qualities) (emphasis in original) with United States v. $22,474.00 in U.S. Currency, 246 F.3d 1212, 1216 (9th Cir. 2001) (requiring “sophisticated dog sniff” in civil forfeiture cases meaning that detection dog would not alert to cocaine residue on currency in general circulation and that detection dog “was trained to, and would only, alert to the odor of a chemical by-product of cocaine called methyl benzoate”). Use of pseudo-scents may be preferable because it prevents the detection dog from becoming distracted by cutting agents routinely found in street drugs. See Jessica Snyder Sachs, The Fake Smell of Death, DISCOVER MAG., Mar. 1, 1996, available at http://discovermagazine.com/1996/mar/thefakesmellofde714 (interviewing sensory biologist Dr. Larry Meters at Auburn University) (last visited Aug. 15, 2009) (recounting that “Myers tells of a narcotics officer who had trained his dog on drugs kept in plastic storage bags. I’ll be damned if that dog didn’t start alerting to the scent of Ziploc bags, says Myers. A dog trained on street drugs can likewise get distracted by cutting agents, homing in on baking powder in the fridge and ignoring uncut cocaine in the pantry”).
to walk through the interior of the structure for detection purposes. Additionally, there is no reported data concerning the accuracy of drug detection dogs, where the dog is limited to a perimeter sniff of a home. Without data, training, or certification, evaluating accuracy in the home-sniff context amounts to little more than guesswork.

The Science of the Canine Sniff: The United States Department of Justice describes canine detector dogs as a type of “trace detector,” capable of detecting vapors or particulates of specific items, including drugs or explosives. Interestingly enough, although a positive canine sniff has important legal consequences, studies show that the dog is not actually alerting to the illegal drug, but instead a contaminant or by-product in the drug. In fact, detection dogs may not be able to detect the so-called ultrapure forms of drugs, such as cocaine and heroin, because of the extremely low vapor-pressure of the unadulterated drug. With cocaine, for example, it appears that detection dogs do not actually alert to the cocaine itself because the drug is a topical anesthetic that “deadens olfactory senses.” Instead, the detection dog likely alerts to methyl benzoate, a high vapor-pressure by-product of cocaine that can occur naturally or as a result of

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30 United States Department of Justice, National Institute of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications, 21-23, 50 (2000) [hereinafter Selection of Drug Detectors] (defining a “trace drug detection system” as “any drug detection system that detects drugs by collecting and identifying traces from the material,” which “may be in the form of either vapor or particulate”).

31 See also Gary S. Settles, Sniffers: Fluid-Dynamic Sampling for Olfactory Trace Detection in Nature and Homeland Security—The 2004 Freeman Scholar Lecture, 127 J. of Fluids Eng’g 189, 189 (2005) [hereinafter Sniffers]. Dogs may not be detecting drug molecules, “but rather one or more other chemicals that are contaminants in the [drug] that have considerably high vapor pressures.” Selection of Drug Detectors, supra note 30, at 22. In fact, a canine may not be able to detect drugs “manufactured in ultrapure form.” Id. Some drugs, such as heroin, are extremely difficult, if not impossible, to detect from their vapor when conducting a trace detection search at room temperature and normal atmospheric pressure because the vapor concentration at room temperature is exceptionally low: one part per trillion. Id. at 43.

32 See United States v. Funds in the Amount of $30,670.00, 403 F.3d 448, 458 (7th Cir. 2005) (explaining that “[i]n addition, research indicates that dogs do not alert to byproducts other than methyl benzoate and would not alert to synthetic ‘pure’ cocaine unless methyl benzoate was added”).
Although methyl benzoate is a cocaine by-product, the molecule is also commonly found in everyday consumer products likely to be stored in a home, such as “solvents, insecticides and perfumes.”

While the volatility of the methyl benzoate molecule, as discussed in civil forfeiture cases, might suggest that this molecule would quickly dissipate in the home as well, we

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33 See L. Paul Waggoner, et. al., *Canine olfactory sensitivity to cocaine hydrochloride and methyl benzoate*, SPIE vol. 2937, 216-17 (1997) [hereinafter *Canine olfactory sensitivity*] (explaining that “[t]his evidence suggests that when dogs are trained to detect cocaine in the field, their discriminations probably depend on one or more constituents in the vapor sample in addition to cocaine [hydrochloride]:” observing that an “odor signature” is the “constituent or multiple constituents of a substance that controls the olfactory detection responses of a dog;” noting that the study’s results “suggest that methyl benzoate may be one of the constituents of the illicit cocaine odor signature for dogs” and that “a combination of methyl benzoate plus other constituents (e.g. benzoic acid and acetic acid or ecogine) may be required to define the odor signature”). In other words, canines may likely be alerting not to pure cocaine, but instead, at least in part, to methyl benzoate and other constituents found in illicit cocaine whether present naturally or as a result of the chemical decomposition of the cocaine. *Id.*

34 See Jacobsen v. $55, 900 in U.S. Currency, 728 N.W.2d 510, 534-35 (Minn. 2007) (Hanson, J., concurring). In his concurrence, Justice Hanson noted:

> The cases that appear to adopt the methyl benzoate theory of dog sniff drug detection do not discuss the fact that methyl benzoate is a common chemical used in multiple consumer products—solvents, insecticides, perfumes, etc. Perhaps the underlying studies eliminate the possibility that a dog may alert to the innocent presence of methyl benzoate from the use of those products, but the court decisions that discuss the studies do not so indicate. The majority opinion here must rely solely on the broad, untested conclusions of other courts because we have no scientific evidence in the record before us. *Id.*

In addition, the United States Food and Drug Administration has approved methyl benzoate for use in foods as a synthetic flavoring substance. 21 C.F.R. § 172.515 (2009). *See also* Richard E. Myers, II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 4 (2006) (noting that dogs “can also learn to associate certain smells with the items on which it is trained, for example air freshener or plastic baggies, and thus alert to non-contraband items”).

35 Civil forfeiture is a proceeding in which the Government seeks to seize currency based upon its connection to criminal drug trafficking. Courts have been called upon to address the argument that most currency is contaminated with trace amounts of cocaine residue and therefore, a positive canine alert is meaningless. To address the currency contamination argument, the Ninth Circuit requires a “sophisticated dog alert,” meaning that the Government “must present evidence that the drug detection dog ‘would not alert to cocaine residue found on currency in general circulation [and that] the dog was trained to and would only, alert to the odor of a chemical by-product of cocaine called methyl benzoate.” *In re* Sumareh v. Doe (*In re* $80,045.00 in U.S. Currency), 161 Fed. Appx. 670, 671-72 (9th Cir. 2006) (quoting United States v. $22,474.00 in U.S. Currency, 246 F.3d 1212, 1216 (9th Cir. 2001)).
presently have no data on this issue. Even in the civil forfeiture cases, however, courts have
documented circumstances that reduce the volatility of the methyl benzoate molecule.\textsuperscript{36}
Significantly, however, neither the possible volatility of methyl benzoate on home surfaces nor
the impact of the likely-present, but entirely legal, sources of the methyl benzoate molecule in
the home have been scientifically studied. Based upon the false-positive canine alert in \textit{Horton}
v. \textit{Goose Creek Independent School District}, where a drug detection dog alerted on a bottle of
perfume in the plaintiff’s purse, the issue warrants further scientific clarification.\textsuperscript{37}

An additional problem arises in the home-sniff context based upon the ease with which
contraband drugs and their contaminants can be transferred to ordinary household surfaces,
including even doorknobs. As the United States Department of Justice has explained:

\begin{quote}
[\text{P}]articulate contamination is easily transferred from one surface to another, so a
person who has handled cocaine will transfer cocaine particles to anything he or
she touches, including skin, clothing, \textit{door handles}, furniture, and personal
belongings. Completely removing particulate contamination from an object
requires rigorous cleaning, and, in the case of bare hands, a single thorough
washing may not be sufficient to remove all particles.\textsuperscript{38}
\end{quote}

\textsuperscript{36} See United States v. $30,670.00, 403 F.3d 448, 458 (7th Cir. 2005) (observing that “[t]he more
closed the environment, the slower the rate of evaporation and the longer the smell [of methyl
benzoate] remains;” stacked bills lose methyl benzoate odor more slowly than unstacked bills).
15 (Canadian Supreme Court observing that “courts are ill-equipped to develop an adequate legal
framework for use of police dogs [because] little is known about investigative techniques using
sniffer-dogs. Indeed, the record remains singularly bereft of useful information about sniffer-
dogs”). As is discussed in Section IV(A), almost all of our understanding of detection dog
reliability (aside from the currency contamination context) arises from anecdotal discussions in
judicial opinions concerning the individual detection dog at issue in the case. See also infra at
notes 191 and 201, discussing, among other things, studies of drug detection dog field-accuracy,
reported by the Privacy Ombudsman of New South Wales to the Australian Parliament, which
revealed that 73\% and 74\%, respectively, of those searched on the basis of a positive canine sniff
were found \textit{not} to be in possession of illegal drugs.
\textsuperscript{38} Selection of Drug Detectors, supra note 30, at 7 (emphasis added). An example of “tenacious”
particulate contamination can be found in twenty-dollar bills, which “in the United States are
contaminated with enough cocaine residue to yield positive detections with certain types of trace
detectors.” \textit{Id.} at 7-8.
Lack of proximity to the scent source may be an additional problem in canine homensniffs. Scientific studies analyzing the aerodynamics of canine olfaction indicate that “close nostril proximity to a scent source is important.” The canine nose is dependent on scent concentration, and “the detailed distribution of a scent source can only be discerned when the nostril is brought into very close proximity with it.” This close-proximity requirement is an inherent limitation to the canine’s nose, which researchers explain is compensated for by the dog’s natural agility and mobility. When a drug detection dog engages in a close-proximity sniff, researchers have documented a process, described as “scanning,” by which the detection canine discovers or hones in on a scent source. During the scanning process, the canine sniffs close to the ground until reaching the scent source. The dog then moves its nose horizontal to the scent source, pausing when directly on top of it. The dog scans past the scent source, but then returns to the scent once the scanning process has ceased, allowing the canine to take a survey of the distribution of the scent.

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39 Gary S. Settles, et al., The External Aerodynamics of Canine Olfaction, in SENSORS AND SENSING IN BIOLOGY AND ENGINEERING 323 (Friedrich G. Barth & Joseph A.C. Humphrey eds. Springer Verlag 2003) [hereinafter Aerodynamics of Canine Olfaction]. The purpose of this study was to determine how an electronic trace detector could be designed to mimic the capabilities of a dog’s nose. Id.
40 Id. at 325.
41 See Sniffers, supra note 31, at 199 (observing that detection dog’s ability to “read” an olfactory “message” is directly tied to “proximity sniffing;” “in order to properly interrogate chemical traces it really is necessary for a dog to poke its nose into everyone’s business”).
42 See Aerodynamics of Canine Olfaction, supra note 39, at 334 (explaining that “evolution [has given] the canine an agile platform with which to bring its aerodynamic sampler into close proximity with a scent source”).
43 See Aerodynamics of Canine Olfaction, supra note 39, at 328-29. See also Sniffers, supra note 31, at 199.
44 See Aerodynamics of Canine Olfaction, supra note 39, at id. See also Sniffers, supra note 31, at 203.
45 See Aerodynamics of Canine Olfaction, supra note 39, at 328-29.
46 Id. The mucous lining in a canine’s nose serves an important purpose in canine olfaction; specifically, it can trap contraband particulates, resulting in “the natural way of sampling and chemosensing aerosol-borne trace substances.” Id. at 331. See also Sniffers, supra note 31, at
If it is optimal for a drug detection canine to be in close proximity to the scent source, then a canine home-sniff may be compromised because of situational-impediments (i.e., lack of proximity) in using the “scanning” process on which detection and tracking dogs typically rely. The proximity consideration becomes even hazier when considering external factors, such as weather and cross-breezes which can likewise interfere with range of a canine sniff. Additionally, the ease of particulate contamination on locations accessible to the public, such as door handles, may render a positive sniff meaningless in the home-sniff context, since the home’s occupants have little, and sometimes no, control over who accesses this open curtilage area. Finally, methyl benzoate, which studies establish is likely the molecule to which detection dogs actually alert, is routinely present in a home. Too many uncertainties and gaps in scientific proof presently exist to assume that a positive canine alert on a home is reliable.

III. SUPREME COURT CASES APPLICABLE TO THE CANINE SNIFF-OF-THE-HOME DEBATE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The touchstone for the modern Fourth Amendment analysis turns on whether the person has a “constitutionally protected reasonable expectation of privacy.” In Katz, the Court rejected

196 (observing that a dry nose, or “[e]xtreme aridity,” can compromise quality of sniff by inhibiting olfaction).
47 See Sniffers, supra note 31, at 205 (explaining that “[i]n the animal world, the only remedy for [breezes interrupting the sniff process] is proximity: If your nostrils are touching the sampled surface, then the wind is not an issue”).
48 See supra notes 31-37 and accompanying text, discussing the fact that drug detection dogs alert to methyl benzoate, not ultrapure form of drug.
49 U.S. CONST. amend. IV.
the Government’s argument that a “search” can occur only when there has been a “physical intrusion” into a “constitutionally protected area,” and reoriented the Fourth Amendment inquiry through the Court’s now-familiar observation that the Fourth Amendment “protects people, not places.”

A. Focus on the Item: No legitimate expectation of privacy in possession of unlawful contraband

Prior to Place, the Court had signaled in Florida v. Royer the likely favorable treatment canine sniffs would receive, at least where the sniff involved luggage located at an airport. The Royer Court’s mention of the canine-sniff technique was dicta, however, because the detectives never subjected Royer’s bags to a narcotics detection dog. As a way of avoiding lengthy and intrusive detentions, the Royer Court seemed to invite the use of a canine sniff as an investigative tool, noting that the brevity of the detention associated with a canine sniff would likely ensure that the boundaries of Terry would not be exceeded. The Royer dicta was clear foreshadowing of both the favorable treatment that canine sniffs would receive and the Court’s eagerness to reach out to consider the sniff issue itself, not just the reasonableness of the detention that would make the sniff possible.

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735, 739 (1979) in determining whether a surveillance technique is a “search” within the Fourth Amendment.

51 Katz, 389 U.S. at 351-53.
53 As Justice Brennan, who concurred in the result, pointed out, the question of using narcotics detection dogs to detect contraband in luggage “is clearly not before us.” Id. at 511 n.* (Brennan, J., concurring in result).
54 Terry v. Ohio, 392 U.S. 1 (1968) (upholding stop and subsequent frisk of individual based on officer’s observation of suspicious behavior and reasonable suspicion that suspect was armed).
55 Id. at 505-06 (observing that “the State has not touched on the question whether it would have been feasible to investigate the contents of Royer’s bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage”).
Just three months later, the Court again went out of its way to discuss canine sniffs in *United States v. Place*. There, detectives seized Place’s luggage on the basis of reasonable suspicion in order to subject the luggage to a narcotics detection dog. The issue before the Court was whether *Terry* supported the limited detention of personal property on the basis of reasonable suspicion. The Court concluded that *Terry* would permit such a limited detention, but the detectives’ 90-minute detention of the luggage was too lengthy to be supported under *Terry*.

Although *Place* did not challenge the validity of the canine sniff that his luggage was eventually subjected to, and the Court of Appeals did not consider the sniff issue, the Court went beyond the issues presented to consider the canine sniff question, all without the benefit of briefs or arguments on this issue. Justice O’Connor, writing for the majority, discussed the canine sniff issue in a conclusory, two-paragraph, citationless statement:

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 search methods.

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56 United States v. Place, 462 U.S. 696 (1983). See *Place*, 461 U.S. at 719 (Brennan, J., concurring in result) (observing that canine sniff issue had not been briefed or argued to Court and that consideration of canine sniff was unnecessary since Court had concluded that detention of Place’s luggage had exceeded permissible guidelines under *Terry*).

57 *Id.* at 709. In addition, the detectives’ failure to provide Place with clear directions about storage and return of his bags exacerbated the intrusiveness of the seizure. *Id.*

58 *Id.* at 719 (Brennan, J., concurring in result) (observing that *Place* “did not contest the validity of the sniff *per se*” at trial, the Court of Appeals did not reach or discuss the sniff issue, and that the question of canine sniffs had not been briefed or argued to the Court). See also *id.* at 723 (Blackmun, J., concurring in judgment) (“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”).
In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited in both 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 the 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.\(^5^9\)

While the *Place* Court’s failure to request briefs and arguments concerning the dog sniff issue is curious, the Court’s refusal to consider the debate that had percolated through the lower courts prior to *Place* is surprising.\(^6^0\) The Court cited not a single case, transforming its

\(^{59}\) *Id.* at 707.

\(^{60}\) As the *Royer* plurality observed, for example, the Courts of Appeals had disagreed about whether a canine sniff of luggage was a “search.” Florida v. Royer, 460 U.S. 491, 505 n.10 (1983). The pre-*Place* lower courts divided into two camps: (1) those that required reasonable suspicion to support a canine sniff, *see* United States v. Beale, 674 F.2d 1327, 1335 (9th Cir. 1982), *cert. granted*, 463 U.S. 1202 (1983) (vacating judgment and remanding for further consideration in light of United States v. *Place*); and (2) those that concluded that a canine sniff was not a search, therefore no suspicion was required, *see* United States v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980). The Second Circuit even coined the amusing phrase “canine cannabis connoisseur” to describe narcotics detection dogs. United States v. Bronstein, 521 F.2d 459, 460 (2d Cir. 1975). The military was also dealing with canine sniff issues involving even clearer privacy concerns, such as the canine sniff of barracks, lockers and on-base residences. The Military Rule of Evidence 313(b) required reasonable suspicion to conduct unscheduled “shakedown” inspections, which could include “any reasonable natural or technological aid,” such as a canine sniff, of individual living areas and lockers. *See* James P. Potteroff, *Canine Narcotics Detection in the Military A Continuing Bone of Contention?*, THE ARMY LAWYER Dep’t of the Army Pamph. 27-50-139, at 77 (July 1984); *see also* M.R.E. 313(b) (2008) (“Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected”). Two pre-*Place* decisions issued by the United States Air Force Court of Military Review demonstrate the tension faced by military tribunals with respect to the canine sniff issue. In *United States v. Peters*, the defendant’s car was searched as a part of a random gate inspection, in which a drug dog participated. 11 M.J. 901, 902 (A.F.C.M.R. 1981). After a suspected bag of marijuana and unknown pills were found, the handler and canine went to the accused’s on-base residence, where the dog alerted at a front window. *Id.* At the time of the alert, the dog’s hind feet were on the ground in the yard while its front paws were on the window sill. *Id.* The Court of Military Review determined that the sniff was a search, despite the fact that the window was slightly open. *Id.* at 904. In contrast, in *United States v. Guillen*, the Court of Military Review determined that a dog sniff conducted at the only door of the accused’s residence was not a search. 14 M.J. 518, 519, 521 (A.F.C.M.R. 1982). In view of the circuit split on the canine sniff issue, and clear indications that canine sniffs could be used in ways that implicate more serious privacy concerns, the *Place* Court’s failure to cite even a single case, and instead, issue a more-global pronouncement on this important legal question is perplexing.
pronouncement that a canine sniff is “sui generis” and therefore not a “search,” into an unassailable judicial monolith. After Place, it appeared that if the original seizure of the individual or the individual’s personal property was supported by reasonable suspicion, the ensuing canine sniff was permissible since the sniff, by definition, was not a search.

Soon after Place, the Court considered another case that would have important implications in the canine sniff area. In United States v. Jacobsen, the Court considered whether warrantless field-testing of a white powder to determine whether it was cocaine violated the Fourth Amendment when that powder was discovered by Federal Express employees and then turned over to the Drug Enforcement Administration (“DEA”). Significant to canine sniff question, the field test was able to identify the powder as cocaine, but was unable to determine whether the powder was any other substance.

The Court granted certiorari to consider two separate issues, the scope of the private-search doctrine and the issue of warrantless field-testing of suspected contraband. In an opinion authored by Justice Stevens, the Court agreed that field-testing of the white powder was not a search within the meaning of the Fourth Amendment, because it compromised no legitimate interest in privacy. The Court explained that government conduct that established only whether a substance was cocaine, and revealed “no other arguably ‘private’ fact,” compromised no

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62 Id. at 122.
63 The Court explained that, under circumstances where the authorities simply “reexamine” the materials discovered by a private actor, the Government has not intruded on any expectation of privacy that “has not already been frustrated.” Id. at 119.
64 Id. at 123 (explaining that Congress had criminalized the “private” possession of cocaine, making its possession illegitimate).
legitimate privacy interest.\textsuperscript{65} The Court’s conclusion was “dictated” by \textit{Place} because field-testing, like a canine sniff, revealed nothing about noncontraband items.\textsuperscript{66}

In an observation that may have important modern implications, the \textit{Jacobsen} Court also noted, “[h]ere, 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{67} This “remoteness” consideration from \textit{Jacobsen} is potentially significant in analyzing canine sniffs in general, and the home-sniff, in particular. This issue is considered in Section IV(A) of this article which discusses our modern understanding of error rates associated with canine sniffs and whether, in view of these acknowledged error rates, the risk of uncovering private, noncontraband information during the ensuing search can truly be said to be “remote.”

Although \textit{Place}’s conclusions regarding the unique diagnostic capabilities of canine sniffs have been criticized as inaccurate,\textsuperscript{68} the Court recently ensured the on-going legal vitality of the canine sniff technique in \textit{Illinois v. Caballes}.\textsuperscript{69} Caballes involved a routine traffic stop for speeding. Although there was no suspicion that Caballes was carrying drugs, the Drug Interdiction Team member, who had arrived at the traffic stop while the ticket was being written,
walked a drug detection dog around Caballes’ vehicle. The dog alerted on the trunk, which the officers opened and discovered the marijuana for which Caballes was arrested.\textsuperscript{70}

Important to the \textit{Caballes} Court in upholding the validity of the canine sniff was the legality of the initial traffic stop,\textsuperscript{71} and the fact that the canine sniff process had not extended the length of Caballes’ detention beyond the time necessary to write the ticket.\textsuperscript{72} The Court relied on \textit{Jacobsen}’s premise that a person lacks a legitimate expectation of privacy in contraband\textsuperscript{73} in upholding the canine sniff, and in some arguably loose language, may have expanded the \textit{Jacobsen} premise in a manner that could have implications for the home-sni ff issue. The \textit{Caballes} Court first quoted \textit{Jacobsen} for the proposition that “[o]fficial conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment.”\textsuperscript{74} The \textit{Caballes} Court then, in an apparent expansion of \textit{Jacobsen}, stated that “any interest in possessing contraband cannot be deemed ‘legitimate.’”\textsuperscript{75}

To return for a moment to the \textit{Jacobsen} opinion, the focus in \textit{Jacobsen} was on the distinction between contraband and noncontraband information.\textsuperscript{76} As the \textit{Jacobsen} Court explained, “[a] chemical test that discloses whether or not a particular substance is cocaine does

\textsuperscript{70} \textit{Id.} at 406.
\textsuperscript{71} \textit{Id.} at 407 (observing that “[h]ere, the initial seizure of respondent when he was stopped on the highway was based on probable cause and was concededly lawful”).
\textsuperscript{72} \textit{Id.} at 407 (observing that “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission”).
\textsuperscript{73} See United States v. Jacobsen, 466 U.S. 109, 122 (1984) (observing that “[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities”) (footnote omitted).
\textsuperscript{74} \textit{Caballes}, 543 U.S. at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).
\textsuperscript{75} \textit{Id.} (emphasis added).
\textsuperscript{76} \textit{Jacobsen}, 466 U.S. at 122 (1984) (observing that “[t]he field test at issue could disclose only one fact previously unknown to the agent – whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether this substance was sugar or talcum powder).
not compromise any legitimate interest in privacy.”

The circumstances that made the field testing possible (the private-search issue) was treated separately by the Jacobsen Court. Therefore, the Jacobsen Court’s focus was on the accuracy of the information to be gained by the field testing, not the circumstances under which this investigative tool might be used.

Caballes, in its discussion of Jacobsen, focused on more than just the contraband/noncontraband distinction, however. By observing that “any interest in possessing contraband is not legitimate,” the Court may be suggesting that the circumstances of that contraband possession is irrelevant. In other words, the Caballes Court may have expanded Jacobsen beyond categorization of the information that the testing revealed to include the context in which the information is discovered. Such an expansion would have clear implications for home-sniffs, since the context of the canine sniff is the critical issue when a private residence is the location being investigated.

The Caballes majority also stated that its decision was “entirely consistent” with Kyllo v. United States. The Caballes Court explained that “[c]ritical to [the Kyllo] decision was the fact that the [thermal imaging] 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 take her daily sauna and

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77 Id. at 123.
78 Id. at 118 (finding that DEA agents’ invasions of privacy involved “two steps,” (1) removal of baggies from tube and powder from baggies and (2) chemical test of powder; useful to discuss issues separately).
79 See id. at 123 (observing that “even if the results are negative – merely disclosing that the substance is something other than cocaine – such a result reveals nothing of special interest”).
81 But see Hudson v. Michigan, 547 U.S. 586, 621 (2006) (Breyer, J., dissenting) (in knock-and-announce case, four Justices observing that “the Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search) (citing Kyllo v. United States, 533 U.S. 27, 40 (2001)). Therefore, the context in which the contraband is discovered, and not just the contraband nature of the item itself, remains an important consideration.
82 Caballes, 543 U.S. at 409.
bath.” The key question after *Caballes* will be whether the majority’s reference to *Kyllo* was simply illustrative of the special legal significance attributed to testing that reveals only contraband, but no contraband information, or instead if *Caballes* is intended to signal the Court’s willingness to incorporate context in the *Jacobsen* premise: meaning that a person would lack any expectation of privacy in contraband even contraband that is secreted in the person’s private residence.

The *Caballes* Court also made a surprising statement about detection-dog accuracy rates. As the *Caballes* Court explained:

> Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

In view of the now-known error rates associated with even “reliable” detection dogs, the Court’s seeming dissection of the sniff from the ensuing search (in response to the positive sniff) may represent an attempt to save the canine sniff technique from arguments that its accuracy-based justification simply has not panned out. Possible meanings for this dicta are explored in Section IV(A) of this article. Equally important, as is also discussed in Section IV(A), the *Caballes* dicta has important implications for the home-sniff issue because we currently lack data on the reliability of drug detection dogs in a residential context, as contrasted with the usual close-proximity sniffs involved in luggage or vehicles.

As a final point, the *Caballes* Court again used the *sui generis* terminology to describe the canine sniff, and cited to both *Place* and *Indianapolis v. Edmond*, a case involving a canine

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83 543 U.S. at 409-10 (quoting *Kyllo* v. United States, 533 U.S. 27, 38 (2001)).
84 *Caballes*, 543 U.S. at 409.
sniff of the exterior of a vehicle at a drug interdiction checkpoint.\textsuperscript{85} In \textit{Edmond}, although the checkpoint-seizure itself was found to violate the Fourth Amendment,\textsuperscript{86} the Court refused to view the canine sniff of the vehicle as a “search.”\textsuperscript{87} While the canine sniff was not “transform[ed]” into a search simply because the seizure of Edmond’s vehicle at the checkpoint was unreasonable, the \textit{Edmond} Court did not suggest that the search and the seizure issues should be analytically severed from one another.\textsuperscript{88} In fact, the \textit{Edmond} Court’s holding is to the contrary. Because the narcotics interdiction checkpoint did not meet the Court’s requirements for suspicionless, administrative-type seizures, police were required to establish individualized suspicion to stop a vehicle to investigate.\textsuperscript{89} The effect, therefore, is that no canine sniff of a moving vehicle would be permissible without first showing the appropriate quantum of suspicion to stop the vehicle to make it possible for the dog to investigate. Left unanswered after both \textit{Caballes} and \textit{Edmond} is the question of whether, at least in the vehicle context, the seizure and search issues could be analytically severed. The practical effect of disconnecting the seizure from the search would be to make it possible for police to run drug detection dogs through public parking lots to conduct suspicionless sniffs of parked vehicles. Since no seizure would be necessary to investigate a parked vehicle, and a canine sniff of a vehicle is not a “search,” suspicionless, dragnet searches would therefore become possible.\textsuperscript{90} Further, if the Court permits

\textsuperscript{85} 531 U.S. 32 (2000).
\textsuperscript{86} Indianapolis v. Edmond, 531 U.S. 32, 47 (2000) (observing that “[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, . . . stops can only be justified by some quantum of individualized suspicion”).
\textsuperscript{87} Id. at 40 (stating “[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in \textit{Place}, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics”).
\textsuperscript{88} Id.
\textsuperscript{89} See id. at 47.
\textsuperscript{90} See Illinois v. Caballas, 543 U.S. 405, 422 (2005) (Ginsberg, J., dissenting) (warning that “[t]oday’s decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots”).

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disconnection of the seizure and search issues in the vehicle context, it sets the stage for arguing that a home-sniff would also be permissible. Since it could be argued that no seizure occurs when a detection dog, performs a sniff from the front-door curtilage area, then Place would make most sniffs-of-the-home judicially unreachable.

Several points bear emphasis when examining the Place, Jacobsen, and Caballes decisions and their potential applicability to canine sniffs conducted outside a home. These cases were implicitly, and in some cases explicitly, based on three essential, and interrelated, legal and factual observations: (1) the lawfulness of the antecedent seizure which made the canine sniff possible; (2) the sniffs occurred under circumstances involving lesser expectations of privacy; and (3) the sniffed item had been disconnected from the person of the suspect at the time of the sniff.

Lawful antecedent seizure: The legality of the police investigative tactic (i.e., canine sniff and field-testing) implicitly turned on the lawfulness of the initial seizure of the item or person. In each of the above-referenced cases, while the Court implicitly tied its approval of the police investigative tool at issue to the lawfulness of the seizure, the Court failed to expressly precondition the tool’s use on the lawfulness of the “seizure” first-step. By making the antecedent justification requirement only an implicit precondition in these decisions, the Court has made it possible for lower courts to disconnect the seizure from the sniff altogether.

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91 United States v. Place, 462 U.S. 696, 710 (1983) (“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”); United States v. Jacobsen, 466 U.S. 109, 120-21 (1984) (“While the agents’ assertion of dominion and control over the package and its contents did constitute a ‘seizure,’ that seizure was not unreasonable”); Caballes, 543 U.S. at 409 (finding that canine sniff during otherwise lawful traffic stop was permissible even without any suspicion that driver was transporting drugs in vehicle).

92 See, e.g., People v. Jones, 755 N.W.2d 224, 229 (Mich. Ct. App. 2008) (observing that “[t]he high court’s fleeting reference to a “public place” in Place simply indicated, at most, that the luggage containing contraband was in an area that the police and the canine were lawfully present”) (emphasis added).
resulting softening and attenuation between these separate, but often-interrelated legal issues, has important implications for the home-sniff question. As a factual matter, no control over the residence, in other words, no “seizure,” need be taken in order to conduct the sniff. By oversimplifying *Place* and *Jacobsen* and focusing exclusively on the police investigative technique, courts have sidestepped the antecedent justification requirement essential to a lawful seizure, in other words, the context in which the investigative tactic is used. The danger from this sort of oversimplification was explained by Justice Brennan in his *Jacobsen* dissent. He warned that exempting any “class of surveillance technique” as categorically outside the definition for “search” or “seizure” without consideration of the “context” in which the tactic was used could lead to dragnet-style, or even selective, applications of the surveillance tactic.

*Reduced expectation of privacy*: The police investigation of the suspicious items in the above-referenced cases took place in locations, or under circumstances, where the suspects had lesser expectations of privacy. Lower courts that find that canine sniffs-of-the-home are not a “search” seize on what they view as the “public location” of the sniff as a primary justification for allowing a home-sniff. As these courts explain, the home-sniff is also conducted from a

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93 *Jacobsen*, 466 U.S. at 137. As Justice Brennan cautioned:

What is most startling about the Court’s interpretation of the term “search,” both in this case and in *Place*, is its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed. . . . [T]he Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possesses contraband.

*Id.*

94 See *id.*

95 *See Place*, 462 U.S. at 707 (concluding 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’”) (emphasis added). *See Royer*, 460 U.S. at 493-94 (airport).

96 *See*, e.g., Stabler v. State, 990 So.2d 1258, 1259 (Fla. Ct. App. 1st Dist. 2008) (allowing canine sniff at front door of defendant’s apartment; front door was “open to public access and to a common area”); People v. Jones, 755 N.W.2d 224, 229 (Mich. Ct. App. 2008) (canine sniff
public location, such as a common hallway in front of an apartment or the front-porch area of a free-standing residence. Therefore, they argue, the public location from which the sniff is conducted makes it essentially identical to the sniff performed in *Place*. This deceptively plausible argument misses the point. In both *Place* and *Caballes*, the canine sniff was performed under circumstances where the suspect had a lesser expectation of privacy; these cases did not turn on the lawfulness of the location of the officer’s feet (or the dog’s paws). While public location is certainly important in evaluating expectations of privacy, location alone cannot be taken as the sole circumstance-driven requirement from these Supreme Court decisions. When the analysis is refocused onto the reduced expectation of privacy involved in the circumstances under which the investigative tactic was used in each of these cases, these decisions stand in sharp contrast to the privacy interests associated with the home.97

*Disconnection from the suspect:* As a further observation, in each of the above referenced cases the suspicious item had been disconnected from the person of the suspect at the time the police investigative technique at issue was used.98 Disconnection therefore reinforces both the first and second organizing principle. In other words, disconnection from the owner could be reflective of the fact that the initial police access to the item which made the surveillance tactic possible (the “seizure”) was supported by an appropriate quantum of suspicion. Additionally, when the item is disconnected from the person of the suspect, as was the case in *Place* and *Caballes*, further investigation in the form of a canine sniff may be less invasive and offensive,
and therefore less intrusive.\textsuperscript{99} The disconnection, therefore, becomes part of the circumstances of the sniff, a fact that suggests that the canine sniff was not performed so intrusively that it violated the suspect’s Fourth Amendment interests.\textsuperscript{100} For a home-sniff, no disconnection of the person from the person’s home is necessary. Therefore, potentially intimidating or offensive encounters between a home’s occupants and an investigating canine team will become increasingly likely.\textsuperscript{101}

\textbf{B. Focus on privacy: No sense-enhancing technology directed at the home}

While the extent to which drug detection dogs will or should be viewed as “technology” remains unresolved, a canine sniff certainly represents sense enhancement of the human sense of smell.\textsuperscript{102} and accordingly, courts faced with a warrantless sniff of a residence must either rely on \textit{Kyllo v. United States}\textsuperscript{103} or rejected its applicability.\textsuperscript{104} Therefore, careful analysis of \textit{Kyllo} is essential.

\begin{itemize}
\item \textsuperscript{99} Cf. Doe v. Renfrow, 631 F.2d 91, 94 (7th Cir. 1980) (Swygert, J., dissenting from order denying petition for rehearing) (arguing that canine sniff of person is more intrusive than sniff of “inanimate and unattended objects”).
\item \textsuperscript{100} See, \textit{e.g.}, Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 477 (5th Cir. 1982) (contrasting sniff of schoolchild’s person with luggage sniff at airport, observing that “[o]ther circuits have emphasized the minimal humiliation entailed in dogs sniffing unattended luggage”).
\item \textsuperscript{101} See, \textit{e.g.}, Langley v. State, 735 So. 2d 606, *2 (Fla. Ct. App. 2d Dist. 1999) (suspect encountered six officers and a police dog while sitting on steps of mobile home; testifying that “she was afraid of the dog”).
\item In \textit{Place}, Justice Brennan pointed out that a dog “adds a new and previously unattainable dimension to human perception” and therefore represent an additional intrusion into privacy. \textit{Place}, 462 U.S. at 719-20.
\item \textsuperscript{102} In fact, the only post-\textit{Kyllo} case which concludes that a canine sniff of a home is a “search” under the Federal Constitution is \textit{State v. Rabb}, 920 So. 2d 1175 (Fla. Ct. App. 4th Dist.), \textit{cert. denied}, 549 U.S. 1052 (2006). \textit{United States v. Thomas} is a pre-\textit{Kyllo} case, but its reasoning is consistent with \textit{Kyllo}’s concerns about gaining information about the interior of a home. 757 F.2d 1359, 1367 (2d Cir. 1985) (observing that “[w]ith a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses”). In an additional case, \textit{United States v. Jackson}, the district court invalidated a search warrant issued in reliance on a positive canine sniff under a \textit{Kyllo}-based privacy analysis; however, the decision may be distinguishable because the detection dog alerted on the back door of the residence, which the court did not view as a “public place.” \textit{United States v. Jackson}, No. IP 03-79-CR-1H/F, 2004 WL 1784756, at *4 (S.D. Ind. Feb. 2, 2004).
\item \textsuperscript{104} See supra note 7 (listing courts that find canine sniff of private residence is not “search” under Federal Constitution). \textit{See also State v. Rabb}, 920 So. 2d 1175, 1190 (Fla. Ct. App. 4th Dist.),
\end{itemize}
In *Kyllo*, the defendant moved to suppress evidence obtained pursuant to a search warrant issued in reliance on the results of a thermal imaging scan\(^{105}\) of his home. The scan, conducted from the lawful vantage point of a public street, revealed temperature gradients that were consistent with high-intensity lights used in an indoor marijuana growing operation.\(^{106}\) In finding that the warrantless use of the thermal imager violated Kyllo’s reasonable expectation of privacy, the majority’s central legal premise was that “the Fourth Amendment draws ‘a firm line at the entrance to the house’” that “must be not only firm but also bright.”\(^{107}\) Justice Scalia, writing for the majority, acknowledged that expectations of privacy had been impacted by technological advances,\(^{108}\) and framed the issue on appeal as “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”\(^{109}\) The Court concluded that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search – at least where (as here) the technology in question is not in general public

\(^{cert. denied, 549 U.S. 1052 (2006)}\) (describing reliance on *Place/Jacobsen*’s binary search approach as representing “fundamental philosophical divide” from privacy-based analysis of *Rabb* majority).

\(^{105}\) A thermal imager is a hand-held device, similar to a video camera, that detects infrared radiation. *Kyllo*, 533 U.S. at 29. The device detects only heat emanating from the exterior of the home, however, and is not able to penetrate walls or windows. *Id.* at 41 n.1 (Stevens, J., dissent).

\(^{106}\) *Kyllo*, 533 U.S. at 30. The scan showed that the roof over Kyllo’s garage and a side wall of his home were relatively hot compared to the rest of his home and substantially warmer than his neighbor’s residences. *Id.*

\(^{107}\) *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573 (1980)).

\(^{108}\) *Kyllo*, 533 U.S. at 33-34 (observing that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology”). The majority pointed to the aerial surveillance cases as examples of technology (human flight) that had enabled police to view uncovered areas of the home or curtilage that had historically gone unobserved. *Id.* (citing *California v. Ciraolo*, 476 U.S. 207 (1986)).

\(^{109}\) *Kyllo*, 533 U.S. at 34.
use.”  

While the technology at issue in *Kyllo* was “relatively crude,” the majority underscored the danger that “advancing technology” would pose to privacy interests.  

*Kyllo* sparked a vigorous dissent, authored by Justice Stevens and joined in by three other Justices. The dissent viewed the thermal imaging device as purely passive technology that did no more than measure radiant heat emanating from Kyllo’s home, not a more sophisticated device that could peer through walls. The dissenting Justices argued that there was a meaningful constitutional distinction between technology that gave the listener “direct access” to information about the interior of the home, on the one hand, and technology that permitted police officers to draw “inferences” based upon “information in the public domain.” In response, the majority explained that while inferencing alone was not a search, the thermal-imaging device provided information that allowed police to infer that contraband was present. In other words, the thermal scan was a “search” because it made possible technology-assisted inferencing about the interior of a home.  

In discussing this police-inferencing issue, the *Kyllo* majority argued that the thermal imaging device might also reveal *noncontraband* information about the interior of the home.  

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110 *Id.* (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).  
111 *Id.* at 35-36 (observing that “[r]eversing [*Katz*]’ approach would leave the homeowner at the mercy of advancing technology – including imaging technology that could discern all human activity in the home”).  
112 See *Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting) (arguing that “[t]here is, in my judgment, a distinction of constitutional magnitude between ‘through the wall surveillance’ that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand”). Justice Stevens also described the inferences as “indirect deductions,” *id.*, and the “mental process of analyzing data obtained from external sources,” *id.* at 49.  
113 *Id.* at 37 n.4 (explaining disagreement with dissent, “[w]e say that such measurement is a search; the dissent says it is not, because an inference is not a search. We took that to mean that, since the technologically enhanced emanations had to be the basis of inferences before anything inside the house could be known, the use of the emanation could not be a search”).  
114 *Id.* at 38 (observing that the thermal imaging scan “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath – a detail that many would consider ‘intimate’”).
The Court found this to be unacceptable because *all* information regarding the interior of the home was protected under the Fourth Amendment, not just the “intimate details” about the home’s interior. The majority focused on the fact that, even though the information revealed by the thermal imager might not be viewed as “particularly private or important,” it was nevertheless “information regarding the interior of the home.”\(^{115}\) Crucial to the Court was the fact that detection of noncontraband information (excessive heat) allowed police to infer that contraband was also present. In Section IV(A), this article argues that an identical inference arises in the home-sniff context because detection dogs alert to the entirely lawful methyl benzoate molecule or other high-vapor pressure contaminants, rather than the drug itself, which allows police to infer that contraband is also present.

The Court has considered other sense-enhancing technology prior to *Kyllo*. One case in particular, *United States v. Karo*,\(^ {116}\) which was cited favorably in *Kyllo*, provides helpful insight into the home-sniff issue. *Karo* involved the use of beeper technology\(^ {117}\) to track the movement of cans of chemicals used in the manufacture or refinement of illegal street drugs. The *Karo* Court concluded that warrantless monitoring violated the Fourth Amendment because the beeper provided “information” about the interior of the home that could not have been obtained through observation from outside the home’s curtilage.\(^ {118}\) The Court analogized the warrantless

\(^{115}\) *Kyllo*, 533 U.S. at 35 n.2. The Court asserted that the dissent’s argument that the information could have been obtained by lawful means (i.e., observation that rainwater evaporated or snow melted at differing rates across Kyllo’s roof) was irrelevant. *Id.* By way of example, the Court explained that even though police could obtain information about how many people are at a given location by “setting up year-round surveillance,” breaking and entering to discover that same information would violate the Fourth Amendment. *Id.*


\(^{117}\) “A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.” *United States v. Knotts*, 460 U.S. 276, 277 (1984).

\(^{118}\) *Karo*, 468 U.S. at 715. Although the Government obtained a warrant authorizing the installment and monitoring of the beeper, the warrant was later invalidated, and the Government did not appeal that ruling. *Id.* at 710. Therefore, the Court was asked to consider whether a warrant was required either to install or monitor the beeper. On the installation issue, Justice
monitoring to surreptitious physical entry by DEA agents to search the home to determine whether the can of ether was still present, a clearly impermissible surveillance technique.\textsuperscript{119}

\textit{Karo} is potentially significant because it is a post-\textit{Jacobsen} case, yet it uses expansive language to describe the protection from police discovery afforded to property secreted in a private residence, language that is arguably inconsistent with the \textit{Jacobsen} premise. \textit{Karo} states that the Fourth Amendment protects from police discovery “information” about the interior of the home;\textsuperscript{120} “a critical fact” about the interior of the premises,\textsuperscript{121} whether a “particular item” is located within the home,\textsuperscript{122} and concerns about monitoring for “property” that has been withdrawn from public view into a home.\textsuperscript{123} While some of these references were simply descriptive of \textit{Karo}’s facts concerning monitoring of the home to determine whether the can of ether was still present,\textsuperscript{124} other language in \textit{Karo} appears to have broad applicability and may be relevant to the sniff-of-the-home analysis. In particular, the \textit{Karo} Court noted:

\begin{quote}
We cannot accept the Government’s contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a suspicion, whether a particular article — or a person, for that matter – is in an individual’s home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.\textsuperscript{125}
\end{quote}

This language would seem to be expansive enough to bar monitoring for \textit{any} type of item, including contraband. The question is whether this is a supportable interpretation of

\begin{quote}
White, speaking for five other Justices, including Chief Justice Burger, concluded that no warrant was required because the installation created no more than the “\textit{potential} for an invasion of privacy.” \textit{Id.} at 712 (emphasis in original). The presence of the beeper created “at most” a “technical trespass,” the existence of which would not be determinative on the Fourth Amendment question. \textit{Id.}
\end{quote}

\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 716 (emphasis added).
Karo’s reasoning. Perhaps it is. Certainly, there is nothing in Karo’s expansive discussion to suggest that contraband hidden in the home is to be excluded from the Court’s treatment of property withdrawn from public view, and when the Court has intended to limit its holding to certain types of property, it has made its intentions known.\footnote{See United States v. Jacobsen, 466 U.S. 109, 123 n.23 (1984) (expressly limiting Court’s “discussion” to “possession of contraband”).}

As an additional point, the Karo Court referenced the use of technology to locate whether a particular person is in a home at a particular time.\footnote{See United States v. Karo, 468 U.S. 705, 715 (1984) (arguing against use of police technology to determine, among other things, whether a particular person “is in an individual’s home at a particular time”).} While knowing a person’s location is obviously helpful in an on-going criminal investigation, the location of a person who has an outstanding arrest warrant is of critical importance to the police. In a sense, the fugitive is like contraband: (1) with an arrest warrant, police can enter the suspect’s home to arrest (“seize”) him;\footnote{Payton v. New York, 445 U.S. 573, 603 (1980) (holding that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within”).} and (2) with a search warrant, police are authorized to enter a third person’s home in order to make the arrest.\footnote{Steagald v. United States, 451 U.S. 204 (1981). The search warrant required in Steagald was necessary to protect the privacy interests of a third person whose home police entered in order to arrest a fugitive, not the privacy interests of the fugitive. \textit{Id.} at 222.} Karo suggests that technology-based monitoring of a home to determine the location of a person, apparently even one who could be lawfully seized upon his or her discovery, would be impermissible. If police are barred from using technology directed at a home to locate a person who police would be permitted to immediately seize, then “information” about the home should also be interpreted to include contraband.

Interestingly enough, technology that would enable police to determine an individual’s exact location already exists.\footnote{Radio Frequency Identification (“RFID”) technology “uses radio waves to identify people or objects” by reading a microchip in a wireless device from a distance, without making any
would allow police to detect an individual’s presence\textsuperscript{131} by identification of a computer chip located on the individual’s driver’s license.\textsuperscript{132} While it could be argued that this proposed technology would detect only the driver’s license rather than the actual fugitive individual, this would be an artificial distinction, since, similar to a cell phone, people ordinarily, in fact almost always, keep their driver’s license on their person or close at hand.\textsuperscript{133} Analogous to the inference that arises when a person’s driver’s license or cell phone is detected inside a private home, detection of methyl benzoate by a drug detection dog enables police to infer that contraband is also present.

IV. FRAMING THE CANINE SNIFF-OF-THE-HOME DEBATE

A. Can Place’s accuracy and limited intrusiveness justifications be extended to support canine sniffs-of-the-home?

This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.\textsuperscript{134}

\textsuperscript{131} U.S. DEP’T OF HOMELAND SEC., DATA PRIVACY & INTEGRITY ADVISORY COMM., RPT. NO. 2006-20, THE USE OF RFID FOR HUMAN IDENTIFICATION VERIFICATION 2, 5 (2006), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_12-2006_rpt_RFID.pdf (last visited Aug. 8, 2009). When in the presence of an appropriate radio frequency, a microchip embedded in an object responds to the signal by sending information to a device capable of interpreting the microchip’s signal. \textit{Id}. Differing RFID chips can be read from different distances: “[s]ome can only operate over a very short distance of a few centimeters or less, while others may operate at longer distances of several meters or more.” \textit{Id}. at 2.

\textsuperscript{132} The “Enhanced Driver’s License (EDL)” is imbedded with an RFID chip, and capable of submitting information, including personal information documents. \textit{Id}. at 2. Some states have already passed legislation addressing EDLs. \textit{See}, e.g., Mich. Comp. Laws § 28.301 (2009), \textit{et seq}.

\textsuperscript{133} \textit{See In re} Application of United States for an Order Authorizing Use of Pen Register and Trap and Trace Device, 2009 WL 1530195 (E.D.N.Y. Feb. 12, 2009) (in trap and trace context, finding that cell phone locational technology—“pinging” of suspect’s cell phone—was more precise than global positioning system device, and therefore, required showing of probable cause to obtain court order because suspect’s movements inside home could be tracked).

\textsuperscript{134} Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., concurring in result).
While permitting canine sniffs of the home is simply a newer application of the rule set out in *United State v. Place*, extending *Place* to this newer, residential factual-setting requires courts to engage in an analogous sort of “construction” process to the one warned about above by Justice Jackson in his *Douglas* concurrence. Courts, at times, extend a constitutional rule too far to be supported by its doctrinal underpinnings, and when that happens, sometimes that floor, too, crashes in. The Court has shown a recent willingness to examine critically a constitutional rule that had been extended in a way that was incompatible with the rule’s justifications. *Place*’s accuracy and limited-intrusiveness justifications do not support extending *Place* to include canine sniffs-of-the-home. Therefore, any such extension would be inconsistent with the Court’s recent demand for consistency between a doctrinal extension and the justifications which support the rule on which the extension is based.

**Accuracy justification and the “sui generis” descriptor:** Prior to *Place*, it was believed that detection dogs did not make mistakes that resulted in invasions of privacy. In other words, when mistakes were made, they inured to the benefit of the suspect, not the police. In view of

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136 See Arizona v. Gant, 129 S. Ct. 1710, 1723 (2009) (refusing to extend *Belton* rule to allow search of vehicle after arrestee had been secured and therefore could not access interior of vehicle; safety rationale of *Belton* not satisfied).
137 See *Gant*, 129 S. Ct. at 1714 (explaining that in search-incident-to-arrest context, “[t]he safety and evidentiary justifications underlying *Chimel*’s reaching-distance rule determine *Belton*’s scope,” and justifications not satisfied when recent occupant of vehicle had been secured after arrest and could not access interior of vehicle). See also *Caballes*, 543 U.S. at 410 (Souter, J., dissenting) (observing that “[w]hat we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place*”).
138 The term, “sui generis,” is defined as: “Of its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).
139 Interestingly, several pre-*Place* lower courts specifically mentioned errors made by detection dogs, but viewed such mistakes as harmless since the mistakes were actually false-negatives rather than false-positives. See, e.g., United States v. Beale, 674 F. 2d 1327, 1334 (9th Cir. 1982) (observing that “any mistake is one of omission favoring the suspect”), cert. granted, 463 U.S. 1202 (1983) (vacating judgment and remanding for further consideration in light of United States v. *Place*). See also United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982) (quoting
that era’s background assumption concerning the accuracy of narcotics detection dogs, it is perhaps not surprising that the Place Court expressed complete confidence in the canine sniff technique; the Court’s view was simply a reflection of what was accepted as true at the time.\textsuperscript{140}

Both Place and Jacobsen were premised, in large part, on the fact that the testing at issue there, the canine sniff and the field testing of the white powder, was accurate.\textsuperscript{141} In language that has had important substantive ramifications for canine home-sniffs, the Place Court explained that because the canine sniff was less intrusive than the traditional rummaging associated with a physical search and because the sniff disclosed only limited information (the presence or absence of contraband), then the canine sniff is “\textit{sui generis}.”\textsuperscript{142} Therefore, accuracy and the harmlessness of any potential canine-sniff miscue was the background understanding of the Place era.

In reality, however, error rates for drug detection dogs belie the Court’s accuracy justification for treating the canine sniff as a \textit{sui generis} practice. As Justice Souter’s Caballes dog handlers as saying “dogs are not foolproof;” they are “less accurate on hot muggy days” and that drug traffickers had found ways “to mask the odors of contraband to fool detection efforts”); \textit{see also} United States v. Bronstein, 521 F.2d 459, 463 (2d Cir. 1975) (observing that while detection dog “may be in error her mistake favors the suspect”).\textsuperscript{140} \textit{See} Thomas H. Peebles, \textit{The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and the Dogs}, 11 GA. L. REV. 75, 100 (1976) (describing fact that “mistakes work in favor of the suspect” as “key difference” between canine sniffs and other forms of surveillance); Max A. Hansen, Comment, United States v. Solis: \textit{Have the Government’s Supersniffers Come Down With a Case of Constitutional Nasal Congestion}, 13 SAN DIEGO L. REV. 410, 417 (1976) (observing that “[w]here the use of drug detection dogs is concerned, the first objection [regarding canine reliability] is lessened because a detector dog’s mistake usually benefits the criminal”).\textsuperscript{141}

\textsuperscript{140} United States v. Jacobsen, 466 U.S. 109, 123 (1984) (observing that “[i]t 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”). \textit{See also} United States v. Place, 462 U.S. 696, 707 (1983) (observing that sniff discloses only “limited” information because “the sniff discloses only the presence or absence of narcotics, a contraband item”).\textsuperscript{141} \textit{See} United States v. Place, 462 U.S. 696, 707 (1983).\textsuperscript{142}
dissent reflects, drug detection dogs are wrong a surprising amount of the time. Additionally, courts have accepted as “reliable,” detection dogs with even higher error rates than the cases referenced in Justice Souter’s Caballes dissent. Evaluating Place’s justifications and analyzing whether time has borne them out is made more complicated by the Court’s use of sui generis language, however. In practice, lower courts have seized on the sui generis label, but have forgotten the justifications that led the Court to use the label. By giving substantive weight to the sui generis descriptor, lower courts effectively ignore Place and Jacobson’s accuracy justifications by injecting probable cause-based language into their analysis of whether a given narcotics detection dog is sufficiently reliable. For these courts, the question of Place then

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143 See Illinois v. Caballes, 543 U.S. 405, 411 (2005) (Souter, J., dissenting (observing that “[t]he infallible dog, however, is a creature of legal fiction”). Justice Souter documented cases in which dogs were accepted by a court as reliable with an accuracy rate of 71%, see United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir. 1997), an error rate of 8% over a dog’s entire career, see, United States v. Scarborough, 128 F.3d 1373, 3178 n.3 (10th Cir. 1997), and an error rate of between 7% and 38%, see United States v. Limares, 269 F.3d 794, 797 (7th Cir. 2001).

144 See, e.g., United States v. Koon Chung Wu, 217 Fed. Appx. 240, 246 (4th Cir.), cert. denied, 551 U.S. 1110 (2007) (accepting as “reliable” drug detection dog with demonstrated field accuracy of 67%; observing that “because the probable cause-standard does not require that the officer’s belief be more likely true than false, an accuracy rate of 60% is more than reliable enough for Cody’s alert to have established probable cause”) (internal quotation marks and citation omitted); United States v. Cantrall, 762 F. Supp. 875, 882 (D. Kan. 1991) (accepting as reliable any detection percentage over 50%, along with dog training and certification in narcotics detection).

145 See, e.g., People v. Jones, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008) (describing Place’s holding as “general categorization of canine sniffs as nonsearches”); State v. Jardines, 9 So. 3d 1, 5 (Fla. Ct. App. 3d Dist. 2008) (observing that “[d]ogs have been used to detect scents for centuries all without modification or improvement to their noses. That, perhaps, is why the Supreme Court describes them as ‘sui generis’ in Place”), review granted, 3 So. 3d 1246 (Fla. 2009).

146 See Koon Chung Wu, 217 Fed. Appx. at 246 (4th Cir.), cert. denied, 551 U.S. 1110 (2007) (accepting as “reliable” drug detection dog with demonstrated field accuracy of 67% because “[p]robable cause only requires a ‘fair probability’ that contraband will be found in a certain place, Gates, 462 U.S. at 238, and Cody’s positive alerts to the packages in both searches clearly established a fair probability that the packages contained controlled substance, given his training and certification as a drug-detection dog”).
boils down to whether there is simply a “fair probability” that a given drug detection dog will be correct, making Place and Jacobson’s accuracy justification essentially disappear.\textsuperscript{147} As discussed above, the Place Court’s stated reasons for treating canine sniffs as \emph{sui generis} were the procedure’s limited intrusiveness and the limited information revealed.\textsuperscript{148} While the accuracy of the information revealed was arguably only an implicit basis for approving the canine sniff procedure in \emph{Place},\textsuperscript{149} the Court expressly justified the practice based upon its accuracy in \emph{United States v. Jacobsen}.\textsuperscript{150} Perhaps that should be the end of the \emph{sui generis} discussion. The Place Court’s accuracy assumption has not withstood the test of time, and that, alone, should be enough to limit the technique’s applicability to the circumstances previously articulated in \emph{Place}\textsuperscript{151} and \emph{Caballes}.\textsuperscript{152} Because of the use of the \emph{sui generis} descriptor, however, the label itself has seemed to take on a life of its own.\textsuperscript{153} It is difficult to meaningfully critique, or

\begin{itemize}
  \item \textsuperscript{147} \textit{See id.} It is enough for some courts that the dog has been trained and certified, without any consideration of the dog’s track record in the field. \textit{See United States v. Sundby, 186 F.3d 873, 876 (8th Cir. 1999)} (observing that “a search warrant based on a drug dog’s alert is facially sufficient if the affidavit states the dog is trained and certified to detect drugs”).
  \item \textsuperscript{148} \textit{See United States v. Place, 462 U.S. 696, 707 (1983)} (observing that “[w]e are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the context of the information revealed by the procedure”).
  \item \textsuperscript{149} \textit{See id.} (observing that because the sniff revealed “only the presence or absence of narcotics . . . [t]his 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”).
  \item \textsuperscript{150} \textit{See United States v. Jacobsen, 466 U.S. 109, 124 (1984)} (comparing field testing at issue to canine sniff, “[h]ere, as in \emph{Place}, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems too remote to characterize the testing as a search subject to the Fourth Amendment”).
  \item \textsuperscript{151} \textit{See Place, 462 U.S. at 707} (luggage located in a public place).
  \item \textsuperscript{152} \textit{See Illinois v. Caballes, 543 U.S. 405, 410 (2005)} (lawfully stopped vehicle).
  \item \textsuperscript{153} Consider, too, discussions generated by the use of the Latin phrase, “\textit{res ipsa loquitor}.” \textit{Creekmore v. United States, 905 F.2d 1508, 1510 (11th Cir. 1990)} (quoting Professor Prosser as stating that \textit{res ipsa loquitor} “has been the source of so much trouble to the courts that the use of the phrase itself has become a definite obstacle to any clear thought, and it might better be discarded entirely”) (internal citations omitted). \textit{See also Ballard v. British R. Co., Sess. Cas., H.L. 43 (1923)} (observing that “if this phrase had not been in Latin, no one would have called it a principle”).
\end{itemize}
even criticize, a doctrine when an ambiguous label has been used to define it.\textsuperscript{154} Therefore, it may prove helpful to gain a better understanding of the Court’s use of the \textit{sui generis} label in other contexts, and in the Fourth Amendment context, in particular, in order to determine whether the \textit{sui generis} label should carry any meaning other than a descriptive one.

The term “\textit{sui generis}” appears in 105 United States Supreme Court opinions, most of which are simply descriptive of the unique factual circumstances at issue that warranted one-of-a-kind treatment by the Court.\textsuperscript{155} In fact, the term “\textit{sui generis}” often appears in dissenting opinions as a pejorative, used to suggest that the majority had sidestepped the real issue in the case and therefore created a rule of almost no value in future decision-making.\textsuperscript{156} Although some lower courts have used \textit{Place’s sui generis} label as an “open sesame,”\textsuperscript{157} \textit{sui generis} terminology is actually a limiting concept that the Court has used to narrowly draw, not just a doctrine, but also the circumstances under which the doctrine may be used. For example, in \textit{Dunaway v. New York},\textsuperscript{158} also a Fourth Amendment case, the Court refused to interpret \textit{Terry}\textsuperscript{159} expansively to allow custodial interrogation of a suspect at the stationhouse on the basis of reasonable suspicion, rather than probable cause. As the \textit{Dunaway} Court explained, \textit{Terry} created a “special

\textsuperscript{154} Cf. \textit{State v. Wiegand}, 645 N.W.2d 125, 138-39 (Minn. 2002) (Page, J., dissenting) (observing that “[t]he U.S. Supreme Court dismisses the intrusiveness of a dog search by labeling it ‘sui generis.’ This is convenient, but lacks any persuasive force given that the dog is used to detect the very thing the officers would look for themselves if the Fourth Amendment did not limit their ability to do so”) (internal citation omitted).


\textsuperscript{156} See \textit{United States v. Santana}, 427 U.S. 38, 47 (1976) (Marshall, J., dissenting) (defendant seen standing in doorway of house and retreated into vestibule upon announcement of police; protesting Court’s failure to consider the then-unresolved question of entry into home to make warrantless arrest, and instead, reaching decision that “appears \textit{sui generis}, [in that it is] useful only in arresting persons who are ‘as exposed to public view, speech, hearing, and touch’ as though in unprotected outdoors”).

\textsuperscript{157} See \textit{supra} note 145.

\textsuperscript{158} 442 U.S. 200 (1979).

\textsuperscript{159} 392 U.S. 1 (1968) (upholding stop and subsequent frisk of individual based on officer’s observation of suspicious behavior and reasonable suspicion that suspect was armed).
category” of Fourth Amendment seizures that were substantially less intrusive than a traditional arrest because the detention involved a “brief, on-the-spot stop on a street” which the Court viewed as reasonable under its balancing test. 160 Although Terry itself does not use the term sui generis, Dunaway explained that, “instead [because the intrusion was so much less severe than a traditional arrest], the Court treated the stop-and-frisk intrusion as a sui generis rubric of police conduct.”161 The Dunaway Court was careful to emphasize, however, the narrow circumstances that made Terry reasonable.162

The Dunaway Court therefore required a close connection between a one-of-a-kind police practice (stop-and-frisk) and the justifications for departing from traditional Fourth Amendment requirements, and in doing so, concluded that custodial interrogation of a suspect at the stationhouse on the basis of reasonable suspicion was not sufficiently close to Terry’s justifications. In the canine sniff context, one-of-a-kind treatment of the canine-sniff police technique means that this practice, too, must be closely tied to the justifications that led the Court to conclude that a sniff was not a “search.” Otherwise, the sui generis label would not simply be descriptive; it would convey substantive meaning on its own. It is unlikely that the Court would accept the substantive weight possibility since the Court has disagreed with lower courts’

160 See Dunaway, 442 U.S. at 209-10 (1968) (stressing that Terry was “narrowly defined”).
161 See id. at 209 (quoting Terry, 392 U.S. at 20) (internal quotation marks omitted).
162 Dunaway, 442 U.S. at 209 (observing that “[b]ecause Terry involved an exception to the general rule requiring probable cause, this Court has been careful to limit its narrow scope”). In the only other Fourth Amendment case that uses the term sui generis as a discussion point, the dissent used the label to argue for a more narrow interpretation off an earlier case than the one used by the plurality. See United States v. Harris, 403 U.S. 573, 597 (1971) (Harlan, J., dissenting) (protesting Court’s relaxation of probable cause standard by its expansive interpretation of United States v. Brinegar, 338 U.S. 160 (1949); expansive reading not proper because “Brinegar itself was very carefully limited to situations involving the arrest of those driving moving vehicles, a problem that has typically been treated as sui generis by this Court”) (internal citation omitted). Although United States v. Santana was a Fourth Amendment case, Justice Marshall used the term, sui generis, in his Santana dissent, to criticize the artificially narrow holding arrived at by the Court. See United States v. Santana, 427 U.S. 38, 47 (1976) (Marshall, J., dissenting). See supra note 156, for discussion of Santana.
attempts to “rope off” a legal issue with a *sui generis* label in lieu of meaningful legal analysis.\(^\text{163}\) Therefore, it is crucial to determine whether canine home-sniffs are consistent with the narrow circumstances that the *sui generis* label conveys.\(^\text{164}\)

*Focus on the item—reliance on the contraband/noncontraband distinction:* Courts that apply the *Place/Jacobsen* analysis describe their legal analysis as a “binary” inquiry. As Judge Moylan, writing for the majority, on the Maryland Court of Special Appeals, explained:

The raison d’etre for treating a dog sniff as a non-search is that the binary nature of its inquiry, “contraband ‘yea’ or ‘nay’?,” precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate. If the possession of narcotics in an automobile or suitcase is illegitimate, so too is the possession of narcotics in a home. It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs.\(^\text{165}\)

The contraband/noncontraband dichotomy appears to be one of the essential justifications of the courts that apply the *Place/Jacobsen* line of cases to resolve the home-sniff issue. For example, in *Fitzgerald v. State*,\(^\text{166}\) the court distinguished *Karo*\(^\text{167}\) and *Kyllo*\(^\text{168}\) from a canine sniff-of-the-home because both *Karo* and *Kyllo* involved tracking of noncontraband items (ether in *Karo* and excessive heat in *Kyllo*) once the item became a “detail of the home.”\(^\text{169}\) The *Fitzgerald* court pointed out that ether, for example, was “a non-contraband item with many

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\(^{163}\) See Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 377 (1974) (disagreeing with Third Circuit’s assumption of the existence of a “public policy disfavoring arbitration of safety disputes” which Third Circuit had viewed as *sui generis*”); see also White v. Regester, 412 U.S. 755, 761-62 (1973) (disagreeing with District Court’s suggestion that *Abate v. Mundt*, 403 U.S. 182 (1971), in accepting total deviations of 11.9% in a county reapportionment, was *sui generis*”).

\(^{164}\) Cf. *Dunaway*, 442 U.S. at 210 (requiring that intrusion must be “carefully tailored to the rationale justifying it;” observing that Court had been “careful to maintain [Terry’s] narrow scope”).

\(^{165}\) *Fitzgerald*, 837 A.2d at 1030.


\(^{169}\) *Fitzgerald*, 837 A.2d at 1036.
legitimate, as well as illegitimate, uses.” The comparison with detection of methyl benzoate molecules in the canine sniff context is unavoidable. As discussed in Section II, scientific research has shown that detection dogs alert to the volatile methyl benzoate molecule, not to cocaine itself. Methyl benzoate, like ether, has many legitimate uses, and, unlike ether, is probably present in the ordinary household. Therefore, recent scientific research involving drug detection dogs appears to render suspect these courts’ reliance on the legality/illegality distinction of the substance or item being tracked.

Reliance on the contraband/noncontraband distinction is too simplistic from a legal perspective as well. As four members of the Court recently reminded, “[t]he Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search.” Therefore, courts that focus exclusively on the illegality of the item are missing the point. The Court requires a determination of whether an unlawful search has occurred and whether it is appropriate to apply an exclusionary remedy under the circumstances. By categorizing all canine sniffs as permissible, and focusing exclusively on the object of the sniff, these courts never analyze the lawfulness of the circumstances of the underlying sniff. If this were a legitimate analysis, then suspicionless canine sniffs of people

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170 Id. (observing that “[e]ther is not contraband. . . . Thus, Karo is factually distinct from both Place and Jacobsen, where the procedure disclosed only the presence or absence of a contraband item) (ellipses in original).
171 See supra notes 31-37 and accompanying text.
172 See supra note 34 and accompanying text, discussing methyl benzoate as being present in insecticides, solvents and perfumes.
174 See Hudson, 547 U.S. at 599 (finding “knock-and-announce” violation, but refusing to suppress evidence seized in search pursuant to search warrant because imposition of exclusionary remedy was “unjustified”).
would be permissible in non-border situations. Such is not the case. While the courts in the
sniff-of-a-schoolchild cases focused on the fact that a person, rather than an unattended item was
being sniffed, the key point is that these courts analyzed the circumstances under which the
canine sniff is being performed. In other words, these courts recognize that canine sniffs were
not per se outside the boundaries of Fourth Amendment protections. By focusing on the context
of the sniff, these courts concluded that the sniff was too intrusive to be performed without
individualized suspicion. Therefore, these cases reflect the fact that considering the
circumstances of a canine sniff is nothing new, and should serve as a clear indicator that
intrusiveness of the sniff is an appropriate consideration in other privacy-sensitive circumstances
as well. Refusing to consider the context of the canine sniff, in favor of focusing on the
contraband for which the dog is sniffing, is therefore misguided.

Limited intrusiveness—removing “remoteness” as a justification for excluding canine
sniffs from Fourth Amendment requirements: To determine whether the canine sniff-of-the-home
is closely enough tied to the justifications for treating the technique as a nonintrusive tool and
therefore not a “search,” it is important to examine the Court’s expectations and assumptions
concerning the sniff technique. As the Jacobsen Court observed, “[h]ere, as in Place, the
likelihood that official conduct of the kind disclosed by the record will actually compromise any

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175 The Courts of Appeals for the Fifth and Ninth Circuits have concluded that a canine sniff of a
schoolchild is a “search” that required a showing of individualized suspicion. See Horton v.
Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); B.C. v. Plumas Unified Sch. Dist.,
192 F.3d 1260 (9th Cir. 1999). But see Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (finding
close contact sniff not a search). See also United States v. Kelly, 302 F.3d 291, 295 (5th Cir.
2002) (permitting suspicionless canine sniff of person at international border).
176 See Horton, 690 F.2d at 478 (recognizing that “the interest in the integrity of one’s person,
and the fourth amendment applies with its fullest vigor against any intrusion on the human body”);
Plumas Unified Sch. Dist., 192 F.3d at 1266 (distinguishing between canine sniff of person and
unattended luggage).
177 See Horton, 690 F.2d at 479 (observing that “[i]ntentional close proximity sniffing of the
person is offensive whether the sniffer be canine or human”); Plumas Unified Sch. Dist., 192
F.3d at 1266 (agreeing with Fifth Circuit’s analysis).
legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.\textsuperscript{178}

On the one hand, this discussion provides clear substantiation for an accuracy-based justification for the police investigative tool at issue. In other words, the \textit{Jacobsen} Court, in its “remoteness” discussion, could be characterizing the testing involved, both the field testing and the canine sniff described in \textit{Place}, as being so accurate that the odds of not finding contraband, and therefore finding instead private, noncontraband information in the ensuing search, are “much too remote” to view the police investigative tool as being a “search” within the meaning of the Fourth Amendment. This semantic interpretation of “remoteness” is consistent with \textit{Place} in that \textit{Place}’s description of detection dogs as “\textit{sui generis}” appeared to be based on both the dog’s accuracy and the limited intrusiveness of the sniff itself.\textsuperscript{179} Additionally, lower courts seem to view remoteness in semantic terms as well. For example, in \textit{Fitzgerald v. State}, the court viewed the likelihood that a drug detection dog would alert on medically-prescribed marijuana as too remote to be meaningful for purposes of \textit{Place}.\textsuperscript{180}

On the other hand, “remoteness” could also be interpreted in a temporal sense. The idea here would be that the eventual search of the person’s now-suspicious item should be severed analytically from the original sniff or field test that produced the suspicion toward the item. A temporal interpretation of remoteness would therefore allow the Court to disconnect the use of the police investigative tool from the inevitable consequences of that use, the search. By looking

\textsuperscript{179} See United States v. Place, 462 U.S. 696, 707 (1983) (observing that determining whether contraband is present through canine sniff does not require opening of suitcase and implicitly assuming accuracy). See also Illinois v. Caballes, 543 U.S. 405, 410 (2005) (Souter, J., dissenting) (observing that classification as “\textit{sui generis}” was based on both limited intrusiveness of sniff and accuracy).
\textsuperscript{180} See 837 A.2d 989, 1028 (Md. Ct. Spec. App. 2003) (observing that “[t]he marijuana in the \textit{Place} case, for instance, might conceivably have been medically prescribed in a state such as California. The critical holding of the Court, however, was not to be foreclosed by a mere ‘remote’ possibility”), aff’d, 864 A.2d 1006 (Md. 2004).
at these steps in isolation, the Court could ignore the consequences of a false-positive triggering event. In other words, the search, the exposure of private, noncontraband information as a result of a false-positive canine alert, is “too remote” to reflect back in some constitutional sense on the search-triggering investigative tool.

The answer to the “remoteness” question has important implications for the on-going vitality of the *Jacobsen* premise. If the semantic interpretation for “remoteness” is the proper one, then changes in our understanding of both the accuracy of drug sniffing dogs, in general, and our societal views on what is “contraband” take center stage. In other words, if narcotics detection dogs are not as accurate as once assumed or if lawful citizens increasingly store prescription medications in their homes that detection dogs would interpret to be contraband, then the likelihood that legitimate interests in privacy will remain undisturbed is, in fact, not “remote.”

Support for the temporal interpretation has emerged in *Illinois v. Caballes*, however. The *Caballes* Court observed that Caballes had failed to argue “that an erroneous alert, in and of itself, reveals any legitimate private information.”181 It is not clear from this statement whether the majority was suggesting that this would not have been a viable argument, or instead, that Caballes had simply dropped the ball in failing to make it. The context of the discussion suggests the former, and not the latter, however. The Court may recognize that experience has shown that an accuracy-based foundation for permissive use of canine sniff is becoming increasingly shaky. To address the problem of false-alerts and how such alerts undermine the sniff rule’s justification, the Court may have severed the connection between the sniff and the ensuing search. As the *Caballes* Court explained:

Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to

181 *Caballes*, 543 U.S. at 409.
contraband, the record contains no evidence or findings that support his arguments. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.\textsuperscript{182}

By surgically separating the false-positive sniff (which \textit{Caballes} claims reveals no “legitimate privacy information”) from the eventual police rummaging in response to the erroneous alert (which apparently is also not a “search” so long as the dog that gave the false alert was “sufficiently reliable”),\textsuperscript{183} \textit{Caballes} represents a genuine drift beyond the now-suspect accuracy and limited intrusiveness justifications expressed in \textit{Place}, and is inconsistent with the Court’s earlier refusal to sever the search and seizure issues in a case involving contraband drugs.\textsuperscript{184} The \textit{Caballes} Court’s surprising statement concerning false positives may represent an implicit acknowledgment that it needs to patch the hole in canine sniff jurisprudence that has become evident in the years following \textit{Place}. “Reliable” narcotic detection dogs make plenty of mistakes.\textsuperscript{185} To suggest that a false-positive alert reveals no private information is an artificial conclusion, if ever there was one, since the alert leads directly and inevitably to the police rummaging in which private, noncontraband items are uncovered.\textsuperscript{186}

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\textit{Id.}

\textsuperscript{182} \textit{Id.} (observing that “the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk”).

\textsuperscript{183} See \textit{United States v. Jeffers}, 342 U.S. 48, 52 (1951) (where Government argued that search and seizure issues were severable, Court explained that “[w]e do not believe that events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied”).

\textsuperscript{184} See \textit{supra} notes 143-44 and accompanying text.

\textsuperscript{185} As Justice Souter explained, “[n]or is it significant that \textit{Kyllo}'s imaging device would disclose details immediately, whereas they would be revealed only in the further step of opening the space following the dog’s alert reaction; in practical terms the same values are at stake in each case.” \textit{Illinois v. Caballes}, 543 U.S. 405, 413 n.3 (2005) (Souter, J. dissenting).
This *Caballes* dicta may have a real impact on the home-sniff question. There is no data on the accuracy of narcotics detection dogs asked to scent under the door of a person’s home.\(^{187}\) The data presently available concerns the accuracy of detection dogs which are asked to scent in close proximity to the container suspected of secreting contraband (i.e., luggage, vehicle, or interior room).\(^{188}\) It is far from clear that existing data concerning luggage and vehicle searches should be unquestioningly extended to establish “reliability” for sniffs of the home. First, the detection dog is not able to gain the same proximity to the contraband item as is typically the case during a canine sniff of cars or luggage.\(^{189}\) A dog that is “reliable” for purposes of sniffing luggage in close proximity at an airport may not be as effective in a residential setting.\(^{190}\) Significantly, however, no data exists to allow meaningful review of reliability in these newer factual situations.\(^{191}\)

\(^{187}\) See *supra* notes 27-29 and accompanying text, discussing the fact that canine certification for narcotics detection involves testing for drugs hidden in vehicles or indoor, interior rooms, not perimeter searches of buildings.

\(^{188}\) See *id.*

\(^{189}\) See *supra* notes 39-46 and accompanying text, discussing “scanning” process that narcotics canines use to detect narcotics scent source. *See also Admissibility of Evidence Found By Marijuana Detection Dogs*, THE ARMY LAWYER (1973) (describing pattern of properly conducted canine-assisted barracks search: “While the dog may detect airborne scent and follow it to its source, more likely the dog will have to *smell the immediate proximity of an area to detect marijuana within it*”) (emphasis added).

\(^{190}\) In fact, the scientific literature, discussed in Section II, reveals that close-proximity an important consideration in both detecting the drug and properly identifying the scent source. *See supra* notes 39-46 and accompanying text.

\(^{191}\) See R v. Kang-Brown, [2008] S.C.C. 18, at para. 15 (Canadian Supreme Court observing that “courts are ill-equipped to develop an adequate legal framework for use of police dogs [because] little is known about investigative techniques using sniffer-dogs. Indeed, the record remains singularly bereft of useful information about sniffer-dogs”). As the Canadian Supreme Court observed, little empirical research on the accuracy of detection dogs exists. One study, conducted in Australia, was reported by the Privacy Ombudsman of New South Wales to Parliament in 2004. The research revealed that 73% of those searched on the basis of a positive alert from a drug detection dog were found *not* to be in possession of illegal drugs. NEW SOUTH WALES OMBUDSMAN, DISCUSSION PAPER: REVIEW OF THE POLICE POWERS (DRUG DETECTION DOGS) ACT 15-16 (2004) [hereinafter *NSW Ombudsman 2004*]. While 61% of the false-positives were attributable to “residual odour” thought to be related to the individual’s admission of use or contact with others who had used drugs, 39% of the false-positives could not be explained. *Id.* at
Second, home occupants have less control over the people who access their front door and associated curtilage areas. Although there are exceptions, the front door is an open curtilage-location where homeowners typically anticipate interacting with non-family members and others. The overall lack of control over who comes and goes from these curtilage areas creates the risk that a drug detection dog may alert on contraband waste molecules left behind by others or even a marijuana seed dropped from a visitor’s pocket into the doormat. This lack of control over the location combined with the dog’s inability to gain proximity to the supposed contraband suggests, at the very least, that we need scientific data to support the conclusion that dogs are sufficiently reliable when sniffing homes.

Caballes’ dicta concerning canine sniff error-rates may generate other problems in the home-sniff context. The scope of the search that a false positive generates is far more expansive in the residential context. While any search based on a false-positive canine sniff reveals private, noncontraband information, this is especially troubling when the sniffed location is a

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23-24. In 2006, the Privacy Ombudsman issued a new report concerning the use of detection dogs. NEW SOUTH WALES OMBUDSMAN, REVIEW OF THE POLICE POWERS (DRUG DETECTION DOGS) ACT (2006) [hereinafter NSW Ombudsman 2006]. Therein, it was determined that 74% of those searched were found not to be in possession of illegal drugs. Id. at 47, 53.

192 Many, if not most, homes and apartments lack gates, signage which forbids entry, locked vestibules (for apartments), or ironically, dogs, that could be thought of as restricting public access to the front door. The issue of impeded access to the front door is an important consideration to lower courts asked to consider the sniff-of-the-home issue. See, e.g., People v. Jones, 755 N.W.2d 224, 229 (Mich. Ct. App. 2008) (observing that there is “no reasonable expectation of privacy at the entrance to the property that is open to the public, including the front porch”).


194 Cf. State v. Jones, 780 So. 2d 949, 950 (Fla. Ct. App. 4th Dist. 2001) (drug detection dog alerted to marijuana “residue” consisting of stems and seeds of an estimated weight of less than one gram, which the State Trooper testified was too insignificant in amount to recover because “it was embedded in the carpet and would have taken tweezers to recover”).

195 Of course, absent exigent circumstances, a search warrant is required to enter a home to search. See Payton v. New York, 445 U.S. 573 (1980).
private residence. The search of luggage based on a positive canine is confined to the luggage, and the same is true of a vehicle. While the probable cause-based search of an item or vehicle might well be a probing search, the scope of the search is defined by the size of the container to which the detection dog has alerted. An alert on a private residence creates suspicion toward a very sizeable container indeed. A search warrant, based on a positive canine sniff, would be significantly more intrusive than the searches in Place or Caballes, both because of the size of the suspected contraband container, and the fact that any search for drugs would likely involve a top-to-bottom perusal of the home’s every nook and cranny. The intrusion on privacy from a false positive, would be vast, turning Place’s justification about limitations on the information revealed on its head. In view of the size of the private residence “container,” unblinking expansion of the Caballes dicta to the home-sniffs does not make sense.

196 It is widely accepted that a positive canine alert can produce probable cause to support the ensuing search for contraband. See, e.g., People v. Jones, 755 N.W.2d 224, 227 n.2 (Mich. Ct. App. 2008) (observing that “there is no dispute that a positive reaction by a properly trained narcotics dog can establish probable cause for the presence of contraband”). But see United States v. Olivas, No. 3:09-CR-1402-KC, 2009 U.S. Dist. LEXIS, 62270, at *11, *12 n.5 (W.D. Tex. July 17, 2009) (finding “merit to the argument that an alert from a detector dog, even when that dog is well-trained, cannot by itself constitute probable cause to search under any circumstances”).


198 See State v. Rabb, 920 So. 2d 1175, 1190 (Fla. Ct. App. 4th Dist.) (observing that “[v]ehicles on public roadways and luggage in airports are similarly different because the privacy to be invaded by the government’s prying eyes is necessarily limited by the size of the vehicle or bag, plus only the effects of one’s traveling life chosen to appear outside the home and in public are at risk of exhibition”), cert. denied, 549 U.S. 1052 (2006).

199 See United States v. Jackson, No. IP 03-79-CR-1H/F, 2004 WL 1784576, at *5 (S.D. Ind. Feb. 2, 2004) (observing that search warrant issued on basis of positive canine sniff of residence would allow “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”).

200 United States v. Place, 462 U.S. 696, 707 (1983) (observing that canine sniff revealed “limited” information about contents of luggage which “ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods”).
Additionally, drug detection dogs have been known to alert on a wide variety of items, including controlled, non-narcotic medications,\textsuperscript{201} noncontraband medications,\textsuperscript{202} and various substances.\textsuperscript{203} In the school-sniff cases, while the issue generally turned on the lawfulness of a canine sniff of a schoolchild,\textsuperscript{204} and the resulting searches in some of those cases were extremely troubling,\textsuperscript{205} the scope of the search was limited to the person of the sniffed individual and their on-campus possessions. Without minimizing the intrusiveness of a sniff of a person or the ensuing search that results from an alert, the search of a home on the basis of a positive canine sniff would be both probing and expansive. Therefore, because detection dogs have been known to alert on such ubiquitous substances as beer, asthma medication, and over-the-counter

\textsuperscript{201} Cf. Fitzgerald v. State, 864 A.2d 1006, 1018 (Md. 2004) (refusing to consider on appeal defendant’s argument that drug detection dog was trained to alert on diazepam, the generic for Valium, because issue not raised at trial). See also NSW Ombudsman 2004, supra note 191, at 26 (documenting false-positive alert on woman in Australia which was attributed to fact that she was carrying her son’s ADD medication in her purse). See also NSW Ombudsman 2006, supra note 191, at 52-53 (documenting alerts on various prescription medicines, including flu medication, Valium, methadone; noting that “[a]lthough drug detection dogs are not trained to detect methadone or prescription drugs, we are not aware of any training performed to eliminate possible false positives with these drugs”). Cf. John M. Dunn, Illinois v. Caballes: The Day the Supreme Court Lost its Dog Kyllo, 76 OKLA. BAR J. 1791, 1794 (observing that “it is important to note that there are several prescription drugs that contain an amphetamine as the active ingredient. Drug dogs are trained to smell amphetamines in order to detect methamphetamines. However, Ritalin, Dexedrine, and Adderall are drugs commonly used to treat Attention Deficit Disorder/Attention Deficit Hyperactive Disorder which contain amphetamines as their active ingredient. Since the prescription medications are not contraband, their owner should enjoy a legitimate expectation of privacy”).

\textsuperscript{202} See Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 474 (5th Cir. 1982) (observing that the drug detection dogs involved were “trained to alert their handlers to the presence of any one of approximately sixty different substances, including alcohol and drugs, both over-the-counter and controlled”); Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 317 (5th Cir. 1989) (canine “capable of reacting to some nonprescription drugs and residual scents lingering for up to four to six weeks;” dog alerted to, among other things, asthma medication and a Primatene inhaler).

\textsuperscript{203} See, e.g., Horton, 690 F.2d at 474 (alcohol); Jennings, 877 F.2d at 318 (detection dog alerting to beer caps, empty beer bottles and cans, and scent of previously vomited beer).

\textsuperscript{204} Horton, 690 F.2d at 473.

\textsuperscript{205} See Doe v. Renfrow, 475 F. Supp. 1012, 1017 (1979) (positive canine sniff of 13 year-old female child at school, which resulted in her nude strip search to look for drugs, was likely caused by child playing with her own dog before school, which was in heat).
medications, a search on the basis of a positive canine sniff may result in a significant invasion of privacy when the sniffed location is a private home. 206

As a final observation, at present, thirteen states have adopted statutes related to medical marijuana, most of which allow possession of between one to eight ounces of marijuana by a qualified patient. 207 For obvious reasons, it is preferable to have such patients store and use this medication in their homes, rather than storing it in their vehicles and thus creating the temptation to use this medication while driving. Medical marijuana is in the unusual position of being both a legal medication in these states, assuming the qualified patient satisfies the state’s applicable medical marijuana laws, but it nevertheless remains a crime to manufacture or possess marijuana under the federal Controlled Substance Act (“CSA”). 208 The Court has recently held that the CSA’s categorical prohibition of the manufacture and possession of marijuana would include even locally grown marijuana that was used for medical purposes, and that the CSA did not exceed Congress’ authority under the Commerce Clause. 209 This unfortunate dual treatment for medical marijuana creates real risks in the sniff-of-the-home context. Even if the investigating officers, out of deference to a state’s decision to decriminalize medical marijuana, wished to

206 Cf. Lewis Katz & Aaron Golembiewski, Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs, 85 Neb. L. Rev. 735, 754-55 (2007) (discussing the inability of detection dog to distinguish between illicit substances and pharmaceutical substances, and that pharmaceutical substances may release same odor as illicit substances).
209 See Gonzales v. Raich, 545 U.S. 1, 15, 28 (2005).
avoid home searches on the basis of a positive canine alert for marijuana, the drug detection dog has no way to signal that it was “just” marijuana detected in the home.\footnote{But see Fitzgerald v. State, 837 A.2d 989, 1028 (Md. Ct. Spec. App. 2003) (dismissing concerns about home-sniff of medically-prescribed marijuana as “mere remote possibility,” observing that the marijuana in Place could “conceivably have been medically prescribed in a state such as California”) (internal quotation marks omitted), aff’d, 846 A.2d 1006 (Md. 2004). In reality, the idea that the Place Court predicted the future and factored medically-prescribed marijuana into its canine sniff discussion, as the Fitzgerald court suggests, is the true “remote possibility” since medical marijuana was not decriminalized in any state as of 1984 when Place was decided.}

\section*{B. Should the context of a canine sniff make a difference in determining whether the sniff is a “search” when the sniffed location is a private residence?}

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.”\footnote{Katz v. United States, 489 U.S. 347, 367 (1987) (Harlan, J., concurring).}

While it is clear that, absent exigent circumstances, police cannot cross the threshold of a home to arrest a person inside or to search the location,\footnote{Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Steagald v. United States, 451 U.S. 204, 211-12 (1981); Payton v. New York, 445 U.S. 573, 586 (1980).} it is less clear whether use of a police surveillance technique that is ordinarily not considered to be a “search” becomes one when that technique is applied to a private residence. With the canine sniff, police do not physically cross the threshold of a home, but can nevertheless deduce information about the interior of the home that could not otherwise be verified by visual surveillance. In the preceding section, this article considered whether the sniff-of-the-home issue should turn on the fact that, as some courts argue, the only “information” revealed by the sniff is the presence of contraband. This section, instead, focuses on whether the well-documented heightened expectations of privacy associated with the home should control the sniff-of-the-home question. While these issues are separated into different analytical sections for discussion purposes, this is not intended to suggest that these
arguments can be completely severed from one another. In a sense, the arguments are mirror images of each other; the question, therefore, is which image is truer to the Fourth Amendment.

Under the Fourth Amendment, the home is “ordinarily afforded the most stringent Fourth Amendment protection.” Significant to the home-sniff question, the area immediately surrounding and associated with a private home, the curtilage, is also afforded Fourth Amendment protection. While the Court has clearly extended Fourth Amendment protection to the curtilage, the Court has yet to clarify the degree of Fourth Amendment protection afforded to the curtilage as compared to the home itself. Further, the front door area, where most canine sniffs are performed, is usually accessible to the public and therefore enjoys some degree of traffic from non-occupants of the home. So, while the front door area is likely encompassed within a home’s curtilage, the home’s occupants likely have little expectation of privacy in items that the public could observe while standing at the front door. With that said, in its cases involving surveillance of a private home’s curtilage, the Court has been careful to

214 Oliver v. United States, 466 U.S. 170, 180 (1984) (observing that “[a]t common law, the curtilage is the area to which extends the intimate activities associated with the ‘sanctity of a man’s home and the privacies of life’”) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
215 Oliver, 466 U.S. at 180 (discussing that curtilage “has been considered part of the home itself for Fourth Amendment purposes”).
216 Id. at 180 (observing that it was unnecessary under Oliver facts “to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage as opposed to the home itself”).
217 For example, in Ciraolo, the Court noted that the small, fence-enclosed suburban backyard at issue “would appear to encompass this small area within the curtilage.” See California v. Ciraolo, 476 U.S. 207, 213 (1986).
218 Cf. United States v. Titemore, 437 F.3d 251, 258-59 (2d Cir. 2006) (finding that homeowner had no reasonable expectation of privacy in patch of front lawn visible from road and which led up to front door; observing that it is “possible that an area might fall within the curtilage of the home, as that concept was defined at common law, but the owner or resident may fail to manifest a subjective expectation of privacy in that area”).
emphasize that information gained about the curtilage was limited to visual observation. As the Court has explained, visual observation is simply less intrusive than an inspection that requires a physical invasion.

The Court’s emphasis on the fact that police curtilage observations were made with the naked-eye in earlier cases suggests that other unenhanced-sensory determinations would likely also be permissible, assuming that the officer was in a curtilage location, like the front door, that the home’s occupant would reasonably anticipate the public to access. The Court’s focus in its curtilage discussions has been on the lack of sense-enhancement, however. Therefore, it is a stretch, indeed, to conclude that because an officer, during a lawfully conducted “knock and talk” encounter with a home’s occupant, can use the officer’s own nose to detect contraband,

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219 See United States v. Dunn, 480 U.S. 294, 304 (1987) (explaining that in California v. Ciraolo, “we held that warrantless naked-eye aerial observation of a home’s curtilage did not violate the Fourth Amendment. We based our holding on the premise that the Fourth Amendment has never been extended to require law enforcement officers to shield their eyes when passing by a home or public thoroughfares”) (internal quotation marks omitted).

220 Bond v. United States, 529 U.S. 334, 337 (2000) (distinguishing California v. Ciraolo and Florida v. Riley, from probing palpation of suspect’s luggage because aerial surveillance cases “involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection”).

221 Consent-based police/resident encounters arise when a police officer approaches a private home, knocks on the door and attempts to engage the resident in a consensual discussion or a consent-based search of the premises. See, e.g., United States v. Ray, 199 F. Supp. 2d 1104 (D. Kan. 2002) (observing that “knock and talk” is ordinarily consensual unless coercive circumstances, such as unreasonable persistence, display of weapons, multiple police officers questioning occupant, or questioning conducted in unusual places or at unusual time, transform encounter into “seizure” under Fourth Amendment).

that the officer could instead use a detection dog, whose sense of smell is more than eight times sharper than a human’s, to do the sniff work.

The question under consideration here is whether intrusion of a trained police dog into a protected curtilage area, such as the front porch, is a “search” under the Fourth Amendment. Because the front door is the location that lower courts have generally permitted human police officers to access in order to engage in consent-based “knock and talk” interaction with a home’s occupants, to distinguish the introduction of a police dog from that of the human police officer, courts must examine: (1) whether there are additional intrusions associated with introducing a police dog into the curtilage area of a private home that would render that practice unreasonable under the Fourth Amendment; and (2) whether the heightened expectations associated with the home make the use of a natural form of technology, such as a canine sniff, to deduce information about the interior of a home a “search.”

Intrusiveness of drug detection canines: Of central importance to courts that conclude that a canine sniff-of-the-home is not a “search” is the fact that the sniff is performed while the detection dog is standing on a location that is accessible to the public. While public location

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223 See, e.g., United States v. Beale, 674 F.2d 1327, 1333 (9th Cir. 1982) (observing that “[a] trained canine’s sense of smell is more than eight times as sensitive as a human’s”), cert. granted, 463 U.S. 1202 (1983) (vacating and remanding for further consideration in light of United States v. Place).

224 See, e.g., Nelson v. State, 867 So. 2d 534, 535 (Fla. Ct. App. 5th Dist. 2004) (canine sniff performed at threshold of hotel room door; “[a]reas outside of a hotel room, such as hallways, which are open to use by others may not be reasonably considered as private”); Stabler v. State, 990 So. 2d 1258, 1259 (Fla. Ct. App. 1st Dist. 2008) (allowing canine sniff at front door of defendant’s apartment; front door was “open to public access and to a common area”); People v. Jones, 755 N.W.2d 224, 229 (Mich. Ct. App. 2008) (canine sniff conducted at front door of defendant’s private home; “no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch”). The front door has not always been required as the permissible sniff location, however. See United States v. Tarazon-Silva, 960 F. Supp. 1152, 1163 (W.D. Tex. 1997) (permitting canine sniff of dryer vent because vent was accessible by standing on paved driveway, area was not enclosed, and “appears to be readily accessible to neighbors, visitors, repairmen, salesmen, utility workers, and/or members of the public”), aff’d, 166 F.3d 341 (5th Cir. 1998).
may be an important consideration in determining whether the home-sniff is reasonable, it should not be presumed to be determinative. After all, prior to Kyllo, the public location from which thermal imaging scans were conducted was important to courts in concluding that thermal scans were insulated from the Fourth Amendment’s warrant requirement.\textsuperscript{225} Kyllo informed us differently.\textsuperscript{226} Therefore, as a threshold matter, it is important to consider whether the location of the dog’s paws makes a constitutional difference in the canine sniff analysis, or instead, whether the focus should be on the intrusiveness of introducing a potentially dangerous animal into the curtilage area of a private home.

The intrusiveness of police behavior cannot be considered in the abstract, since this would amount to nothing more than a subjective “vote” about whether the practice “felt” unreasonable. As the Rakas Court explained: “[l]egitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”\textsuperscript{227} Toward that end, the Court has looked to a number of factors in examining the intrusiveness of police behavior to determine whether a warrant is required.\textsuperscript{228} The Court has “given weight” to such factors as the intention of the Framers of the Fourth Amendment;\textsuperscript{229} the uses to which the

\textsuperscript{225} Brief for the United States at 15 n.4, Kyllo v. United States, 533 U.S. 27 (2001) (No. 99-8508) (observing that Courts of Appeals had “uniformly held” that use of thermal imager from public location to observe exterior of dwelling was not “search” within meaning of Fourth Amendment, and listing cases).

\textsuperscript{226} See Kyllo, 533 U.S. at 33 (2001) (in requiring search warrant to perform thermal imaging scan of private home, Court observed, “[t]he present case involves officers on a public street engaged in more than naked-eye surveillance of a home”).


\textsuperscript{228} See Oliver v. United States, 466 U.S. 170, 177 (1984) (observing that “[n]o single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant”).

\textsuperscript{229} Id. at 178 (citing United States v. Chadwick, 433 U.S. 1, 7-8 (1977)).
person has put a location; and our “societal understanding” that certain areas deserve “the most scrupulous protections from government invasion.”

Although we might prefer to visualize a narcotics detection dog as being a member of the United States Agricultural Department’s “Beagle Brigade” or a Labrador retriever, like most explosives detection dogs, such is not the case. Narcotics detection dogs are often selected for the intimidation factor that they produce. The intimidation is, therefore, intentional. When asked, and sometimes when not asked, these dogs can be dangerous. Unlike an ordinary weapon, which obviously lacks a mind of its own, the potential exists for a dog, even a well-trained dog, to be disobedient. Courts that refuse to apply Kyllo in the home-sniff context on

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230 Id. (citing Jones v. United States, 362 U.S. 257, 265 (1960)).
231 Id. (citing Payton v. New York, 445 U.S. 573 (1980)).
232 See supra note 17, discussing Agricultural Department’s choice of beagles for detection purposes, in part, because they are “nonaggressive” dogs.
233 See supra note 21, discussing ATF’s choice of Labrador retrievers, in part, because they “possess a gentle disposition” that allows them to be used in crowds and around children.
234 See, e.g., Danelle Aboud, Dog Lends City Police a Paw, DETROIT FREE PRESS, Apr. 10, 2003 at 6 (observing that “[p]olice dogs have the “intimidation factor,” causing “[p]eople [to] react differently when they are stopped and see or hear the barking dog in the back of the police car”) (quoting Madison Heights Police Officer David Koehler); see Matt Lait, Role Over for Veteran Police Dog, L.A. TIMES, Jan. 5, 1991, at B3 (noting that although fear is “the handler’s first line of defense,” the genesis of that defense is that “[t]he dogs are used more frequently for mere presence and intimidation and searching than they are for biting”).
235 See, e.g., Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 479, 482 (5th Cir. 1982) (in canine sniff at school, observing that representative from the security services firm hired to conduct campus sniffs testified that “Doberman pinschers and German shepherds were used precisely because of the image maintained by the large dogs;” those breeds were selected “to maintain an image of strength and ferocity,” although firm actually chose individual animals on the basis of their docility).
236 See Merrett v. Moore, 58 F.3d 1547, 1549 (11th Cir. 1995) (noting that during narcotics-detection roadblock, “one person was bitten by a dog”); Doe v. Renfrow, 475 F. Supp. 1012, 1017 (1979) (positive canine sniff of 13-year-old female child at school, which resulted in her nude strip search to look for drugs, was likely caused by the child playing with her own dog before school, which was in heat). See also Matthew Pleasant, Police dog suspended during attack investigation, HOUMA COURIER, Jul. 23, 2009 (reporting that detection dog, a Belgian Malinois, was taken out of service following allegations that dog escaped its kennel and attacked woman; noting that one of handler’s previous dog, also a Belgian Malinois, mauled a 77-year-old bicyclist in 2007 after dog was unleashed), available at
the basis that dogs are not technological devices cannot also avoid consideration of the intrusiveness that arises because dogs are not mechanical devices. There is a societal cost associated with introducing intimidating dogs into the curtilage of a private home, and the Court has instructed that societal “understandings” are an appropriate consideration in determining reasonableness under the Fourth Amendment.\(^\text{237}\)

While the courts that refuse to apply \(Kyllo\) emphasize our societal recognition that dogs are familiar and have been used by law enforcement for tracking purposes for centuries,\(^\text{238}\) these courts ignore the fact that dogs have also been used as tools of institutional oppression for perhaps even longer. Although dogs have long been used by military forces,\(^\text{239}\) as early as 2500 B.C., Egyptians used dogs on civilians for purposes of crowd control to protect the pyramids.\(^\text{240}\) The Spanish Conquistadors used dogs to kill and subdue the native populations upon Spanish arrival in the New World.\(^\text{241}\) Dogs were used to attack Native Americans\(^\text{242}\) and to chase down

\(^\text{237}\) \(Rakas\), 439 U.S. at 143 (observing that legitimacy of expectations of privacy to be determined by reference to sources outside the Fourth Amendment, such as “understandings that are recognized and permitted by society”).

\(^\text{238}\) See, e.g., Fitzgerald v. State, 837 A.2d 989, 1037 (Md. Ct. Spec. App. 2003) (observing that “[t]he use of the sense of smell generally is a familiar tool of perception much older than the common law or the Bill of Rights. Indeed, [the Kentucky Supreme Court] stated that bloodhound evidence ‘was looked upon with favor as early as the twelfth century’”) (internal citation omitted), aff’d, 864 A.2d 1006 (Md. 2004).

\(^\text{239}\) The ancient Romans used war dogs, training Mastiffs to attack the legs of their enemies, who would then “lower their shields.” The United States War Dogs Association, \(War Dogs in the Marine Corps in World War II, available at\), \url{http://www.uswardogs.org/id187.html} (last visited July 5, 2009).


\(^\text{241}\) In 1513, Bartolome de Las Casas, a missionary and conquistador, described Spanish tactics in the conquest for gold and land. The Conquistadors slaughtered native peoples, and “[t]hese evil men had even taught their hounds, fierce dogs, to tear natives to pieces at first sight.” Bartolome de Las Casas, \(Atrocities of the Spanish Conquistadors in the West Indies\) (1513), reprinted in \(Eyewitness to History\), 82, 83 (John Carey, ed., Harvard Univ. Press 1988).

\(^\text{242}\) As Benjamin Franklin wrote to James Read:
run-away slaves. During the Civil War, dogs were used to intimidate and injure African-American soldiers fighting for the North. Following Pearl Harbor, dogs were used to intimidate Japanese-Americans residing in Hawaii.

In more modern times, police dogs have been used for purposes of crowd control, even on non-violent civil rights demonstrators. The passage of time may not have healed these wounds. Recent events have again brought intimidating dogs to the forefront of our national

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In Case of meeting a Party of the Enemy, the Dogs are then to be all turn’d loose and set on. They will be fresher and fiercer for having been previously confin’d, and will confound the Enemy a good deal, and be very serviceable. This was the Spanish Method.


243 *See*, e.g., Brister v. State, 26 Ala. 107 (Ala. 1855) (observing that “[t]he defendants are slaves . . . [and] were taken into custody by sixteen or seventeen white men, who went on the place armed with double-barreled guns, negro whips and sticks, and accompanied by a pack of negro dogs, known to be such by defendants”); Benjamin v. Davis, 6 La. Ann. 472 (La. 1851) (observing that “the defendants came to the house of witness early in the morning with their negro dogs, and said they were going to hunt runaway negroes;” “[h]e had a right to use the dogs in his attempt to make such a capture, such means being customary among the planters of the parish”).

244 *Social Control*, supra note 242, at 129.

245 Id. at 130.


247 *See* Carlos Campos, *Alpharetta putting 2 canine cops on the beat*, ATL. JOURNAL AND CONST, Nov. 24, 1994 at G34 (observing that despite passage of time, “some people may associate police-trained German Shepherds with the black-and-white news footage of vicious dogs cut loose on civil rights activists during the 1960s”). As a further illustration, prior to his confirmation hearings, now-Justice Thomas described the “bitterness and nostalgia” of his childhood in Savannah, Georgia: “I remember being excluded from certain parks, stadiums and movie theaters. I saw the Klan marches, the riots, the police dogs and water hoses.” Timothy M. Phelps, *Nominee a Puzzle: A look at the pieces on eve of hearings on confirmation*, NEWSDAY, at 7.
While the German Shepherds used at Abu Ghraib Prison were military-trained, the fact remains that people are afraid of dangerous-looking dogs. Further, our increasingly multicultural society requires social understanding that contact with dogs may be offensive to followers of Islam and perhaps other religions as well.

At present, there are few cases that document face-to-face encounters between the occupant of a home and a narcotics detection dog. It seems that, at present, most officers are astute enough to avoid bringing a drug detection dog along on a “knock and talk” encounter, likely out of concern that the presence of a dangerous-looking dog would create a coercive atmosphere that would render involuntary the occupant’s consent to talk or search. In a sense,

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248 In 2004, photographs emerged that depicted military-trained German Shepherds which were used to intimidate prisoners at Abu Ghraib Prison in Afghanistan as an interrogation strategy. See Bob Deans and Mike Williams, ‘Disgust and disbelief: Bush views prison abuse photos, ATLANTA JOURNAL-CONSTITUTION, May 11, 2004 at 1A (“The Washington Post, which last week first published photos of a female U.S. soldier holding a leash attached to the neck of a naked Iraqi prisoner, printed a picture in Monday’s editions of a naked detainee pinned against cell bars as a pair of guard dogs stood threatening him from both sides”).

249 As Justice Ginsburg noted in her Caballas dissent, “[a] drug-detection dog is an intimidating animal.” Illinois v. Caballas, 543 U.S. 405, 421 (2005) (Ginsburg, J. dissenting). See also id. at 41 n.2 (Souter, J. dissenting) (agreeing with Justice Ginsburg in finding that introduction of narcotics detection dog into routine stop “can in fact be quite intrusive”).

250 See Evan Thomas, Into Thin Air, NEWSWEEK, Sep. 3, 2007, at 24 (observing that American soldiers “continually make cultural blunders, like using canine units to search people’s homes [in view of the fact that] dogs are considered unclean in Muslim culture”) (parentheses omitted); Johanna McCreary, et al., The Scandal’s Growing Stain; Abuses by U.S. Soldiers in Iraq Shock the World and Roil the Bush Administration. The Inside Story of What Went Wrong—And Who’s to Blame, TIME, May 17, 2004, at 26 (observing that police dogs were used as interrogation tactic because Muslims consider dogs to be unclean); Bill Hensel, Jr., Happier landings sought; With energy conference near, city wants to cut hassles at airport, HOUSTON CHRON., Apr. 16, 2005, at Business 1 (noting Muslim concerns about security checkpoint dogs at airport).

251 See, e.g., Sniffer dogs unclean, N.Z. TIMES (Mar. 6, 2006), at World (stating in its entirety, “Hindu priests cleansed a shrine to Indian independence leader Mahatma Gandhi after a visit by [President George W.] Bush, the Hindustan Times reported yesterday. It wasn’t the US leader who offended them, but the sniffer-dogs that scoured the area ahead of his visit”).

252 Cf. Langley v. State, 735 So. 2d 606, 607 (Fla. Ct. App. 2d Dist. 1999) (finding that reasonable person would not feel free to leave knock-and-talk encounter when confronted by six officers and “K-9 dog;” defendant testified she was “afraid of the dog”).

253 See GEORGE S. STEFFAN & SAMUEL M. CANDELARIA, DRUG INTERDICTION: PARTNERSHIPS, LEGAL PRINCIPLES, AND INVESTIGATIVE METHODOLOGIES FOR LAW ENFORCEMENT 67 (CRC
then, law enforcement’s own apparent practice of eschewing dogs during “knock and talks” is an implicit acknowledgment that dogs are intimidating and offensive, and therefore, intrusive. With that said, we also have limited information regarding whether occupants, either adults or children, were aware that their residence was subjected to a sniff, but that the occupants chose to avoid a direct confrontation with the human police officers and the detection canine. It does not require the paranoia of a conspiracy-theorist to suspect, however, that drug detection dogs have been observed while sniffing a residence, that occupants of the sniffed home have been offended or fearful as a result, and that detection dogs will be introduced into residential settings with increasing frequency if the Court allows police to use canine sniffs in an entirely discretionary manner. Further, in every case, the potential for discovery, and therefore intimidation or offense, exists and cannot be predicted in advance. Accordingly, all canine sniffs of the home should be supported by, at a minimum, reasonable suspicion.

As a further thought, we presently have no information about property damage to the home of the sort that detection dogs have been known to produce in other contexts. Property damage of even the most de minimis sort has not gone unnoticed by the Court, at least in the seizure context. For example, even such de minimis intrusions as the destruction of a minute

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254 This “potential for discovery” is distinguishable from Karo’s reference to a “potential for an invasion of privacy” made in discussing whether the installation of a beeper constituted a seizure. See United States v. Karo, 468 U.S. 705, 713 (1984) (emphasis omitted). In Karo, the “potential” privacy invasion was entirely within the discretion of the police, because the police could decide to turn the beeper on, or not. Here, the intrusiveness of the canine sniff would involve circumstances beyond the officer’s control.

255 See Merrett v. Moore, 58 F.3d 1547, 1549 (11th Cir. 1995) (noting that “the dogs scratched several cars” during discussion of whether narcotics-detection roadblock violated Fourth Amendment). See also United States v. Cota-Lopez, 358 F. Supp. 2d 579, 584 (W.D. Tex. 2002) (narcotics detection dog alerted by barking and “scratching at the door”).

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amount of white powder by the field testing in *Jacobsen*\textsuperscript{256} or the paint scrapings taken from the exterior of a vehicle in *Cardwell v. Lewis*\textsuperscript{257} required justification under the Court’s reasonableness analysis.\textsuperscript{258} Important to the Court was the fact that the property at issue, the white powder in *Jacobsen* and the automobile in *Cardwell*, had already been lawfully seized at the time these additional *de minimis* intrusions occurred.\textsuperscript{259} For home-sniffs, on the other hand, no lawful seizure of the home is required. Therefore, even relatively minor property damage to the home may be viewed as unreasonable.\textsuperscript{260} Since it is impossible to know in advance whether doors will be scratched, cats chased,\textsuperscript{261} or occupants will be frightened or bitten, all canine sniffs of the home should be supported by, at a minimum, reasonable suspicion.\textsuperscript{262}

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\textsuperscript{256} United States v. Jacobsen, 466 U.S. 109, 124-25 n.27 (1984) (observing that, even though amount of tested powder was so minute that its loss was undetectable, field testing of white powder “did affect [Jacobsen’s] possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one”).

\textsuperscript{257} 417 U.S. 583, 591-92 (1974).

\textsuperscript{258} See *Jacobsen*, 466 U.S. at 125 (observing that “[t]o assess the reasonableness of [the field testing], we must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion”) (internal quotation marks omitted).

\textsuperscript{259} Id. (observing that “since the property had already been lawfully detained, the ‘seizure’ could, at most, have only a *de minimis* impact on any protected property interest”).

\textsuperscript{260} Id. at 125 n.28 (noting that although the destruction of white powder in *Jacobsen* was reasonable, Court cautioning that “[w]e do not suggest, however, that any seizure of a small amount of material is necessarily reasonable”).

\textsuperscript{261} While the idea of cats being chased is introduced, in part, to provide a bit of levity to the discussion, it should be noted that even *inconveniences* with respect to property must be supported by a lawful initial seizure. For example, in discussing the seizure of the minute amount of white powder necessary for the field testing at issue in *Jacobsen*, the Court observed that the seizure of the luggage in *Place* became unreasonable because the bags were kept too long. *Jacobsen*, 466 U.S. at 125 n.25. Again, the key point with respect to these additional investigative activities (field testing in *Jacobsen* and canine sniff in *Place*) is the fact that both were supported by a lawful initial seizure of the item involved. No such lawful initial seizure of a private home is required in the sniff-of-the-home context that would otherwise support inconveniences like runaway pets or trodden landscaping.

\textsuperscript{262} Cf. *Jacobsen*, 466 U.S. at 125 n.28 (noting that “where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances”).
While the drug detection dogs presently in service are often of the intimidating sort, the intrusiveness that arises from a dangerous dog’s presence in a home’s curtilage could be mitigated by reliance on more “people-friendly” dogs like the members of the Department of Agriculture’s Beagle Brigade. Therefore, this article does not propose that reliance on any particular type of drug sniffing dog, by itself, justifies treating the canine sniff of a home as a “search.” With that said, it is nevertheless important to emphasize, that the drug detection dogs presently in service are intimidating, and that this fact must not be ignored by courts asked to consider the sniff-of-the-home question. When the practice of introducing threatening police-dogs into the protected curtilage of a private home is viewed in conjunction with the heightened expectation of privacy associated with the home, then the canine sniff issue comes into sharper focus.

*Heightened expectation of privacy associated with the home:* The conclusion that a canine sniff of the home is a “search” within the meaning of the Fourth Amendment can be traced to *United States v. Thomas*. Thomas is a case involving the criminal trial of multiple defendants for their operation of a large narcotics ring run by a governing body called the “Council.” In *Thomas*, the Second Circuit concluded that the warrantless sniff under one of the defendant’s apartment door violated the Fourth Amendment:

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263 See supra notes 18-21 and accompanying text, discussing the fact that potentially dangerous breeds are generally selected as drug detection dogs for an “intimidation” factor and because drug detection dogs are often cross-trained for apprehension, or “bite,” capabilities.

264 See supra note 17. Even “people-friendly” dogs would remain offensive to those who objected to dogs on religious grounds. See supra notes 250-51 and accompanying text.

265 As a further observation, however, even people-friendly dogs, like beagles, may produce the sorts of property damage, like scratched doors, or inconveniences, like lost pets or damaged yards, discussed above.

266 757 F.2d 1359 (2d Cir. 1985).

267 Id. at 1362. The story of this vast and highly organized drug operation is depicted in “American Gangster,” a movie starring Denzel Washington as drug kingpin Frank Lucas, and with Cuba Gooding, Jr. playing the Leroy “Nicky” Barnes’ role. AMERICAN GANGSTER
A practice that is not intrusive in a public airport may be intrusive when employed at a person’s home. 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 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.268

The Second Circuit’s conclusions on this issue were viewed as unsound, however, and have been rejected by all federal circuits and district courts that have considered the sniff-of-the-home issue.269 Only one court has followed Thomas’ privacy-based analysis and found that a canine sniff of a home is a “search” under the Federal Constitution.270 The Rabb court, in reliance on Thomas and Kyllo’s concerns about protecting the privacy of the home from government intrusions, explained that:

Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in 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 house at all, or in this case, the fact that a dog’s sense of smell crossed the “firm line” of Fourth Amendment protections at the door of [the] house.271

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268 Thomas, 757 F.2d at 1366-67.
269 See supra note 7, listing courts that find that home-sniff is not “search” under Federal Constitution. See also Fitzgerald v. State, 837 A.2d 989, 1031 (Md. Ct. Spec. App. 2003) (observing that Thomas had met with “universal disapprobation”), aff’d, 864 A.2d 1006 (Md. 2004).
270 See State v. Rabb, 920 So. 2d 1175 (Fla. Ct. App. 4th Dist.), cert. denied, 549 U.S. 1052 (2006). One district court clearly accepted Thomas’s reasoning, but its holding was potentially distinguishable because the canine sniff in that case was performed at the back door of the private home, a location that the court concluded was not a “public place.” See United States v. Jackson, No. IP 03-79-CR-1H/F, 2004 WL 1784756, at *4 (S.D. Ind. Feb. 2, 2004).
271 Rabb, 920 So. 2d at 1184.
While all federal courts, other than the Second Circuit, refuse to extend Fourth Amendment protection to home sniffs, a number of states have interpreted their own constitutions to provide protection under a variety of canine-sniff circumstances.\(^{272}\) Although not determinative of the Fourth Amendment search issue,\(^{273}\) these cases are strong evidence that states routinely consider the circumstances of the canine sniff, and when privacy concerns are implicated, states provide protection. In a sense, perhaps, the sheer number of states that consider the circumstances of the canine sniff in determining whether it is a “search” may suggest that “time has set its face against” a categorical rule that sniffs are *per se* non-searches.\(^{274}\) Further, these states’ practice is evidence that the canine-sniff technique can be viewed as a “search” when used in privacy-sensitive circumstances without burdensome disruption of police investigative efforts. In view of the heightened expectation of privacy associated with the home and the intrusiveness of bringing a drug detection dog into the protected curtilage area of a

\(^{272}\) *See* McGahan v. State, 807 P.2d 506, 509-11 (Alaska Ct. App. 1991) (canine sniff of exterior of warehouse was “search” under Alaska Constitution); People v. Haley, 41 P.3d 666, 672 (Colo. 2001) (canine sniffs are “searches” requiring reasonable suspicion under Colorado Constitution); State v. Bauman, 759 N.W.2d 237, 239 (Minn. Ct. App. 2009) (canine sniff of common hallway of apartment building is “search” under Minnesota Constitution which must be supported by reasonable suspicion); State v. Ortiz, 600 N.W.2d 805, 811 (Neb. 1999) (without expressly stating that canine sniff of threshold of apartment was “search,” finding legitimate expectation of privacy under Fourth Amendment and Nebraska Constitution requiring “reasonable, articulable suspicion” to conduct sniff); State v. Tackitt, 67 P.3d 295, 302-03 (Mont. 2002) (requiring “particularized suspicion” under Montana Constitution); State v. Pellicci, 580 A.2d 710, 716-17 (N.H. 1990) (canine sniff of vehicle was “search” requiring reasonable suspicion under New Hampshire Constitution); People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990) (sniff outside apartment door was “search” under New York Constitution); State v. Woljevach, 828 N.E.2d 1015, 1018 (Ohio Ct. App. 2005) (canine sniff was “search” under Ohio Constitution); Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993) (sniff of person was “search” under Pennsylvania Constitution requiring probable cause); State v. Dearman, 962 P.2d 850, 854 (Wash. Ct. App. 1998) (sniff of garage was “search” under Washington Constitution).

\(^{273}\) *Cf.* Mapp v. Ohio, 367 U.S. 643, 652-53, 660 (1961) (discussing states’ decision to adopt exclusionary rule despite fact that Court had not required them to do so; observing that “the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable”).

\(^{274}\) *Cf.* *id.* at 653 (discussing, among other things, states’ voluntary movement toward adopting exclusionary rule).
private residence, it is appropriate to characterize a canine sniff-of-the-home as a “search” under the Fourth Amendment.

**Reasonable suspicion or probable cause?** If the Court were to conclude that a canine sniff-of-the-home is, in fact, a “search” under the Fourth Amendment, as this article proposes, the essential remaining question would be what quantum of suspicion is required to support a home-sniff: reasonable suspicion or probable cause?275 Certainly, this is an issue over which reasonable minds could disagree. New York, for example, has concluded that a canine sniff-of-a-home is a “search” under its state constitution, but that reasonable suspicion is sufficient to support the sniff-search.276 Washington and Ohio have concluded that a canine sniff-of-a-home is a “search” under their state constitutions which these courts interpreted to require a search warrant supported by probable cause.277 The *Rabb* court also found the home-sniff to be a search, but based its conclusion on the Fourth Amendment, which *Rabb* also interpreted to require a warrant supported by probable cause.278 While the point of this article is to argue that a canine sniff-of-the-home is a search under the Fourth Amendment, and leave for another day a rigorous

275 As the New York Court of Appeals observed, “[o]ur conclusion that there was a search, however, does not end the inquiry.” *Dunn*, 564 N.E. 2d at 1058.

276 *Id.* (deciding that sniff may be used without warrant or probable cause, provided that police have reasonable suspicion that residence contains contraband). *See also Ortiz*, 600 N.W.2d at 811 (without expressly stating that canine sniff of threshold of apartment was “search,” finding legitimate expectation of privacy under Fourth Amendment and Nebraska Constitution requiring “reasonable, articulable suspicion” to conduct sniff).


278 *Rabb*, 920 So. 2d at 1192. In fact, Florida’s district courts of appeal are presently split on the home-sniff issue, with the Fourth District Court of Appeal finding a “search” under the Fourth Amendment, and the Third District Court of Appeal finding no search. *Compare* State v. Rabb, 920 So. 2d 1175 (Fla. Ct. App. 4th Dist.), *cert. denied*, 549 U.S. 1052 (2006) with State v. Jardines, 9 So. 3d 1 (Fla. Ct. App. 3d Dist. 2008), *review granted*, 3 So. 3d 1246 (Fla. 2009).
analysis of the quantum of suspicion that should be required to support the home-sniff, a few observations seem appropriate.

Absent exigent circumstances, a warrant is required to search a person’s home or his or her person. While the Court has refused to allow increased law enforcement efficiency to serve as a basis for by-passing the warrant requirement, the Court does consider the real-world pressures of law enforcement when police are asked to make split-second decisions involving unfolding events in the field. In most cases involving a canine sniff-of-a-home, however, the police decision to perform the sniff does not involve the sort of split-second calculation that was present in Terry. Similar to other sorts of intrusive police surveillance, such as the thermal imager, in most cases there is time for police to resort to the warrant process. Some courts faced with the home-sniff question have suggested that probable cause would be an illogical requirement to support a sniff, since a showing of probable cause would allow officers to obtain a search warrant to conduct a physical search of the premises in any event. The same argument

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279 McDonald v. United States, 335 U.S. 451, 456 (1948) (observing that “[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home”).

280 Mincey v. Arizona, 437 U.S. 385, 393 (1978) (observing that “[t]he investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law”).

281 Terry v. Ohio, 392 U.S. 1, 20 (1968) (observing that “we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure”).


283 See, e.g., Fitzgerald v. State, 837 A.2d 989, 1039 n.6 (Md. Ct. Spec. App. 2003) (observing that “[a] requirement for either a probable-cause-based warrant or even probable cause without a warrant as justification for a dog sniff would be an exercise in redundancy. The probable cause to conduct a dog sniff would ipso facto make the dog sniff unnecessary. The probable cause would in and of itself justify the issuance of the search warrant and the dog sniff would be superfluous”), aff’d 864 A.2d 1006 (Md. 2004).
could, of course, be made regarding a thermal imaging device, but the years since Kyllo have disproven this concern. The focus of post-Kyllo thermal-imaging warrant applications is on whether there is probable cause to conduct the scan, not on whether there is probable cause to physically search the premises. With that said, regardless of whether dog sniff warrants are issued on the basis of probable cause, or, instead, reasonable suspicion, examination of the facts by a neutral and detached magistrate provides the steadying balance that is essential to ensure that home-sniffs are conducted only under appropriate circumstances.

C. Are there limitations in Kyllo that argue against its applicability to the canine home-sniff issue?

Justice Stevens, in his Kyllo v. United States dissent, expressed concern that Kyllo would seem to bar the use of “mechanical substitutes” for narcotics detection dogs, even if the

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284 See, e.g., United States v. Kattaria, 553 F.3d 1171, 1175 (8th Cir. 2009) (finding probable cause to issue thermal imaging warrant; results of thermal scan therefore properly used to obtain warrant to physically search premises); United States v. Henry, 538 F.3d 300, 301 (4th Cir. 2008) (observing that police first obtained search warrant to perform thermal scan, then used results of thermal scan as well as other information to then obtain “conventional search warrant” to physically search property).

285 Johnson v. United States, 333 U.S. 10, 14 (1948) (observing that “[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime”). See also Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (observing that “prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regards to their own investigations—the competitive enterprise that must rightly engage their single-minded attention”) (internal quotation marks omitted).


device was similarly-limited in the information revealed to the presence of contraband. Justice Stevens’ observation is a clear acknowledgement of the tension between the Place/Jacobson line of cases, should they be applied to the home, and the Kyllo holding.

Dogs as natural technology: On the one hand, dogs are familiar fixtures in American society. Many of us have one sleeping on our sofa, guilt-free, at any given time. On the other hand, it is important not to allow our fondness for personal pets to color the legal analysis of whether a trained detection-dog, when used to discover information about the interior of a home, should be viewed as “technology” for purposes of Kyllo. Lower courts that refuse to apply Kyllo to the canine-sniff-of-the-home issue do so, in part, based upon our overall familiarity with dogs and their superior sense of smell, and, as they argue, because the canine sense of smell is not a rapidly advancing technology of the sort warned about in Kyllo.

Interestingly enough, the White House’s Office of National Drug Control Policy discusses detection dogs and lists them as “Non-Intrusive Technology” and, as is discussed below, the Government describes detection dogs as “technology” in other project materials as

288 See id. at 47-48 (observing that Kyllo would also bar “the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive”).
289 See id. at 48 (observing that “[i]f nothing more than that sort of information [the odor of deadly bacteria or chemicals used in production of explosives] could be obtained by using the devices in a public place to monitor emissions from a house, then their use would be no more objectionable than the use of the thermal imager in this case”).
290 But cf. Fitzgerald v. State, 864 A.2d 1006, 1015 (Md. 2004) (observing that “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”).
291 See, e.g., Fitzgerald, 837 A.2d at 1037 (Md. Ct. Spec. App. 2003) (observing that “[t]he use of the sense of smell generally is a familiar tool of perception much older than the common law or the Bill of Rights. Indeed, [the Kentucky Supreme Court] stated that bloodhound evidence ‘was looked upon with favor as early as the twelfth century’”) (internal citation omitted), aff’d, 864 A.2d 1006 (Md. 2004).
292 See id. (observing that “[t]he investigative use of the animal sense of smell, human or canine, cannot even be defined as a technology. It is, a fortiori, not an unfamiliar or rapidly advancing technology that ‘is not in general public use’”). See also State v. Bergmann, 633 N.W.2d 328, 334 (Iowa 2001) (in vehicle-sniff context, observing that “a drug sniffing dog is not ‘technology’ of the type addressed in Kyllo”).
293 See infra notes 295-96 and accompanying text.
well. Therefore, the Government may find itself in the uncomfortable position of both defining and treating drug detection dogs as “technology” in its own project literature and also arguing to courts that such dogs are not sense-enhancing “technology” for purposes of criminal suppression hearings. Understanding why the Government treats drug detection dogs as technology is therefore important in analyzing whether drug detection dogs are “advancing technology” for Kyllo purposes.294

As a threshold matter, it is helpful to consider more thoroughly the Government’s treatment of drug detection dogs in its own project literature. For example, a program is presently in place that is intended to enhance the drug-detection dog gene pool. In its Nonintrusive Inspection discussion, the White House’s Office of National Drug Control Policy described the program’s intended goal of creating a “worldwide gene pool” for substance detection canines:

In conjunction with the U.S. Customs Service, the graduates of a breeding program for substance detection canines are now working at U.S. ports of entry. Based on quantitative genetic principles proven by the Australian Customs Service, initial results indicate the potential to establish a worldwide gene pool for substance detection canines.

Scientists at Auburn University are analyzing functional olfaction characteristics to improve our understanding of the biological and behavioral processes in substance detection with canines. A dynamic three-dimensional model has been constructed olfactory laminar flow, recovery, and adaptation. Further study will verify the mechanisms of the particle filtration process. Findings are being disseminated to all substance detection canine training agencies.295

294 Courts that refuse to apply Kyllo to home-sniffs base their decision, in large part, on Kyllo’s “advancing technology” comment. See, e.g., State v. Jardines, 9 So. 3d 1, 5 (Fla. Ct. App. 3d Dist. 2008) (observing that “[a] dog’s nose is not, however, a ‘device,’ nor is it improved by technology. Dogs have been used to detect scents for centuries all without modification or ‘improvement’ to their noses), review granted, 3 So. 3d 1246 (Fla. 2009).


Genetics research is also being conducted by the Transportation Security Administration (“TSA”) to enhance the capabilities of explosives detection dogs. See Zack Phillips, The Sniff
Additionally, the 2002 Counterdrug Research and Development Blueprint Update (the “Blueprint”) includes “substance detection canines” in the technology section of its brief. The discussion of a “worldwide gene pool” is flanked by a neutron-based probe that can be used to “provide a characterization of the [searched and] imaged object based on its elemental composition,” and a handheld device that can be used “to identify drugs in solid mixtures (e.g., pills) and aqueous solutions” through a “near infrared Raman spectroscopy method.”

While a drug detection dog is obviously not a gadget, these dogs are the object of meaningful scientific study and development; study for both the purpose of improved training of drug detection dogs and to scientifically enhance detection dog capabilities. The canine sniff technique is being enhanced (and, therefore, advanced) through scientific research, breeding programs, scientifically-validated training programs, and cloning technology. Just because

Test, GOV’T EXECUTIVE, Dec. 1, 2006 (“We’ll be custom-designing dogs for purposes of detection. We call them Labrador retrievers; there may come a day we call them Labrador detectors”) (quoting Scott Thomas, breeder for TSA program), http://www.govexec.com/features/1206-01/1206-01s2.htm. The TSA breeding program has produced “a new custom breed,” the Vinzslador, in the hope of producing detection dogs with the best qualities of both Labrador retrievers and vizslas. Id. (“Let’s not think of a dog as an old tool that can’t be improved on. It can, with current technology”) (quoting Thomas).

Counterdrug Research, supra note 295, at 6. Appendix C classifies canines as a “nonintrusive inspection technolog[y],” while Appendix D includes the canine breeding program as a “narcotics detection technolog[y].” See Appendix C, at C-1, and Appendix D, at D-1, D-3.

Russia, for example, has created a new breed of “super sniffer” dogs by cross-breeding Siberian Huskies with jackals. See Ben Aris, Russians breed superdog with a jackal’s nose for bombs and drugs, TELEGRAPH.CO.UK, Dec. 15, 2002, http://www.telegraph.co.uk/news/worldnews/europe/russia/1416227/Russians-breed-superdog-with-a-jackals-nose-for-bombs-and-drugs.html (last visited Aug. 22, 2009). The “super sniffer dog,” a cross between a Siberian Huskie and a jackal, which has an “enhanced sense of smell” was the product of a twenty-seven year scientific research project. Id.

See supra note 295 and accompanying text.

For example, in the civil forfeiture context, concerns about currency contamination have led some courts to require a “sophisticated dog alert” on money which the Government seeks to seize because of its connection to drug trafficking. See In re $80,045.00 in U.S. Currency v. John Doe, I, 161 Fed. Appx. 670, 671 (9th Cir. 2006). In order to establish a sophisticated dog alert, the Government must establish that the drug detection canine “would not alert to cocaine residue found on currency in general circulation [and that] the dog was trained to, and would
a dog is not a gadget is not determinative of whether detection dogs have been trained and developed such that they represent a form of sense-enhancing technology. As the definition of “technology” suggests, the term describes “practical application of knowledge especially in a particular area.” Because detection dogs receive careful training using “technical processes, methods, or knowledge,” and are the subject of scientific study that is intended to enhance detection-dog capabilities, these dogs satisfy the definition of “technology.” Certainly the Government’s own treatment of drug detection dogs is a clear indication that, true to the label the Government has attached to them, these specially-trained canines are a form of technology.

Additionally, from a practical perspective, it makes sense to treat a canine sniff-of-the-home as “technology,” and therefore subject to Kyllo. If dogs are permitted to sniff homes for drug detection purposes, it would open the door for other types of sniffers to be used on the home, of the sort warned about by Justice Stevens in his Kyllo dissent. The only distinguishing

only, alert to the odor of a chemical by-product of cocaine called methyl benzoate.” United States v. $22, 474.00 in U.S. Currency, 246 F.3d 1212, 1216 (9th Cir. 2001).

See supra note 295 and accompanying text, discussing creation of “worldwide gene pool” for substance detection canines. Additionally, South Korea has used cloning technology to create “the world’s first cloned drug-sniffing dogs.” South Korea to use cloned dogs to sniff for drugs, explosives, L.A. TIMES, Apr. 24, 2005, (“We came up with the idea of dog cloning after thinking about how we can possess a superior breed at a cheaper cost”) (quoting Hur Yong-suk, head of Korean Customs Service), available at http://articles.latimes.com/2008/apr/24/world/fg-cloned25 (last visited Aug. 12, 2009). These cloned dogs are touted as possessing superior drug detection capabilities than ordinary canines. See Clone ranger sniffs out airport drugs, PHYSORG.COM (Aug. 12, 2009) (stating that the cloned drug detector’s “achievement [in locating 3 grams of narcotics in a ‘tightly-zipped’ bag] has demonstrated that cloned dogs have much better abilities in spotting narcotics than ordinary dogs”), http://www.physorg.com/news169283100.html (last visited Aug. 12, 2009).

The definition of “technology” includes “a manner of accomplishing a task esp. using technical processes, methods, or knowledge.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1283 (11th ed. 2003).

See, e.g., Canine olfactory sensitivity, supra note 33, at 216 (observing that “[t]he following laboratory study of dogs’ detection of cocaine hydrochloride and its degradation product methyl benzoate were conducted as part of the ongoing efforts of Auburn University’s Institute for Biological Detection Systems to enhance canine detection technology”) (emphasis added). See also supra note 297 concerning development of “super sniffer” dog.

See supra notes 288-89 and accompanying text.
differences between these two varieties of “sniffers” would be that a dog is animate and perhaps less accurate than any mechanical sniffer that might ultimately be used in the field.\textsuperscript{304} While some might argue that the lack of precise-accuracy of the canine sniff, as compared to a mechanical sniffer, makes the canine sniff less intrusive, this argument makes little sense in the home-sniff context since the ensuing search on the basis of a false-positive alert would be so extraordinarily intrusive.\textsuperscript{305} Furthermore, basing any distinction on Kyllo’s expressed concerns about “advancing technology” seems premature in the canine sniff context since genetics-based breeding programs are in place, programs with the intended goal of enhancing drug detection-dog capabilities,\textsuperscript{306} and a so-called “super sniffer” dog has been produced by cross-breeding Siberian Huskies with jackals.\textsuperscript{307} Therefore, the remaining distinction is that dogs are animate sensing-devices and mechanical sniffers are not. While this is admittedly a way to distinguish the two varieties of “sniffers,” it appears to be the only way to distinguish them in a principled manner. As the Rabb court observed:

\begin{quote}
At the end of the analysis, the Fourth Amendment remains decidedly about “place,” and when the place at issue is a home, a firm line remains at its entrance
\end{quote}

\textsuperscript{304} The Georgia Institute of Technology has developed a mechanical sniffer, which has been referred to as an electronic “dog-on-a-chip.” The vapor sensor, also known as an “electronic nose,” is said to be more sensitive than a drug detection dog; dogs can detect molecules in the part-per-billion range, while the dog-on-a-chip at “a few trillionths of a gram.” Press Release, Georgia Institute of Technology, ‘Dog-on-a-Chip’ Could Replace Drug-Sniffing Canines (Nov. 7, 2003) (reporting results from D.D. Stubbs, et al., \textit{Investigation of Cocaine Plumes Using Surface Acoustic Wave Immunoassay Sensors}, 75 \textit{ANALYTICAL CHEMISTRY} 6231 (2003)), available at \url{http://www.gatech.edu/newsroom/release.html?id=209} (last visited Aug. 15, 2009). See also Paige Bowers, \textit{How to Put a Police Dog On a Chip}, \textit{TIME}, Jan. 04, 2004, available at \url{http://www.time.com/time/magazine/article/0,9171,570268,00.html} (last visited Aug. 15, 2009). As discussed in Section II, canine detectors have a natural advantage over electronic detectors based upon the dog’s mobility and agility, \textit{see supra} note 42 and accompanying text, but this was not a consideration in this scientific research.\textsuperscript{305} \textit{See supra} notes 198-206 and accompanying text, discussing intrusiveness of home-search both because of size of home in comparison to other containers to which drug detection dogs alert and because police would be permitted to examine any container or location capable of secreting drugs.\textsuperscript{306} \textit{See supra} notes 295, 297, and 300. \textsuperscript{307} \textit{See supra} note 297.
blocking the noses of dogs from sniffing government’s way into the intimate
details of an individual’s life. If that line should crumble, one can only fear where
the future lines will be drawn and where sniffing dogs, or even more intrusive and
disturbing sense-enhancing methods, will next be seen.\textsuperscript{308}

Accordingly, drug detection dogs represent a “natural” technological aid to law
enforcement and should therefore be subject to \textit{Kyllo}.\textsuperscript{309} Similar to the thermal imager in \textit{Kyllo},
detection dogs do not actually detect contraband in most cases; their alert to the methyl benzoate
molecule instead allows police to \textit{infer} that contraband is present. Therefore, drug detection
dogs are a sense-enhancing technology, albeit a natural one, because detection canines implicate
the same concerns expressed in \textit{Kyllo}: (1) the potential for advancement of sensing capabilities
(either through science-based breeding programs, cloning technology, and innovative training
tactics); and (2) the potential disclosure of noncontraband information.

\textit{“Routineness” of technology directed at home:} As \textit{Kyllo} clearly indicated, not all sense-
enhancing technology was barred from use in gathering information about the interior of the
home. The \textit{Kyllo} Court specified that whether technology was in “general public use,” which
\textit{Kyllo} explained to mean “routine,” may be a factor in determining whether the police
surveillance tactic at issue amounted to a “search.”\textsuperscript{310} Therefore, it is worthwhile to consider
whether dogs could be viewed as sufficiently “routine” to merit treatment as technology that is in
“general public use.” In other words, even if dogs are viewed as sense-enhancing technology
within the meaning of \textit{Kyllo}, the canine sniff might be sufficiently “routine” that society would
lack a reasonable expectation of privacy in the information revealed by the sniff.

\textsuperscript{308} \textit{State v. Rabb}, 920 So. 2d 1175, 1192 (Fla. Ct. App. 4th Dist.), \textit{cert. denied}, 549 U.S. 1052
\textsuperscript{309} While the \textit{Kyllo} Court also referenced “hi-tech measurement of emanations from a house,” the
opinion does not suggest that this comment was intended to \textit{exclude} from \textit{Kyllo}’s reach natural
 technological aids that implicated \textit{Kyllo}’s concerns about advancing technologies in general. See
\textit{Kyllo} v. United States, 533 U.S. 27, 37 n.4 (2001) (responding to dissent’s argument that thermal
imager at issue simply allowed police to infer what was going on inside \textit{Kyllo}’s house).
\textsuperscript{310} \textit{Kyllo}, 533 U.S. at 40, n.6.
While the *Kyllo* Court did not specify how “routineness” was to be determined,\textsuperscript{311} guidance on this issue can be found in *Kyllo*’s treatment of earlier cases in which technology was used to gain information about the home or its uncovered curtilage areas. *Kyllo* expressly endorsed earlier Supreme Court decisions that permitted the use of technology to facilitate the ordinary perceptions of police officers.\textsuperscript{312} In the aerial surveillance cases, *Florida v. Riley*\textsuperscript{313} and *California v. Ciraolo*,\textsuperscript{314} the technology of air flight enabled the officers to observe marijuana plants growing in uncovered curtilage areas of the private residences involved. Neither case involved optical magnification of a human’s ordinary eyesight, however. The *Riley* and *Ciraolo* cases focused on the lawfulness of air flight at the elevations involved and the fact that no intimate details concerning the home were discovered during aerial surveillance.\textsuperscript{315} Although *Kyllo* clearly accepted the validity of the *Riley* and *Ciraolo* decisions,\textsuperscript{316} it reoriented their

\textsuperscript{311} In fact, Justice Stevens, in his *Kyllo* dissent, protested the Court’s failure to analyze the “general public use” factor, or to remand for an evidentiary hearing on this issue. See *Kyllo*, 533 U.S. at 47 n.5 (arguing that there are thousands of thermal imagers presently in use and that they are readily available to the public).

\textsuperscript{312} See *Kyllo* v. United States, 533 U.S. 27, 33 (2001.) The majority noted that the Court had concluded on two different occasions that aerial surveillance of private homes and their surrounding areas was not a “search.” See *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

\textsuperscript{313} *Riley*, 488 U.S. at 448 (observing that “[w]ith his naked eye, he was able to see through the openings of the roof . . . to identify what he thought was marijuana growing in the structure”).

\textsuperscript{314} *Ciraolo*, 476 U.S. at 215 (observing that “[t]he Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye”).

\textsuperscript{315} *Riley*, 488 U.S. at 451 (observing that “it is of obvious importance that the helicopter in this case was not violating the law”) (emphasis in original); *Ciraolo*, 476 U.S. at 213 (noting that “the observations by [the officers] took place within public navigable airspace”). Also important to the *Riley* Court was the fact that “no intimate details” involving the home or curtilage were observed, and that there was no undue noise and no wind, dust, or threat of injury. *Riley*, 488 U.S. at 452. The *Ciraolo* Court noted in a footnote that the State had acknowledged that aerial surveillance of curtilage could become invasive either because of physical intrusion or the use of “modern technology” to reveal intimate details that would be otherwise imperceptible. *Ciraolo*, 476 U.S. at 215 n.3.

\textsuperscript{316} *Kyllo* cites these cases favorably, in part, because of our long history of permitting non-trespassory visual surveillance. See *Kyllo*, 533 U.S. at 31-32 (observing that “[v]isual surveillance was unquestionably lawful because ‘the eye cannot by the laws of England be guilty
justification to make those decisions consistent with *Kyllo*’s reasoning. The *Kyllo* Court deemphasized the earlier decisions’ reliance on the non-intimacy of the information discovered, and instead focused on the routineness of the air-flight technology which made the naked-eye observations possible.\(^{317}\)

After *Kyllo*, all “details” concerning the home are private, regardless of the intimacy of that information.\(^{318}\) On the other hand, in intending protectiveness, *Kyllo* may have injected a more damaging categorization issue into the technology discussion. By characterizing air flight as “routine” and therefore available for gathering information about the home, *Kyllo* completely severed the technology, in a definitional sense, from the context in which it was used. As Justice O’Connor pointed out in her *Riley* concurrence, the circumstances under which the technology is used should determine whether expectations of privacy are reasonable.\(^{319}\)

After *Riley*, the Court seemed to embrace Justice O’Connor’s more situation-sensitive analysis in *Bond v. United States*.\(^{320}\) *Bond* is a pre-*Kyllo* decision that considered the reasonable societal expectations of bus passengers concerning how their luggage would be manipulated by

\(^{317}\) *Kyllo*, 533 U.S. at 38 n.5 (observing that “[w]e think the [Ciraolo] Court’s focus in this secondhand dictum [from the California Supreme Court] was not upon intimacy but upon otherwise-imperceptibility, which is precisely the principle we vindicate today”). The majority explained that limiting “searches” to those that revealed only intimate details “would not only be wrong in principle; it would be impractical in application.” *Id.* at 38.

\(^{318}\) *Id.* at 40 (observing that “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant”). *See also id.* at 38 (observing that “[l]imiting the prohibition of thermal imaging to intimate details that would not only be wrong in principle; it would be impractical in application”).

\(^{319}\) *See* *Florida v. Riley*, 488 U.S. 445, 455 (1989) (O’Connor, J., concurring in judgment) (disagreeing with plurality’s focus on fact that helicopter remained within navigable air space and arguing that “we must ask whether the helicopter was in public airways at an altitude at which members of the public travel with sufficient regularity that Riley’s expectation of privacy from observation was not one that society is prepared to recognize as reasonable”).

\(^{320}\) *See 529 U.S. 334, 338-39 (2000) (finding that officer’s probing palpation of Bond’s soft-side luggage located in bus’ overhead bin violated Fourth Amendment).*
other passengers on a bus. Rather than follow a more-categorical approach, like the one used by the Riley plurality, the Bond Court instead found that the Fourth Amendment had been violated based upon a more context-sensitive analysis: while any passenger could have squeezed Bond’s luggage in attempting to place their own luggage in the overhead bin, the Court concluded that passengers do not reasonably anticipate that other passengers will manipulate their luggage in the probing manner used by the officer. The Kyllo Court’s short-hand reference to air flight as “routine” without any reference to the context of the air flight, suggests that “routineness” may be analyzed under the categorical approach of the Riley plurality rather than context-sensitive approach articulated in Bond. If this is the case, then once a given technology is deemed to be “routine,” courts might no longer consider the way in which the technology was used.

For canine home-sniffs, Kyllo’s apparent blueprint for analyzing “routineness” creates risks beyond the obvious ones: where a category of excluded surveillance tactics (i.e., one excluded from Fourth Amendment scrutiny because it is “routine”) collides with another category of excluded surveillance tactics (i.e., canine sniff), the risk of unreasonably narrowing Katz’ privacy-based Fourth Amendment analysis becomes real. In allowing canine sniffs of the home, lower courts have emphasized our overall familiarity with dogs and our societal recognition that dogs have an excellent sense of smell that has long benefited law enforcement.

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321 If the Riley plurality approach had been applied, then because any passenger could have probed Bond’s luggage while placing their own bag in the overhead bin, police would be permitted to conduct such a probing palpation as well.
322 See Bond, 529 U.S. at 338-39 (observing that while “a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or employees will, as a matter of course, feel the bag in an exploratory manner”).
323 The obvious hazard that Kyllo’s exception for routine technology creates was described by Justice Stevens in his Kyllo dissent: “[P]utting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.” Kyllo, 533 U.S. at 47.
324 See, e.g., Fitzgerald v. State, 837 A.2d 989, 1037 (Md. Ct. Spec. App. 2003), aff’d, 864 A.2d 1006 (Md. 2004). As the Maryland Court of Special Appeals observed in Fitzgerald:
In other words, dogs are “routine,” setting the stage for the conclusion that even if detection dogs are viewed as “technology” for purposes of Kyllo, they should be viewed as “routine” technology.

The convergence between two categorical exclusions from Katz’ privacy analysis simply goes too far. After Place and Caballes, unless the context of the canine sniff (here, the home) is viewed as being too intrusive for Fourth Amendment purposes, then the validity of the warrantless canine sniff must be upheld. If routineness is also a factor (assuming for now, as some lower courts have, that a detection dog could be viewed as “routine”), then no meaningful examination of the context of the sniff would be available even under Kyllo. Such a model makes no sense. Even assuming the on-going vitality of the canine sniff doctrine, adding another layer of insulation from review in the form of “routineness” would render judicial evaluation of most canine sniffs of the home unreachable.325

In addition to the “routineness” factor to Kyllo’s applicability, Riley and Ciraolo are important for another reason. In fact, these cases are important for what they do not say. Riley and Ciraolo turned on society’s acceptance of modern air travel and the assumption that items may be viewable by air travelers when looking out plane windows. The Court noted, and perhaps even emphasized, in both cases that the observations had been made with the naked

325 Cf. Thomas H. Peebles, The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs, 11 GA. L. REV. 75, 86 (1976) (arguing that “failure to reach the question of reasonableness of a search has meant that many types of governmental intrusions are taken out of the domain of judicial control altogether. To hold that no reasonable expectation of privacy existed and that no search occurred permits the judiciary, in effect, to wash its hands of its normal supervisory role over a given type of governmental investigative activity”).
To be clear, the issue of optical magnification was not before the Court in either Riley or Ciraolo, only the warrantless use of technology (air flight) to gain a better vantage point. The Riley and Ciraolo Courts’ analysis was based on a generalized lack of privacy in observations made during the course of air travel, not on the more specific assertion that individuals lack an expectation of privacy in contraband, even when that contraband is located in their homes or uncovered curtilage areas. Significantly, however, if the more specific assertion, the Jacobsen premise, controlled the legal question, then the fact that the observations in Riley and Ciraolo were made with the naked eye would have been irrelevant. If Jacobsen controlled, use of optical magnification would be permissible since the observations would not be physically intrusive and society has come to accept that the vantage point for the observation (air flight) is routine. The Riley and Ciraolo Courts did not so much as hint that the use of optics would have been permissible, however. Perhaps, the “routineness” factor from Kyllo will come to subsume the question of ordinarily-available optical magnification, such as binoculars, directed at the home. Again, though, “routineness” represents a separate question from the Jacobsen premise that a person lacks an expectation of privacy in contraband. Instructive to the sniff-of-the-home question is the fact that nowhere in Riley and Ciraolo does the Court rely on the Jacobsen premise.

V. THE PATH AHEAD

[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized in America. While the requirements of the

326 Florida v. Riley, 488 U.S. 445, 448 (1989) (“With his naked eye, he was able to see through the openings of the roof . . . to identify what he thought was marijuana growing in the structure”); California v. Ciraolo, 476 U.S. 207, 215 (1986) (“The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye”).

327 However, the lack of optical magnification was an important fact, even to the Kyllo Court. See Kyllo, 533 U.S. at 34 (observing that, unlike Riley and Ciraolo, “[t]he present case involves officers on a public street engaged in more than naked-eye surveillance of a home”).
Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement, it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one’s home or office are invaded.\footnote{328} It is reasonable and appropriate to consider the context in which a police investigative tool is used to determine whether it is a “search” for Fourth Amendment purposes. Canine sniffs are not \textit{per se} beyond the reach of the Fourth Amendment when the sniff is performed under intrusive circumstances or in a location that implicates stringent Fourth Amendment privacy concerns. A canine sniff-of-a-home is problematic both because of its intrusiveness and because it implicates the privacy concerns expressed in \textit{Kyllo}. Therefore, home-sniffs are a “search” under the Fourth Amendment, and must be treated accordingly.

Moreover, treatment of canine sniffs as searches would not unduly hamper law enforcement efforts. While dragnet use of canine sniffs would be prohibited under the Federal Constitution, this practice is already impermissible under a number of state constitutions, seemingly without adverse law enforcement consequences. Resort to the warrant process, regardless of whether the dog-sniff warrant is issued on the basis of probable cause or reasonable suspicion, appropriately places a neutral magistrate in the decision-making role for determining whether this privacy-sensitive surveillance tactic should be used. Similar to thermal-imager warrants after \textit{Kyllo}, a dog-sniff warrant application would consider whether there was probable cause, for example, to conduct the \textit{sniff}, not on whether there was probable cause to physically search the premises. When viewed in this light, a dog-sniff warrant would not involve an unreasonably burdensome showing, and would provide the objectivity of a magistrate in considering whether this potentially intrusive police technique was appropriate.

As a final thought, the Court’s recent reminder in *Arizona v. Gant*\(^{329}\) that extensions of constitutional rules must be supported by the rule’s underlying justifications has clear applicability to the sniff-of-the-home issue. Extending *Place* to include canine sniffs of the home cannot be justified by *Place*’s accuracy and limited-intrusiveness justifications. The canine home-sniff is not the minimally intrusive law enforcement tool that a sniff of luggage at an airport or a lawfully-stopped vehicle at the roadside would represent. Therefore, mechanically concluding that canine sniffs are *per se* nonsearches on the basis of *Place* and *Caballes* is unreasonable.

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\(^{329}\) 129 S. Ct. 1710, 1723 (2009) (refusing to extend *Belton* rule to allow search of vehicle after arrestee had been secured and therefore could not access interior of vehicle; safety rationale of *Belton* not satisfied).