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## ARTICLES

# CALLING IN THE DOGS: SUSPICIONLESS SNIFF SEARCHES AND REASONABLE EXPECTATIONS OF PRIVACY

*Cecil J. Hunt, II*<sup>†</sup>

*"[T]he sword of technology has two razor-sharp edges. While one edge can be employed to preserve a nation's security, the other can imperil its very essence."*<sup>1</sup>

### INTRODUCTION

Imagine that you are a pedestrian standing on a busy street corner in broad daylight, or a motorist sitting in your car waiting for the light to change, or simply sitting in your parked car. Suddenly, you notice a police officer approaching you with a large black police dog on a tight leash with a muzzle around its jaws. Without uttering a word of warning or explanation and in the absence of even a modicum of suspicion of criminal activity, the police officer then conducts what is referred to as a "sniff-around," by walking the dog around your person or your car, while the dog sniffs you or your car. Suddenly, the dog stops by your side, its nose close to your leg or your car door and begins pawing at you. This action by the dog is known as an "alert" and it indicates that the dog believes that it has detected the presence

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<sup>1</sup> James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 320 (2002).

of contraband—illegal drugs. On the basis of this alert, the police officer then orders you to surrender your bags or to exit your car and submit to a search. This is not a request; it is a directive that you may not refuse.

Under these circumstances, would you feel intimidated by the police officer's actions? Would you feel frightened? Would you feel that you had a reasonable expectation of privacy from government intrusion that has just been violated? Would you feel that the government had crossed a constitutional Rubicon of inappropriate behavior? Would you feel that the suspicionless sniff-around, performed by the officer and the dog of either your person or your idling car, constituted a search by the state?

Under the recent United States Supreme Court decision in *Illinois v. Caballes*,<sup>2</sup> everything that just happened to you is perfectly legal and beyond the reach of constitutional scrutiny under the Fourth Amendment. Any person aggrieved by this treatment at the hands of the state would have absolutely no constitutional basis to complain of either being sniffed or searched. In *Caballes*, the Court held that a suspicionless sniff-around does not constitute a search and is therefore not subject to review under the Fourth Amendment guarantee against unreasonable searches and seizures.<sup>3</sup> Moreover, under this decision, the Court held that even if a person felt that this conduct violated an expectation of privacy, it is an expectation that the courts had no obligation to recognize because it is not one that "society is prepared to consider reasonable."<sup>4</sup>

The central argument of this essay is that the *Caballes* case was wrongly decided and constitutes a deeply problematic and dangerous intrusion into American civil liberties. It was wrongly decided for three reasons. First, because its holding is so unlimited in scope, it "clears the way," as Justice Ginsburg cautioned in her dissent, for the expanded use of "suspicionless, dog-accompanied drug sweeps,"<sup>5</sup> precisely like those suffered by our hypothetical pedestrian and motorist. Second, because the majority fails to adequately appreciate the role of the automobile in contemporary society, it misapplies the settled legal test of constitutional legitimacy for claims of privacy. Third, it unreasonably expands the standards for a *Terry* stop to what Justice Souter rightly describes as "an open-sesame for general

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<sup>2</sup> 125 S. Ct. 834 (2005).

<sup>3</sup> U.S. CONST. amend IV.

<sup>4</sup> *Caballes*, 125 S. Ct. at 837 (quoting *United States v. Jacobson*, 466 U.S. 109, 124 (1984)); see *Katz v. United States*, 389 U.S. 347 (1967); see also *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>5</sup> *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting).

searches”<sup>6</sup> in the absence of any reasonable suspicion of criminal activity. As a result, the government intrusions that the majority’s decision in *Caballes* imposes on the public are unreasonable and overbroad. *Caballes* was a bad decision for the cause of American civil liberties; the better policy is to require that the state have at least some minimum quantum of evidence of potential criminal activity before being allowed to “call in the dogs, to the distress and embarrassment of the law-abiding population.”<sup>7</sup>

This analysis is divided into four sections: Section I discusses the Fourth Amendment, the automobile, and the reasonable expectation of privacy. Section II considers the three ways in which the *Caballes* decision poses a threat to American civil liberties. Section III offers some recommendations for possible solutions. And Section IV offers some concluding comments.

## I. THE FOURTH AMENDMENT, THE AUTOMOBILE, AND THE REASONABLE EXPECTATION OF PRIVACY

### A. *The Fourth Amendment, the Automobile, and Sniffing*

*Caballes* is ostensibly a case about the constitutionality of a canine sniff search of a car that had been lawfully seized in a routine traffic stop. However, a broader, deeper and more incisive interrogation of the Court’s decision suggests that “[f]or the government, for society, and for each and every individual, the stakes are high indeed.”<sup>8</sup> This is true because, since the sniff search was conducted without any probable cause or reasonable suspicion that the driver might be involved in criminal activity, in a larger context it is also a case about the Court’s continuing struggle to reconcile Fourth Amendment concerns with the pace of technological advances in police investigatory techniques.<sup>9</sup>

This may, at first blush, seem to be an odd characterization because, in and of themselves, live and trained drug-sniffing dogs might not normally be considered technological advancements in police investigatory techniques. However, the intense amount of expert knowledge regarding the science of canine biology, physiology, psychology, as well as the technological aids and innovations in the training, care, and handling required to develop, deploy, and work a drug-sniffing dog clearly suggest that this can be accurately characterized

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<sup>6</sup> *Id.* at 841 (Souter, J., dissenting).

<sup>7</sup> *Id.* at 845 (Ginsberg, J., dissenting).

<sup>8</sup> Tomkovicz, *supra* note 1, at 326.

<sup>9</sup> *Id.* at 357 (discussing “the relationship between technological enhancements of human capacities and the scope of the Fourth Amendment”).

as "technology" understood in its purest form;<sup>10</sup> and one that has been enormously useful to law enforcement. Moreover, the technological community is currently at work on a wide variety of electronic and mechanical "sniffing machines" or "electronic noses" that in many ways rival the expertise of drug- and bomb-sniffing dogs. Although these machines are in the relative early stage of technical development, they are already being widely used by law enforcement agencies. The new technology is designed as either large permanent installations or even hand held devices.<sup>11</sup> Many of these electronic sniffing machines are already deployed in airports and highways all around America as part of the war on terrorism and since the tragic events of September 11, they have been in high demand by every level of law enforcement.<sup>12</sup>

Law enforcement agencies now widely use both live and electronic sniffers in the same way as other investigatory tools that significantly enhance their ability to gather and evaluate otherwise unattainable physical evidence. As a result, to the extent that "smell evidence" is gathered, evaluated, and accepted at trial, the law should be critically concerned with the methods used to collect such evidence and the accuracy of its evaluation. These sniffing tools, both living and mechanical, perform similar investigatory functions in similar ways; they both enable the police "to perceive concealed [and] otherwise confidential information."<sup>13</sup> Therefore, there should be no constitutional space between their respective treatments under the law. Thus the Court's treatment in *Caballes* of the police investigatory technique of using trained drug-sniffing dogs to conduct examinations of lawfully seized personal property, especially in the absence of either probable cause or reasonable suspicion of criminal activity, "has significant implications for" any and all "technological devices with similar abilities to augment human faculties and reveal concealed, arguably private information."<sup>14</sup>

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<sup>10</sup> THE NEW OXFORD AMERICAN DICTIONARY 1742 (2001) (defining technology as "the application of scientific knowledge for practical purposes").

<sup>11</sup> See Tomkovicz, *supra* note 1, at 351 n.163.

<sup>12</sup> See Michael P. Regan, *Can Machines Out-Sniff Dogs? Not Usually*, Detroit Free Press, Nov. 27, 2001, at 4E, available at [http://www.freep.com/news/nw/dogs27\\_20011127.htm](http://www.freep.com/news/nw/dogs27_20011127.htm) ("[A]lthough dogs have worked their paws raw in the aftermath of the Sept. 11 attacks. . . [There is] no fear that dogs will be replaced by machines anytime soon.").

<sup>13</sup> Tomkovicz, *supra* note 1, at 351 n.163. ("While one might question whether drug-sniffing canines are a technological development, I include them in this section because they constitute a novel "scientific" development that enhances normal human capacities to perceive concealed otherwise confidential information.").

<sup>14</sup> *Id.* (citing Bob Mitchell, *Electronic 'Drug Dogs'*, TORONTO STAR, Apr. 16, 2001, at 1 (discussing "electronic sniffer"); Tom Godfrey, *Customs Looks at Scanner: Hi Tech Device in U.S. Detects Trace Bits of Drugs, Explosives*, TORONTO SUN, May 31, 2000, at 3 (discussing high tech electronic nose)).

In light of the *Caballes* decision, one can foresee that it will not be long before police officers who stop a motorist for an ordinary traffic violation will approach the car, ask for the driver's license, registration etc., and then "sniff" the car and the driver either with a dog or with a handheld electronic sniffing machine, which under the decision in *Caballes*, is beyond the reach of constitutional review by the Fourth Amendment. It is indeed hard to imagine how this kind of electronic evidence-gathering by the police is not characterized as a search subject to Fourth Amendment scrutiny. But it is clear that whether the evidence is gathered by a live drug-sniffing dog or an electronic handheld device, the legal principles involved are the same. Thus, the cases dealing with enhanced human capacity and the Fourth Amendment are a helpful lens through which to view *Caballes*. Likewise, the decision in *Caballes* has significant implications for the law's treatment of the rapidly increasing technologically enhanced ways that law enforcement is now gathering evidence about people by "sniffing" their bodies, their possessions, or both.

### *B. The Automobile and the Reasonable Expectation of Privacy*

The tension between the Fourth Amendment and technology represented by *Caballes* is not new to the Court.<sup>15</sup> Since its original adoption, "the United States Supreme Court has repeatedly confronted the question of how to interpret the Fourth Amendment in light of technological developments."<sup>16</sup> The canonical text of the Fourth Amendment provides that

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.<sup>17</sup>

The baseline ideological premise of the Fourth Amendment is that searches and seizures are presumptively unreasonable unless subject

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<sup>15</sup> See Tomkovicz, *supra* note 1, at 324-25 ("The Fourth Amendment is an acknowledgment by the Framers of our Constitution that liberty and social order are in tension with one another. It reflects their best effort to strike and capture the most desirable balance between those two goals.").

<sup>16</sup> Kathryn R. Urbonya, *A Fourth Amendment "Search" in the Age of Technology: Post-modern Perspectives*, 72 MISS. L.J. 447, 454 (2002-2003).

<sup>17</sup> U.S. CONST. amend. IV.

to a warrant, issued by a neutral magistrate, upon "probable cause, supported by Oath or affirmation."<sup>18</sup> In this way, the text of the Fourth Amendment "itself has already performed the constitutional balance between police objectives and personal privacy."<sup>19</sup> However, the Court has consistently created exceptions to this warrant requirement "[w]here law enforcement authorities have probable cause . . . [and] if the exigencies of the circumstances demand it."<sup>20</sup>

First articulated in *Carroll v. United States*,<sup>21</sup> the automobile has long represented an express exception to the general warrant requirement, primarily because of its inherent mobile capacity.<sup>22</sup> Some courts have taken this exception to absurd limits and held it to be operative even when the automobile is in police custody and the driver is in jail.<sup>23</sup> This line of cases is poorly reasoned and has effectively converted what was intended to be a rule of practical reality regarding the mobility of certain forms of transport, into a rule of logical proof, much like the dreaded rule against perpetuities.<sup>24</sup>

The basic logic supporting the general automobile exception to the warrant requirement is sound. It reasons that because cars and other forms of ready transport can potentially drive away and either dispose of evidence or put suspects out of reach, it makes little sense for po-

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<sup>18</sup> *Id.*

<sup>19</sup> *United States v. Place*, 462 U.S. 696, 718 (1983) (Brennan, J., concurring) (quoting *Michigan v. Summers*, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting)).

<sup>20</sup> *Id.* at 701 (citing *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

<sup>21</sup> 267 U.S. 132 (1925).

<sup>22</sup> *Id.*; see *Chambers v. Marony*, 399 U.S. 42, 51 (1970) (holding that cars were inherently mobile); see also *Florida v. White*, 526 U.S. 559 (1999) (dealing with a car seized as contraband); *Whren v. United States*, 517 U.S. 806 (1996) (approving warrantless search of car passengers); *California v. Carney*, 471 U.S. 386 (1985) (holding a warrantless search of a mobile home was valid); James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizen's Fourth Amendment Privacy Expectations in Automobiles*, 47 *DRAKE L. REV.* 833 (1999); Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule*: *Florida v. White*, 90 *J. CRIM. L. & CRIMINOLOGY* 917, 919-20 (2000) ("The historical record supported the idea that courts' and legislatures' construction of the Fourth Amendment had always distinguished between mobile and immobile items."); Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exception to the Warrant Requirement*, 36 *CASE W. RES. L. REV.* 375 (1976).

<sup>23</sup> See *Chambers*, 399 U.S. at 52; see also Chilcoat, *supra* note 22, at 921 (noting that in *Chambers*, "the car itself somehow remained 'mobile' for constitutional purposes in spite of the fact that it was in police custody").

<sup>24</sup> See JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES*, § 201 (4th ed. 1942) ("No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."); see also JESSE DUKEMINER & JAMES E. KRIER, *PROPERTY*, 303 (5th ed. 2002) ("The Rule against Perpetuities is a rule that strikes down contingent interests that might vest too remotely. The essential thing to grasp about the Rule is that it is a rule of logical proof."). *But cf.* *Jee v. Audley*, 29 Eng. Rep. 1186, Ch. (1787) (deeming John and Elisabeth Jee, capable of having another child even though, at the death of the testator, they were both seventy-years-old).

lice officers to take the time to obtain a warrant before conducting a search if the circumstances otherwise justify it on the basis of probable cause. It is also appropriate, however, that the automobile is the subject of a special rule under Fourth Amendment scrutiny because the personal car has always occupied a special place in both the lives and the hearts of the American people.

*C. Extending the Sense of "Home" to Include Automobiles*

The fundamental interests underlying the Fourth Amendment guarantee are powerfully implicated by the manner in which the Court treats the expectation of privacy surrounding the automobile. Since the Court's holdings bring these interests into play and threaten to intrude upon them, it follows that the underlying principles should also be brought into play. Applying these principles to the relationship that contemporary Americans have with their cars reveals that the American public now has an expectation of privacy in their private automobiles that has evolved to the point where it is commensurate with the protection they expect in their homes. Thus, in contemporary America, the personal automobile has become, at minimum, either an extension of the traditional stationary home or, in some cases, an actual replacement for it altogether. This logic suggests that the automobile should be afforded the same degree of Fourth Amendment protection that the traditional home has enjoyed.

The personal automobile has become a private domain of its own. To most Americans, and in the national mythology, the automobile is far more than a mere means of convenient transportation. In the American mythology, the automobile represents an essential feature of their lives and is variously held out to represent notions of freedom, liberty, power, mobility (spatial, economic, and psychological) as well as independence, masculinity, sex appeal, seclusion, and privacy. In fact, in *Caballes*, the initial police stop occurred on the interstate highway where Mr. Caballes, using his car in search of the American dream, was in route from Las Vegas to Chicago in search of greener pastures—a new job, a new home, and a better life. What started as a routine traffic stop, at which Mr. Caballes was only issued a warning for speeding, suddenly became much more when a K-9 officer showed up on his own initiative and did a “sniff-around” of the car with his drug-sniffing dog. The dog alerted at the car's trunk; it was searched and a quantity of marijuana was found. Notably, the officers acknowledged at trial that until the unrequested drug-sniffing dog alerted at the car trunk, they had neither probable cause nor reasonable suspicion to suspect any criminal activity was afoot. In short,



it was a suspicionless search that was conducted just because the police happened to have the car in temporary custody for the minor traffic offense of driving six miles an hour over the speed limit on an interstate highway. Thus it was a search born of convenience, not suspicion. But, independent of the fact that Mr. Caballes was transporting contraband, in many ways he and his car are representative of the classic American dream of a person traveling down the road, alone, in search of greener pastures, a better life, and his own little patch of heaven.

Thus, the deep failure of the Court in *Caballes* was due to its inability or unwillingness to appreciate that, despite all of its faults as a cause of pollution, noise, and accidents, America is locked in a deep and passionate love affair with its cars. The grip of this love affair is so powerful that the feeling of joy, pride, and the expectation of privacy that many Americans now feel for their cars, closely resembles the feelings they have for their homes.

The personal car is now so central to contemporary American life and so highly valued<sup>25</sup> that it is not unusual for some families to spend more of their disposable income on their car payments than on their rent or mortgage payments.<sup>26</sup> If one were to factor in the price of gas, insurance, taxes, tolls, maintenance, repairs, etc., the price of maintaining a personal car can easily rival, if not surpass, the personal expense for a home. For a great many members of the general populace, their cars are the center of their lives.

The process of contemporary America extending its sense of home to include cars began with the nation's "intense love affair with cars" from the moment "they were first invented."<sup>27</sup> As journalist David Shi observed, "[s]ince its first appearance in the 1890's, the automobile has embodied deep-seated cultural and emotional values that have become an integral part of the American Dream. All of the romantic mythology associated with the frontier experience has been transferred to the car culture."<sup>28</sup> The love of cars was apparently a habit Americans picked up early in their history; and they do not show any signs of letting it go, either individually or as a culture. From a humble obsession in 1890 to today, cars are now so ubiquitous that in

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<sup>25</sup> David E. Shi, *Well, America: Is the Car Culture Working?*, THE PHILA. INQUIRER, July, 9, 2000, at D7 ("We refuse to consider other transportation options. As a popular bumper sticker resolutely declares, 'You'll Get Me Out of My Car When You Pry My Cold, Dead Foot from the Accelerator.'").

<sup>26</sup> *Id.* ("In Los Angeles there evidently are more registered cars than people. . . . We dream of cars as we dream of lovers. They express our fantasies; they fulfill our desires.").

<sup>27</sup> *Id.* (noting that "America's love affair with cars has matured into a marriage—and an addiction").

<sup>28</sup> *Id.*

many cities the cars actually outnumber the people; their numbers have grown so fast that "the car population . . . since 1969 [has] grown six times faster than the human population."<sup>29</sup>

The "firm hold" that the car seems to have "over the psyche" of America is at least partially explained by the fact that the car represents the perfect expression of "what Americans have always prized: the seductive ideal of private freedom, personal mobility, and empowered spontaneity."<sup>30</sup> Thus, in the mind of the general American populace the car became a deeply felt and easily understood "symbol of American freedom, . . . independence,"<sup>31</sup> and power. The car has thus become synonymous, at least according to the American mythological narrative, with all of the quintessentially American traits that America prizes so highly, such as a sense of "personal freedom and mobility, rugged individualism and masculine force."<sup>32</sup> As a result, the personal car now forms the basis of a type of "personal democracy," which acts as a "social leveling force, granting more and more people a wide range of personal choices—where to travel, where to work and live, where to seek personal pleasure and social recreation."<sup>33</sup>

The personal car was a major factor in the creation of suburban America. It helped to spur and facilitate the almost wholesale "flight from the city as an antidote to urban life."<sup>34</sup> In America, the car represents a type of "social leveling force." While not every person can realistically dream of owning a home, they can and do dream of owning their own car. This social leveling quality of the personal car has transformed the ordinary car into an "everyman's castle"; and just as it was captured in early English law, it applies equally to America's cars that "[n]o man can set his foot upon my ground without my license."<sup>35</sup> In fact, when people are in their cars, it may be the "only time" in their lives where "they can experience the . . . psychologi-

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<sup>29</sup> Seth Dunn, *Autocracy in America*, WORLD WATCH MAG. (Nov.–Dec. 1997), available at <http://www.chicagocriticalmass.org/media/autocracyinamerica.html> [hereinafter ASPHALT NATION] (reviewing JANE HOLTZ KAY, ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA AND HOW WE CAN TAKE IT BACK (1997)) (noting that a focus on the rapid growth of the car population is helpful because it "opens the widest window to date on the complex relationship between a country and the car").

<sup>30</sup> Shi, *supra* note 25, at D7.

<sup>31</sup> *Driving Passion: America's Love Affair with the Car, Part One—Birth of the Automobile* (NTSC Warner Home Video July 25, 1995).

<sup>32</sup> Shi, *supra* note 25, at D7 ("The automobile is the 'handiest tool ever devised for the pursuit of that unholy, unwholesome, all-American trinity of sex, speed and status.'" (citation omitted)); see Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 148 (2003).

<sup>33</sup> Shi, *supra* note 25, at D7.

<sup>34</sup> ASPHALT NATION, *supra* note 29.

<sup>35</sup> *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (1765).

cally satisfying" feeling of being "in charge." A feeling that they cannot find "at home, or at work."<sup>36</sup> The contemporary American who has to commute by car to work now spends so much of their time in their cars that it would not be an exaggeration to say that in a very real sense they actually *live* a great part of their lives in their cars.<sup>37</sup>

Moreover, not only do Americans *think* of their cars as an extension of their homes, they actually *treat* them that way too. We not only listen to music, talk on the phone and eat in our cars, we also now watch DVD movies, sleep, change clothes, have babies and engage in private consensual sexual activity in our cars suggesting that we treat the car like an extension of or replacement for the intimate rooms of the physical and stationary home.<sup>38</sup> Thus, as one observer noted, "many very intimate encounters occur in vehicles. People have private conversations in automobiles. People who are not driving read private messages in automobiles. People make love in automobiles."<sup>39</sup> Those that engage in these and other personal activities in cars would never think of doing the same things in public. That's precisely the point; when they are in their cars, Americans do not think they are in public, they think they are in their own private space that just happens to have wheels on it. At least one court has recognized the reality of the modern fixation with the automobile when it noted that

[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy

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<sup>36</sup> Associated Press, *Everybody Out of the Car Pool*, CBSNEWS.COM, Aug. 20, 2002, <http://election.cbsnews.com/stories/2002/08/20/national/main519263.shtml> (noting that the words were spoken by "Michael Marsden, an Eastern Kentucky University professor who teaches a course in the automobile's role in society").

<sup>37</sup> ASPHALT NATION, *supra* note 29 (noting that Americans spend more than "72 billion hours stuck in smog filled traffic jams each year").

<sup>38</sup> Shi, *supra* note 25, at D7 ("Our solution to the rush hour gridlock is not to demand public transportation but to transform our immobile automobile into a temporary office, bank, restaurant, bathroom, and stereo system. Americans' talk on the phone, eat meals, don makeup, cash checks, and listen to music and audio books in them.").

<sup>39</sup> Saltzburg, *supra* note 32, at 148 ("To pretend that the automobile is not a private place so that a bright line rule can be employed means that a rule without a principle or rationale is created to enable law enforcement to act in a world that is unreal.").

in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.<sup>40</sup>

Many Americans even give their cars pet names; and first driver's licenses and first cars are traditional rights of passage into adulthood for many adolescents. In short, almost every act of personal intimacy traditionally reserved for and usually performed in the interior of private homes now takes place in cars. The mere fact that these acts are performed with such frequency and ease and are universally regarded as acceptable behavior is powerful evidence that the public has already accepted this expectation as reasonable.

Americans are not only spending more time in their cars, but the cars themselves have morphed into larger vehicles capable of carrying multiple numbers of people and sustaining their every need within the confines of the vehicle over long periods of time. For example, vans, campers, motor homes, Winnebagos, and private buses all constitute a class of vehicles in which people, to one degree or another, live for some period of time. Long-haul truckers actually live in the back of their cabs for days and weeks at a time while they drive cross-country. During the time that this living goes on, they carry with them a sense of personal space in the interior of these vehicles that is commensurate with their feelings about their personal stationary homes.

The logic suggests that the public's expectation of privacy in their homes has been extended, at least to some degree, to their cars and they should therefore be equally protected from unwarranted government intrusion. Thus, any realistic analysis by the Court of the legitimacy of expectations of privacy in personal automobiles is constrained to find that it does in fact satisfy the test first articulated in *Katz v. United States*<sup>41</sup> and should therefore be recognized. This expectation of privacy, of course, only covers those areas not exposed to public view since the *Katz* test draws this sharp distinction. But even subject to the normal effects of the plain sight doctrine, the areas of our cars that are not similarly exposed; where we take the care to prevent public view, by storing items in a closed and locked portion of the car, like the trunk, should certainly be entitled to the protection of the Fourth Amendment. That does not mean that these closed and locked sections of automobiles will be inaccessible to police under

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<sup>40</sup> *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

<sup>41</sup> 389 U.S. 347 (1967). Under the principle first announced in *Katz*, the Court has long held that a Fourth Amendment search requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). For a more detailed discussion of *Katz*, see *infra* Part I.D.

any circumstances short of a warrant. The balancing test that is integral to interpreting the Fourth Amendment may weigh more favorably in the direction of law enforcement against the interests of privacy depending on the interest the state is pursuing. For example, in situations where the state would be pursuing interests that bear on the health and safety of the public, as opposed to ordinary law enforcement, the interests in privacy would be outweighed.

#### *D. Applying This Expanded View of Privacy to Caballes*

If the Court in *Caballes* had appreciated the power of America's love for its cars, and the almost irresistible attraction that the automobile exerts over most of America, it would have focused its inquiry on the reasonable expectation of privacy in the car itself, rather than on the contraband contained in the trunk. If the Court had focused the privacy inquiry on the container rather than its contents, it would have had to apply the two-prong test of the *Katz* rule.<sup>42</sup> That test measured first, whether the individual "exhibited an actual (subjective) expectation of privacy" in the object of the challenged search and, second, whether such subjectively held and manifested expectation of privacy was one that "society is prepared to recognize as 'reasonable.'"<sup>43</sup>

Applying this test to the facts of *Caballes*, it is clear that the first prong of the *Katz* test has been satisfied, because Mr. Caballes had placed the contraband in a location—the trunk—that was locked and out of view. By locking the contraband in his car trunk, it could be persuasively argued that Mr. Caballes evidenced a clear subjective intent to keep the substance from public view and inaccessible by anyone who did not receive the key from him, either voluntarily or through compulsion. This conduct certainly evidences a subjective expectation of privacy in the "object" of the challenged search. That "object" being the car itself and its nonrevelatory compartments—specifically the locked and inaccessible trunk. Moreover, this focus would have been the proper one, because rather than concluding, as the Court did, that Mr. Caballes had no expectation of privacy because one cannot have an expectation of privacy in illegal contraband, in the absence of any probable cause or reasonable suspicion of criminal activity, it would have more precisely focused on his expectation of privacy in the true object of the search, which was the car itself and not its contraband contents.

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<sup>42</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>43</sup> *Id.*; see *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005) (Souter, J., dissenting).

The second prong of the *Katz* test asks whether society is “willing to recognize” the subjective manifestation of an expectation of privacy “as reasonable.” Taken together, the profound love affair between the American nation and its cars, as well as the nature and range of the intimate and expansive contemporary behavior taking place within cars, provides substantial and persuasive evidence that the public does in fact have a strong expectation of privacy regarding their cars, and thus it is by definition one that society is willing to and in fact does recognize as reasonable, where the state has no reason to suspect criminal behavior.

In addition, the Supreme Court itself has to some extent also recognized the legitimacy of an expectation of privacy in cars generally, and especially with regard to the contents of a locked trunk. This is powerfully evidenced by the Court’s holding that even incident to a lawful custodial arrest of the driver of a vehicle, the arresting officer’s authority to search the vehicle is limited “only [to] the interior of the passenger compartment of an automobile and *does not encompass the trunk*.”<sup>44</sup> Thus, even incident to a lawful arrest of the driver, the Court has recognized that a suspect in police custody has a reasonable expectation of privacy in those portions of his car that he has chosen to keep out of public view and locked away from easy access, and has yet to forfeit that expectation. That expectation is so strong that it can only be overcome by the requirement that the police seek a search warrant from a neutral magistrate to search the trunk of a car, even after they have lawfully arrested the driver. This procedural requirement constitutes powerful evidence of a judicially recognized, and therefore by definition, a reasonable, expectation of privacy in both a locked trunk and its contents unless there is probable cause, reasonable suspicion of criminal activity, or a judicial warrant that justifies its subordination to more compelling state concerns.

Instead of analyzing the legitimacy of Mr. Caballes’s expectation of privacy under the famous *Katz* test, the Court looked to its decision in *United States v. Jacobsen*.<sup>45</sup> It cited *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.”<sup>46</sup> The Court then reasoned that since “any interest in possessing contraband cannot be deemed ‘legitimate,’ thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate

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<sup>44</sup> *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (emphasis added); see also *Chimel v. California*, 395 U.S. 752 (1969) (recognizing that a lawful search includes a search of the immediately surrounding area).

<sup>45</sup> 466 U.S. 109 (1984).

<sup>46</sup> *Caballes*, 125 S. Ct. at 837 (quoting *Jacobsen*, 466 U.S. at 123).

privacy interest.’”<sup>47</sup> The Court explained that this was true “because the expectation ‘that certain facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society is prepared to consider reasonable.’”<sup>48</sup> However, the Court did not even consider the possible argument that an individual may in fact enjoy a legally enforceable expectation that items will remain concealed from the authorities if they are placed inside of a container that is already recognized as having a legally protected expectation of privacy absent evidence of probable cause, reasonable suspicion of criminal activity or a valid warrant.

The Court concluded that Mr. Caballes had no legitimate expectation of privacy in the marijuana because it was contraband. However, the Court did not stop to observe that this contraband was inside of a locked trunk and that prior to the dog’s alert, it is important to emphasize that the police had no basis, based either on probable cause or reasonable suspicion, to suspect Mr. Caballes of any criminal activity. Under the Court’s precedents, it is clear that the proper focus for purposes of determining the legitimacy of a claimed expectation of privacy is the “container” or “object” to be searched, not the substance or contraband that might be inside that container. In this case the “container” or “object” to be searched was the car itself, not simply the trunk.

Under the Court’s prior reasoning in similar cases, the focus of examining the legitimacy of a claimed expectation of privacy should be on the object to be searched, not its contents. This is the reason that the first prong of the *Katz* test focuses on the “manifestation” of a subjective expectation of privacy. That which a person exposes to the world is by definition not private,<sup>49</sup> but those things that a person seeks to hide from the world, to protect from public view<sup>50</sup> by placing them in a solid container under lock and key certainly qualify as a subjective manifestation of an expectation of privacy—of both the container and thereby its contents.

### *E. The Fourth Amendment and Privacy*

The term “privacy” is difficult to define with a high degree of precision.<sup>51</sup> However, despite its seeming vagueness as defined by

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<sup>47</sup> *Id.* (quoting *Jacobsen*, 466 U.S. at 123).

<sup>48</sup> *Id.* (quoting *Jacobsen*, 466 U.S. at 122).

<sup>49</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>50</sup> *Id.*

<sup>51</sup> See Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1155 (2005) (“Despite its recognition for over a century, the right to privacy has been poorly articulated and only vaguely theorized. As a result, modern commentators despair at

scholars, it is clear that the public's sense of privacy is premised on an expectation of freedom from unreasonable state intrusions into their "personal space"; a sense of having a right to be "left alone" by the state absent a compelling justification for the intrusion. Additionally, this sense of "being left alone" reflects a value deeply rooted in the American constitutional soul, its history,<sup>52</sup> and its common-law articulations.

### 1. Context

Although it is true that "scholars have struggled to define 'privacy,'"<sup>53</sup> there does appear to be a general consensus regarding a broad outline of the nature of the interests subject to Fourth Amendment review. Some commentators have described this consensus as "encompass[ing] three separate 'clusters,'" described as "decisional privacy," "residential privacy," and "data privacy."<sup>54</sup> Others have divided the notion of privacy into "two strands . . . [t]he first has to do with access to one's person, the other with information about key aspects of one's life."<sup>55</sup> This dichotomy, which has come to be characterized as a distinction between "personal privacy" and "informational privacy," provides an excellent scaffolding upon which to evaluate the various ways that the Court has interpreted the scope of Fourth Amendment protection.

#### a. Technological Shrinkage of Privacy

The privacy goals of the framers enshrined in the Fourth Amendment clearly reflect their appreciation of multiple levels of privacy. Moreover, the framers adopted this constitutional limitation on the

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ever being able to define 'privacy' coherently.").

<sup>52</sup> See IAN R. CHRISTIE, *WILKES, WYVILL AND REFORM* (1962); GEORGE RUDE, *WILKES AND LIBERTY* (1962); see also, Ralph Heller, *An 18th Century Champion of Personal Privacy: A Name To Remember*, NEV. J. (July 1998), available at <http://nj.npri.org/nj98/07/secondshots.htm>.

[T]oday's Americans wonder just how far government should be permitted to go in violating personal privacy. It is instructive to review the story of an 18th Century Englishman, John Wilkes, whose valiant and successful battle against royal intrusion into his private papers inspired our own Fourth Amendment banning "unreasonable searches and seizures" of "persons, houses, papers and effects." Indeed, Wilkes was so admired by the Sons of Liberty in Boston—a group that included John Adams and John Hancock—that the organization asserted that "the fate of Wilkes and America must stand or fall together."

*Id.*

<sup>53</sup> Richards, *supra* note 51, at 1208.

<sup>54</sup> *Id.*

<sup>55</sup> William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 8 (2001).



state's power to search private spaces, even though they realized that in doing so they were correspondingly providing at least some "breathing space for criminal conduct."<sup>56</sup>

Obviously in their judgment, this choice reflected a balancing test. It suggests that the framers thought that a genuinely free society required a balance between the private need for a sense of personal privacy and security, and the public need to engage in crime fighting. However, in the modern state, the constitutional right to privacy faces a unique threat. As Justice Scalia observed in *Kyllo v. United States*,<sup>57</sup> "[i]t would be foolish to contend that the degree of privacy secured to the citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."<sup>58</sup> Thus he concludes that the overarching question that the law must answer is "what limits there are upon this power of technology to shrink the realm of guaranteed privacy."<sup>59</sup> This article argues that the Supreme Court should suffer no amount of technologically induced shrinkage in the public's constitutional right to be free from unreasonable government intrusion into their personal space absent a compelling governmental reason for doing so.<sup>60</sup> To do otherwise runs the very real risk that such technology creep could incrementally totally upset the delicate balance and eviscerate the constitutional protections of personal privacy that the Fourth Amendment was designed to protect.

### *b. The Intent of the Framers*

It is not persuasive in this regard to argue that the framers could not have possibly envisioned the rapid technological capacity of scientific advances that would make it possible "to reveal *any* concealed [or] otherwise inaccessible information . . . that could not have been sensed by unregulated means at the time the Constitution was framed."<sup>61</sup> This is true because the framers were both individually and

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<sup>56</sup> Tomkovicz, *supra* note 1, at 389.

<sup>57</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>58</sup> *Id.* at 33-34.

<sup>59</sup> *Id.* at 34.

<sup>60</sup> Tomkovicz, *supra* note 1, at 413-14.

It is arguable that such shrinkage is intolerable, that human ingenuity should not be capable of diminishing priceless constitutional liberties, and, consequently, that no matter how much the public exploits technological tools, governmental use of these tools to gain previously unavailable access to confidential matters should be constrained. . . . We should not have to live our lives less freely and more circumspectly because confidentiality protective precautions that could prevent human perception are impotent against superhuman faculties afforded by science and technology.

*Id.*

<sup>61</sup> *Id.* at 392, 401.

collectively very much men of science<sup>62</sup> and keenly appreciated the relatively rapid pace of technological advances in their own age.<sup>63</sup>

My point here is that a more reasonable conclusion regarding the failure of the framers to provide for some balancing mechanism with respect to Fourth Amendment privacy rights and technological advance, is not to be found in any lack of imagination or prescience on their part, but rather as a reflection of a conscious attempt to frame basic, fundamental, constitutional liberties that were and should forever remain beyond the reach of mortal power to affect regardless of the technological advances of science. Thus, the exploitation of any technological advance that would allow the government to gain access to any personal information that "could not have been sensed by unregulated means at the time the Constitution was framed . . . jeopardizes cognizable interests in informational privacy"<sup>64</sup> and should be subject to Fourth Amendment scrutiny.<sup>65</sup> With respect to technological advances that the framers could not have imagined, the same basic principles of personal privacy apply in order to determine if they cross the Fourth Amendment threshold.

The Fourth Amendment protects against government searches and seizures, "but the rapid growth of technology in our contemporary world heightens our need to understand the Court's definition of what constitutes a 'search' within the meaning of the Fourth Amendment."<sup>66</sup> The definition of the term "search" that the Courts have adopted defines the word in the context of how it was understood at the time the amendment was adopted. Thus, writing for the Court in *Kyllo*, Justice Scalia in footnote number one adopted a definition of the term "search" that reflected the Amendment's colonial roots. In selecting this definition he observed that "[w]hen the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look things over or through for the purpose of finding something; to explore; to examine

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<sup>62</sup> See I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS* (1995) (analyzing how the founding fathers' scientific education influences their political thought).

<sup>63</sup> *Id.*

<sup>64</sup> Tomkovicz, *supra* note 1, at 401.

<sup>65</sup> *Id.*

Technological increases in human abilities to breach confidentiality are an insufficient reason to compromise the effort to preserve original values. I find it inconceivable that the Framers would have expected (or desired) scientific or technological circumvention of fundamental protections. Consequently, I would respond to the question highlighted by Justice Scalia in simple, straight forward terms: Science and technology have *no* inherent power to shrink the domain of privacy guaranteed by the Constitution. We should be vigilant against that danger and determined to interpret the law in ways that prevent it from happening.

*Id.* at 437.

<sup>66</sup> Urbonya, *supra* note 16, at 454-55.

by inspection; as, to *search* the house.”<sup>67</sup> Similarly, in *Caballes*, Justice Souter complained in his dissent that the majority was guilty of ignoring the obvious nature of a dog sniff as a government sponsored search, because of the obvious “actual function that dog sniffs perform. They are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive.”<sup>68</sup> Under this definition, a dog sniff is clearly a search since it is conducted for the purpose of obtaining information. Thus, the question is whether it is the sort of search that is subject to Fourth Amendment scrutiny.

Scholars have frequently described the Court’s considerable efforts over the years to precisely define the contours of the Fourth Amendment protection as “a mess”<sup>69</sup> and as characterized by inconsistent, contradictory, and incoherent decisions.<sup>70</sup> The Court has been consistent with this pattern in attempting to reconcile the Fourth Amendment’s protections with the pace of technological advances in police investigatory tools. This is partly because by its very nature the “sword of technology has two razor-sharp edges” that can cut both ways.<sup>71</sup> Therefore, technology that can save lives can also, if misused, threaten, undermine, and subvert the most cherished American freedoms.

Despite the fact that “scholars have railed against the Court’s inconsistent approaches in deciding the constitutionality of investigatory practices,”<sup>72</sup> the sky is not falling; moreover, a focus on the “multiple, conflicting interpretive paths”<sup>73</sup> that the Court has taken in

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<sup>67</sup> *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989)).

<sup>68</sup> *Illinois v. Caballes*, 125 S. Ct. 834, 843 (2005) (Souter, J., dissenting).

<sup>69</sup> Urbonya, *supra* note 16, at 520; *see also*, Ronald B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) (“The fourth amendment cases are a mess!”); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787-88 (1999) (“Each doctrine is more duct tape on the Amendment’s frame and a step closer to the junkyard.”); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 291 (describing the Court’s Fourth Amendment cases as “illogical, inconsistent, . . . and theoretically incoherent” (quoting Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 204 (1993))).

<sup>70</sup> *See* Dworkin, *supra* note 69; Luna, *supra* note 69; Sklansky, *supra* note 69; Urbonya, *supra* note 16.

<sup>71</sup> Tomkovicz, *supra* note 1, at 320. Tomkovicz noted that “[o]ur lives are both immeasurably enriched and seriously imperiled by advances in science and technology.” *Id.* at 318; *see* Michael L. Closen et al., *Notorial Records and the Preservation of the Expectation of Privacy*, 35 U.S.F. L. REV. 159, 173 (2001) (noting that technology is a “double-edged sword . . . because advances that promise to better the lot of some in society often threaten others in the process”).

<sup>72</sup> Urbonya, *supra* note 16, at 448.

<sup>73</sup> *Id.*

this effort, may shed some light on "why the Court has no constant guiding principle or principles,"<sup>74</sup> in this area of Fourth Amendment jurisprudence. A view of this conflicting scene through the lens of a postmodernist critique<sup>75</sup> suggests that in fact, the Court's inconsistency in this area is not surprising at all. This is because a postmodernist perspective "would expect multiple, conflicting constructions of the Fourth Amendment because 'interpretation' is merely a community construct."<sup>76</sup> Thus, since America is now more than ever explicitly composed of "numerous, contrasting communities . . . we should anticipate different constructions of the Fourth Amendment."<sup>77</sup> Focusing on the language and rhetoric of the Court in its efforts to determine what governmental conduct constitutes a search in the con-

<sup>74</sup> *Id.* at 449.

<sup>75</sup> *See id.* at 466, explaining that

[p]ostmodernism contends that "[h]uman knowledge is the historically contingent product of linguistic and social practices of particular local communities of interpreters, with no assured 'ever closer' relation to an independent ahistorical reality." Postmodernism rejects the idea of an objective truth, an objective historical narrative, an objective "X." In short, postmodernism "challenges the possibility of grounding reason in anything other than actual social practices."

(quoting Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317, 329 (1994)); *see also*, DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 11 (1997) (arguing that postmodernists believe that "reason is not a uniform faculty in all humankind but rather is socially constructed; it is always situated within existing practices and discourses, and it will therefore be biased or slanted in favor of existing power relations"); *id.* at 34-35 (noting that postmodernists reject the "foundational concepts [of] neutrality, justice, reason, history, nature, the social contract, God, the rational self, and the inherent autonomy of the individual" and that "postmodernism is characteristically critical, seeking to expose the foundations of modern jurisprudence as constructs or ideologies which parade as eternal verities"); Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1, 31 ("[T]he image of the consumer as someone induced from *outside* to enter the circle of liberal justification is wrong. In many important senses, the consumer is *already within the circles of liberal justification*.").

<sup>76</sup> Urbonya, *supra* note 16, at 449; *see* J.M. Balkin, *Essay, What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1666, 1672 (1992) (noting that postmodernists "view knowledge as an activity infused with social interaction and power rather than merely a set of articulable propositions or truths"); Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 748 (1994).

[Postmodernists] suggest that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world and that then presents itself as beyond mere interpretation, as truth itself.

*Id.* (quoting Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28, 30 (July/Aug. 1987)).

<sup>77</sup> Urbonya, *supra* note 16, at 451 ("Even though postmodern philosophy rejects the idea of an objective grand, unifying theory, the loss of an objective constitutional interpretation should not dishearten us or make us fear that nihilism is right around the corner."); *see also*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8-9 (1984) ("[T]he absence of determinacy, objectivity, and neutrality does not condemn us to indifference or arbitrariness. . . . The lack of a rational foundation to legal reasoning does not prevent us from developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.").

text of evolving technology, provides a glimpse of the range of policy choices that confronted the Court and may help to explain why it made the choice that it did.<sup>78</sup>

This postmodern perspective can both reveal and explain "the 'language games'" the Court deployed in these decisions "that arise with respect to different spheres of social life, each incomplete and constantly subject to alteration and development."<sup>79</sup> From this perspective, the Court's Fourth Amendment "mess" is not a cause for despair but rather for hope, because it is possible that an analysis of the "mess" through this lens will be able to "tell us [something] about policing in our society."<sup>80</sup> Thus, "[b]y discerning the lack of clear, objective rules, we are able to view legal doctrines, principles and interpretations as reflecting our society"<sup>81</sup> in less rigid, more flexible, and thus larger, more inclusive, contradictory, and ultimately more realistic ways. Under this approach, the Court's interpretation of the relationship between the Fourth Amendment and government-enhanced investigatory techniques can more accurately reflect the variety of life as it is actually lived by a wider range of the populace than might have been possible through other perspectives.

In the end, the postmodern perspective can be especially illuminating to this constitutional inquiry because this school of "constitutional law theory recognizes the evolving nature of law."<sup>82</sup> Thus, it greatly facilitates our capacity to see "that Fourth Amendment analysis is a product of our times" and the Court's multiple and conflicting positions as offering not merely "interpretations"<sup>83</sup> of the constitutional

<sup>78</sup> See Francis J. Mootz, III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 638-39 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (focusing on the range of choices that the courts make in deciding among competing interpretations). The author notes that

[m]uch of the work by critical race theorists, radical feminist and gay legal scholars . . . seek[s] to displace the conceit that law operates as a rational enterprise, not by claiming that law is hopelessly irrational, but by demonstrating that law often requires a reasonable judgment as between two or more logically acceptable resolutions of a given issue.

*Id.*

<sup>79</sup> Urbonya, *supra* note 16, at 452; see also, GUYORA BINDER & ROBERT WEISBERT, *LITERARY CRITICISMS OF LAW* 122 (2000) ("[T]he pragmatist philosopher Ludwig Wittgenstein argues for the instability of sign systems, which he calls 'language games.'"); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 256 n.9 (1992) ("In postmodernity, legitimation of first-order discourses (e.g., law and science) by resort to second-order discourses of reason (e.g., philosophy) is replaced with a picture of knowledge as a move within a game, specifically a 'language-game.'").

<sup>80</sup> Urbonya, *supra* note 16, at 453.

<sup>81</sup> *Id.* at 453-54.

<sup>82</sup> *Id.* at 455.

<sup>83</sup> *Id.*; see also Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1102 n.198 (2002) ("[T]he reigning mythology of American law and legal studies . . . typically

provision, but rather, “constructions of the law.”<sup>84</sup> As a result, it is certainly possible, and in fact quite likely, that “[t]he perception of the Court’s shifting paradigms and inconsistencies may not only reflect our particular communities’ values, but also suggests changes in our society or . . . particular changes in technology.”<sup>85</sup>

## 2. *Alternative Bases for the Sense of Privacy*

### *a. Personal Space*

The essence of a sense of personal privacy is focused on the integrity of one’s physical body or person and those extensions that are intimately connected to that sense. The most obvious extension of a sense of personal privacy involves the home, the center of private life. The case law under the Fourth Amendment evidences a special judicial reverence for personal privacy in the home. In fact, the most fundamental object of traditional constitutional privacy is the home.<sup>86</sup> Even Justice Scalia observed in *Kyllo* that warrantless governmental searches of the home, though no longer presumptively invalid,<sup>87</sup> constitute “the prototypical and hence most commonly litigated area of protected privacy.”<sup>88</sup> Moreover he noted that this value of privacy in one’s home had “roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.”<sup>89</sup> Thus, there appears to be a “special reverence,”<sup>90</sup> and a deep “historical respect for homes and [a] clear intent [by] the Constitution’s authors to preserve an entitlement to be left alone in our ‘castles.’”<sup>91</sup>

Upon closer analysis, however, the traditional privacy-related reverence for the home is not, as it may at first appear, based on the physical existence of the home itself. Rather, it reflects the privacy

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frames law as if it were a priori subject to the dictates of reason, intelligence, and really good normative arguments.”).

<sup>84</sup> Urbonya, *supra* note 16, at 455 (“The metaphor of ‘constructing’ law as opposed to ‘interpreting’ law highlights communities’ projecting their meaning in text.”).

<sup>85</sup> *Id.*

<sup>86</sup> *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

<sup>87</sup> See *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (noting that warrantless entry into a home is not prohibited when consent is obtained); *Payton v. New York*, 445 U.S. 573, 586 n.25 (1980) (noting that exigent circumstances allow police to enter a person’s home despite the “‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable” (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971))).

<sup>88</sup> *Kyllo*, 533 U.S. at 34 (2001).

<sup>89</sup> *Id.*

<sup>90</sup> Tomkovicz, *supra* note 1, at 422.

<sup>91</sup> *Id.*

"interests" that the home has traditionally represented. The home has traditionally been the primary situs for the center of one's sense of "private space." That is the central animating value of a sense of privacy, not the serendipitous geography of the building in which one lives. In fact, an overemphasis on the home's physicality is revealed to be misplaced when one considers that at the time the Fourth Amendment was adopted only aristocrats had "homes" in the sense that we understand them today.

At that time, the vast majority of people in America, as well as Europe, did not own their own homes; instead they rented their abodes from landlords in exchange for some combination of money, crops, labor, and personal services.<sup>92</sup> In this arrangement, they had no reasonable expectation in these abodes of being free from or able to successfully resist unreasonable intrusions by either the landlord or the state. Thus the reference to men being able to "retreat into the privacy and safety" of their homes, or "their castles" really referred only to wealthy landowners who often had a literal castle within which to retreat. As such, referring to the physical nature of the home does not reflect the sense of privacy prevalent when the Fourth Amendment was adopted. The Founding Fathers conceived of the home as a concept, not a place. And it was a concept that could be moved from place to place and was sufficiently flexible to be able to expand over time to take into account changing contemporary values, as well as changes in both the "technological and the attitudinal landscape."<sup>93</sup> Thus, the core of the Fourth Amendment privacy guarantee should be focused on the value of personal integrity in one's "private space," wherever that might be.<sup>94</sup>

### *b. Property Rights*

Neither the Fourth Amendment itself nor any other part of the Constitution ever mentions the word "privacy."<sup>95</sup> In fact, the Court's initial basis for determining whether a challenged government conduct constituted a search under the Fourth Amendment was not ex-

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<sup>92</sup> See generally, JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 559 (3d ed. 2002) ("The tenants did not own the land in any modern sense; they held the land of the king in return for periodic services to him. . . . Everyone except the king, was subordinate to some lord, and everyone, except the tenant-in-demesne, was lord of some tenant . . .").

<sup>93</sup> Tomkovicz, *supra* note 1, at 415.

<sup>94</sup> Examples of privacy for the homeless include boxes, grate space, space under bridges, etc.

<sup>95</sup> See Heffernan, *supra* note 55, at 9 ("Equally significant is the failure of the authors of *The Federalist Papers* to discuss the concept of privacy: Madison for example, was deeply concerned about the protection of property rights but had nothing to say about privacy.").

pressly grounded on notions of privacy at all, but rather on values reflecting the “the eighteenth century[’s] . . . profound respect for property rights.”<sup>96</sup> Thus it is clear that the “conceptual framework” of the men who adopted the Fourth Amendment “was grounded in a concern for property generally and the law of trespass in particular.”<sup>97</sup> In a world grounded on notions of property, trespass<sup>98</sup> constituted the most fundamental sort of invasion and was the principal ideological basis for its defense. In the early common-law case of *Entick v. Carrington*,<sup>99</sup> Lord Camden found the government’s search invalid because of the significant degree of physical invasion suffered at the hands of the Crown.<sup>100</sup> In *Entick*, Lord Camden eloquently articulated the basic relationship in England between the social investment in the concept of property as a cherished value and the law of trespass as its gallant protector. He wrote, “[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license.”<sup>101</sup>

This decision is generally thought to demonstrate the early common law’s reverence for the protection of the informational aspect of an individual’s privacy. As the *Entick* Court noted, “[p]apers are the

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<sup>96</sup> *Id.* at 10; see also WILLIAM BLACKSTONE, 2 COMMENTARIES \*1-2 (“There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property.”); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 243 (Marvin Meyers ed., 1973).

This term [property], in its particular application, means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.” In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right, and which leaves to everyone else the like advantage.

*Id.* (quoting James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792).

<sup>97</sup> Heffernan, *supra* note 55, at 12. “According to eighteenth century common law cases, a necessary condition for establishing . . . liability [for a government search] was proof that one of the government’s agents had trespassed on someone’s property.” *Id.* at 10.

<sup>98</sup> Trespass as used in this article also includes the concept that a “[t]respass on someone’s person—an arrest can be defined as a trespass in this sense—interferes with privacy of the person.” *Id.* at 10; see also *id.* at 10 n.32 (“The term ‘trespass’ is normally employed to refer to possessory interests in real estate. However, . . . the gist of the tort [of trespass] is intentional interference with rights of exclusive possession; no other harm is required.” (quoting DAN DOBBS, THE LAW OF TORTS 95-96 (2001))); *id.* (“[T]he term [trespass] is relevant to possession of one’s person [because] ‘[e]xclusive possession’ can of course refer to rights over one’s person as well as rights over real estate.”).

<sup>99</sup> 19 Howell’s State Trials 1029 (1765).

<sup>100</sup> See *id.* at 1030 (noting that in their search of Entick’s home government officials “broke open the boxes, chests, drawers, etc. [of all] private papers [making public] his secret affairs”).

<sup>101</sup> *Id.* at 1066; see also Heffernan, *supra* note 55, at 13 (“Camden grounded his approach in a Lockean premise about the ends of government, contending that ‘[t]he great end, for which men entered society was to secure their property.’” (quoting *Entick*, 19 Howell’s State Trials at 1066)).



owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."<sup>102</sup> However, a very persuasive argument can be advanced that even for these colonial forbearers, the concept of "property" was not exclusively focused on corporeal possessions but was instead a proxy for values that transcended mere real estate. In describing Entick's papers as his "*dearest* property" the Court "unmistakably focused on the emotional rather than the market value of private papers"<sup>103</sup> thus demonstrating that the Court was primarily concerned not about the physicality of the papers but rather "the role such papers play in sustaining personal life."<sup>104</sup> The underlying value at play here is therefore a "profound respect for informational privacy."<sup>105</sup>

Similarly, shortly after *Entick* was decided, William Pitt expressed an equally eloquent respect for the fundamental value of the privacy of the individual. In his famous "home-as-a-castle principle" enunciated in a speech to the British House of Commons, he triumphantly announced that in England:

The poorest man may, in his cottage, bid defiance to all of the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.<sup>106</sup>

Thus, the earliest English references to a sense of personal privacy focused on the same themes regarding the primacy of the home that are also part of today's current discussion of privacy.

### *c. Information*

It has been argued that "informational privacy is the core interest safeguarded by constitutional control over searches."<sup>107</sup> While the informational content of private lives is an important interest to protect against unreasonable government intrusions, it constitutes only one aspect of the core expectation of constitutionally protected pri-

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<sup>102</sup> *Entick*, 19 Howell's State Trials at 1044.

<sup>103</sup> Heffernan, *supra* note 55, at 14.

<sup>104</sup> *Id.* ("[Lord Camden's] categories of analysis were those of property law, but property provided an awkward proxy for the values he was actually championing.").

<sup>105</sup> *Id.*

<sup>106</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 49-50 (1937).

<sup>107</sup> See Tomkovicz, *supra* note 1, at 382.

vacy. Equally important as the aspect of constitutional privacy primarily concerned with the content of private space, is the sense of a personal ownership of this private space without regard to its physical contents. This private space is critical and forms the conceptual basis for a personal sense of identity, safety, control, agency, and value in society. It is within this personal space that we make our most intimate decisions, engage in our most intimate conduct, and expect for others and ourselves a certain degree of respect and distance from the prying eyes and grasping hands of both the public and the state.

One scholar unknowingly captured the real interests at stake in Fourth Amendment searches while ironically arguing that an interest in informational privacy is the “core value” of the Fourth Amendment. He observed this interpretation was consonant with the understanding of those who adopted the amendment because, he argued, “The invasions known to the framers violated privacy by breaching confidentiality and uncovering secrets hidden within homes and other enclosed spaces. Those physical intrusions gained access to concealed information about the colonists’ lives by *piercing barriers* that safeguarded that information.”<sup>108</sup>

The concept of governmental conduct that “pierces the barrier” safeguarding the content of personal informational privacy is the key to understanding this argument. The central focus should not be on the personal information exposed and accessed by this governmental piercing—the contents of this space—but rather the “piercing” of the personal barrier itself. The true essence of the claim of government intrusion is therefore not based on keeping the government away from our private papers, as keeping it out of our private space. This sense of private space is essential for our sense of identity and agency. Moreover, the preservation of a sense of personal space that was achieved by protecting the public from such government intrusions also “furnished a critical foundation” for a “sphere of confidentiality” that seemed necessary “to live full and genuinely free lives.”<sup>109</sup>

#### *d. Personal Security*

The values animating the framers of the Fourth Amendment combined this dual sense of a separate but interdependent relationship between personal and informational privacy. This combined sense of both personal and informational privacy is captured in a part of the Fourth Amendment that gets very little attention: the eighth word of

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<sup>108</sup> *Id.* at 342 (emphasis added).

<sup>109</sup> *Id.*

the first sentence of the amendment provides the American people with the right to be "secure."<sup>110</sup>

In the opening words of the amendment, the framers make it clear that the central value they sought to serve was that of recognizing that the first duty of every sovereign state is to provide for the security of its citizens. This word choice by the framers represents a conscious and deliberate choice to acknowledge that in fulfilling this critical first duty, the state must not only protect its citizens from threats "foreign and domestic" but it must also protect them from itself—the power of the state. They understood that for the citizenry to feel truly secure in a democratic republic, they must also have rights against the state in order to create a "personal life [and] sustain a sense of personal identity and independent existence."<sup>111</sup>

This suggests that the failure of the framers to include the word "privacy" in either the Constitution or their personal writings, may not be a result of a difference in values from the contemporary era, but rather a difference in language and political rhetoric.<sup>112</sup> The colonists surely understood the threats that the British Crown had imposed on them and held perilously over their heads, which their revolution sought to "secure" them from. In order to have the space to pursue life as a free person in a democracy, the framers understood that security meant freedom not only from the threat of the Crown's army in the field but also its soldiers at the door. It is behind this small, secure, personal veil that private life is lived; that private political choices are made; that private market choices are made; and that private family choices are made. One could even go so far to say that the security and seclusion provided behind this veil of privacy is the essence of what it means to live in a free country and to be a free person.

The starkest evidence that this perspective accurately reflects the views and values of the framers with respect to the concept of privacy is the fact that it was this precise sense of personal security and seclusion that they sought to deny from their Black slaves. In this way, they seemed to understand that just as democratic self-governance needs to provide its subjects with security and seclusion in order to work properly, a system of chattel slavery needed to deprive its sub-

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<sup>110</sup> See *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (deciding a Fourth Amendment case without mentioning the word "secure" once in the opinion).

<sup>111</sup> Heffernan, *supra* note 55, at 15 ("Security of the home, the principle Pitt champions . . . promotes a number of different interests, not only privacy of the person but also informational privacy and control over property.").

<sup>112</sup> See Urbonya, *supra* note 16, at 452 (discussing how language is constantly changing and alternative linguistic choices were not always as apparent as they are now).

ject of precisely the same things in order to maintain the dominance and control.<sup>113</sup> The slave could call nothing his own, not even his own body or any aspect of his personal life. The free white man could call anything and everything (at least potentially) his own, especially his own body and any personal aspects of his life that he chose not to disclose. And therein was the essential distinction between being master or slave, citizen or merchandise, eligible for shelter from the state under cover of the Fourth Amendment as citizen or denied all rights of agency and privacy as property.<sup>114</sup>

Thus one can argue that the original founding generation did not “view privacy as a separate consideration but instead reasoned in terms of a general interest”<sup>115</sup> that included privacy of the person and informational privacy—as well as the very hallmarks of citizenship and freedom itself. Although the scope of the Fourth Amendment was originally articulated in property-based terms, it is clear that the founding generation understood it to be far more expansive than could be conveyed by the crude proxy of real estate and chattels, however dear.

Because early Courts originally conceived of the parameters of Fourth Amendment jurisprudence through a property lens, the common-law notion of trespass became the key determinant of whether the government crossed the constitutional threshold. If the government physically penetrated a person’s property space, a trespass had occurred and Fourth Amendment protection applied. However, in the

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<sup>113</sup> See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRE-SUMPTIONS OF THE AMERICAN LEGAL PROCESS* 50 (1996).

One of the corollaries of the precept of inferiority was that blacks were to be made to always feel hopeless, submissive, and docile. This corollary was accomplished by regulating their lives so thoroughly and completely that they would have only the bare minimum of control over their own fates. To assure docility and compliance, the slave had to understand that his master knew best, that resistance was futile, and that any attempt to regain control over his life would be met with severe punishment and possibly death.

*Id.*

<sup>114</sup> See *id.* at 50-51.

The Virginia legislature adopted the original 1669 statute to say, in effect, that since blacks were not fully human, to kill one was not murder, as it would be if the victim had been white. . . . The statute proceeded to absolve the “person giving correction” of any criminal liability if the slave died as a result of being disciplined. As such, the statute was not directed toward the slaves. It did not seek to deter slaves from running away or resisting by spelling out their punishment if they did. Instead, it is directed toward the master. The statute sought to reinforce the master’s right to punish the slave as he saw fit, even if it meant killing the slave because, in the words of the legislature, the slave was part of the master’s estate. He was the master’s *property*.

*Id.*; see also GEORGE M. FREDRICKSON, *THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM AND SOCIAL INEQUALITY* (1988); TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICAN (Robin D.G. Kelley & Earl Lewis, eds., 2000).

<sup>115</sup> Heffernan, *supra* note 55, at 15.

absence of a physical penetration, no trespass had occurred and the government could act free of Fourth Amendment constraints.

Thus, when first confronted with technologically enhanced surveillance in the form of electronic wire tapping on wires entirely outside the home, the Court viewed the case "through the lens of property law"<sup>116</sup> and refused to characterize the government's conduct as a search for constitutional purposes. In *Olmstead v. United States*,<sup>117</sup> the Court held that the Fourth Amendment constitutional border had not been crossed when the government engaged in wiretapping a suspect's outside telephone lines.<sup>118</sup> The ideological key to the decision in *Olmstead* was the fact that the government had accomplished its wiretapping arrangement entirely by tapping the wires outside the suspects dwelling place, and therefore the state never committed a physical invasion of the suspect's home or penetrated his personal space. For more than a decade, the Court faithfully followed the doctrine articulated in *Olmstead* and refused to extend the shelter of the Fourth Amendment prohibition on government searches unless the government action was also accompanied by a physical trespass.<sup>119</sup>

*e. Reasonable Expectation as a Basis for Privacy*

The modern constitutional standard for determining the reach of Fourth Amendment concern is *Katz v. United States*.<sup>120</sup> In this case, the Court "re-imagined the boundaries of 'searches' under the Fourth Amendment."<sup>121</sup> Until that time, the reigning standard by which the protections of the Fourth Amendment was available was in notions of "constitutionally protected areas"<sup>122</sup> under the common-law rubric of the trespass. *Katz* decoupled the law of privacy from the common law of trespass and instead "embraced the more fluid and more openly normative concept of 'reasonable expectations of privacy.'"<sup>123</sup>

In its landmark decision in *Katz*, the Court rejected the outmoded trespass requirement and held that the electronic eavesdropping in question constituted a search, not because it physically penetrated

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<sup>116</sup> Urbonya, *supra* note 16, at 481.

<sup>117</sup> 277 U.S. 438 (1928).

<sup>118</sup> *Id.* at 469.

<sup>119</sup> See generally *Goldman v. United States*, 316 U.S. 129, 135 (1942) (holding that there was not a Fourth Amendment violation based on governmental agents' use of a dictaphone).

<sup>120</sup> 389 U.S. 347 (1967).

<sup>121</sup> Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2493 (1996).

<sup>122</sup> *Katz*, 389 U.S. at 351 n.9.

<sup>123</sup> Steiker, *supra* note 121, at 2493 ("This concept and phraseology have remained constant from 1967 until today, but the Burger and Rehnquist Courts have elucidated notions of 'reasonableness' in expectations of privacy that are increasingly deferential to the government.").

personally protected physical space, but because it had “violated the privacy upon which [Mr. Katz] justifiably relied.”<sup>124</sup> Thus, because of the march of technology, the old *Olmstead* property-based standard was unable to keep up and “safeguard the important interests”<sup>125</sup> at the heart of Fourth Amendment protections. Thus, *Katz* rejected the physical intrusion standard that had previously been a matter of settled law.

The *Katz* privacy test is an interest-oriented approach that “focuse[s] on the core Fourth Amendment interest in privacy and evaluate[s] whether governmental conduct jeopardizes that interest.”<sup>126</sup> If those fundamental interests are jeopardized, the government conduct in question is subject to Fourth Amendment scrutiny. In this way, the original founding vision of constitutional privacy can accommodate the “variety of difficult [and] unforeseeable”<sup>127</sup> “constitutional dangers posed by innovative enhancements of human sensory abilities.”<sup>128</sup>

In his famous concurring opinion in *Katz*, Justice Harlan argued that the parameters of Fourth Amendment protection are determined by the “reasonable expectation of privacy.”<sup>129</sup> The reasonableness test formulated by Justice Harlan consists of two prongs, both of which must be satisfied to qualify for Fourth Amendment protection. The first prong asks whether the subject of the search “exhibited an actual (subjective) expectation of privacy.”<sup>130</sup> The second prong requires that such an expectation must “be one that society is prepared to recognize as ‘reasonable.’”<sup>131</sup>

The second prong of the *Katz* test is the key to Harlan’s reasonableness standard and thus constitutes the “lodestar” for making Fourth Amendment threshold determinations.<sup>132</sup> It consists of an objective evaluation of the extent to which “society is prepared to recognize a particular expectation as reasonable.”<sup>133</sup> Moreover, in practice, this test “has not been guided by actual assessments of society’s

<sup>124</sup> *Katz*, 389 U.S. at 353.

<sup>125</sup> Tomkovicz, *supra* note 1, at 339.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 326.

<sup>128</sup> *Id.* at 348.

<sup>129</sup> *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

<sup>130</sup> *Id.* at 361.

<sup>131</sup> *Id.*

<sup>132</sup> Tomkovicz, *supra* note 1, at 343.

<sup>133</sup> *Id.*; see also *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (“[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“[W]herever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.” (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))).

attitudes, but instead by objective indicia of whether it is rational to validate an assertion that officials have deprived an individual of a cognizable interest in secrecy."<sup>134</sup> It is important to note that Harlan's reasonableness test, as articulated in *Katz*, is a flexible and organic one that is designed to grow and expand with society's understanding and consensus of what constitutes a constitutionally protected sphere of private space and how government interests weigh against that value. In this way, the *Katz* test of the legitimacy of privacy expectations can evolve over time to keep pace with advances in the technological augmentation of human sensory perceptions and evolving public attitudinal standards of reasonableness.

## II. THE THREAT *CABALLES* POSES TO AMERICAN CIVIL LIBERTIES

### A. Public Health and Safety Exception—Terrorism

The critique expressed in this article regarding the inadvisability of authorizing and encouraging suspicionless searches with dogs, is expressly limited to drug-sniffing dogs and the so-called war on drugs and does not extend to bomb-sniffing dogs and the contemporary war on terrorism. Although these two areas are superficially similar, they are doctrinally quite distinct.

In their dissents, both Justices Souter and Ginsburg addressed this issue in drawing a Fourth Amendment distinction between routine crime fighting techniques and those employed to serve important public health and safety concerns. Justice Souter noted that "[s]uffice it to say here that what is a reasonable search depends in part on demonstrated risk."<sup>135</sup> Justice Ginsburg invoked the "special needs doctrine"<sup>136</sup> to distinguish suspicionless sniff searches for bombs from routine crime control. Moreover, she drew the distinction back to the Court's line of cases that dealt with "the general interest in crime control and more immediate threats to public safety."<sup>137</sup> She then noted

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<sup>134</sup> Tomkovicz, *supra* note 1, at 346 (pointing out that this second prong of the *Katz* test has been determinative in a number of Supreme Court decisions).

<sup>135</sup> *Illinois v. Caballes*, 125 S. Ct. 834, 843 n.7 (2005) (Souter, J., dissenting).

I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. . . . Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.

*Id.*

<sup>136</sup> *Id.* at 847 (Ginsburg, J., dissenting) ("[T]he immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.").

<sup>137</sup> *Id.* (citing *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, (1990)).

that “[a]s the Court observed in *Edmond*: ‘[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.’”<sup>138</sup>

## *B. Unlimited Scope of the Decision*

### *1. An Invitation to Potential Law Enforcement Abuse*

The scope of the *Caballes* decision is unreasonably broad and thus threatening to civil liberties, because it opens the way for the police to conduct suspicionless drugs searches with drug-sniffing dogs in any lawful traffic stop on any car that is temporarily motionless either in traffic or while parked and potentially even on any pedestrian in public. The broad sweep of the Court’s holding in *United States v. Place*,<sup>139</sup> that a sniff is not a search, has the distinct prospect of becoming, precisely what Justice Souter feared it might—an “open-sesame for general searches.”<sup>140</sup> It would be futile for our hypothetical pedestrian or motorist to attempt to comfort himself with the notion that however outrageous and intrusive the suspicionless dog sniff search may be, he has nothing to worry about since he has in fact done nothing wrong. First, this view is of no comfort because the constitutional protections against unreasonable searches and seizures are not and should not be premised on the potential guilt or innocence of its targets.<sup>141</sup>

Secondly, it is quite possible, even in the case of an innocent person unaware of possessing drug-tainted currency, for a drug-sniffing dog to alert to the presence of the cocaine-tainted currency in that person’s possession. This is true because, as the court noted in *United States v. Carr*,<sup>142</sup> “a substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence.”<sup>143</sup> In fact, the substantiality

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<sup>138</sup> *Id.* (second alteration in original) (quoting *Edmond*, 531 U.S. at 44); see also *id.* (“[P]ermitting exceptions to the warrant and probable-cause requirements for a search when ‘special needs, beyond the normal need for law enforcement’ make those requirements impracticable.” (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985))).

<sup>139</sup> 462 U.S. 696 (1983).

<sup>140</sup> *Caballes*, 125 S. Ct. at 841 (Souter, J., dissenting) (“[T]hat rule requires holding that the police do not have reasonable grounds to conduct sniff searches for drugs simply because they have stopped someone to receive a ticket for a highway offense.”).

<sup>141</sup> *Id.* at 845 (Ginsburg, J., dissenting) (“The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty.”); see also *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) (“Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.”).

<sup>142</sup> 25 F.3d 1194 (3d Cir. 1994).

<sup>143</sup> *Id.* at 1215 (Becker, J., concurring in part and dissenting in part).



of the drug-tainted character of all United States currency is such that a court recently noted that "as much as 80 [percent] of currency in circulation has drug residue."<sup>144</sup> Therefore, even those who are innocent of any criminal activity face a substantial likelihood that a trained drug-sniffing dog conducting a sniff-around of either their person or car will alert to the presence of contraband, in the form of drug residue on their currency; thereby subjecting them to an invasive governmental search. In addition, even in the absence of tainted currency, the innocent, law-abiding public faces the prospect of potential "false positives" when a drug-sniffing dog may alert to them in complete error.<sup>145</sup>

An important part of the majority's reasoning in concluding that a dog sniff-around is not a search and thus immune from Fourth Amendment scrutiny, is because it regarded dog sniffs as a "*particularly nonintrusive procedure*."<sup>146</sup> However, as Justice Ginsburg observes, trained drug-sniffing dogs are "not lap dogs"; rather they are large, imposing, and physically as well as psychologically "intimidating animal[s]."<sup>147</sup> Accordingly, Justice Souter also injects a note of common sense when he observes that "I agree with Justice Ginsburg that the introduction of a dog to a traffic stop (let alone an encounter with someone walking down the street) can in fact be quite intrusive."<sup>148</sup> Whether the dog alerts or not, the experience of being subjected to a suspicionless sniff-around by such an intimidating animal, whether in one's car or, as Justice Souter observes, while walking down the street, can be not only an intrusive but also an unsettling and frightening experience.

The degree of intrusiveness of a dog sniff may well be more reasonably determined by the nature of the thing being sniffed. If the object of the sniff is an inanimate object, which is not in the immediate physical presence of a person, then the argument for a lower degree of intrusiveness would be more persuasive. When the object of the sniff is a person, however, the physical, psychological, and emotional trauma associated with being sniffed by a trained drug-sniffing police dog, can hardly be said to be nonintrusive.

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<sup>144</sup> *United States v. \$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003), *vacated on other grounds by reh'g en banc*, 357 F.3d 1225 (11th Cir. 2004).

<sup>145</sup> *Caballes*, 125 S. Ct. at 839 (Souter, J., dissenting) ("In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.").

<sup>146</sup> *Id.* at 839 n.2 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)) (emphasis added).

<sup>147</sup> *Id.* at 845 (Ginsburg, J., dissenting) (citing *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004)).

<sup>148</sup> *Id.* at 839 n.2 (Souter, J., dissenting).

In *Doe v. Renfrow*,<sup>149</sup> in a written dissent to the Court's denial of certiorari, Justice Brennan reminded us just how intrusive a dog sniff of a person can be. In that case, the administrators of a combined junior and senior high school worked with the local police force to detain all 2,780 students for two hours during school while each one was systematically sniffed by a team of uniformed, armed police and fourteen trained drug-sniffing dogs. The petitioner, a young thirteen-year-old girl was strip searched by two women employees of the school because a dog alerted to her twice.<sup>150</sup> The trial court rejected her claims of Fourth Amendment violations, and the Seventh Circuit Court of Appeals affirmed, holding that the sniff searches of the students were "'a justified action taken in accordance with the *in loco parentis* doctrine' and that, 'the sniffing of a trained narcotic detecting canine is not a search.'"<sup>151</sup>

Justice Brennan disagreed with the Seventh Circuit and concluded that the "officials' use of the trained police dogs" did in fact "constitute a search."<sup>152</sup> His decision was no doubt motivated in part by his sense that the experience of being sniff searched by police dogs is unnerving. He got a sense of this experience by observing that, "[i]n the case of petitioner, the dog repeatedly jabbed its nose into her legs. Petitioner testified that the experience of being sniffed and prodded by trained police dogs in the presence of the police . . . was degrading and embarrassing."<sup>153</sup> Justice Brennan, in his brief dissent, further observed that on these facts, he was "*astonished* that the court did not find that the school's use of the dogs constituted an invasion of petitioner's reasonable expectation of privacy."<sup>154</sup>

His dissent also pointed out that the dogs were not terribly reliable. He noted that "[e]ach of the 2,780 students . . . was subjected to mass detention and general exploratory search,"<sup>155</sup> and "[e]leven students, including petitioner, were subjected to body searches."<sup>156</sup> Further, the dogs alerted fifty times, but of the fifty alerts, the police found con-

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<sup>149</sup> 451 U.S. 1022 (1981).

<sup>150</sup> *Id.* at 1024 (Brennan, J., dissenting). The authorities were unable to find any drugs or drug paraphernalia on the petitioner's person during the strip search; the dog apparently alerted to her twice not because of drug possession, but as Justice Brennan explained in a footnote, "the police dogs alerted to petitioner because she had been playing with her own dog, which was in heat, on the morning of the raid." *Id.* at 1024 n.1.

<sup>151</sup> *Id.* at 1025 (quoting *Doe v. Renfrow*, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979)).

<sup>152</sup> *Id.* ("The dogs were led from student to student for the express purpose of sniffing their clothing and their bodies to obtain information that the school authorities and police officers, with their less developed sense of smell, were incapable of obtaining.").

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1025-26 (citing *Katz v. United States*, 389 U.S. 347 (1967); *Wolf v. Colorado*, 338 U.S. 25 (1949)) (emphasis added).

<sup>155</sup> *Id.* at 1024.

<sup>156</sup> *Id.*

traband on only seventeen students,<sup>157</sup> Thus, the dogs' alert was accurate only 34 percent of the time and what contraband they did find consisted of only various small amounts of "marihuana, drug 'paraphernalia,' and three cans of beer."<sup>158</sup>

## 2. Lack of a Workable Framework for Future Applications

Although the dogs in *Doe* were right only 34 percent of the time, almost three thousand students had to endure the degrading, embarrassing, and frightening experience of being detained and sniff searched by police dogs. This presents a particularly exploitable scenario for potential law enforcement abuses. The Court's refusal to grant certiorari in *Doe* on these "astonishing" facts, coupled with its recent decision in *Caballes*, ensures that these sorts of searches remain a perfectly legal part of the arsenal of police investigatory tactics that can be deployed anywhere, anytime, and against anyone without being subject to any constitutional oversight under the Fourth Amendment.

One of the most problematic aspects of the Court's decision in *Caballes* concerns the scope of its implications in controlling future police behavior and advising the public of their constitutional rights. In his dissent, Justice Souter expressed the hope that the Court's decision did not signal the "recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car . . . or on the person of any pedestrian minding his own business on a sidewalk."<sup>159</sup>

Despite this "hope," he also noted that Justice Ginsburg was nonetheless "rightly concerned"<sup>160</sup> about such dire future prospects. Moreover he argued that the Court's decision failed to provide a "workable framework" from which such future cases could be analyzed because he concluded that "the Court's stated reasoning provides no apparent stopping point short of such excesses."<sup>161</sup> Most importantly, he opined that such a workable framework was essential because, given the Court's reasoning, the excesses that both he and Justice Ginsburg feared were, in his view, "certain to come along."<sup>162</sup> Thus, under the Court's reasoning, lower courts will be completely without guidance regarding how to resolve these inevitable confrontations between police drug-sniffing dogs and the public.

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Illinois v. Caballes*, 125 S. Ct. 834, 842 (2005) (Souter, J., dissenting).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

Similarly, Justice Ginsburg was equally concerned about the future implications of the Court's decisions in terms of the police officers' conduct but unlike Justice Souter, she was less sanguine about the majority's sweeping reasoning. She chastised the majority's decision as failing to "apprehend[] the danger in allowing the police to search for contraband despite the absence of cause to suspect its presence."<sup>163</sup> As a result, she concluded that "[t]oday's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots."<sup>164</sup> She distressingly observed that, at the very minimum, the majority's decision meant that "every traffic stop could become an occasion to call in the [intimidating] dogs,"<sup>165</sup> for routine encounters between the public and the police.

She goes on to observe that the result of injecting such animals into otherwise routine traffic stops would almost certainly "change the character of the encounter between the police and the motorist" and thereby make such stops "broader, more adversarial, and (in at least some cases) longer."<sup>166</sup> Moreover, she hauntingly warns that even beyond the routine traffic stop, motorists would have no "constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green."<sup>167</sup>

### 3. Implications

Despite the Court's purported effort to limit its decision to motor vehicles that have been legitimately seized pursuant to a valid traffic violation, its sweeping rejection of any reasonable expectation of privacy from government-imposed suspicionless dog sniffs, and its refusal to characterize such dog sniffs as a search subject to constitutional scrutiny, it is reasonable to conclude that at least some police departments around the country will foreseeably view this decision as judicial license to conduct sniff-arounds of any person, vehicle, or even doorway that the law allows them to legitimately approach. It is also reasonably foreseeable that, under the Court's reasoning in *Caballes*, the law-abiding public will have little guidance and considerable insecurity regarding their constitutional right to resist having their person or their property sniffed by police dogs.

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<sup>163</sup> *Id.* at 845 (Ginsburg, J., dissenting).

<sup>164</sup> *Id.* at 845-46.

<sup>165</sup> *Id.* at 845.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 846.

For example, consider the reasonably foreseeable circumstance in which the police knock on a citizen's front door accompanied by a drug-sniffing dog. If upon opening the door, the dog alerts to the presence of drugs either on the person of the individual who opens the door or within their home, do the police now have license to search that person or the interior of the home based on this "evidence"? Arguably, under the decision in *Caballes*, the answer is yes.

Given the probability of a dog alert to tainted currency or even the possibility of false positives, will the prospect of such intrusions induce citizens to refuse to open their front doors to police who come knocking for any reason? What effect will this have on the ability of the police to conduct investigations or even merely canvassing for witnesses following a criminal activity in the vicinity? Uncertainty over the scope of police authority to conduct dog sniffs and the significance of the results of a positive dog alert, may well lead to a widespread refusal by the public to cooperate with police, to open the door to police, or even to allow the police to approach.

### *C. Misapplications of the Privacy Test*

#### *1. Inconsistent with Kyllo*

In *Kyllo*, the Court had to consider whether a thermal-imaging device that registered the heat emissions coming from a private home constituted a search. The Court analyzed this question under the standard articulated in *Katz*: whether the "expectation of privacy in the object of the challenged search" is one which "society [is] willing to recognize . . . as reasonable."<sup>168</sup> In *Caballes*, the drug-sniffing dog did not alert to the presence of contraband. Rather, he alerted to the emanations coming from the surface of Mr. Caballes's car trunk—a closed and locked container.

This is an important distinction because, in *Kyllo*, the Court held that emanations from the surface of enclosed spaces were not devoid of reasonable privacy expectations.<sup>169</sup> In fact, the Court wrote that for

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<sup>168</sup> *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1985), which applies the standard set forth in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

<sup>169</sup> *Id.* at 35. The Government argued that the thermal-imaging device used in that case did not constitute a search because

it detected only heat radiating from the external surface of the house. The dissent makes this its leading point, contending that there is a fundamental difference between what it calls "off the wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house.

important policy reasons “[w]e rejected such a mechanical interpretation of the Fourth Amendment in *Katz*.”<sup>170</sup> Therefore, by ignoring the container within which the contraband was located, that is, the car, and by not subjecting the entire vehicle, including the locked trunk to the *Katz* test, the majority in *Caballes* has effectively undermined its previous holding in *Kyllo*.

This point is starkly illustrated in the Court’s opinion in *Kyllo*, where the defendant also possessed contraband that the Court described as “an indoor growing operation involving more than 100 plants.”<sup>171</sup> However, rather than focusing on the possession of contraband, as the Court did in *Caballes*, the *Kyllo* court rightly focused on the “object of the challenged search”—the house.<sup>172</sup>

Just like the dog sniffs in *Caballes*, the thermal-imaging device in *Kyllo* detected neither lawful nor unlawful activity. Instead, it merely provided information regarding the relative degree of heat emanating from various parts of the defendant’s home, in comparison to his neighbors. The nature of the activity responsible for these heat-imaging disparities had to await the physical search of the premises to be determined. It is only during this physical search that the lawful from the unlawful activities can be detected.

Similarly, in *Caballes*, Justice Souter pointed out in his dissent that

the dog does not smell the . . . contraband; it smells the closed container. An affirmative reaction therefore does not identify a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on. The police will then open the container and discover whatever lies within.<sup>173</sup>

Whatever lies within the container, like the heat that produces the images, could be “marijuana or the owner’s private papers”<sup>174</sup> that the owner has concealed with intention of keeping them private.<sup>175</sup> In both *Caballes* and *Kyllo*, a physical search was required to reveal and distinguish lawful from unlawful activity found within the object that

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*Id.*

<sup>170</sup> *Id.* (“Reversing that approach would leave the homeowner at the mercy of advancing technology . . . that could discern all human activity in the home.”).

<sup>171</sup> *Kyllo*, 533 U.S. at 30.

<sup>172</sup> *Id.* at 33.

<sup>173</sup> *Caballes v. Illinois*, 125 S. Ct. 834, 842 (2005) (Souter, J., dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 842 n.6.

was searched.<sup>176</sup> Justice Souter rightly argues that “in practical terms the same values protected by the Fourth Amendment are at stake in each case . . . [so] if constitutional scrutiny is in order for the imager, it is in order for the dog.”<sup>177</sup>

Moreover, the Court found the conclusion in *Caballes* to be entirely consistent with *Kyllo* in which the Court held that “the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search.”<sup>178</sup> However, the Court distinguished its finding in *Kyllo* from Mr. Caballes’s situation by noting that “critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as ‘at what hour each night the lady of the house takes her daily sauna and bath.’”<sup>179</sup>

Thus the Court reasoned that since the thermal-imaging devices used in *Kyllo* could also reveal lawful private activity while dog sniffs could only reveal the presence of contraband, the two cases were easily distinguishable. The Court argued that this was because “[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent’s hopes or expectations concerning the nondetection of contraband in the trunk of his car.”<sup>180</sup>

In short, the Court held that for constitutional purposes, a dog sniff was not a search and did “not rise to the level of a constitutionally cognizable infringement”<sup>181</sup> on the Fourth Amendment protection against unreasonable searches because, unlike the thermal-imaging device in *Kyllo*, “[a] dog sniff . . . reveals no information other than the location of a substance that no individual has any right to possess.”<sup>182</sup>

However, Justice Souter concluded that because of the inherent fallibility of drug-sniffing dogs, and only a vague connection to the facts of *Jacobsen*, the car in *Caballes*, and the house in *Kyllo* should be regarded as commensurate property interests when determining eligibility for protection under the Fourth Amendment. Thus he suggests that “[a]ny difference between the dwelling in *Kyllo* and the trunk of the car here may go to the issue of the reasonableness of the

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<sup>176</sup> *Id.* at 840 n.3 (noting that the imaging device in *Kyllo* was used to “explore details of the home that would previously have been unknowable without physical intrusion.” (quoting *Kyllo*, 533 U.S. at 30)).

<sup>177</sup> *Id.* at 840-41 n.3.

<sup>178</sup> *Id.* at 838 (majority opinion) (noting the holding from *Kyllo*, 533 U.S. at 27).

<sup>179</sup> *Id.* (quoting *Kyllo*, 533 U.S. at 38).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

respective searches, but it has no bearing on the question of search or no search."<sup>183</sup> Therefore, in practical terms, since the same values regarding a reasonable expectation of privacy are at stake in both *Kyllo* and *Caballes*, the degree of constitutional protection from unreasonable government intrusions that they enjoy should also be the same.<sup>184</sup>

## 2. Misapplication of *Jacobsen*

The Court's reliance on *Jacobsen* is misplaced. In *Jacobsen*, the sole inquiry was whether a "Fourth Amendment search occurred when federal agents analyzed powder they had already lawfully obtained."<sup>185</sup> In that case, the police were dealing with a potential quantity of contraband that they already lawfully seized, whereas in *Caballes*, the police had only lawfully seized the car, they had "yet to put their hands on"<sup>186</sup> the contraband in the locked trunk.

Moreover, unlike the powder in *Jacobsen*, which was either going to test positive or negative as contraband, the action taken by the police in *Caballes* was not a simple black and white test. Instead, it required a physical search of a locked and enclosed space that might have contained a contraband substance. Thus, Justice Souter observed, "in the case of the dog sniff, the dog does not smell the disclosed contraband; it smells a closed container."<sup>187</sup> That container is the car itself and its locked trunk. Unlike *Jacobsen*, therefore, the test, or the dog sniff, did not reveal "a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband."<sup>188</sup> Thus, the proper focus of the Court's privacy inquiry should have been on the car itself and the locked trunk in particular rather than on the contraband substance.

### a. Possession of Contraband Substance

The source of the Court's mistake was trying to resolve this case under their holding in *Jacobsen*. In *Jacobsen*, the police already had a powdery substance in their lawful possession and the only question was whether they were violating the Fourth Amendment by subjecting it to a chemical test to determine whether or not it was an illegal substance. In contrast, in *Caballes*, the police had yet to even discover

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<sup>183</sup> *Id.* at 840 n.3 (Souter, J., dissenting).

<sup>184</sup> *See id.*

<sup>185</sup> *Id.* at 841-42 (noting this was the decision in *United States v. Jacobsen*, 466 U.S. 109 (1984)).

<sup>186</sup> *Id.* at 842.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*



the existence of a contraband substance; all they had was the lawful seizure of an automobile for the limited purpose of writing a traffic ticket. The dog sniff did not give the police possession of the contraband; instead, it merely gave them some evidence to suspect that it might be contained in the car's trunk.

The Court argued that the person in whose possession the powder was found could not invoke Fourth Amendment shelter to prevent the test, because he had no reasonable expectation of privacy in the identity of the powder as a either a legal or illegal substance. The facts of *Jacobsen* make it completely inapposite to a rational analysis of *Caballes*. In distinguishing these cases, it cannot be overemphasized, as Justice Souter pointed out in his dissent, that on their basic facts, these two cases are "significantly different."<sup>189</sup>

### *b. Scope of the Implications*

Based on this evidence, the police must still open whatever container the dog has alerted to and physically search it. When they do, "[t]he police will then open the container and discover whatever lies within, be it marijuana or the owner's private papers."<sup>190</sup> Thus, *Jacobsen's* logic does not even apply to *Caballes* because first, in the former case, the test had a much higher degree of certainty associated with it—either it would test as cocaine or it would not. Second, the mere chemical test carried a much lower degree of potential exposure of perfectly legal private information.

The only potential exposure in this regard in *Jacobsen* is the revelation that the substance was not contraband, whereas in *Caballes* the government test (i.e., the dog sniff) would expose "details of the [container] that would previously have been unknowable without physical intrusion,"<sup>191</sup> because everything in the container to be searched will inevitably be exposed as part of the physical search.

### *3. Misapplication of Place*

The Court relied on its previous holding in *United States v. Place*<sup>192</sup> to determine that Mr. Caballes had no legitimate expectation of privacy. That reliance was misplaced. The Court reasoned that since there is no reasonable expectation of privacy in the possession of contraband, any conduct by the government that will "disclose[]

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 840 n.3 (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)) (explaining the similarity of the dog sniff in *Caballes* and the thermal-imaging device in *Kyllo*).

<sup>192</sup> 462 U.S. 696 (1983).

only the presence or absence of narcotics, a contraband item"<sup>193</sup> cannot, therefore, infringe on a legitimate and thus "constitutionally protected interest in privacy."<sup>194</sup>

*a. Factual Distinctions*

On its facts, *Place* should not even apply to *Caballes* because the underlying factual scenarios are simply too different. For example, the bag that was sniffed in *Place* had been found in public. But, the container in *Caballes* was secured in a locked private car trunk. In *Place*, after the dog alerted but before opening the bag and discovering the contraband, the police obtained a search warrant before a neutral magistrate.<sup>195</sup> In *Caballes*, after the dog alerted, the police conducted an immediate search and did not impound the car until after the contraband was found.

Most importantly, in terms of their factual discrepancies, the defendant in *Place* was already under reasonable suspicion by the police for engaging in criminal activity. That suspicion, by definition lowered his expectation of privacy; under the decision in *Terry v. Ohio*,<sup>196</sup> he could now be subject to a forced stop, interrogated, handcuffed, made to lay face down on the ground, moved to a different location, and forced to answer questions, at least in terms of having to identify himself, all short of evidence of probable cause or custodial arrest.<sup>197</sup> In stark contrast, the defendant in *Caballes* did not have a similarly lowered expectation of privacy and none of these things could be done to him without constitutional violation because the police did not have either reasonable suspicion or probable cause to suspect him of any criminal activity. These factual distinctions make the Court's

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<sup>193</sup> *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005) (quoting *Place*, 462 U.S. at 707).

<sup>194</sup> *Id.* at 837.

<sup>195</sup> *Place*, 462 U.S. at 700 ("Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a Magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.").

<sup>196</sup> 392 U.S. 1 (1968).

<sup>197</sup> See E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 279 (2005).

Whereas a *Terry* stop was originally conceived as a narrow exception to the requirement that all government seizures be accompanied by probable cause—a nominally innocuous "stop and frisk"—the Supreme Court and its lower-court counterparts have since granted police officers broad arrest-like powers in executing a *Terry* stop. These powers include the authority to move suspects and their passengers to different locations, detain suspects for extended periods of time, handcuff and point weapons at suspects, and force suspects to lie prone on the ground. This expansion has been criticized as a pernicious broadening of police investigatory powers by some, while heralded as an important means of allowing for effective law enforcement by others.

*Id.* (citations omitted).

invocation of *Place* highly suspect as a source of authority to resolve *Caballes* and thus impacts negatively on its persuasiveness and application to future cases.

### *b. Drug-Sniffing Dogs*

The Court also noted that "we treated a canine sniff by a well-trained narcotics-detection dog as '*sui generis*' because it 'discloses only the presence or absence of narcotics, a contraband item.'"<sup>198</sup> It is important to note that this conclusion by the Court in *Place* was not its holding, but only mere dicta and thus not binding on the *Caballes* Court.<sup>199</sup> Even more importantly, as Justice Brennan's concurring opinion points out in *Place*, the issue of the reliability of the drug-sniffing dogs was not argued in the court below, was not briefed by the parties, and was not argued on appeal.<sup>200</sup> As a result, the Court had absolutely nothing before it upon which to make a finding that drug-sniffing dogs were *sui generis*. This conclusion by the *Place* Court constitutes the rankest kind of judicial speculation without any support in the record.

### *c. Infallible Drug-Sniffing Dogs*

However, in weak support of its *sui generis* conclusion, the Court cited the respondents' own brief and pointed out that "[r]espondent likewise concedes that 'drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband.'"<sup>201</sup> The Court then acknowledged that, though the respondent to some degree may have conceded to the unique accuracy of dog sniffs, at the same time the Court also attacked arguments that denied the infallibility of dog sniffs. The Court noted respondent argument

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<sup>198</sup> *Caballes*, 125 S. Ct. at 838 (quoting *Place*, 462 U.S. at 707).

<sup>199</sup> See *Place*, 462 U.S. at 711 (Brennan, J., concurring) (criticizing the majority's opinion for reaching beyond the constitutional issues presented and "purport[ing] to resolve[] the constitutionality of the . . . exposure of [defendant's] luggage to a narcotics detection dog"); *id.* at 723 (Blackmun, J., concurring) ("The Court's resolution of the status of dog sniffs under the Fourth Amendment is troubling . . .").

<sup>200</sup> *Id.* at 719 (Brennan, J., concurring).

The Court also suggests today, in a discussion unnecessary to the judgment, that exposure of respondent's luggage to a narcotics detection dog "did not constitute a 'search' within the meaning of the Fourth Amendment." In the District Court, respondent did "not contest the validity of sniff searches *per se* . . ." The Court of Appeals did not reach or discuss the issue. It was not briefed or argued in this Court. In short, I agree with Justice Blackmun that the Court should not address this issue. . . . [it is] "unnecessarily broad dicta."

*Id.* (citations omitted).

<sup>201</sup> *Caballes*, 125 S. Ct. at 838 (quoting Brief for Respondent at 17, *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (No. 03-923)).

that dog sniffs are frequently prone to error, and therefore, such "error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband."<sup>202</sup>

In responding to respondent's attack on the infallibility of dog sniffs, the Court made three arguments: First, "the record contain[ed] no evidence or findings that support[ed] [this] argument."<sup>203</sup> Second, even if true, "respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information."<sup>204</sup> And third, the trial court "found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk."<sup>205</sup>

On the basis of this logic, the Court concluded that well-trained narcotics-detection dogs were sufficiently reliable that their use by the government in connection with a lawfully seized car did "not implicate [any] legitimate privacy interests" because such dogs "[do] not expose noncontraband items that otherwise would remain hidden from public view."<sup>206</sup>

#### *d. Dicta and the Fiction of Infallible Drug-Sniffing Dogs*

As Justice Souter pointed out in his dissent, the notion of an infallible drug-sniffing dog is "a creature of legal fiction."<sup>207</sup> However, "[a]t the heart of both *Place* and the Court's opinion [in *Caballes*] is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband."<sup>208</sup> Not only is this conclusion unnecessary dicta, it is also starkly at odds with the facts of the case itself and authorities cited in the decision itself. Under the facts of *Place*, the drug dogs were directed to sniff two pieces of luggage not just one. In this respect, the Court noted that "[t]he dog reacted positively to the smaller of the two bags but ambiguously to the larger bag."<sup>209</sup> Thus, even in the case in chief, the dog had only a 50 percent accuracy rating. In addition, Justice Brennan's dissent cited *Doe v. Renfrow*,

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

<sup>207</sup> *Id.* at 838 (Souter, J., dissenting).

<sup>208</sup> *Id.* at 839 ("Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff does not implicate legitimate privacy interests and is not to be treated as a search." (citations omitted)).

<sup>209</sup> *Place*, 462 U.S. at 699. Thus in the underlying facts of this very case it is evident that the dogs are fallible. Its ambiguous reaction to one bag was wrong. Its positive reaction to the other was correct; that is a 50 percent accuracy rating.

which dealt with a situation involving a drug sniffing raid on a combined junior and senior high school. In that case, after fourteen dogs spent more than two hours conducting a sniff search their alerts were only accurate 34 percent of the time.<sup>210</sup> The *Place* majority completely ignored the evidence of only moderate dog sniffing accuracy from the case in chief and evidence of poor accuracy furnished by Justice Brennan in the Court's own previous holding. Yet despite this evidence, and without the benefit of oral argument or briefing by the parties, the Court gratuitously concludes that drug dogs are sufficiently accurate to be placed in a class by themselves.

Moreover, the Court's insistence that drug-sniffing dogs alert to "only" the presence of contraband is fatally undermined by facts regarding the accuracy and dependability of drug-sniffing dog searches that were learned after their holding in *Place*. Since that time, as Justice Souter pointed out in his dissent in *Caballes*, experience has shown that the premise that drug-sniffing dogs are infallible is erroneous.<sup>211</sup>

In fact, Justice Souter goes so far as to say 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*'s decision against treating the intentional use of a trained dog as a search."<sup>212</sup> Specifically, Justice Souter pointed out that the supposed infallibility of drug-sniffing dogs "is belied by judicial opinions . . . the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine."<sup>213</sup> Thus, Justice Souter concludes that "the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."<sup>214</sup>

In the face of the reality of reasonably high rates of false positives or errors by sniffing dogs, and thus stripped of "that aura of uniqueness," as Justice Souter argues, "there is no basis in *Place*'s reason-

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<sup>210</sup> *Doe v. Renfrow*, 451 U.S. 1022, 1023-24 (1981) (Brennan, J., dissenting).

<sup>211</sup> *Caballes*, 125 S. Ct. at 839 (Souter, J., dissenting).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (citing, for example, *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (describing a sniffer dog with an error rate between 7 and 38 percent); *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997) (describing a sniffer dog with only a 71 percent accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378 n.3 (describing a sniffer dog that had an 8 percent accuracy rate over its career); *Laimé v. State*, 60 S.W.3d 464, 476 (2001) (describing a sniffer dog that had been inaccurate between ten and fifty times)).

<sup>214</sup> *Caballes*, 125 S. Ct. at 840 ("[A] study cited by Illinois in this case for the proposition that dogs sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5 to 60 [percent] of the time, depending on the length of the search." (citing Reply Brief for Petitioner at 13, *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (No. 03-923) (quoting KELLY J. GARNER, ET AL., DUTY CYCLE OF THE DETECTOR DOG: A BASELINE STUDY 12 (2001)))).

ing”;<sup>215</sup> therefore the majority’s reliance on its decision in *Place* collapses under the weight of reality.<sup>216</sup> Thus, an alert by a drug-sniffing dog, does not necessarily indicate the presence of contraband. Rather, it simply indicates the mere possibility that the container being searched might contain contraband. Moreover, in order to follow-up on this indication of possible evidence, the police are then required to “open the container or enclosed space whose emanations the dog has sensed” and actually physically search it by hand.

#### *D. Undermining the Limits of Terry Stops*

The constitutional analogue by which the acceptable range of police behavior is measured during a “common traffic stop [is] the limited detention for investigation authorized by *Terry v. Ohio*.”<sup>217</sup> The permissible range of government intrusion authorized by the so-called *Terry* stop is dictated first by concerns for the safety of the officers involved,<sup>218</sup> and second by the original justification for the detention.<sup>219</sup> Thus, under *Terry*, merely because a person is detained under a *Terry* stop does not authorize the police to “take advantage of a suspect’s immobility to search for evidence unrelated to the reason for the detention.”<sup>220</sup> Justice Souter observed that this restriction on the constitutionally permissible range of government behavior during a *Terry* stop was conceptually necessary to avoid allowing “*Terry* . . . to become an open-sesame for general searches.”<sup>221</sup>

In light of these fundamental restrictions on government conduct during a *Terry* stop, the majority’s decision in *Caballes* fundamentally undermines and offends the policies expressed in that decision. This is true because, at the time of the official stop, before the drug-sniffing dog alerted to the trunk and the quantity of marijuana was

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<sup>215</sup> *Id.* at 840.

<sup>216</sup> *See id.* at 839 (“Once the dog’s fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment.”).

<sup>217</sup> *Id.* at 841 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)); *see also* *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (reaffirming the *Terry* stop analogy to a routine traffic stop); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (“[T]he usual traffic stop is more analogous to a so-called ‘*Terry* stop’ than to a formal arrest.” (citation omitted)).

<sup>218</sup> *Caballes*, 125 S. Ct. at 841 (Souter, J., dissenting) (“*Terry* authorized a restricted incidental search for weapons when reasonable suspicion warrants such a safety measure.” (citing *Terry*, 392 U.S. at 25-26)).

<sup>219</sup> *Id.* (“[T]he Court took care to keep a *Terry* stop from automatically becoming a foot in the door for all investigatory purposes; the permissible intrusion was bounded by the justification for the detention.” (citing *Terry*, 392 U.S. at 29-30)).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

found, there was no evidence to suggest that Mr. Caballes was involved in criminal activity of any kind.<sup>222</sup>

Thus, part of the rationale supporting the Illinois Supreme Court's decision that a sniff may indeed constitute a search for constitutional purposes focused on whether, contrary to *Terry*'s dictates, introducing a drug-sniffing dog into an otherwise routine traffic stop, transformed the character of that stop into a drug investigation, in the absence of any "'specific and articulable facts' to suggest drug activity."<sup>223</sup> The United States Supreme Court accepted the absence of any suspicion of criminality as a baseline fact in this case, thus proceeding on the "assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding."<sup>224</sup> As a result, the Court explicitly "omitted any reference to facts about respondent that might have triggered [even] a modicum of suspicion."<sup>225</sup>

Although there were a number of factors from which one could argue that Mr. Caballes presented a least of "modicum of suspicion," the Court rightly disregarded them in this case for two reasons. First, the Illinois Supreme Court held that even if those factors were considered collectively, "they constitute[d] nothing more than a vague hunch that defendant may have been involved in possible wrongdoing."<sup>226</sup> Secondly, none of those factors, however probative they may have been, were known to the K-9 officer and his drug-sniffing dog. According to the testimony proffered at trial, the K-9 officer responded to the call and upon arriving at the scene, initiated and concluded his drug dog sniff-around of Mr. Caballes's car without ever consulting the officer issuing the traffic citation.<sup>227</sup>

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<sup>222</sup> *Id.* ("[T]he police had no indication of illegal activity beyond the speed of the car . . .").

<sup>223</sup> *Id.* at 836.

<sup>224</sup> *Id.* at 837.

<sup>225</sup> *Id.*

<sup>226</sup> *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834 (2005). The police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs. . . . Moreover, the observations made by Officer Gillette during the stop that (1) defendant said he was moving to Chicago, but the only visible belongings were two sport coats in the backseat of the car, (2) the car smelled of air freshener, (3) defendant was dressed for business while traveling cross-country, even though he was unemployed, and (4) defendant seemed nervous were insufficient to support a canine sniff.

*Id.* at 204-05.

<sup>227</sup> *Id.* at 203.

### 1. Changing the Character of the Stop

Despite the absence of any suspicion of criminality, the majority argues that injecting a drug-sniffing dog into an otherwise routine traffic stop does not “change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent’s constitutionally protected interest in privacy.”<sup>228</sup> As noted earlier, the Court found that since no one has a constitutionally protected interest in possessing contraband, “governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’”<sup>229</sup>

The Court’s analysis on this issue plainly misses the point. The question is not whether Mr. Caballes had a legitimate privacy interest in possessing the contraband, but whether he had one in the container that was searched, that is, generally speaking, the car itself and more specifically its locked car trunk. Moreover, the proper question is whether the dog sniff search was consistent with the reasons justifying the original detention. The Court’s argument is essentially a non sequitur. This is true because the successful results of the search cannot be used to justify its initiation in the first instance. The clear requirement of *Terry* is that the conduct of the police must be justifiable *ex ante*, before the search is conducted, not by the results afterward.

If, as the Court says, the mere possession of contraband in your car nullifies any legitimate expectation of privacy to the entire car simply because there is a claimed test that will “*only* reveal[] the possession of contraband,”<sup>230</sup> including its locked and secured compartments, then the concept of an illegal search has lost all meaning and has been almost defined out of existence. This is because, under this logic, every search of a car with such a test, that yields contraband is therefore presumptively legal since there was no legitimate right to privacy because of the possession of the contraband itself; and every unsuccessful search can be chocked up to harmless error.

In terms of giving the police in the field reasonable guidance in conducting *Terry* stops and field searches, this is a very poor rule. This is a hapless rule because it does not tell officers *before the search*, whether they have a right to engage in that conduct. Moreover, it clearly suggests that even a suspicionless search can be justified by successful results as long as one of the only tests that are used can “*only*” detect the presence or absence of contraband.<sup>231</sup> Similarly,

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<sup>228</sup> *Caballes*, 125 S. Ct. at 837.

<sup>229</sup> *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*



it offers no security or clarity to members of the public when they are told that the legitimacy of their expectation of privacy in their cars depends on what tests are employed and what the car contains, rather than what the car is, where it is located, or what action it has engaged in. This cannot possibly be the rule that the *Caballes* court meant to articulate, because it effectively swallows the Fourth Amendment altogether.<sup>232</sup>

As Justice Ginsburg notes in her dissent, "The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty."<sup>233</sup> In this way, she is arguing that in order to have any real meaning at all, the shelter of the Fourth Amendment must be available to both the innocent and the guilty—those who possess contraband and those who do not. Thus she concludes that "Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty."<sup>234</sup>

For this reason, applying *Jacobsen* to the privacy expectation of contraband that is still undiscovered and within a covered and locked container, constitutes a misapplication of the precedent and leads to irrational results.

## 2. *Expanding the Scope of the Stop*

The *Terry* stop has two distinct elements that must both be satisfied to pass constitutional muster. First, the officer's actions in initiating an investigatory stop must be "justified at its inception."<sup>235</sup> And second, the officer's actions thereafter must be "reasonably related in scope to the circumstances which justified the interference in the first place."<sup>236</sup> In her dissent, Justice Ginsburg concluded that the majority's decision to allow a suspicionless drug-sniffing dog search during a routine traffic stop "diminishes the Fourth Amendment's force by

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<sup>232</sup> See Chilcoat, *supra* note 22 (arguing that cases relying on the automobile exception to retaining a valid warrant ignore the Fourth Amendment's purpose in protecting against abusive governmental intrusions).

<sup>233</sup> *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting) (citing *United States v. Karo*, 468 U.S. 705, 717 (1984)).

<sup>234</sup> *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting)).

<sup>235</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>236</sup> *Id.*; see also *Caballes*, 125 S. Ct. at 844 (Ginsburg, J., dissenting) ("In applying *Terry*, the Court has several times indicated that the limitation on 'scope' is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted."); *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004) (requiring a suspect to disclose his name during a *Terry* stop does not violate the Fourth Amendment); *United States v. Hensley*, 469 U.S. 221, 235 (1985) (describing how a detention may be so lengthy or intrusive that it may surpass the limits of a *Terry* stop); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (discussing how the scope of an intrusion will vary depending on the particular circumstances of a case).

abandoning the second *Terry* inquiry” regarding the reasonable relationship between the scope of the search and the purpose of the stop.<sup>237</sup> She reasons that the injection of an intimidating drug-sniffing dog<sup>238</sup> “changes the character of the encounter between the police and the motorist” by at the very least making it “broader, more adversarial [in tone], and (in at least some cases) longer” in duration.<sup>239</sup>

The willingness of the majority in *Caballes* to expand the parameters of *Terry* stops is part of disturbing recent trends in which “the *Terry* doctrine has expanded well beyond its original delimitations as set forth by the Supreme Court in 1968.”<sup>240</sup> From its original creation as a “nominally innocuous ‘stop and frisk’”<sup>241</sup> rule, “the Court has steadily expanded the authority of officers to impose upon individual liberties during a *Terry* encounter.”<sup>242</sup> In fact, it has been persuasively argued that

the lower courts have taken license to expand the scope of a *Terry* stop far “beyond [*Terry*’s] original contours.” This expansion has been “multifaceted” and broad. Officers executing a *Terry* stop may now handcuff a suspect and draw their weapons in the suspect’s direction, force a suspect to lie prone, and move a suspect to a different location.<sup>243</sup>

As a result of this incredible and ultimately unwise expansion, a *Terry* stop is now “oftentimes scarcely distinguishable from a traditional arrest.”<sup>244</sup>

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<sup>237</sup> *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting).

<sup>238</sup> *Id.* (“A drug-detection dog is an intimidating animal.”); see also *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004) (McKay, J., dissenting) (“[D]rug dogs are not lap dogs. They typically are large, and to many ordinary innocent people, fearsome animals.”).

<sup>239</sup> *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting).

<sup>240</sup> Estrada, *supra* note 197, at 279.

<sup>241</sup> *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 10 (1968)).

<sup>242</sup> *Id.* at 284.

<sup>243</sup> *Id.* at 285-86 (citations omitted).

<sup>244</sup> *Id.* at 286; see also Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 733 (“*Terry* stops—as a whole—have become much more intrusive than they were just a few years ago. It is commonplace for these investigatory detentions to involve handcuffs, drawn weapons . . . and other forms of force that used to be appropriate only for full-scale arrests.”); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451, 452 (1997) (arguing that the line between a formal arrest and a *Terry* stop has become blurred).

### III. RECOMMENDATIONS

#### *A. Narrow Interpretation*

Although *Caballes* was wrongly decided and should be revisited and reversed, for the time being it is the controlling law and must be followed in appropriate cases. However, to minimize the damage to civil liberties that this decision could cause, it should be interpreted quite narrowly. This narrow interpretation should focus on several of the most easily distinguishable aspects of the decision. For example, the first basis upon which later cases should distinguish themselves from *Caballes* involves the custody of the item to be searched. Under the facts of *Caballes*, when the car was subjected to a sniff search it had already been lawfully seized by the police, in the course of a routine traffic stop. Thus, future sniff searches of cars that have not been similarly lawfully seized should not be controlled by this decision.

The second basis for distinguishing *Caballes* from later cases, involves the inanimate focus of the sniff search. The driver was neither in nor around the car when it was sniffed. The sniff search was conducted only on an unoccupied automobile; it did not involve the sniffing of a person's body either directly or while they were either seated in their car or within its immediate vicinity. Thus, the reach of *Caballes* should be limited to sniff searches of inanimate objects, not living persons. Future sniff searches of people, either directly or while either seated in or within the immediate vicinity of their cars, should not be controlled by this decision. This is an important distinction that Justice Brennan made in the *Place* decision when he wrote that "I have expressed the view that dog sniffs of people constitute searches. . . . I suggested that sniffs of inanimate objects might present a different case."<sup>245</sup> Since neither *Place* nor *Caballes* involved a dog sniff of a person but only an inanimate object, any future cases that are not similarly limited should not be controlled by this line of decisions.

This is also an important distinction because when a dog sniff of an automobile is conducted while the driver is still seated inside, it is not clear whether the dog is smelling the car itself or a combination of both the car and the driver. For example, in *People v. Cox*,<sup>246</sup> the precursor to *Caballes* in Illinois state court, the defendant was still seated in the driver's seat when the sniff search of the car was conducted. The dog alerted at the driver's side door. On that basis, the police searched the car and found only "possible cannabis seeds and residue

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<sup>245</sup> United States v. Place, 462 U.S. 696, 721 (1983) (Brennan, J., concurring) (quoting Doe v. Renfrow, 451 U.S. 1022, 1025-26 (1981) (Brennan, J., dissenting)).

<sup>246</sup> 782 N.E.2d 275, 277 (Ill. 2002).

on the floorboard.”<sup>247</sup> However, when the police then searched the driver, they found a small quantity of marijuana on her person.<sup>248</sup>

The court in *Cox* took particular note of the fact that this sniff test involved a mixture of person and car, and arguably the dog alert was more to the person than the vehicle. However, it noted that “because of our resolution of this cause, we need not consider whether it was appropriate for the police to conduct the dog-sniff test with defendant inside the vehicle.”<sup>249</sup> The court nonetheless emphasized that “other considerations may factor in a search of a driver’s person as opposed to a search of the driver’s vehicle.”<sup>250</sup> Accordingly, *Caballes* should be narrowly construed to apply only to those cases that involve (1) a drug dog sniff search of inanimate objects in general and in particular an unoccupied vehicle and (2) an automobile that has already been lawfully seized by the state or is otherwise being lawfully detained. These limitations on the reach of *Caballes* would go a long way toward alleviating the concerns of potential law enforcement abuse raised by Justices Souter and Ginsburg in their dissents and in the opening of this discussion.

### *B. Prevent Exception from Swallowing the Rule*

*Caballes* should also not be read to provide a broad exemption from the legitimacy of the expectation of privacy based on “governmental conduct that *only* reveals the possession of contraband.”<sup>251</sup> The first problem with this standard is that it partakes of a legal fiction. There are no such tests that “only reveal” the presence or absence of contraband. All that any test can do is provide raw data from which the police or some human interpreter must determine whether the findings are sufficient to infer the “possible” presence of contraband. Thus, no test will yield a definitive result indicating the presence or absence of contraband but their results must be interpreted by a human agency and then confirmed by an actual physical search of the object.

Neither the dog in *Caballes* nor the thermal-imaging device in *Kyllo* could be classified as investigational tools that can “only reveal” the presence or absence of contraband. In both cases, there is also the possibility of error. As noted earlier, the false positive or error rate of drug-sniffing dogs is far higher than the majority in *Ca-*

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<sup>247</sup> *Id.* (quotation omitted).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 281.

<sup>250</sup> *Id.*

<sup>251</sup> *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005).

*balles* was willing to acknowledge. Moreover, their *sui generis* status awarded in *Place* was reached by the Court without any support in the record and without the benefit of either oral argument or briefing on the issue.

Beyond the wholly fictional nature of the very existence of such tests, this standard is also highly problematic because it is an exception that threatens to swallow the rule. The rule is that all government searches are presumptively unreasonable unless accompanied by a warrant or covered by a particular and limited exception. This exception would, in effect, as Justice Scalia feared in *Kyllo*, "leave the homeowner" and the public "at the mercy of advancing technology."<sup>252</sup>

The truth of this concern is graphically illustrated by a small mind experiment. Suppose that the thermal-imaging in *Kyllo* was capable of measuring more than the gross amount of heat coming from the home. Suppose, with the advance of technology, thermal-imaging becomes capable of measuring the precise heat or electromagnetic signatures of every living thing producing a readout that suggests the particular heat or electromagnetic signature being recorded is likely that of growing marijuana. On this basis, under the reasoning of *Caballes*, the police could conclude that the homeowner had no reasonable expectation of privacy because "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"<sup>253</sup> On the basis of this reasoning, the homeowner would forfeit any expectation of privacy in the interior of his home based on the claimed but yet unverified data readout of a technological tool of police investigation. The primacy of a person's right to privacy in the home would thus be overridden, not by a more compelling government purpose but by a sophisticated piece of government technology. This cannot be right. First, as a practical matter, there are no investigatory tests that have this perfect level of accuracy. Second, if there were such perfectly accurate tests and the Fourth Amendment was made subordinate to such scientific precision, no matter what the claimed accuracy was of a tool of law enforcement technology, the "core of the Fourth Amendment, . . . 'the right of a man to retreat into his own home and there be free from

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<sup>252</sup> *Kyllo v. United States*, 533 U.S. 27, 35 (2001). The Court explained that "[w]hile the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." *Id.* at 36.

<sup>253</sup> *Caballes*, 125 S. Ct. at 837 (quoting *United States v. Jacobson*, 466 U.S. 109, 123 (1984)).

unreasonable government intrusion,”<sup>254</sup> would not only be “at the mercy of advancing technology” but it would also become distinctly subordinate to the value of technological advancement.<sup>255</sup>

To the extent that so-called fail-safe government tests deprive people of the reasonable expectation of privacy in their homes, it turns the Fourth Amendment presumption that considers all warrantless searches of private homes to be unconstitutional, absent a few limited exceptions, on its head. In fact, reliance on such tests to bypass the scrutiny of the Fourth Amendment does more than turn it on its head, it actually consumes the rule and replaces it with a presumption that all government intrusions are constitutional if based on a highly accurate technological examination that purports to be able to determine criminality “scientifically.” Thus, such highly accurate technological examinations would not simply validate such government searches, but in fact prevent them from being characterized as searches at all for constitutional purposes, since it would deprive the person of having a legitimate expectation of privacy in the entire object that is subject to the technological examination. The Fourth Amendment was never intended to strap the public’s right to privacy over a technological gun barrel and the Court should not do it now under the banner of *Caballes*.

Consider the result under the authority of *Caballes* if a police officer knocks on the front door of person’s home for routine questioning regarding recent criminal activity in the neighborhood. Suppose the dog then alerts at the doorway to the private home? Does *Caballes* mean that the homeowner has forfeited their reasonable expectation of privacy from government intrusion in the *entire house* because the dog thinks it has smelled contraband at the doorway? Does *Caballes* mean that the officer may now enter and conduct a sniff search of the entire home without probable cause, or reasonable suspicion, and without fear of violating the Fourth Amendment? Does *Caballes* mean that the positive dog alert is itself probable cause or reasonable suspicion? Does the act of opening the door expose the home and its smells to public view or public smell, and thus come under the “plain sight” doctrine as articulated in *Katz*? The positive dog alert should not be allowed to provide probable cause or reasonable suspicion to search under these conditions, because the sniff “pierce[s] barriers”<sup>256</sup> of privacy itself without any justification and should therefore constitute a search subject to Fourth Amendment review in the first in-

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<sup>254</sup> *People v. Cox*, 782 N.E.2d 275, 289 (Ill. 2002) (Thomas, J., dissenting) (quoting *Kyllo*, 533 U.S. at 31).

<sup>255</sup> *Kyllo*, 533 U.S. at 28.

<sup>256</sup> Tomkovicz, *supra* note 1, at 342.

stance. The broad and unlimited reasoning in *Caballes*, as well as its choice of narrative language dismissing the expectation of privacy when the possession of contraband can be accurately determined by a government test, poses the frightening prospect that the answers to all of the aforementioned questions may well be—yes.

*C. Recharacterize Sniff Searches as Involuntary  
Takings of Bodily Property*

It should be kept in mind that in essence, a sniff test *is* a bodily invasive law enforcement technique. In fact, it is far more invasive than the heat detector in *Kyllo*. This is true because in *Kyllo*, the thermal-imaging device passively registered the gross amount of heat emanating from a home. It did not touch, disrupt, or in any way interfere with this heat effluent. In contrast, to conduct a sniff test, it is necessary that actual physical particles or samples be “collected” from the test subject and evaluated, by either the dog’s biological sensory apparatus or the artificial sensors of a mechanical sniffer.<sup>257</sup> But in either case, to evaluate a smell sample, both testing methods (sniffing dog or sniffing machine), must actually interfere with the smell emanations from the subject and collect actual physical samples from the surface of the subject for evaluation.

From this perspective, a sniff search smacks of a form of *physical trespass*, and thus invokes the early foundations of the popular and judicial understanding of what constituted an illegal search under both *Enrick* and *Olmstead*. Although the Court’s opinion in *Katz* said that a search no longer required a trespass to be constitutionally cognizable, it did not say that a trespass was no longer sufficient to constitute the predicate for a search. Logically, a sniff search permitted under *Caballes* is a physically invasive technique that is far more intrusive

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<sup>257</sup> See Matthew Yeomans, *Sniffing Out Bombs: Canine vs. Machine*, WIRED, Apr. 2002, available at <http://wired.com/wired/archive/10.04/mustread.html?pg=7>. In describing the differences in the functioning of sniffing dogs and sniffing machines, the author describes the differences in their methods of operation in the following way:

[A dog] [d]raws sample into nasal cavity, where air molecules come into contact with a network of membranes. The air stimulates smell receptor cells that connect to the large olfactory bulb in the dog’s brain. . . . [A machine] [a]nalyzes a trace swiped from baggage onto a cotton or lint sample or sucked into its specimen detector. A heater vaporizes the sample, ionizing it.

*Id.*; see also, Regan, *supra* note 12, at 4E.

During the detection process, particles are swabbed from suspicious areas or sucked directly into the machines. The particles are vaporized and the resulting ions are examined to see whether they resemble chemicals used in bombs or narcotics. . . . [some devices] can identify particles as small as one-trillionth of a gram, putting them in the same league as a good bomb dog.

*Id.*

than the passive thermal-imaging device that was prohibited under *Kyllo*. To this extent, *Caballes* is not only inconsistent with *Kyllo*, but also extends its reach far beyond anything that the Court seemed willing to tolerate in terms of physically invasive government conduct.

The physical invasiveness of a sniff search that requires the sniffer to actually take a sample from the surface of the target and subject it to biological or technological testing, bears a striking resemblance to efforts by law enforcement to gain access to other aspects of human bodily tissue or fluids. However, the courts have uniformly held that absent "special needs"<sup>258</sup> the state may not compel the production, much less forcibly extract samples of human body tissue, fluids, or DNA without the subject's consent or a properly issued warrant.<sup>259</sup> The involuntary capture of smell samples from the surface of a person's body, for the express purpose of subjecting them to a biological or mechanical drug test, appears to qualify for the same constitutional protection as other body fluids, tissues, and hair samples.

Moreover, smell samples ought not fall beyond the reach of legal protection in this regard simply because the sizes of the samples being extracted and tested are extremely small.<sup>260</sup> The law has never placed a quantitative limit on the ability of law enforcement to compel or forcibly extract any other bodily property, there seems to be no principled reason why smell should be any different. Would the law make an exception for blood, hair, DNA, or skin that was involuntarily taken by the police from a subject if the authorities defended on the basis that the sample thereby secured was quite small—say only "one-trillionth of a gram?" Clearly, the answer to that question is no. The basis of the law's prohibition on forcibly extracting bodily samples is not based on quantity, but rather on such acts being inherently invasive of the privilege of bodily integrity that is at the heart of the sense of personal privacy.

Whether the sample extracted is large or miniscule, the invasion of privacy is the same. Therefore, law enforcement should have no greater right to physically intrude and involuntary take a smell sample

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<sup>258</sup> See *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (listing the limited circumstances in which drug tests may be constitutionally warranted); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (sustaining drug tests of employees of Custom Service who sought promotion to "sensitive positions"); *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602 (1989) (sustaining drug tests for railroad employees involved in train accidents).

<sup>259</sup> See *Ferguson v. Charleston*, 532 U.S. 67, 87 (2001) (rejecting cocaine tests for expectant mothers); *Chandler*, 520 U.S. at 309 (rejecting drug tests for candidates running for state offices). But see *United States v. Dionisio*, 410 U.S. 1 (1973) (holding that a Fourth Amendment violation did not occur when a grand jury witness was compelled to furnish a voice exemplar).

<sup>260</sup> Apparently, the best new sniffing machines and a "good bomb dog" can identify smell particles as small as "one-trillionth of a gram." Regan, *supra* note 12, at 4E.



from the surface of a sniff subject, than it can any other bodily property. Once the smell molecules have dissipated into the air sufficiently in both time and distance to no longer be associated with their original owner, any reasonable expectation of privacy in them should cease. However, while those molecules are either on a person's skin or in their immediate vicinity, and thus identifiable with that person, they should continue to be characterized as an item of that person's personal property subject to the same protections under the Fourth Amendment as any other item of personal property.

Without ever having the benefit of either oral argument or briefing on the technological details of sniff detection, either by dog or machine, the Court's reliance on a legal fiction regarding sniffing dog accuracy and on a false paradigm of the nonintrusiveness of sniff searches, has absolutely no evidentiary foundation, or basis in reality. The Court's choice of narrative language to describe dog sniffs as "nonintrusive," masks the reality of their true physically invasive nature. This narrative choice by the Court clearly favors law enforcement over the privacy interests of the public. If the Court had heard evidence on this issue and made a principled decision, it would be hard to dispute because, it may well turn out to be an issue upon which reasonable and informed minds can differ. However, without the benefit of any evidentiary foundation, the Court's choice smacks of a completely arbitrary and capricious decision to favor law enforcement without regard to its impact on the reasonable privacy expectations of the public, and thereby a breach of the fundamental constitutional mandate of reasoned decision-making.

#### *D. Reinvigorate the Katz Rule to Protect Evolving Reverence for Personal Space*

The rule laid out in *Katz* for determining the legitimacy of a claimed expectation of privacy remains the most well-reasoned judicial statement on the issue. It has been criticized as circular because by basing its reasoning on what people are willing to consider reasonable, it allows the government through the broad imposition of innovative technology, to condition the public's acceptance based on its ubiquity, and thereby to continually narrow the circle.

This criticism is of little moment, because in the end, all public expectations of any significance have their origins in the state; including the expectation of the right to own property, to engage in exchange transactions, etc. The state gives rise to these expectations and defends them with its coercive authority, thereby concretizing them in the public conscious. Thus, to the extent that the parameters of the

expectation of privacy is derivative of state practices and thereby susceptible to state manipulation, this is simply a normative quality that privacy shares with virtually every right claimed within the state, with the single and notable exception of the right to life itself.

Moreover, the *Katz* test is particularly noteworthy because it does not attempt to establish a static definition of privacy. Instead, it allows the metric of its potential expansion to rest with the enlightened (albeit potentially state-influenced) view of the general public and thereby to “reflect [the] contemporary values”<sup>261</sup> of the time, regarding what constitutes a broadly based and accepted sense of privacy. This test, thus, has the advantage of having a legitimacy grounded on a broad base of evaluation while retaining the ability to grow and expand over time and “to take changes in both the technological and the attitudinal landscape into account”<sup>262</sup> in the face of advancing technological developments.

#### IV. CONCLUSION

The Court’s decision in *Caballes* represents a serious and dangerous threat to civil liberties in America. It constitutes the latest in a long series of decisions by the Court to favor law enforcement over the privacy interests of the public. This trend has no constitutional foundation in either the text or history of the document and represents precisely the kind of government overreaching that the Fourth Amendment was originally enacted to prevent. Thus, rather than a principled constitutional conclusion, it appears to be a naked policy choice based on the predilections of the individual justices involved.

As a matter of sound public policy, before the government should be allowed to invade a person’s bodily integrity and involuntarily extract a physical sample or subject the public to the frightening and intimidating specter of dangerous drug-sniffing dogs without constitutional liability, at the very minimum it ought to have a very good reason for doing so. To authorize law enforcement to take these actions against the public in the absence of probable cause or even reasonable suspicion, thus constitutes a dangerous precedent with an enormous

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<sup>261</sup> Tomkovicz, *supra* note 1, at 424.

Time has not diminished society’s reverence for the home and for freedom to keep confidential whatever we choose to do within our private residences. For these reasons, the decision to subject technologies that afford access to *any* otherwise imperceptible details about the home to Fourth Amendment constraints is legitimate, logical and laudable.

*Id.*

<sup>262</sup> *Id.* at 415 (“The protection afforded by a living Constitution might expand or contract due to changes in the fabric of the society for which it was designed.”).

potential for abuse, with a concomitant loss in public respect for a law that seems to be out of touch with reality. Part of that reality is that drug-sniffing dogs are large breed sporting dogs "not lap dogs." Instead, they are frightening, intimidating, and dangerous animals that ought not to be turned on a hapless and unsuspecting public without good and compelling reason to justify the intrusion on public privacy and the risk to public health and safety.<sup>263</sup> This concern is especially important in light of the existing concerns regarding the prospect of racial targeting and abuses in the current use of dogs as an investigatory tool where racial minorities are concerned. For example it has been noted independently of the issues raised in this case, that "although whites committed nearly a third of the crimes in which dogs are usually deployed . . . court documents from several misconduct cases show that nearly all the victims of mauling by Los Angeles police dogs in the last seven years were black or Hispanic."<sup>264</sup> Although it is unclear how widespread this racial disproportionality is across the country, the fact that it exists at all in cities like Los Angeles with a high proportion of racial minority citizens, raises legitimate concerns regarding the civil liberties implications born of the increased latitude for law enforcement authorities to use dogs as an investigatory tool outside of constitutional scrutiny.

While the public health and safety concerns in an age of terrorism might justify bomb-sniffing dogs, this rationale does not justify suspicionless dog sniffs for mere drug possession when the public safety is not similarly imperiled. In appropriate cases of compelling public necessity, suspicionless bomb-sniffing dog searches may be beyond the reach of Fourth Amendment scrutiny, but suspicionless drug-sniffing dog searches conducted in the course of ordinary law enforcement should be clearly within reach of its constitutional shelter, and the absence of such shelter suggests the very real possibility of potential abuses against the public generally, and racial minorities in particular.

In determining the reasonable expectation of privacy for car drivers, the Court needs to reconsider the contemporary privacy expecta-

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<sup>263</sup> Every year, dogs attack, maim, injure, and kill dozens of people, from one-day-old newborn babies to the elderly. See KAREN DELISE, FATAL DOG ATTACKS: THE STORIES BEHIND THE STATISTICS 92 (2002) ("From 1980-2001, there was an average of 16 deaths per year due to a traumatic dog attack. . . . From 2000-2001 there were 41 fatal dog attacks. . . . The age group with the highest number of fatalities were children under the age of 1 year old accounting for 19% of the deaths.").

<sup>264</sup> Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 959 n.65 (2001) (citing Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1).

tions associated today with the personal automobile. While it may be debatable whether the car has reached the level, in terms of privacy expectations, that it is the functional equivalent of a private home, it is abundantly clear that the private car enjoys considerably more respect in life as it is generally lived among reasonable people, than the High Court has so far been willing to recognize. For all of their admitted faults as sources of noise, pollution, and traffic accidents, contemporary Americans are still deeply locked into a profound love affair with their cars, and judging simply from the way in which these cars are used, such widespread and casual conduct suggests that most Americans at least act as if they expect a higher degree of privacy in their cars, than this case appears to recognize.

Moreover, we now spend so much time in our cars that just about every intimate detail that was once confined to the home, we now also perform in our cars. As a result, it appears that most Americans have an expectation of a degree of privacy in our cars that approaches commensurability with the expectation that the courts have traditionally associated with the private home. Thus, in determining whether subjectively manifested expressions of privacy while in a car are subject to Fourth Amendment shelter, it is important to note that ultimately the legal standard is grounded in the public's willingness to regard the expectation as reasonable. America's obsession with their cars provides powerful evidence that even if the Court is not prepared to recognize it, this is an expectation that the public is prepared to accept as reasonable.

In fact, the evidence suggests that given the wide range of private activity that Americans now routinely conduct in their cars, the public is not only prepared, but in fact already has accepted this expectation as reasonable in everyday life. Moreover, when a drug-sniffing dog sniffs a car that still contains the driver, it is unclear whether it smells the car itself, or a combination of the driver plus the car. Thus, suspicionless dog sniffs of cars that still contain either drivers or passengers should be regarded as suspicionless searches of the bodies of the people involved and subjected to constitutional scrutiny as a search of the person.

The legal limits imposed on police during a *Terry* stop have already been expanded so far from its original limited vision, that a *Terry* stop is now functionally indistinguishable from a full-blown arrest. The Court's decision in *Caballes* continues this problematic trend and in so doing opens the way for potentially dangerous governmental intrusions into areas of personal privacy that could seriously imperil American civil liberties. This trend must be checked lest

the *Terry* stop completely swallow and supplant the Fourth Amendment and become the rule itself.

The right to privacy is currently under a vigorous attack from the rapid pace of technological advances in law enforcement's capacity to gather and analyze evidence. Rather than fighting against this attack and enforcing the Fourth Amendment's constitutional pledge to protect the public's interest in privacy, this case represents yet another giant step forward in the Court's willingness to aid and abet the interests of law enforcement at the expense of the public. Cases like *Caballes* are helping to dull the edge of the constitutional sword of the Fourth Amendment, limit its reach, and thereby slowly shrink the zone of protected personal privacy that Americans have long enjoyed. This is a potentially dangerous and unfortunate trend that calls for constant vigilance, careful monitoring, serious consideration, and robust resistance, until it can be reversed altogether.