**NOTE**

# TO SNIFF OR NOT TO SNIFF: MAKING SENSE OF PAST AND RECENT STATE AND FEDERAL DECISIONS IN CONNECTION WITH DRUG-DETECTION DOGS—WHERE DO WE GO FROM HERE?

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## I. INTRODUCTION

As law enforcement investigatory tools have become more enhanced,[1] courts have been faced with Fourth Amendment issues and have attempted to place limits on law enforcement when it comes to searches and seizures.[2] One such tool involves dogs. Canine sniffs can play an important role in uncovering illegal contraband, especially drugs. After receiving extensive training, drug-detection dogs can easily uncover various types of illegal substances, including marijuana, hashish, heroin, and cocaine.[3] The major problem for law enforcement in their use of drug-detection dogs is that state and federal courts have issued conflicting decisions as to the proper application of the Fourth Amendment and similar provisions in state constitutions in connection with this type of natural sense enhancement. This note seeks to explore and reconcile the conflicts regarding the courts' various decisions involving drug-detection dogs.

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[1] These tools can include anything from tracking beepers and thermal-imaging devices to drug-detection dogs. RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 95 (4th ed. 2012).

[2] *See id.*

[3] Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 149 (2013).

Part II provides an overview of the Fourth Amendment and specifically looks at important cases that have helped define what exactly constitutes a search,[4] with an emphasis on how the courts have moved away from simply protecting certain areas specified in the Fourth Amendment and toward what has become known as the "reasonable expectation of privacy" test.[5] Additionally, Part II discusses the difference between search warrants and warrantless searches; the justifications of probable cause and reasonable suspicion, the use of plain view, plain hearing, and plain smell doctrines; and concludes with a brief introduction to the enhancement of natural senses through technology and other tools. Part III discusses the use of dogs in law enforcement generally, focusing on breeds, purposes, and the training of detection dogs. Part IV explores detection dogs in conjunction with the Fourth Amendment and state constitutions, looking first at what the court means by the word "sniff." This part also explores whether or not the use of detection dogs constitutes a search as defined under the Fourth Amendment and state constitutions, whether an alert by a drug detection dog constitutes probable cause, and the conflicts between state courts and federal courts regarding these search issues. Part V concludes with recommendations on how to classify drug-detection dogs so that law enforcement officials can effectively use them in the future.

## II. FOURTH AMENDMENT BACKGROUND

The Fourth Amendment provides:

> 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.[6]

The Fourth Amendment is meant to protect the accused from violations by law enforcement personnel,[7] but deciphering what

[4] While the Fourth Amendment covers both searches and seizures, this note focuses predominantly on searches.

[5] However, more recently, the current U.S. Supreme Court seems to be trying to reincorporate a property analysis back into their decisions. *See infra* notes 76–84 and accompanying text.

[6] U.S. CONST. amend. IV.

[7] *See* WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a), at 3–4 (5th ed. 2012).

constitutes an unreasonable search or seizure can be complicated.[8] In fact, "[t]he Fourth Amendment has not changed, but courts keep reinterpreting it, especially the part about 'unreasonable searches and seizures.'"[9] Some would suggest that the rules created by the courts have placed too difficult a burden on law enforcement, while others think the Fourth Amendment protection is not strong enough.[10]

In the 1921 case *Burdeau v. McDowell*,[11] the Supreme Court held that the Fourth Amendment only applies to government action and not private searches.[12] It later determined in *Mapp v. Ohio*[13] that the Fourth Amendment's protections are not limited to the federal government and, through incorporation by the Fourteenth Amendment, they apply to state and local government action as well.[14] In fact, some states have more fully defined what constitutes state action as opposed to action by private citizens.[15] Until the 1970s, all states seemed to follow the idea that the Fourth Amendment applied to state but not private action—all, that is, except Montana.[16] For example, in *State v. Helfrich*,[17] the Montana Supreme Court applied its own constitution and held that "the right of individual privacy explicitly guaranteed . . . is inviolate and the search and seizure provisions . . . apply to private individuals as well as law enforcement officers."[18] Therefore, in Montana—for several years, until the highest court ruled otherwise—regardless of whether the evidence was gathered by state or private actors using an illegal search, it was not admissible.[19] "No other state, however,

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[8] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 62–63 (4th ed. 2010).

[9] RON FRIDELL, PRIVACY VS. SECURITY: YOUR RIGHTS IN CONFLICT 10 (2004).

[10] RICH SMITH, FOURTH AMENDMENT: THE RIGHT TO PRIVACY 8 (John Hamilton ed., 2008).

[11] Burdeau v. McDowell, 256 U.S. 465 (1921).

[12] DRESSLER & THOMAS, *supra* note 8, at 65; KENNETH R. EVANS, SEARCH AND SEIZURE: SOURCEBOOK FOR STATE JUDGES 31 (2002).

[13] Mapp v. Ohio, 367 U.S. 643 (1961).

[14] BRENT E. NEWTON, PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL 87–88 (2d ed. 2011) ("[T]he Supreme Court has 'incorporated' the Fourth Amendment in the Due Process Clause of the Fourteenth Amendment and thus applied it equally to state and federal prosecutions.")

[15] *See* EVANS, *supra* note 12, at 32–33 (discussing various cases illustrating the distinction between state and private action).

[16] *Id.* at 35.

[17] State v. Helfrich, 600 P.2d 816 (Mont. 1979), *overruled by* State v. Long, 700 P.2d 153 (Mont. 1985).

[18] EVANS, *supra* note 12, at 35.

[19] *Id.* Montana no longer takes this position as the Montana Supreme Court has held that the privacy provisions in the Montana Constitution "only proscribe state action." *Long*, 700 P.2d at 156–57.

has been willing to go that far."[20]

This example shows that a state government can go farther than the federal government and offer more protections from searches and seizures—it just cannot offer less protection. In fact, a particular search may not violate the U.S. Constitution but may violate a more stringent state constitution, statute, or regulation.[21] A number of states, including New York, Vermont, Massachusetts, and California, have chosen to provide more protections for their citizens. As an illustration, the New York Constitution appears to offer greater protection than the U.S. Constitution. In fact, while article I, section 12 of the New York Constitution and the Fourth Amendment of the U.S. Constitution have similarities,[22] the New York provision provides additional protections including, for example, the interception of telephone and telegraph communications.[23]

### *A. A Move from Protected Areas to Privacy Interests*

Courts have reinterpreted the Fourth Amendment and moved from discussions of "constitutionally protected areas" towards an interpretation that focuses on privacy.[24] "For many years, for a 'search' within the meaning of the Fourth Amendment to have

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[20] EVANS, *supra* note 12, at 35.

[21] LAFAVE, *supra* note 7, § 1.5(a), at 200 & n.1; *see also* People v. Scott, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.").

[22] *Compare* U.S. CONST. amend. IV, *with* N.Y. CONST. art. I, § 12.

[23] *Scott*, 593 N.E.2d at 1335. The New York Constitution "contains a clause not found in the Fourth Amendment." *Id.* While article I, section 12, clause 1 of the New York Constitution has exactly the same wording as the Fourth Amendment, there is a second clause in the New York Constitution that is not found in the Fourth Amendment. This additional clause states:

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

N.Y. CONST. art. I, § 12. This section "provid[es] protection against interception of telephone and telegraph communications, contrary to the now obsolete rule of Olmstead v United States." *Scott*, 593 N.E.2d at 1335 (citing N.Y. CONST. art. I, § 12). In *Olmstead*, the U.S. Supreme Court held that wiretap eavesdropping was not a search within the meaning of the Fourth Amendment because there was not an "actual trespass into a constitutionally protected area." *Id.* at 1332 (citing Olmstead v. United States, 277 U.S. 438, 463–66 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967)).

[24] JERALD H. ISRAEL & WAYNE R. LAFAVE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS IN A NUTSHELL § 2.2(a), at 53 (7th ed. 2006).

taken place, the Supreme Court required a physical trespass by the government into a constitutionally protected area."[25] Therefore, early on, the Fourth Amendment simply protected homes and possessions[26] from unreasonable searches, including the area known as "curtilage, which is the land immediately surrounding and associated with the home."[27] The Fourth Amendment, however, does not protect "[o]pen fields."[28] Eventually, the courts began to widen the scope and have since included mail, a person's physical body, and intangible objects,[29] to name just a few additional protections. The Supreme Court noted in *Mapp* that the Fourth Amendment created a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[30] The scope of privacy extended even further, thanks to *Griswold v. Connecticut*,[31] whereby the U.S. Supreme Court held that "the Fourth Amendment created 'zones of privacy,'"[32] which required the utmost constitutional protection.[33]

As the courts moved away from interpreting the Fourth Amendment as a protection of certain areas to a protection of privacy in general, the case that redefined what constituted a search under the Fourth Amendment was *Katz v. United States*.[34] "Its impact . . . has been exclusively on the subject of threshold applicability or coverage. It may not have altered the substantive law with respect to coverage, but it has changed dramatically the vocabulary we use when we talk about coverage."[35] In fact, *Katz* helped provide a definition for the word "search." *Katz* involved a warrantless electronic surveillance device that law enforcement officials placed on a public telephone booth, which was used to

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[25] THE FOURTH AMENDMENT: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE—SEARCH AND SEIZURES 66 (Cynthia Lee ed. 2011).

[26] FRIDELL, *supra* note 9, at 10.

[27] WEAVER ET AL., *supra* note 1, at 93 (internal quotation marks omitted). A classic example of the curtilage of the home is the front porch. Florida v. Jardines, 133 S. Ct. 1409, 1414–15 (2013).

[28] WEAVER ET AL., *supra* note 1, at 93; *see also* Oliver v. United States, 466 U.S. 170, 176 (1984) ("[The] special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to open fields." (quoting Hester v. United States, 265 U.S. 57, 59 (1924)) (internal quotation marks omitted)).

[29] FRIDELL, *supra* note 9, at 10, 14–15.

[30] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[31] Griswold v. Connecticut, 381 U.S. 479 (1965).

[32] FRIDELL, *supra* note 9, at 15.

[33] *See Griswold*, 381 U.S. at 485.

[34] *See* Katz v. United States, 389 U.S. 347, 358–59 (1967).

[35] WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS 2 (2d ed. 2003). Of particular influence is Justice Harlan's concurrence. *Id.*

discover criminal violations by Katz.[36] Because the FBI could have very easily obtained a court order for this surveillance, the Court found that the FBI violated Katz's Fourth Amendment rights and, in stating that "the Fourth Amendment protects people, not places,"[37] the Court created what has come to be known as "the reasonable expectation of privacy test."[38] Justice Harlan's concurring opinion, which explained the test, has been used by lower federal courts, state courts, and eventually the majority of the U.S. Supreme Court to interpret and apply this test.[39] In fact,

> [w]ithin a year, the Supreme Court started to use Harlan's "reasonable expectation of privacy" test as the standard in its Fourth Amendment jurisprudence. Within a decade, Harlan's test became so familiar that the Court officially recognized it as the essence of the *Katz* decision—a rare instance where a concurrence effectively replaced a majority opinion.[40]

Justice Harlan set forth a two-part test: "[F]irst that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[41] In *United States v. White*,[42] Harlan more fully fleshed out the meaning of a search: searches are "those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties."[43]

The test set forth in *Katz* has been used by state courts as well, some of which follow its line of reasoning while others are critical of

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[36] *Id.*

[37] *Katz*, 389 U.S. at 351, 354–57; *see also* Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause."); People v. Scott, 593 N.E.2d 1328, 1333 (N.Y. 1992) ("[I]n *Katz v. United States*, [the Court] abandoned the *Hester-Olmstead* property-oriented, physical trespass approach to its Fourth Amendment jurisprudence and declared that the 'Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures.'" (quoting *Katz*, 389 U.S. at 353)).

[38] BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW § 3:1, at 3-3 (1995) (internal quotation marks omitted).

[39] LAFAVE, *supra* note 7, § 2.1(b), at 579 & n.75; *see also* Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, *in* THE FOURTH AMENDMENT: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE—SEARCH AND SEIZURES, *supra* note 25, at 68, 70 (noting that most courts cite to Harlan's opinion).

[40] Winn, *supra* note 39, at 70.

[41] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[42] United States v. White, 401 U.S. 745 (1971).

[43] *Id.* at 786 (Harlan, J., dissenting).

it.[44] For example, in Massachusetts courts have cited *Katz* when defining privacy. In *Commonwealth v. Blood*,[45] the court held that "[t]he privacy interests protected under art. 14 [of the Massachusetts Constitution] (and the Fourth Amendment) exist when it is shown 'that a person [has] exhibited an actual (subjective) expectation of privacy,' and when that 'expectation [is] one that society is prepared to recognize as 'reasonable.'"[46] A few years later, in *Commonwealth v. Montanez*,[47] the highest court in Massachusetts again used the *Katz* reasoning to find a subjective, but not an objective, reasonable expectation of privacy in "a space above a dropped ceiling in a common hallway outside defendant's apartment," so that the search of this area "did not constitute a search in the state constitutional sense."[48]

New Hampshire's highest court, on the other hand, has "neither adopted nor rejected" the *Katz* analysis when analyzing state constitutional issues.[49] In *State v. Pellicci*,[50] the majority of the New Hampshire Supreme Court discussed privacy concerns, whereas the concurrence relied on a property analysis to ultimately reach the same conclusion.[51]

Other states, like New Jersey, Oregon, and Washington, for example, have all criticized *Katz* and the reasonable expectation of privacy test.[52] In fact, the New Jersey Supreme Court has rejected the subjective prong of the *Katz* test, noting in *State v. Hempele*[53] that "a defendant's 'actual (subjective) expectation of privacy' does not determine the New Jersey Constitution's restraints on the State's power to search and seize."[54] Washington closely resembles New Jersey in its criticism of *Katz* and also appears to reject the subjective prong.[55] Oregon is even more critical and rejects *Katz* altogether, holding "that the expectation of privacy test did not define 'search' for the Oregon Constitution."[56] More specifically, in

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[44] LATZER, *supra* note 38, § 3:1, at 3-5 to -6.
[45] Commonwealth v. Blood, 507 N.E.2d 1029 (Mass. 1987).
[46] *Id.* at 1033 (second and third alterations in original) (quoting *Katz,* 389 U.S. at 361).
[47] Commonwealth v. Montanez, 571 N.E.2d 1372 (Mass. 1991).
[48] LATZER, *supra* note 38, § 3:1, at 3-5 to -6 & n.17 (citing *Montanez*, 571 N.E.2d at 1381).
[49] LATZER, *supra* note 38, § 3.1, at 3-5 to -6.
[50] State v. Pellicci, 580 A.2d 710 (N.H. 1990).
[51] *See* LATZER, *supra* note 38, § 3:1, at 3-6.
[52] *Id.* § 3:1, at 3-6 to -10.
[53] State v. Hempele, 576 A.2d 793 (N.J. 1990).
[54] LATZER, *supra* note 38, § 3:1, at 3-6 to -7 (quoting *Hempele*, 576 A.2d at 800).
[55] *Id.* § 3:1, at 3-9 to -10.
[56] *Id.* § 3:1, at 3-8.

*State v. Campbell*,[57] the Oregon Supreme Court stated:

> This court has expressed doubts about the wisdom of defining Article I, section 9, searches in terms of "reasonable expectation of privacy." . . . Because the phrase continues to appear so often in arguments, we here expressly reject it for defining searches under Article I, section 9. The phrase becomes a formula for expressing a conclusion rather than a starting point for analysis, masking the various substantive considerations that are the real bases on which Fourth Amendment searches are defined. . . . Moreover, the privacy protected by Article I, section 9, is not the privacy that one reasonably expects but the privacy to which one has a *right*. . . . . The Supreme Court of the United States is not unaware of this difficulty, for it has stated that a "reasonable expectation of privacy" is an expectation of privacy that is "legitimate" or that "society is prepared to recognize as reasonable." . . . The definitional gloss, however, does not make the phrase any more useful for defining a search.[58]

While *Katz* is not universally applied by all states, with respect to the federal government and those states that do apply it, the *Katz* Court articulated one important principle: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[59] Since *Katz*, courts have noted that multiple factors play a role in determining reasonableness and have extended the protection to places, not just people.[60] It has been held that when a person has a reasonable expectation of privacy in a certain place, the Fourth Amendment may be invoked.[61] However, as noted in *United States v. Jacobsen*,[62] when it comes to contraband there is no legitimate expectation of privacy.[63] In fact, "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts

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[57] State v. Campbell, 759 P.2d 1040 (Or. 1988).
[58] LATZER, *supra* note 38, § 3:1, at 3-8 to -9 (quoting *Campbell*, 759 P.2d at 1044).
[59] WEAVER ET AL., *supra* note 1, at 93.
[60] *Id.* at 94.
[61] *Id.*
[62] United States v. Jacobsen, 466 U.S. 109 (1984).
[63] *Id.* at 123.

will not come to the attention of the authorities."[64] In *Jacobsen*, Federal Express employees observed a white powdery substance coming from a torn package.[65] After opening the package the employees called law enforcement officials who proceeded to conduct a field test of the substance, which indicated that it was cocaine.[66] Based upon this field test and a second field test, the agents obtained a warrant to search the premises of defendants, who were later arrested, tried, and convicted.[67] On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed, noting that the agents should have obtained a warrant before conducting the field test because the field test "constituted a significant expansion of [an] earlier private search."[68] The Supreme Court disagreed, however, and found that there was no search.[69] In fact,

> [t]he initial invasions of [defendants'] package were occasioned by private action. Those invasions revealed that the package contained only one significant item, a suspicious looking tape tube. Cutting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder. Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.[70]

Not only did the agents not exceed the scope of the private search, their subsequent actions were reasonable.[71] Both "[t]he agent's viewing of what a private party had freely made available for his inspection"[72] and the subsequent field inspection did not constitute a Fourth Amendment search.[73] The field test merely told the officer whether or not the white powder was an illegal substance, which did not infringe upon a legitimate expectation of privacy.[74] In fact, "Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably

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[64] *Id.* at 122.
[65] *Id.* at 111–12.
[66] *Id.*
[67] *Id.* at 112.
[68] *Id.*
[69] *Id.* at 123.
[70] *Id.* at 115 (footnote omitted).
[71] *Id.* at 118.
[72] *Id.* at 119.
[73] *Id.* at 119, 123.
[74] *Id.* at 123.

'private' fact, compromises no legitimate privacy interest."[75]

Though the *Katz* test was used by the federal court for many years, more recently, there has been a "partial resurrection of the trespass doctrine in Fourth Amendment law,"[76] and the justices of the Supreme Court seem to be grappling with what rubric to use—the *Katz* reasonable expectation of privacy test or a property-based construction—to determine whether law enforcement officials conducted a search.[77] In 2012, as illustrated in *United States v. Jones*, the Court appeared to revert back to a property-based approach. In *Jones*, the Court was trying to determine whether a Global-Positioning-System (GPS) placed inside a person's automobile to monitor his movements constituted a search or seizure.[78] In the majority opinion, Justice Scalia noted that a person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation"[79] and that "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[80] Justice Sotomayor, in her concurrence, agreed that "*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test . . . . Thus, 'when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'"[81] For both justices, when there is a physical trespass into a constitutionally protected area that trespass is sufficient to constitute a violation of the Fourth Amendment and when there is no physical trespass the *Katz* test should be used to determine whether or not there was a violation.[82] Justice Alito, as noted in his separate concurrence, however, noted it "is unwise" to revert back to a trespass analysis,[83] and would appear to rely solely on the reasonable expectation of privacy test to determine whether or not a person's Fourth Amendment rights were violated.[84]

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[75] *Id*.

[76] Timothy C. MacDonnell, Florida v. Jardines*: The Wolf at the Castle Door*, 7 N.Y.U. J.L. & LIBERTY 1, 40 (2013).

[77] *See* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013); United States v. Jones, 132 S. Ct. 945, 949–51 (2012).

[78] *Jones*, 132 S. Ct. at 949–50.

[79] *Id.*

[80] *Id*. at 952.

[81] *Id*. at 955 (Sotomayor, J., concurring) (citations omitted) (quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

[82] MacDonnell, *supra* note 76, at 41.

[83] *Id*.

[84] *See Jones*, 132 S. Ct. at 958 (Alito, J., concurring).

A little over a year later, in *Florida v. Jardines*, when determining whether or not a dog sniff within the curtilage of a person's home constituted a search, Justice Scalia again used a "property-rights baseline" and cited to *Jones*, reasoning "[t]hat the officers learned what they learned only by physically intruding on Jardines' property to gather evidence," which "is enough to establish that a search occurred."[85] Justice Kagan, while agreeing that the dog sniff constituted a search, did not subscribe to Justice Scalia's "property rubric" and would have simply used the reasonable expectation of privacy test.[86]

### *B. Search Warrants, Warrantless Searches, Probable Cause, and Reasonable Suspicion*

Regardless of what test is used to determine whether or not a search took place, a search warrant is generally required for a search to be reasonable. While the Fourth Amendment does not explicitly require the use of a search warrant, courts seem to prefer that police have one before conducting a search.[87] In fact, "warrantless searches are disfavored and are 'per se unreasonable subject only to a few specifically established and well-delineated exceptions.'"[88] Except in cases involving these well-established exceptions, the courts have required the use of a warrant for the simple reason that the Supreme Court wants to "maximize the number of occasions in which individual privacy is protected because law enforcement searches or seizures are reviewed—*prior* to the time that they take place—by judicial officers."[89] Search warrants require the law enforcement officer to demonstrate probable cause,[90] thus protecting against unjustified intrusions by the police.[91]

While there is no precise definition,[92] probable cause is "something more than 'mere suspicion,' but something less than 'beyond a reasonable doubt,'"[93] is based on common sense, and

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[85] Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013). For a more thorough discussion of *Florida v. Jardines*, see *infra* notes 245–59 and accompanying text.

[86] *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

[87] WEAVER ET AL., *supra* note 1, at 101.

[88] *Id.* (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[89] WEAVER ET AL., *supra* note 1, at 70.

[90] *Id.* at 71.

[91] *See id.* (quoting Steagold v. United States, 451 U.S. 204, 213 (1981)).

[92] Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 790 (2013).

[93] WEAVER ET AL., *supra* note 1, at 71.

involves a flexible approach involving the totality of the circumstances[94] as set forth in *Illinois v. Gates*.[95] In fact, when dealing with probable cause issues "the [Supreme] Court has 'rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.'"[96] This flexible standard can prove helpful for police officers, especially when dealing with murky situations.[97]

> A flexible standard allows police to rely on their expertise, intuition, and observational skills to decide whether suspicious behavior warrants further action, without the constraints of a rigid test. In complex cases, quantification of the standard by assigning it a numerical percentage would obscure the true, qualitative nature of the inquiry and create a false sense of precision.[98]

Some may find this lack of quantification problematic, especially as police use tools and enhancements to show probable cause to obtain a search warrant.[99] In fact, a number of states find the totality of circumstances standard,[100] as adopted by the federal courts and many states,[101] insufficient for determining probable cause and, thus, have elected to use the two-pronged test created from *Aguilar v. Texas*[102] and *Spinelli v. United States*.[103] The first

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[94] Charles D. Weisselberg, *DNA, Dogs, the Nickel, and Other Curiosities: Criminal Law Cases in the Supreme Court's 2012–2013 Term*, 49 CT. REV. 178, 179 (2013).

[95] Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

[96] Weisselberg, *supra* note 94, at 179 (quoting Florida v. Harris, 133 S. Ct. 1050, 1055 (2013)); *see also* Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. U. L. REV. COLLOQUY 64, 65 (2013) (discussing the Supreme Court's adherence to the totality of the circumstances approach adopted in *Illinois v. Gates* for determining whether probable cause exists).

[97] Goldberg, *supra* note 92, at 790–91.

[98] *Id.*

[99] *See id.* at 791 ("There are an increasing number of situations, like . . . one[s] involving [drug-detection dogs], where the police rely on machines or tools (such as a dog) to create their suspicion. As a result, the likelihood of criminal activity can be quantified. In such situations, the virtues of having an undefined probable cause standard are outweighed by its vices, including the lack of uniformity in application and susceptibility to abuse.").

[100] For example, Alaska, California, Massachusetts, New Mexico, and New York. *See* LATZER, *supra* note 38, § 3:13, at 3-86 to -95.

[101] "The *Gates* rule has been widely approved on state constitutional grounds." *Id.* § 3:13, at 3-86. There are a number of states that follow the *Gates* approach, such as Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Texas, West Virginia, Wisconsin, and Wyoming. *Id.* § 3:13, at 3-86 n.47.

[102] Aguilar v. Texas, 378 U.S. 108, 114–15 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).

[103] Spinelli v. United States, 393 U.S. 410, 415–16 (1969), *abrogated by Gates*, 462 U.S. 213.

prong is "the 'basis of information' prong" and the second prong is "the 'veracity' prong," and when using this *Aguilar-Spinelli* test, both prongs need to be satisfied; whereas with the totality of circumstances approach, if one prong fails it does not necessarily mean that probable cause will not be satisfied.[104] States that follow the *Aguilar-Spinelli* test find it to be more protective.[105]

While search warrants are the favored method of conducting searches, "warrantless searches account for the *overwhelming majority* of all searches performed by law enforcement officers"[106] and courts have often found these warrantless searches to be "reasonable."[107] In fact, while search warrants play an important role in the ability of police to search a person's home,[108] automobiles fall under one of the a well-established exceptions to the rule. "The automobile exception is one of the oldest exceptions to the warrant requirement. It provides that, when the police have probable cause to believe that an automobile contains the fruits, instrumentalities or evidence of crime, they may search the vehicle without a warrant."[109] Automobiles receive less protection than homes for two reasons: the mobility of cars and a lessened expectation of privacy that a person has when it comes to his or her car.[110]

> In light of these two factors . . . the Court has held that the existence of probable cause justifies an immediate warrantless search of an automobile "before the vehicle and its occupants become unavailable." It does not matter whether the car is being driven at the time of the stop so long as it is capable of moving and therefore has "ready mobility."[111]

Just like with search warrants, probable cause plays an important role here as well. "The scope of the automobile search is tied to the probable cause that justifies it. In other words, the police can search parts of the car for which they have probable cause to believe that the fruits, instrumentalities or evidence of crime can be found,"

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104 LATZER, *supra* note 38, § 3:13, at 3-84 to -85.

105 *See id.* § 3:13, at 3-86 to -87.

106 WEAVER ET AL., *supra* note 1, at 70–71.

107 *Id.* at 101.

108 *Id.* at 104 ("[T]he Fourth Amendment draws 'a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'" (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).

109 WEAVER ET AL., *supra* note 1, at 113.

110 *Id.*

111 *Id.*

which includes closed containers found within the car.[112]

"Although probable cause is the critical standard for the most intrusive searches, there are other categories of searches . . . that are constitutionally permitted based on less suspicion or justification."[113] The term "reasonable suspicion" has been used to justify various forms of government intrusion, but this term also does not have a specific definition.[114] In fact, "courts define reasonable suspicion in relation to probable cause. Reasonable suspicion requires some degree of certainty, which is less than probable cause, and police must articulate the grounds for that suspicion."[115] *Terry v. Ohio* outlines the reasonable suspicion standard. In that case, the Supreme Court "came up with a balancing test that weighed the government interest with the type of intrusion."[116] The type of police conduct as found in *Terry* would not be conducive to a probable cause and warrant requirement, which is why the lessened standard of reasonable suspicion is appropriate.[117] Some have suggested that a reasonable suspicion standard, and not a probable cause standard, should also be used when determining whether the police are allowed to use drug-drug-detection dogs due to the dog's less intrusive nature than other types of searches, their use as an extremely helpful police investigatory tool, and because "a dog sniff is generally limited to detecting contraband."[118]

### *C. Plain View, Hearing, and Smell*

In the context of the Fourth Amendment there is the "plain view exception"; an exception to the warrant requirement that sometimes

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[112] *Id.* at 117.

[113] Goldberg, *supra* note 92, at 797.

[114] *See id.*

[115] *Id.*; *see also* Terry v. Ohio, 392 U.S. 1, 19, 24 (1968) (holding that reasonable suspicion is needed for police officers to conduct stop-and-frisks).

[116] Robert M. Bloom & Dana L. Walsh, *The Fourth Amendment Fetches Fido: New Approaches to Dog Sniffs*, 48 WAKE FOREST L. REV. 1271, 1290 (2013).

[117] In *Terry*, the Court recognized the need of police officers to ensure their safety and the safety of those in the community, even in situations where they do not have probable cause to arrest someone. *Terry*, 392 U.S. at 23–24. Because of this, the Court held that

> [w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

*Id.* at 24.

[118] Bloom & Walsh, *supra* note 116, at 1291; *see infra* Part IV.

includes natural senses other than sight, like smell and hearing.[119] "When the police are in a place where they have the right to be . . . either pursuant to a warrant or pursuant to an exception to the warrant requirement, this exception allows them to seize items that they find in 'plain view.'"[120] Additionally, the plain view exception can be used to describe "a situation in which there has been no Fourth Amendment search at all" because the law enforcement officer observes something out in the open and "the observation is lawful without the necessity of establishing either pre-existing probable cause or the existence of a search warrant or one of the traditional exceptions to the warrant requirement."[121] It is important to note that if the police do not have the right to be there, the warrantless exception does not automatically give the police the justification they need to enter.[122]

> For example, suppose that a police officer is walking down a city street and observes marijuana laying on a table inside a nearby house. If the officer does not possess a warrant to enter the house, and cannot enter under one of the recognized exceptions to the warrant requirement, the officer cannot justify entry under the plain view exception. The officer's observation will give him probable cause to obtain a warrant to search the house for the marijuana.[123]

Nevertheless, there are times when certain "exigent circumstances" would allow the officer to enter the building after seeing contraband in plain view—for example, to prevent the individual from destroying the evidence.[124]

The plain view exception has, in some circumstances, been stretched to include other natural senses, such as hearing and smell, as well. "Just as what an officer sees where he is lawfully present is a nonsearch plain view, what he learns by reliance upon his other senses while so located is likewise no search and thus per se lawful."[125] A good example of what constitutes "plain hearing" can be found in *United States v. Fisch*,[126] where officers listened in

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[119] ISRAEL & LAFAVE, *supra* note 24, § 2.2, at 55.

[120] WEAVER ET AL., *supra* note 1, at 101.

[121] LAFAVE, *supra* note 7, § 2.2(a), at 599–600.

[122] WEAVER ET AL., *supra* note 1, at 103 ("By itself, the plain view exception will not justify a warrantless entry into a residence even though the officer, standing in a public place, can see contraband lying in plain view.").

[123] *Id.*

[124] *Id.*

[125] LAFAVE, *supra* note 7, § 2.2(a), at 605.

[126] United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973).

to conversations in an adjoining motel room by lying on the floor next to the crack under the connecting door to overhear the defendants' conversation.[127] The court held that this was not a search because the conversations were able to be heard by the naked ear and refused to categorize degrees of audibility.[128] Similar reasoning applies for "plain smell," and courts have held that "there is no 'reasonable expectation of privacy' from lawfully positioned agents 'with inquisitive nostrils.'"[129] It is not a search, for Fourth Amendment purposes, when an officer, who is rightfully at a certain location happens to smell something, whether it is coming from a home, vehicle, or other area.[130]

### *D. Enhanced Law Enforcement Investigatory Tools and Techniques*

The issue of using one's natural senses to detect criminal activity melds into one final issue relating to the Fourth Amendment that gets to the heart of this paper—augmenting those senses by using enhanced technology or other tools, including such things "as varied as canine sniffs, tracking beepers, helicopter 'fly overs,' aerial mapping cameras, and thermal-imaging devices."[131] The use of things like flashlights or binoculars does not seem to present a Fourth Amendment issue, but there are other technologically advanced devices that are so extremely intrusive under certain circumstances that their use constitutes a search.[132]

The use of these enhancements has been a source of a number of cases that have come before state and federal courts, presenting these courts with the challenging task of placing limits on the use of these techniques.[133] One of the more influential cases is *Kyllo v. United States*,[134] in which "[t]he use, without a warrant, of a thermal imaging device was found to be a search."[135] In *Kyllo*, law enforcement used thermal imaging outside the defendant's home to determine whether the defendant was growing marijuana.[136] With the information obtained from this thermal imaging, in connection

[127] LAFAVE, *supra* note 7, § 2.2(a), at 605–06.
[128] *Id.* § 2.2(a), at 606.
[129] *Id.* (quoting United States v. Johnson, 497 F.2d 397, 398 (9th Cir. 1974)).
[130] LAFAVE, *supra* note 7, § 2.2(a), at 606–07.
[131] WEAVER ET AL., *supra* note 1, at 95.
[132] *See* ISRAEL & LAFAVE, *supra* note 24, § 2.2, at 55. An argument can be made that drug-detection dogs, however, are far less intrusive than other investigatory tools.
[133] *Id.* § 2.2, at 55–56.
[134] Kyllo v. United States, 533 U.S. 27 (2001).
[135] EVANS, *supra* note 12, at 8.
[136] GREENHALGH, *supra* note 35, at 126.

with information obtained from an informant as well as the defendant's utility bills, law enforcement personnel were able to successfully obtain and execute a search warrant and found what they suspected—a marijuana growing enterprise.[137] The Court held that the use of this device constituted an unreasonable search and violated the Fourth Amendment because the information could not have been acquired without physically entering into a protected area, and the device used did not have a general public purpose.[138] Therefore, the Supreme Court remanded the case to see if the police had sufficient evidence without the information obtained using the thermal imaging device to support a search warrant.[139] The Supreme Court has indicated that such technology can only be used if it is widely available for use by the public, not just for the police.[140]

The use of drug-sniffing dogs is one such "enhanced" law enforcement tool and continues to be a source of contention among courts.[141] However, dogs are not like some of the other more advanced tools used by law enforcement. Their advantage is their superior sense of smell, unlike that of humans, which can be of great benefit to police officers in trying to detect criminal activity. "Nonetheless, a dog's sense of smell has not progressed, unlike most technology that humans develop, such as computers, chemical tests, and electronics."[142] Based on the premises that a dog is "not like a machine" and cannot "advance in sophistication like other technologies,"[143] perhaps they should not be treated the same as the more intrusive technology used by law enforcement. The heart of the issue is really whether or not the use of the drug-detection dog, despite its potentially less intrusive nature, still constitutes a search because it is invading the privacy of an individual. In fact, and as discussed more fully in Part IV, "[o]lfactory 'searches' that are challenged under the Fourth Amendment usually involve trained police canines searching for human scents or drugs."[144] For many years, the Supreme Court has held that when it comes to luggage at the airport or the exterior of an automobile, canine sniffs are not "searches" and therefore do not implicate the Fourth

137 *Id.*
138 EVANS, *supra* note 12, at 8.
139 GREENHALGH, *supra* note 35, at 126.
140 *See id.*
141 *See* Bloom & Walsh, *supra* note 116, at 1274–76.
142 *Id.* at 1291.
143 *Id.* at 1292.
144 NEWTON, *supra* note 14, at 90.

Amendment since there is no reasonable expectation of privacy in either of these things.[145] Some state courts wholeheartedly disagreed with that assessment.[146] Additionally, "lower courts are divided on whether (or in what circumstances) a dog sniff of a person or the outside of a private residence constitutes a 'search.'"[147] As will be discussed in Part IV, the Supreme Court recently reached a somewhat different decision on this issue in *Florida v. Jardines*, but the discussion of what constitutes a search is far from settled.

## III. DOGS IN LAW ENFORCEMENT

When it comes to the assistance of canines in law enforcement searches and seizures, the training of the dogs plays an important role. Not just any dog can become a detection dog:

> While all domestic dogs are very good sniffers—the dog's primary sense is olfaction—not every dog is or can be a very good detection dog. Those selected for training are often not walk-ons: they might come from a breed line known to produce sensitive dogs, or, better, they are raised with the intention of eventually going into a training program.[148]

The types of dogs used for detection "are generally large work dogs, German Shepherds and Doberman Pinschers, who often intimidate those with whom they come in contact."[149] Other types of dogs have been used in the United States as well, "including Golden Retrievers, Belgian Malinois, Labrador Retrievers, and English Springer Spaniels,"[150] as well as some smaller breed dogs like beagles and cocker spaniels.[151] In fact, the breed of dog used by the police seems to be changing in some areas, with some law enforcement agencies making conscious decisions to use friendlier

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[145] *Id.*

[146] *Id.* at 90 & n.27.

[147] *Id.* *Compare* State v. Rabb, 920 So. 2d 1175, 1182, 1192 (Fla. Dist. Ct. App. 2006) (holding a dog sniff constituted a search when it sniffed the air directly outside the immediate area of a private home), *with* People v. Jones, 755 N.W.2d 224, 229 (Mich. Ct. App. 2008) (holding a dog sniff did not constitute a search under very similar circumstances as those in *State v. Rabb*).

[148] Alexandra Horowitz, *The Limits of Detection*, NEW YORKER (Apr. 24, 2013), http://www.newyorker.com/news/news-desk/the-limits-of-detection.

[149] Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 751 (2007). "[T]he German Shepherd is the most commonly used breed in law enforcement and in militaries around the world, with the Belgian Malinois as a close second." Braverman, *supra* note 3, at 140–41.

[150] Braverman, *supra* note 3, at 141.

[151] *Id.* at 144. These smaller breeds are being used to search areas that are inaccessible to larger dogs. *Id.*

dogs instead of those with bad reputations.[152]

While this note focuses more specifically on the use of drug-sniffing dogs, it is important to mention the other ways dogs have been used as part of law enforcement efforts. Historically, dogs have been used for centuries in a variety of ways, including to corral and kill people in concentration camps, hunt down slaves who had escaped, and to break up demonstrations.[153] Additionally, dogs have been used to sniff for mines, enemy ambushes, and bombs or other explosives.[154] "There are even dogs trained to detect wildlife or wildlife parts, like rhino horns and ivory, that smugglers try to sneak across borders."[155] Each dog has its own specialty, and is "trained specifically on particular molecules or compounds, and pays other odors no mind at all."[156]

Detection dogs receive extensive training, and "[f]ederal, state, and municipal police have each developed their own organizations, centers, and methods for training detection dogs."[157] Detection dogs do not work alone; they have a canine enforcement officer or handler that works with it as part of a team.[158] This canine enforcement officer also receives training, and the dog-handler team "must complete a certification exam in which the dog and handler must detect marijuana, hashish, heroin, and cocaine in a variety of environments. This exam and the following annual re-certifications must be completed perfectly, with no false alerts and no missed

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[152] Sarah Tynan, *The Fourth Amendment and Modern Practices: Drug Sniffing Dogs and Stop and Frisk*, 8 CRIM. L. BRIEF 74, 75 (2013) ("[F]or example, the Metropolitan Police Department (MPD), in Washington, D.C., made a policy decision to use dogs, like Labradors, that are more personable and less frightening to people.").

[153] Katz & Golembiewski, *supra* note 149, at 751 n.54.

[154] *War Dog Roles*, OLIVE-DRAB, http://olive-drab.com/od_wardogs_roles.php (Sept. 21, 2015). Although not the focus here, it is important to briefly mention the use of bomb-sniffing dogs in slightly more detail. Some have argued the rules relating to these types of dogs should be lessened:

> [I]n times of increased national security the use of dogs trained to sniff for explosives presents a heightened special need which may justify bypassing ordinary Fourth Amendment procedures. The use of bomb sniffing dogs, which is a separate practice from dogs used to sniff for drugs, should be subject to less stringent requirements due to heightened circumstances.

Katz & Golembiewski, *supra* note 149, at 739 n.12.

[155] Jane J. Lee, *Detection Dogs: Learning to Pass the Sniff Test*, NAT'L GEOGRAPHIC (Apr. 7, 2013), http://news.nationalgeographic.com/news/2013/04/130407/detection-dogs-learning-to-pass-the-sniff-test/.

[156] Horowitz, *supra* note 148.

[157] Braverman, *supra* note 3, at 146. While a detailed discussion of detection-dog training is beyond the scope of this note, Braverman sets forth an extensive discussion of the types of training detection dogs receive in his article.

[158] *Id.* at 149.

drugs."[159] In fact, canine enforcement teams train for hundreds of hours before actually going into the field.[160] Once in the field, however, the detection process only lasts a few minutes, and the officer watches carefully to observe any signs by the dog to indicate it has found drugs.[161]

"The use of dogs to detect narcotics is not an exact science"[162] and this leads to the issue of whether these dogs are reliable and accurate. "[E]ven though military and law enforcement agencies around the world have used canines to sniff out drugs and other contraband for decades, scientific evidence has pointed to a range in their reliability and accuracy."[163] In one study, researchers found the reliability of dogs trained to detect a federally protected tortoise could fall anywhere between twenty-seven and seventy-three percent.[164] Another study showed that the "detection dog handlers could be inadvertently cuing their canines to the presence of a target."[165]

Another issue is a lack of universality in the type of training the dogs receive. While there are some consistencies among the training methods, "[p]eople use an array of [training] techniques, and depending on who you talk to, their method will be the best method . . . [but] there is not much data to support one training method over another."[166] Additionally, some agencies also rely on private vendors to train and certify the dogs.[167] While these private programs have some minimum requirements, it is somewhat difficult to determine how reliable these programs truly are.[168]

With that being said, a dog's nose is a powerful instrument, and a dog "can isolate and identify compounds within a scent."[169] Knowing this, "[d]rug smugglers often try to mask the smell of their shipments by packaging them with coffee beans, air fresheners, or

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159 *Id.*

160 Brett Geiger, Comment, People v. Caballes*: An Analysis of* Caballes*, the History of Sniff Search Jurisprudence, and Its Future Impact*, 26 N. ILL. U. L. REV. 595, 609 (2006).

161 *Id.*

162 *Id.*

163 Lee, *supra* note 155.

164 *Id.*

165 *Id.*

166 *Id.* (second alteration in original).

167 Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 835–36 (2009). These private vendors include the "U.S. Police Canine Association (USPCA), the National Narcotic Detector Dog Association (NNDDA), and the American Working Dog Association (AWDA)." *Id.*

168 *Id.* at 836–37.

169 Burkhard Bilger, *Beware of the Dogs*, NEW YORKER, Feb. 27, 2012, at 46.

sheets of fabric softener."[170] One researcher attempted to see if certain scents could help fool a dog, and so he "flooded his laboratory with different scents, then added minute quantities of heroin or cocaine to the mix . . . but the dogs had no trouble homing in on the drug. 'They're just incredible at finding the needle in the haystack.'"[171]

Nevertheless, others have suggested that the dogs are actually alerting to a by-product of the drug and not the drug itself.[172] Because "a dog merely detects what it has been conditioned to detect, which could be a lawful scent," the dogs may not be able to distinguish between things that have similar smells.[173] For example, dogs may have trouble "discerning marijuana and hashish from . . . hemp products, juniper trees, or firs."[174] There is the added complication of false alerts, which occurs when drug-detection dogs indicate that drugs are in a certain location when, in actuality, they are not.[175]

One additional caveat is the issue of what to do when certain substances are decriminalized.[176] For example, both "Washington state and Colorado legalized marijuana through voter-approved referendums" and "[a]t least 16 other states . . . have some form of legalized or decriminalized marijuana, whether for medical or recreational uses. And other states are taking steps toward legalization."[177] Dogs will need to be retrained so they no longer identify when they smell marijuana, and some Washington state police departments have already taken steps to do just that.[178] Some experts believe that dogs can, in fact, be retrained, but a problem arises when drugs are mixed.[179] "What if [it is] marijuana and cocaine? . . . How do you know which substance the dog is alerting on for its handler?"[180] This issue could be problematic for prosecutors, as good defense attorneys may argue inadequate proof of retraining.[181] "[It is] also unclear whether every Washington police department intends to retrain their detection dogs. A canine

[170] *Id.*
[171] *Id.*
[172] Lunney, *supra* note 167, at 838.
[173] Bloom & Walsh, *supra* note 116, at 1285.
[174] *Id.*
[175] Geiger, *supra* note 160, at 608.
[176] Lee, *supra* note 155.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* (internal quotation marks omitted).
[181] *Id.*

that [has not] been retrained might alert an officer to a substance legal under state law, leading to a search when the police had no cause to detain someone based on that alert."[182] This could have some serious Fourth Amendment implications that have not been fully contemplated yet.

## IV. DETECTION DOGS AND THE FOURTH AMENDMENT

Previously, when it came to applying the Fourth Amendment to drug-detection dogs, the courts seem to have taken different approaches depending on how the particular court defined a dog sniff. "The courts have assumed different and, at times, contradictory approaches when considering whether or not to define the dog sniff as a Fourth Amendment search. Until now, these approaches have greatly depended upon the definition of dog sniffs as either a natural biological occurrence or an advancing technology."[183]

The word "sniff"[184] was used by Justice O'Connor in *United States v. Place*,[185] and courts continue to use that term and case to determine the propriety of a search in their subsequent decisions, even though the dog sniff issue was not central to the case and O'Connor's discussion regarding canine sniffs was dictum.[186] *Place* involved a search in an airport, whereby Drug Enforcement Administration agents who suspected an individual of carrying drugs used a positive canine sniff to obtain a warrant.[187] The agents eventually uncovered drugs and the individual was ultimately convicted.[188] The Supreme Court reversed this conviction due to the unconstitutional seizure that took place and

[182] *Id.*

[183] Braverman, *supra* note 3, at 83.

[184] "The word 'sniff' connotes a canine sniffing the air and not touching or pawing the subject. As a result of their olfactory biology, drug dogs do much more than sniff; they place their snouts on subjects and are prone to paw at them as well." Katz & Golembiewski, *supra* note 149, at 736 n.2.

[185] United States v. Place, 462 U.S. 696 (1983).

[186] Katz & Golembiewski, *supra* note 149, at 736–37 & n.2; *see also* Hope Walker Hall, *Sniffing Out the Fourth Amendment:* United States v. Place*—Dog Sniffs—Ten Years Later*, 46 ME. L. REV. 151, 152 (1994) ("In *United States v. Place*, the United States Supreme Court announced in dictum that a canine sniff of luggage in an airport was not a 'search' within the meaning of the Fourth Amendment. . . . [T]he Place discussion of canine sniffs was strictly dictum in that it was not essential to the outcome of the case. This has not prevented subsequent courts from expanding and further delineating the rather terse assertion by the Court that sniffs are not searches.").

[187] Hall, *supra* note 186, at 171.

[188] *Id.*

not due to an unconstitutional search, since the Supreme Court decided that the dog sniff did not constitute a search at all.[189]

> The *Place* doctrine that a dog sniff is not a search rests upon three premises: (1) that a dog sniff is a minor intrusion, (2) that a dog discloses nothing other than whether the object of the sniff contains contraband or the person subject to the sniff is carrying contraband, and (3) that dogs are extremely accurate when discerning the presence of illegal drugs. As a result of these three characteristics, the Court held that the drug dog is sui generis.[190]

It is "*sui generis*" because it is an "investigative procedure that is . . . limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[191] Basically, the majority of the Court felt that this procedure was not as intrusive as some other investigatory techniques.[192] The Court believed that drug-detection dogs were accurate in their discoveries, and even if any mistakes were made by a drug-detection dog, this amounted to harmless error since the mistake is usually one where the dog does not find contraband.[193]

With that backdrop in mind, for many years, numerous federal courts have relied on *Place* to justify holding that a canine sniff does not constitute a search.[194] "Other courts have held either that a canine sniff is presumptively reasonable or that a canine sniff must be weighed against the defendant's legitimate expectation of privacy in the area or item sniffed."[195] In noting that, in general, a dog sniff does not constitute a search, some courts have recognized that it may be a search under certain circumstances.[196] "When the circumstances are similar to those in *Place*, federal courts have followed *Place*. That is, if the dog sniffed luggage in an airport, bus, or train, the courts dispose of the issue by merely referring to *Place*."[197] Drug sniffs at the border have also not constituted searches.[198]

"The more difficult problem arises when the circumstances under

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189 *See id.*
190 Katz & Golembiewski, *supra* note 149, at 751–52.
191 United States v. Place, 462 U.S. 696, 707 (1983).
192 *See id.*
193 *See* Lunney, *supra* note 167, at 861–62.
194 Hall, *supra* note 186, at 153, 173.
195 *Id.* at 153 (footnote omitted).
196 *Id.* at 173.
197 *Id.* at 174.
198 *Id.*

which the dog sniff occurred implicate a higher expectation of privacy" or "when roaming police dogs indiscriminately sniff everything in sight."[199] In fact, in the 1985 case *United States v. Thomas*,[200] the U.S. Court of Appeals for the Second Circuit deviated from previous precedent when looking at drug-detection dogs in the context of a sniff at an apartment door and held that the particular sniff at issue in that case constituted a search for Fourth Amendment purposes.[201] The Second Circuit recognized that while dog sniffs may not be intrusive in other areas, it may be in the context of a person's home.[202] "Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation [of privacy]."[203] Other federal circuit and district courts rejected the Second Circuit's reasoning in *Thomas* and for some time continued to hold that a dog sniff is not a search, even in the home.[204] Throughout the late 1980s and early 1990s, despite the deviation by the Second Circuit, federal courts simply cited *Place* for the proposition that a dog sniff did not constitute a search.[205]

During that same time period, most state courts followed suit and also held that dog sniffs were not searches, citing *Place* in their decisions.[206] However, some state courts diverged from this interpretation and used their own state constitutions to afford greater protections.[207] In fact, New York, New Hampshire, and Pennsylvania "all [held] that dog sniffs are searches."[208] As an illustration, in *People v. Dunn*,[209] the New York Court of Appeals declined to follow *Place* and held that, though a dog sniff for narcotics in an apartment building hallway might not constitute a search under the Fourth Amendment, it was a search under the New York State Constitution.[210] In fact, the Court of Appeals "believe[d] that the fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on

199 *Id.*
200 United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985).
201 *See* Lunney, *supra* note 167, at 887.
202 *Thomas*, 757 F.2d at 1366–67.
203 *Id.*
204 Lunney, *supra* note 167, at 888.
205 Hall, *supra* note 186, at 173.
206 *Id.* at 175–76.
207 *See id.* at 176.
208 *Id.* at 176 n.151.
209 People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990).
210 *Id.* at 1055.

whether it constitutes a search. Notwithstanding such a method's discriminate and nonintrusive nature, it remains a way of detecting the contents of a private place."[211] The court's analysis looked at how the dog sniff invaded an area where a person has a reasonable expectation of privacy—here an apartment—so that the police were able to acquire evidence that they would not have been able to obtain otherwise, and therefore, this constituted a search under the New York Constitution.[212] However, despite the fact that this was a search, the court noted that the police did not need probable cause or a warrant so long as they had reasonable suspicion that there were drugs or other illegal items within the premises for the very reason that a dog sniff is both less intrusive than other types of searches and is an investigative tool that greatly aids police officers.[213] In *Dunn*, the officers received what appeared to be a credible tip that drugs were being kept in defendant's apartment, and for the court, this constituted reasonable suspicion.[214] In subsequent cases, the New York Court of Appeals continued to look at whether a person had a reasonable expectation of privacy in a particular area to determine whether or not the dog sniff constituted a search, and in addition to one's home, the court determined that a person has a reasonable expectation of privacy in one's car, so "that a canine sniff of the exterior of an automobile constitutes a search under [the New York Constitution]."[215]

Similarly, in *State v. Pellicci*, New Hampshire's highest court found a dog sniff of an automobile constituted a search under its

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[211] *Id.* at 1057 (citation omitted).

[212] *Id.* at 1058.

[213] *Id.*

[214] *Id.* at 1055–56.

[215] People v. Devone, 931 N.E.2d 70, 74 (N.Y. 2010). However, in this case, because it involved an automobile and not a home, the majority held that only "founded suspicion" was required and not reasonable suspicion. *Id.* The dissent disagreed and believed that reasonable suspicion was still the appropriate level of suspicion despite the lesser expectation of privacy. *Id.* at 75 (Ciparick, J., dissenting). As discussed by the dissent, in New York, as outlined in *People v. DeBour*, there are four possible levels of suspicion in police-citizen encounters and there are certain requirements for each:

> [L]evel one requires that police have "an objective, credible reason, not necessarily indicative of criminality"; level two requires "a founded suspicion that criminal activity is afoot"; level three requires "a reasonable suspicion that the particular individual was involved in a felony or misdemeanor"; and level four "requires probable cause to believe that the person . . . has committed a crime."

*Id.* 75 & n.* (citing People v. DeBour, 352 N.E.2d 562, 571–72 (N.Y. 1976)); *see also* Andrea A. Long, *Stop, Frisks, and Police Encounters: The New York Court of Appeals's Strict Application of the* DeBour *Standard*, 78 ALB. L. REV. 1468–69 (2013/2014) (discussing the *DeBour* Standard).

state constitution.[216] In *Pellicci*, police officers were waiting outside a nightclub in order to catch the defendant committing a drug transaction.[217] When police saw the defendant, they stopped him and brought the detection dog near the exterior of defendant's car, and the dog subsequently alerted that it smelled drugs.[218] In that case, the majority concluded that "a search ordinarily implies a prying into hidden places, and a dog sniff of an automobile certainly meets this criterion."[219] Like New York, the New Hampshire court justified the intrusion based upon a reasonable suspicion standard.[220] "Because a dog sniff discloses limited information and entails less embarrassment than a traditional search, it is justified by reasonable suspicion."[221]

Pennsylvania also follows New York and New Hampshire in holding both that a drug sniff is a search and that a reasonable suspicion standard is the appropriate justification, except when it comes to a dog sniff of an actual person, which requires probable cause and a search warrant.[222] In *Commonwealth v. Johnston*,[223] a dog sniff of a warehouse was found to be a search and reasonable suspicion that drugs were present was required.[224] "In *Johnston*, reasonable suspicion was established when narcotics agents observed two people carrying what appeared to be bales of marijuana from the storage warehouse."[225] In *Commonwealth v. Martin*,[226] the Pennsylvania high court again held a dog sniff was a search,[227] but this time, noted that

> [w]here the search involves the person, reasonable suspicion will not suffice; "police must have probable cause to believe that a canine search of a person will produce contraband or evidence of a crime." The police may then detain the suspect for a reasonable time while a search warrant is sought, during which time they may pat down only as allowed under constitutional rules for protective searches.[228]

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[216] State v. Pellicci, 580 A.2d 710, 716 (N.H. 1990).
[217] *Id.* at 712; LATZER, *supra* note 38, § 3:5, at 3-39 to -40.
[218] *Pellicci*, 580 A.2d at 712.
[219] LATZER, *supra* note 38, § 3:5, at 3-6.
[220] *Id.* § 3:5, at 3-39.
[221] *Id.* § 3:5, at 3-40.
[222] *Id.* § 3:5, at 3-42.
[223] Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987).
[224] LATZER, *supra* note 38, § 3:5, at 3-42.
[225] *Id.*
[226] Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993).
[227] *Id.* at 559–60.
[228] LATZER, *supra* note 38, § 3:5, at 3-42 (quoting *Martin*, 626 A.2d at 560).

Despite some state courts finding dog sniffs to be a search, in 2005, the Supreme Court again held that a search by a drug-detection dog is not actually a search for purposes of the Fourth Amendment and extended that reasoning to traffic stops. In *Illinois v. Caballes*,[229] police officers used a drug-detection dog during a lawful traffic stop.[230] After a police officer pulled over Caballes for speeding, another officer arrived at the scene with his detection dog.[231] While the first officer began to write out a ticket, the second officer approached the car with the dog, and as the detection dog was walked around the car, the dog alerted the officer to the trunk of the car.[232] Because of this, the officers searched the car and found marijuana.[233] Caballes was arrested and eventually convicted, sentenced, and fined.[234] The U.S. Supreme Court took the position that a dog sniff is not a search,[235] despite the fact that the Illinois Supreme Court "conclud[ed] that because the canine sniff was performed without any 'specific and articulable facts' to suggest drug activity, the use of the dog 'unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation.'"[236] The Illinois court, however, seemed to take more issue with the seizure aspect of the case, finding that the seizure was the result of an unlawful sniff because the officers lacked reasonable suspicion that the defendant had drugs in his possession, which changed the nature of the traffic stop.[237] The U.S. Supreme Court held otherwise, concluding that "conducting a dog sniff would 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 [the defendant's] constitutionally protected interest in privacy. Our cases hold that it did not."[238] Moreover, the U.S. Supreme Court noted that its decision in *Caballes* was in line with its previous decision in *Kyllo* and *Jacobsen*:

> Critical to [the *Kyllo*] decision was the fact that the device

[229] Illinois v. Caballes, 543 U.S. 405 (2005).
[230] *Id.* at 406.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.* at 406–07.
[235] Orin S. Kerr, *Four Models of Fourth Amendment Protection*, *in* THE FOURTH AMENDMENT: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE—SEARCH AND SEIZURES, *supra* note 25, at 74, 76.
[236] *Caballes*, 543 U.S. at 407 (second alteration in original) (quoting People v. Caballes, 802 N.E.2d 202, 205 (Ill. 2003), *vacated*, 543 U.S. 405 (2005)).
[237] *Caballes*, 543 U.S. at 408.
[238] *Id.*

> was capable of detecting lawful activity—in that case, intimate details in a home . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [a defendant's] hopes or expectations concerning the nondetection of contraband in the trunk of his car [as seen in *Jacobsen*]. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.[239]

Some would suggest that the ruling in *Caballes* "ha[d] taken the teeth out of the Fourth Amendment"[240] and stretched the limits as to how far a police officer may go during a traffic stop.[241] "The impact of the *Caballes* decision has been felt far beyond vehicle sniffs, however. Lower courts have taken the *Place* and *Caballes* decisions as a signal that canine sniffs are per se nonsearches and that it is therefore permissible to conduct suspicionless canine sniffs of homes."[242] In fact, some would suggest that the major problem with classifying dog sniffs as something other than a search is that it allows law enforcement officials to circumvent the need for probable cause and warrants in general.[243] Nevertheless, for others, reasonable suspicion may be the more appropriate standard to use, with some state courts holding that dog sniffs are searches under their state constitutions but also justifying the search based upon reasonable suspicion.[244]

In 2013, the Supreme Court diverted from previous precedent regarding drug-detection dogs. In *Florida v. Jardines*, the Court held that a dog sniff does in fact constitute a search, at least when a person's home is involved.[245] This was the first time the Supreme

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[239] *See id.* at 409–10. Since the initial writing of this paper, the U.S. Supreme Court has issued a subsequent decision regarding traffic stops and dog sniffs. Rodriguez v. United States, 135 S.Ct. 1609 (2015). In *Rodriguez*, the Court held that law enforcement officials may not prolong a completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. *Id.* at 1614–15. This case falls in line with previous case law, since the Court in *Caballes* cautioned against prolonging the duration of a traffic stop beyond the time reasonably necessary to issue a ticket because doing so could constitute a Fourth Amendment violation. *Id.*

[240] Joshua B. Adams, *Search and Sniff: What's Left of the Fourth Amendment after* Illinois v. Caballes*?*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 185, 201 (2006).

[241] *Id.* at 203.

[242] Lunney, *supra* note 167, at 831.

[243] *See* Bloom & Walsh, *supra* note 116, at 1272.

[244] *See supra* notes 206–28 and accompanying text.

[245] Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

Court addressed drug-detection dogs in the context of the home.[246] In this case, the dog sniff was conducted within the curtilage of the defendant's home—the front porch.[247] After receiving a tip that Jardines was growing marijuana, a group of law enforcement officials went to his home, including a handler and his drug detection dog.[248] The dog made a positive alert of drugs, after which the police obtained a warrant to conduct a search of Jardines' home, and upon searching found marijuana and arrested Jardines.[249] Jardines moved to suppress this evidence, which the trial court granted.[250] After the Florida Court of Appeals, Third District, reversed, the Florida Supreme Court ultimately decided in favor of Jardines and "approved the trial court's decision to suppress, holding . . . that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search."[251] The U.S. Supreme Court granted certiorari to determine whether this constituted a search under the Fourth Amendment,[252] and in a 5 to 4 decision, the majority affirmed the Florida Supreme Court's judgment and held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment."[253] However, Justice Scalia, writing for the majority, veered away from the *Katz* reasonable expectation of privacy test,[254] and used "a property rubric" to reach the conclusion that this was a search.[255] For the majority, the law enforcement officials and drug detection dog were physically intruding upon the curtilage of Jardines' home without permission by Jardines.[256] Expanding upon that, Justice Scalia wrote that even though the police officers could approach an individual's home without a warrant and knock on the door, since this is something an

[246] *See* Bloom & Walsh, *supra* note 116, at 1272.

[247] *Jardines*, 133 S. Ct. at 1413.

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.* (citing Jardines v. State, 73 So. 3d 34, 36–37 (Fla. 2011), *aff'd*, 133 S. Ct. 1409 (2013)).

[252] *Jardines*, 133 S. Ct. at 1414.

[253] *Id.* at 1417–18.

[254] *Id.* at 1417 (discussing *United States v. Jones* and noting that law enforcement's actions constituted a search in that case because the GPS was "physically mounted" on the automobile of the defendant).

[255] *Id.* at 1418 (Kagan, J., concurring) (noting that Justice Scalia used "a property rubric" instead of relying on *Katz*).

[256] *Id.* at 1415 (majority opinion).

ordinary citizen would be able to do, this did not give them the right to bring a trained detection dog into that same area in order to detect evidence of wrongdoing.[257]

While it is now clear that a dog sniff in a person's home or within the curtilage of a person's home constitutes a search for Fourth Amendment purposes, it is less clear whether this would still constitute a search in other areas.[258] Regardless of whether *Jardines* is extended to other areas, Justice Kagan's concurrence noted that "drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners."[259] In *Florida v. Harris*, the Supreme Court looked at that very issue—the reliability of drug-detection dogs and whether a drug-detection dog "alert" gives an officer probable cause to search an automobile.[260] The Court concluded that "if a dog 'alert' provides probable cause to search, the Fourth Amendment does not require the State to present an extensive set of records to establish the dog's reliability."[261]

*Harris* involved a traffic stop for an expired license plate.[262] After observing an open container of alcohol and noting that Harris seemed "visibly nervous," the officer asked Harris if he could search the car.[263] After Harris refused, the officer walked a drug detection dog around the car.[264] The dog alerted that it detected drugs, which led the officer to believe that he had probable cause and could search the vehicle.[265] Upon searching the vehicle, the officer discovered a variety of ingredients used to make methamphetamine, but no actual drugs that the dog was trained to detect.[266] Harris was arrested and charged "with possessing pseudoephedrine for use in manufacturing methamphetamine."[267] When Harris was

[257] *Id.* at 1416.

[258] Bloom & Walsh, *supra* note 116, at 1283.

[259] *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring) (citing Florida v. Harris, 133 S. Ct. 1050, 1056–57 (2013)).

[260] *See Harris*, 133 S. Ct. at 1053.

[261] Weisselberg, *supra* note 94, at 179.

[262] *Harris*, 133 S. Ct. at 1053.

[263] *Id.*

[264] *Id.* at 1053–54.

[265] *Id.* at 1054.

[266] *Id.* The dog was "trained to detect certain narcotics (methamphetamine, marijuana, cocaine, heroin, and ecstasy)." *Id.* at 1053. The vehicle, on the other hand, contained only various ingredients that are typically used to make methamphetamine, including "200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals." *Id.* at 1054.

[267] *Id.*

released on bail, he was again stopped by the same officer and drug-detection dog team for another traffic violation.[268] The officer again brought the dog to the car and the dog again alerted that it detected drugs, but this time nothing was found.[269]

Harris made a motion to suppress the evidence from the first search, claiming that the officer did not have probable cause to search his vehicle.[270] The officer testified as to the training he and the dog received, and also explained the actions of the detection dog—"[a]ccording to [the officer], Harris probably transferred the odor of methamphetamine to the door handle, and [the dog] responded to that 'residual odor.'"[271] The trial court found this to be sufficient and denied Harris's motion, concluding that the officer had probable cause, which justified the search.[272] Harris ultimately appealed to the Florida Supreme Court, which reversed.[273] The court held that the prosecution did not sufficiently demonstrate that the officer had probable cause and was required to present more evidence of the dog's reliability and accuracy, such as

> the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability.[274]

In this particular case, the officer kept less than impeccable records so the court was not convinced that the officer could fully rely on the dog.[275] The U.S. Supreme Court granted certiorari and in reversing the Florida Supreme Court's decision noted that Florida's highest court ignored the preferred method of determining probable cause—the *Gates* totality of the circumstances method.[276] The Supreme Court noted that "a finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements. No more for dogs than for human informants is such an inflexible checklist the way to prove

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[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.* (citation omitted).
[272] *Id.*
[273] *Id.* at 1055.
[274] *Id.* (quoting Harris v. State, 71 So. 3d 756, 775 (Fla. 2011), *rev'd*, 133 S. Ct. 1050 (2013) (internal quotation marks omitted)).
[275] *Harris*, 133 S. Ct. at 1055.
[276] *Id.* at 1055–56.

reliability, and thus establish probable cause."[277] In fact, field data may not accurately represent the dog's reliability since a "false positive" may not actually be a mistake due to the fact that the drugs may be "too well hidden" or not large enough in quantity, or the smell may be the residual odor of something that was at one point located within the automobile.[278] Additionally, field assessments may also not accurately record "false negatives."[279] According to the Supreme Court, a dog's successful completion of a training or certificate program, on the other hand, is sufficient evidence to show that the dog is reliable.[280] All in all,

> a probable-cause hearing focusing on a dog's alert should proceed much like any other . . . [and] the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.[281]

Here, the Court found that the dog's sniff met the test because the training records showed that the dog was sufficiently dependable for the officer to appropriately rely on the alert, giving him probable cause to justify a search.[282] Though the Court said it was relying on the totality of the circumstances approach, it appears that the Court instead created a "sweeping rule that a drug dog's positive alert is enough to create a presumption of probable cause so long as the dog either 'recently and successfully completed a training program' or was certified by a 'bona fide organization.'"[283]

## V. CONCLUSION

Due to the Supreme Court's conflicting holdings in *Place* and *Caballes* on the one hand and *Jardines* on the other, questions remain such as whether or not a dog sniff constitutes a search in an area other than a home. The law is further compounded by the decision in *Harris*, which appears to be in conflict with *Jardines* in

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[277] *Id.* at 1056.
[278] *Id.* at 1056–57.
[279] *Id.* at 1056.
[280] *Id.* at 1057.
[281] *Id.* at 1058.
[282] *Id.*
[283] Kinports, *supra* note 96, at 65 (quoting *Harris*, 133 S. Ct. at 1057).

that the *Harris* court said that a dog sniff provides an officer with probable cause to conduct a search, whereas in *Jardines* the Court said that a dog sniff *was* a search.[284] Thus, there remains the question of whether a dog sniff constitutes a search. Questions remain as to whether a dog sniff is a search only in the context of a home and whether dog sniffs should be interpreted differently in other contexts, such as during a traffic stop or in public areas such as an airport or a storage locker.

It is unclear how much *Jardines* will affect subsequent decisions relating to drug-detection dog sniffs in connection with places other than the home. *Jardines* is unlikely to have an impact on state courts that have already held that dog sniffs are searches under their own state constitutions.[285] For lower federal courts and state courts that previously held dog sniffs to be something other than searches, it appears that some of these courts are already attempting to distinguish *Jardines* from cases unrelated to the home,[286] and will most likely continue to do so since the Court in *Jardines* did not overrule *Place* or *Caballes*—in which dog sniffs occurred in an airport and during a traffic stop, respectively, and did not constitute searches in either instances.[287]

Regarding the Court's use of a property-based analysis in *Jardines*, while the courts have afforded the home greater

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[284] *Cf.* Brian L. Owsley, *The Supreme Court Goes to the Dogs: Reconciling* Florida v. Harris *and* Florida v. Jardines, 77 ALB. L. REV. 349, 374–75 (2013/2014) (noting that while *Harris* and *Jardines* appear to be conflicting, they are actually reconcilable because of their factual differences).

[285] *See supra* notes 206–28 and accompanying text.

[286] *E.g.*, United States v. Taylor, 979 F.Supp. 2d 865, 880 (S.D. Ind. 2013), *aff'd*, 776 F.3d 513 (7th Cir. 2015) (noting that, unlike the search in *Jardines*, the search in this case occurred on the property of a third party); United States v. Jordan, No. 5:13-CR-170-H, 2013 U.S. Dist. LEXIS 184689, at *10–11 (E.D.N.C. Dec. 27, 2013) (finding a dog sniff on defendant's property not to be a search on the basis that the officers in this case, unlike those in *Jardines*, had a legitimate reason to be on defendant's property other than to collect evidence); United States v. Mathews, No. 13-79 ADM/AJB, 2013 U.S. Dist. LEXIS 153463, at *7–8 (D. Minn. Oct. 25, 2013) ("The holding in *Jardines* did not fundamentally alter Fourth Amendment protections over homesteads, and it did not expand Fourth Amendment coverage to common areas outside of an apartment. Eighth [sic] circuit courts, both before and after *Jardines*, have held that an apartment common area or hallway is not part of a curtilage, and thus does not receive the same Fourth Amendment protection."); United States v. Beene, No. 13-39 (01), 2013 U.S. Dist. LEXIS 139311, at *21–22 (W.D. La. Sept. 24, 2013) (holding that the dog sniff of a vehicle outside the curtilage of the home did not constitute a search); State v. Arellano, No. 1 CA-CR 12-0440, 2013 Ariz. App. Unpub. LEXIS 848, at *5 (Ariz. Ct. App. July 25, 2013) ("[T]he narcotics canine search did not violate Arellano's Fourth Amendment rights, as 'a dog sniff is not a search for Fourth Amendment purposes when . . . it is conducted on the exterior of a car in a public place at which the police have a right to be present.'" (quoting State v. Box, 73 P.3d 623, 627–28 (Ariz. Ct. App. 2003))); State v. Johnson, 2014-Ohio-671, at ¶ 15–16 (declining to apply *Jardines* to a dog sniff of a storage locker).

[287] *See supra* notes 187–93, 230–39 and accompanying text.

protections against unreasonable searches and seizures, a return to a trespass analysis in discussing these issues seems unnecessary since the *Katz* test could very easily apply due to the fact that there is both a subjective and objective reasonable expectation of privacy associated with one's home.[288] Though not universally accepted by all federal and state courts, it makes the most sense to use the *Katz* rationale to determine what constitutes a search, especially as related to dog sniffs. While the Oregon high court did make an interesting point in noting that privacy is a right and should be protected regardless of whether one reasonably believes it should be protected,[289] the *Katz* test takes into account both an individual, subjective belief as to what should be afforded privacy protections, as well as what society as a whole objectively believes should be protected. There is no need to protect something if no one thinks it should be protected. Therefore, courts should continue to use the *Katz* test to determine whether, and in what contexts, the dog sniff constitutes a search.

It is important to recognize the "discriminate and nonintrusive nature"[290] of a dog sniff, regardless of whether it can be used to "detect[] the contents of a private place."[291] In fact, a dog sniff is less intrusive than other types of searches (like the thermal-imaging in *Kyllo*), is used to look for a very specific item (contraband), and is a valuable law enforcement investigative tool; so it would be more useful (and appropriate) to classify a dog sniff as a quasi-search. By classifying it as such, a less restrictive standard than probable cause (reasonable suspicion) would be suitable to justify this quasi-search. "Similar to a *Terry* stop, it seems proper to require an officer to have, based on experience, reasonable grounds to suspect criminal activity before utilizing a drug-detection dog to investigate a person."[292] If a situation arose, such as a visibly nervous defendant combined with some other incriminating factors during a traffic stop (as seen in *Harris*) or some other similar situation not relating to a traffic stop but in some other context, an officer would be able to use his or her judgment and determine if there was reasonable suspicion to conduct a dog sniff. If the officer has reasonable suspicion, he or she may then proceed with the dog sniff and briefly walk the dog around

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288 *See* Owsley, *supra* note 284, at 371; *supra* note 41 and accompanying text.
289 *See supra* note 58 and accompanying text.
290 People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990).
291 *Id.* at 1057.
292 Bloom & Walsh, *supra* note 116, at 1291.

the person or area. Should the dog then alert that it found drugs, this would provide the officer with probable cause to conduct a more in-depth and thorough search, provided that the dog successfully completed a training or certificate program to show that it is reliable, as set forth in *Harris*. However, with the movement toward legalization of marijuana in some states, this aspect may have to be revisited. It may not be sufficient that the dog completed a training or certificate program and additional proof may be required. The officer will have to show the dog was effectively retrained to not alert to a drug that is no longer illegal.

Only time will tell how the courts will choose to apply *Jardines* and *Harris* in their subsequent decisions and whether they will follow suit or attempt to distinguish the cases. Regardless of what happens, it seems like this area of the law is currently in a state of flux, where rules keep changing and new questions continue to arise, and it will probably continue on this way for some time.