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Sniffing Out the Fourth Amendment: United States v. Place-Dog Sniffs-Ten Years Later

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SNIFFING OUT THE FOURTH AMENDMENT: *UNITED STATES v. PLACE*—DOG SNIFFS—TEN YEARS LATER

INTRODUCTION

In the endless and seemingly futile government war against drugs, protections afforded by the Fourth Amendment of the United States Constitution may have fallen by the wayside as courts struggle to deal with drug offenders. The compelling government interest in controlling the influx of drugs all too often results in a judicial attitude that the ends justify the means. Judges can be reluctant to exclude evidence of drugs found in an unlawful search pursuant to the exclusionary rule,[1] which provides that illegally obtained evidence may not be used at trial. The exclusion of drugs as evidence in drug cases often results in a dismissal of the case.[2]

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1. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914) (holding that violations of the Fourth Amendment result in exclusion of the evidence illegally obtained).

2. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383

The courts do not reach this exclusionary quandary, however, if investigatory techniques used to discover the drugs are not covered by the Fourth Amendment. If the court holds that a given technique is not a search, no Fourth Amendment inquiry ensues. This is exactly what is happening to some investigatory techniques used in the "drug war." Canine sniffs,[3] aerial searches,[4] and drug field tests[5] have all been upheld on the ground that these techniques are not searches within the purview of the Fourth Amendment. Withdrawing judicial scrutiny from these techniques results in a growing sphere of government activity that is unreviewable. When government activity is unreviewable, the law enforcement process is open to abusive use of otherwise reasonable investigatory techniques. This Comment focuses exclusively on canine sniffs and argues that sniffs should be considered searches to be analyzed properly under the Fourth Amendment.

In *United States v. Place*,[6] 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. Before *Place*, state courts had taken various approaches to dealing with the question of whether a canine sniff was a search under the Fourth Amendment. These approaches resulted in conflicting holdings.[7] Since *Place*, canine sniffs have generally been upheld, even when they occur outside of airports.[8] What is disturbing, however, is that the *Place* discussion of canine sniffs was strictly dictum in that it was not essential to the outcome of the case.[9] This has not prevented subsequent courts from expanding and further delineating the rather terse assertion by the Court that sniffs are not searches. Thus, while *Place* might be read as limiting permissible sniffs of lug-

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(1914). In drug cases the exclusionary rule is particularly problematic for the general public. Because mere possession of drugs constitutes a crime, exclusion of the drugs will leave the government without a case. Moreover, the defendant will go free and unpunished for violating the law. When drugs are excluded because of a constitutional violation, the public perceives this as "letting a criminal off on a technicality." Consequently, judges are in a quandary, forced to consider competing constitutional and public demands.

3. United States v. Place, 462 U.S. 696 (1983).

4. Florida v. Riley, 488 U.S. 445 (1989); Dow Chemical Co. v. United States, 476 U.S. 227 (1986); California v. Ciraolo, 476 U.S. 207 (1986).

5. United States v. Jacobsen, 466 U.S. 109 (1984).

6. 462 U.S. 696 (1983).

7. See Stefan Epstein, Annotation, *Use of Trained Dog to Detect Narcotics on Drugs As Unreasonable Search in Violation of Fourth Amendment* 31 A.L.R. FED. 931 for a discussion of state and federal cases addressing the constitutionality of canine sniffs before *Place*.

8. *See, e.g., infra* notes 10-13.

9. The Court's holding in *Place* was that a seizure of the defendant's luggage for over ninety minutes exceeded the limits of an investigative stop and thus violated his Fourth Amendment rights. United States v. Place, 462 U.S. at 709.

gage to sniffs conducted in public places, its subsequent application by lower courts has not been so limited.

Most of the courts that have dealt with the issue of dog sniffs, have taken *Place* literally and have applied it to any number of situations using a slightly different Fourth Amendment analysis.[10] Many courts have held that a canine sniff is not a search by relying on the *Place* dictum.[11] Other courts have held either that a canine sniff is presumptively reasonable[12] or that a canine sniff must be weighed against the defendant's legitimate expectation of privacy in the area or item sniffed.[13]

Four states courts to date, Alaska, New Hampshire, New York, and Pennsylvania, have voiced their disapproval of the United States Supreme Court's assertion that sniffs are not searches, and have reacted by interpreting their own state constitutional search and seizure provisions to hold that sniffs are searches.[14] The Maine Supreme Judicial Court, sitting as the Law Court, recently had occasion to review whether a canine sniff of a package was a search and the court concluded that it was not, basing its decision on the Fourth Amendment to the United States Constitution.[15] In reaching its conclusion, the Law Court clearly relied on the Supreme Court dictum in *Place* and on *United States v. Jacobsen*,[16] which is discussed below.

Since the dictum in *Place*, the Supreme Court has not reanalyzed its position that canine sniffs are not "searches" in the context of the Fourth Amendment. Although *Place* was widely criticized for its

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10. *See, e.g.*, United States v. Decker, 956 F.2d 773 (8th Cir. 1992) (United Parcel Service package subjected to canine sniff); United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991) (canine sniff of exterior of legally impounded vehicle); United States v. Thomas, 787 F. Supp. 663 (E.D. Tex. 1992) (canine sniff of closed container inside vehicle).

11. *See, e.g.*, United States v. Dovali-Avila, 895 F.2d 206 (5th Cir. 1990); United States v. Stone, 866 F.2d 359 (10th Cir. 1989); United States v. Beale, 736 F.2d 1289 (9th Cir. 1984).

12. United States v. Trayer, 701 F. Supp. 250 (D.D.C. 1988); United States v. Liberto, 660 F. Supp. 889 (D.D.C. 1987), *aff'd without op.*, 838 F.2d 571 (D.C. Cir. 1988).

13. United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985), *cert. den.*, 474 U.S. 819 (1985); United States v. Sklar, 721 F. Supp. 7 (D. Mass. 1989); State v. Snitkin, 681 P.2d 980 (Haw. 1984); State v. Stamphill, 769 P.2d 861 (Wash. Ct. App. 1989).

14. *See* Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985); State v. Pellicci, 580 A.2d 710 (N.H. 1990); People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990); Commonwealth v. Johnston, 515 A.2d 454 (Pa. 1987).

15. State v. Phaneuf, 597 A.2d 55 (Me. 1991).

16. 466 U.S. 109 (1984) (upholding the field testing of a white powder that confirmed the powder was cocaine). *Place* and *Jacobsen*, decided one year after *Place*, should be read together because much of the discussion in *Jacobsen* is an extension of the dialogue in *Place*. Moreover, Justice Brennan's dissent in *Jacobsen* points out that most of his criticisms are equally applicable to the majority analysis in *Place*.

judicial treatment of canine sniffs,[17] there has been little examination of the subsequent effects of *Place* and the systematic use of canines today in the war against drugs.[18] In light of the limited finding in *Place* that a dog sniff of luggage in a public place is not a search, it is worth examining how courts are assessing the validity of canine sniffs in a variety of situations.

This Comment will first describe the Supreme Court's Fourth Amendment analysis to the extent that it is possible to find any bright line rules. Part II will examine the status of canine sniffs in the federal and state courts after *Place*. The status of dog sniffs in most federal courts is clear; sniffs are not considered searches. State courts, however, are free to and should adopt a different position under state constitutions. Several states have independently examined a dog sniff under their state constitutions and have concluded that sniffs are to be considered searches and, therefore, worthy of protection.

Part III will suggest some alternatives to the approach used in *Place* and will argue that the Supreme Court should revisit the issue. The flawed analysis in *Place* has resulted in both the inconsistent and incomprehensible treatment of Fourth Amendment considerations implicated by a canine sniff. It is evident that the criticisms of *Place* are even more relevant today, after ten years of dog sniff case law.

Finally, this Comment will conclude with a brief examination of a better way to approach canine sniffs. At the very least, a dog sniff should be considered a search, albeit perhaps, presumptively reasonable. Dog sniffs should be examined in light of the particular circumstances in which the dog was used. Although a dog sniff of luggage in an airline terminal may be reasonable, clearly there are different considerations when a dog is used in dragnets or when a dog is used to sniff a person. The Supreme Court's failure to establish any concrete guidelines for when a canine sniff becomes an impermissible search means the Court has placed Fourth Amendment jurisprudence into the hands of law enforcement officials. There is a need for a clearer Fourth Amendment analysis that on the one hand supports the reasonable use of dogs and on the other hand recog-

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17. *See* WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE § 2.2(f) (1988) (criticizing the Supreme Court's holding in *Place*); Linda M. Sickman, *Fourth Amendment—Limited Luggage Seizures Valid on Reasonable Suspicion*, 74 S. CT. REV. 1225 (1983) (arguing that although support exists for holding that sniffs are not searches, there is equally persuasive support for holding that sniffs do constitute searches).

18. The use of drug-sniffing dogs, however, may be curtailed in the future given the prevalence of drug residue on U.S. currency. *See* Mark Corriden, *Courts Reject Drug-Tainted Evidence*, A.B.A. J., Aug. 1993, at 22 (Seventy percent of U.S. currency in circulation is tainted with trace amounts of cocaine. Trained drug-sniffing dogs are able to detect these trace amounts on currency.).

nizes that canine sniffs are searches. In this way, the Fourth Amendment will serve as a limitation upon unreasonable canine sniffs.

I. THE UNITED STATES SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment maxim that is most often repeated but seldom followed by the Supreme Court was expressed in *Katz v. United States*:[19] "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[20] When *Katz* was decided in 1967, there were few exceptions to the warrant requirement for a search under the Fourth Amendment.[21] Shortly thereafter, however, the Supreme Court came to recognize several more exceptions.[22]

In later years, these exceptions were broadened to meet the need by law enforcement officials to adapt to changing social circumstances, an increasing crime rate, and the apparent impractical requirement of obtaining a warrant before conducting a search.[23] As a result, the Court has moved away from the strict standard enunciated in *Katz*, to a more permissive attitude toward government conduct. Many modern Fourth Amendment cases deal with defendants involved in drug activity whereby the court is asked to review government conduct in obtaining drug evidence. Many scholars have attributed the Court's relaxed Fourth Amendment analysis to the "war on drugs"[24] and judicial abhorrence of the exclusionary rule.[25]

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19. 389 U.S. 347 (1967).

20. *Id.* at 357 (footnotes omitted).

21. For example, at the time *Katz* was decided, the Supreme Court had recognized an "automobile exception" that allowed a warrantless search of a motor vehicle when the officer had probable cause to believe the car contained contraband. *See* Carroll v. United States, 267 U.S. 132 (1925).

22. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border searches); Schneckcloth v. Bustamonte, 412 U.S. 218 (1973) (search pursuant to voluntary consent); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop-and-frisk searches for weapons); Harris v. United States, 390 U.S. 234 (1968) (seizure of objects in plain view).

23. For example, the automobile exception permits searches of stationary vehicles, *see* California v. Carney, 471 U.S. 386 (1985), and a stop-and-frisk can last 20 minutes without violating *Terry v. Ohio*, *see* United States v. Sharpe, 470 U.S. 675 (1985).

24. *See, e.g.*, Steven Wisotsky, *Crackdown: The Emerging Drug Exception to the Bill of Rights*, 38 HASTINGS L.J. 889, 909 (1987) ("The result of the War on Drugs is thus a gradual, but inexorable, expansion of enforcement powers at the expense of personal freedoms."). *See generally*, Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment* (as illustrated by the Open Fields Doctrine), 48 U. PITT. L. REV. 1 (1986).

25. *See, e.g.*, John M. Burkoff, *When is a Search Not a "Search?" Fourth*

Most recently, very few exceptions to the warrant requirement have been created; instead, the Court has adopted restrictive interpretations of what constitutes a "search."[26] When the Court refuses to acknowledge certain police investigative techniques as "searches," the Court has effectively removed the conduct from judicial scrutiny. If conduct is not a "search," then the Fourth Amendment does not apply. In addition, the Court has indicated that as long as the search is "reasonable," no warrant is required.[27] This last test, however, completely ignores the presumptive warrant requirement and, instead, uses an ad hoc balancing analysis to determine whether the law enforcement officer's conduct meets a threshold of objective reasonableness viewing the circumstances as a whole.[28]

To understand better the various analyses used by the Supreme Court, it is useful to examine a representative sampling of decisions to explain three of the most significant approaches used when the Court attempts to determine whether a violation of the Fourth Amendment has occurred.[29] This discussion will demonstrate the shift away from the hard and fast rule that warrants should be required before conducting a search, towards the rule that a reasonable search does not require a warrant. Most of the cases mentioned below concern the seizure of drugs. This is no accident. The perceived drug crisis and subsequent drug war have significantly contributed to the number of Fourth Amendment decisions in the past

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Amendment Doublethink, 15 U. TOL. L. REV. 515, 523-24 (1984).

> [W]hile a majority of the justices on the Supreme Court continue to accept (however tenuously) the proposition that the only way the fourth amendment can be effectively enforced is through an evidentiary exclusionary rule, use of such a rule necessarily means that at least some few presumedly "guilty" criminals will be set free. This prospect, however seldom it occurs in actuality, has had a significant effect on the way some justices have approached, interpreted and applied the fourth amendment. . . .

Id. at 523 (footnotes omitted).

See also John M. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 190-92 (1979); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest On A "Principled Basis" Rather than an "Empirical Proposition?"* 16 CREIGHTON L. REV. 565, 645-46 (1983).

26. A narrow interpretation of a "search" has led to permitting aerial surveillance, *see* Florida v. Riley, 488 U.S. 445 (1989), drug field tests, *see* United States v. Jacobsen, 466 U.S. 109 (1984), and most importantly for the purposes of this Comment, drug-sniffing dogs in the airport, *see* United States v. Place, 462 U.S. 696 (1983).

27. *See* discussion *infra* Part I.C.

28. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of school girl's purse deemed reasonable); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (drug tests of government employees may be reasonable).

29. *See infra* discussion in Part I and cases cited therein. The cases chosen are by no means intended to suggest that they are the only important ones but are meant to serve as examples of Fourth Amendment analysis.

fifteen years.[30]

A. Katz v. United States: *Presumptively Unreasonable Warrantless Searches and Reasonable Expectations of Privacy*

This Comment's starting point for tracing Fourth Amendment analysis is *Katz v. United States*.[31] Although Justice Harlan's concurrence in *Katz* has become the most influential part of the opinion,[32] it is useful to examine the majority opinion as well. Katz was charged with transmitting wagering information by telephone across state lines. The Supreme Court reversed his conviction because FBI actions in bugging the exterior of the booth where Katz placed his bets was an unconstitutional warrantless search. In language that is still widely quoted, Justice Stewart, writing for the majority, emphatically stated that "the Fourth Amendment protects people, not places."[33] Furthermore, "[w]hat 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."[34] Notwithstanding the fact that Katz placed his calls from an area where he could be seen, Katz was entitled to exclude the "uninvited ear."[35] The act of shutting the booth door was enough for the Court to conclude that Katz had expressed a desire for privacy from the world. The government's recording devices violated the privacy expectation that the Court found Katz was entitled to hold and, thus, the recording was deemed to be a "search" under the Fourth Amendment.[36]

Turning the inquiry to whether the search was constitutional, the Court found the lack of a warrant fatal to the government's case. The government argued that because the recording was narrowly circumscribed to when Katz was placing calls, and tailored for the specific purpose of learning the content of only his conversations, it did no more than what it was entitled to do had a warrant been issued. The Court rejected the theory that the government's self-imposed restraint was sufficient to justify a warrantless search and

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30. For reasoned discussions on the connection between the drug war and apparent shrinking Fourth Amendment protection, see generally, Wisotsky, *supra* note 24; Daniel J. Larkosh, Note, *The Shrinking Scope of Individual Privacy: Drug Cases Make Bad Law*, 24 SUFFOLK U. L. REV. 1009 (1990).

31. 389 U.S. 347 (1967).

32. *See infra* note 40.

33. Katz v. United States, 389 U.S. at 351. The Court rejected the method of assigning Fourth Amendment protection to "constitutionally protected areas." *See, e.g.*, Berger v. New York, 388 U.S. 41, 57 (1967); Lopez v. United States, 373 U.S. 427, 438-39 (1963); Silverman v. United States, 365 U.S. 505, 510 (1961).

34. Katz v. United States, 389 U.S. at 351-52 (citation omitted).

35. *Id.* at 352.

36. *Id.* at 353.

stated "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[37] The Court refused to create a new exception and reversed Katz's conviction.

In his concurring opinion, Justice Harlan set forth his understanding of the majority's reference to "people not places."[38] In a two-part test, Harlan stated that the Fourth Amendment requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable' "[39] before a search will be unconstitutional. Justice Harlan required a threshold determination that the defendant had a reasonable expectation of privacy in the item or area searched. Although Justice Harlan did not explicitly define "reasonable" in *Katz*, he extended Fourth Amendment protection to Katz because Katz had a legitimate expectation of privacy when he closed the booth door that lasted as long as he was speaking on the telephone. Later decisions by the Courts have followed Harlan's test.[40]

Katz clearly stands for two propositions: first, that the Fourth Amendment protects individuals, not places; and second, that it protects whatever individual expectations of privacy the Court is prepared to say are reasonable. The holding in *Katz* also means that if a search does not fall within some exception to the warrant requirement, and if a privacy interest is implicated, the search violates the Fourth Amendment. *Katz*, therefore, also stands for strict enforcement of the warrant requirement.

In *Mincey v. Arizona*,[41] the Supreme Court, following *Katz*, reversed the Arizona Supreme Court decision that created a "murder scene" exception to the warrant requirement. The murder scene exception[42] was held to be inconsistent with the Fourth Amendment.

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37. *Id.* at 357. The Court held that the facts did not warrant a finding of any of the established exceptions: search incident to arrest, automobile exception, hot pursuit, or consent. *Id.*

38. *Id.* at 361 (Harlan, J., concurring).

39. *Id.*

40. *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 90 (1987); California v. Ciraolo, 476 U.S. 207, 211 (1986); United States v. Knotts, 460 U.S. 276, 280-81 (1983); Smith v. Maryland, 442 U.S. 735, 740 (1979); Terry v. Ohio, 392 U.S. 1, 9 (1968).

41. 437 U.S. 385 (1978).

42. The Arizona Supreme Court expressed its murder scene exception as follows:

> We hold a reasonable, warrantless search of the scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. . . . For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a

Following the analysis set forth in *Katz*, Justice Stewart held that the intrusive search conducted without a warrant was *per se* unreasonable.[43]

The fairly complicated facts of *Mincey* can be briefly summarized as follows: During a narcotics raid on Mincey's apartment, an undercover police officer, who had slipped into Mincey's bedroom, was found shot and later died. Homicide detectives conducted an exhaustive warrantless search of Mincey's apartment for four days and seized over 200 objects. Mincey was convicted of murder, assault, and several narcotic charges. During the trial and appeal, Mincey claimed that the evidence that was seized from his apartment should be suppressed. The Arizona Supreme Court, however, held that a warrantless search of a homicide scene did not violate the Fourth Amendment so long as the search was reasonably limited to determining the circumstances of the death.[44] The United States Supreme Court did not agree.[45]

Beginning with the premise that warrantless searches are unreasonable unless they fall under a recognized exception to the warrant requirement, the Supreme Court held that Arizona failed "to show the existence of such an exceptional situation" that would justify creating a new exception.[46] Following Justice Harlan's reasoning in *Katz*, the Court first held that the act of taking Mincey into custody did not lessen Mincey's reasonable expectation of privacy in his apartment.[47] Second, no exigent circumstances existed to justify a warrantless search.[48] Third, the Court rejected Arizona's argument that a vital state interest in investigating serious crimes made the search reasonable.[49] The Court reasoned "[i]f the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary."[50]

In *Mincey*, the Court simply could not envision a "rational limitation" of the interest in investigating crimes.[51] The Arizona Supreme Court's guidelines for using the "murder-scene" exception "confer

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reasonable period following the time when the officials first learn of the murder (or potential murder).

State v. Mincey, 566 P.2d 273, 283 (Ariz. 1977) (citation omitted).

43. Mincey v. Arizona, 437 U.S. at 390.

44. State v. Mincey, 566 P.2d at 283.

45. Mincey v. Arizona, 437 U.S. at 390.

46. *Id.* at 391 (quoting Vale v. Louisiana, 399 U.S. 30, 34 (1970); *see* United States v. Jeffers, 342 U.S. 48, 51 (1951)).

47. Mincey v. Arizona, 437 U.S. at 391-92.

48. *Id.* at 392-93.

49. *Id.* at 393-94.

50. *Id.* at 393. Indeed, the warrantless search conducted here is far more "reasonable" than the warrantless searches in *O'Connor v. Ortega* and *New Jersey v. T.L.O.* *See infra* Section C of this part.

51. Mincey v. Arizona, 437 U.S. at 393 (quoting Chimel v. California, 395 U.S. 752, 766 (1969)).

unbridled discretion upon the individual officer to interpret" its terms.[52] In other words, police officers should not be called upon to interpret "reasonableness" by themselves. Like the FBI in *Katz*, the police in *Mincey* would have been granted a warrant had they applied for one.[53] This does not, however, make the warrantless search retroactively constitutional.

Because the murder scene exception did not conform with any of the other existing exceptions to the warrant requirement, the Supreme Court rejected the Arizona Supreme Court's analysis.[54] Thus, in 1978, Justice Harlan's reasonable expectation of privacy standard was still controlling and the warrant requirement was again strictly enforced.

B. Smith *and* Jacobsen: *Rethinking a "Search"*

One year after *Mincey*, the Supreme Court decided *Smith v. Maryland*.[55] The Court, purporting to rely on the analysis set forth in *Katz*, declined to classify the installation and use of a pen register a "search."[56] As such, the analysis used in *Smith* marks the subtle shift from protecting the individual from any government intrusion to the more recent view that certain intrusions are not searches, thereby allowing some government intrusion. This precludes the further inquiry required under the Fourth Amendment regarding the reasonableness of the intrusion.

Smith was suspected of robbing a victim's house and later threatening her in obscene phone calls. At the request of the police and without a warrant, the telephone company installed a pen register on Smith's residential telephone to record the telephone numbers dialed from his home. The installation subsequently revealed that Smith telephoned the robbery victim. On the basis of these recorded calls, the police obtained a warrant to search Smith's house. Subsequently, Smith was convicted for robbery.[57]

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52. *Id.* at 395. See *supra*, note 42, for a description of the murder scene exception as set forth by the Arizona Supreme Court.

53. Specifically, the Court said, "It may well be that the circumstances described by the Arizona Supreme Court would usually be constitutionally sufficient to warrant a search of substantial scope. But the Fourth Amendment requires that this judgment in each case be made in the first instance by a neutral magistrate." Mincey v. Arizona, 437 U.S. at 395.

54. *Id.* at 394.

55. 442 U.S. 735 (1979).

56. *Id.* at 742-43. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977). A pen register "is usually installed at a central telephone facility . . . [and] records on a paper tape all numbers dialed from [the] line" to which it is attached. United States v. Giordano, 416 U.S. 505, 549 n.1 (1974).

57. Smith v. Maryland, 442 U.S. at 737-38.

On appeal, Smith challenged the pen register on the basis that it was a search conducted without a warrant. Specifically Smith argued that the government infringed a "legitimate expectation of privacy"[58] and thus conducted a warrantless search. Not only did the Supreme Court deny that Smith was entitled to an expectation of privacy in the numbers he dialed, it stated that even if he had such an expectation, it was one that society was not prepared to recognize as reasonable.[59]

In analyzing the first prong of Justice Harlan's test, Justice Blackmun, writing for the majority, concluded that given the fact that the actual numbers dialed on the telephone are reported to the telephone company for billing, no telephone customer actually believes that the numbers themselves are private. Regarding the second prong of Harlan's test, the Court was not prepared to say that Smith's expectations were reasonable, even if Smith himself believed he had an expectation of privacy.[60] Furthermore, in a leap of logic criticized by the dissent, the Court stated that "[i]n these circumstances, petitioner assumed the risk that the information would be divulged to the police."[61] Therefore, the installation and subsequent use of the pen register by police did not require a warrant because it could not be deemed a "search".[62]

Justice Stewart in his dissent stated that telephone numbers dialed from a private telephone "are not without 'content' " and thus should be afforded Fourth Amendment protection from disclosure.[63] Justice Marshall, in a separate dissent, was concerned about the majority's assertion that individuals conveying information to a third party somehow have "assumed the risk" that the information will be conveyed to law enforcement officials.[64] This is particularly disturbing, he noted, because "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he

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58. *Id.* at 741.

59. *Id.* at 743.

60. *Id.*

61. *Id.* at 745. This "assumption of risk" language is reminiscent of *United States v. Miller*, 425 U.S. 435 (1976), where the Supreme Court held that a bank depositor has no legitimate expectation of privacy in financial information "voluntarily" given to banks. "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443 (citing United States v. White, 401 U.S. 745, 751-52 (1971)).

62. Smith v. Maryland, 442 U.S. at 745-46.

63. Justice Stewart stated:

> I doubt there are any [telephone subscribers] who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

Id. at 748 (Stewart, J., dissenting).

64. *Id.* at 749 (Marshall, J., dissenting).

cannot help but accept the risk of surveillance."[65]

Although the majority purported to follow the test that Justice Harlan articulated in *Katz*, it applied a restrictive interpretation of "reasonable expectation of privacy" to preclude a finding that a search had been conducted. Furthermore, the Court added an "assumption of risk" component to preclude a person from having a "legitimate" subjective expectation that the telephone numbers would not be released to the police.[66] It would have been a reasonable extension of the majority holding in *Katz*, however, to conclude that a person is entitled to believe the number he dialed "will not be broadcast to the world."[67]

In *United States v. Jacobsen*[68] the Court again refused to find a search when Drug Enforcement Agency (DEA) workers reopened a Federal Express package and field tested a white powder substance, found to be cocaine. The package was damaged and Federal Express employees noticed some bags inside the tube. Suspecting drugs inside the package, Federal Express called in the DEA. The Court held that reopening the package did not enable the DEA to learn anything that the Federal Express employees had not learned when they opened the package the first time. Thus, reopening the package did not infringe upon any "legitimate expectation of privacy."[69] The Court independently examined the propriety of the field test and concluded that, given the limited function of the test, no search occurred.[70] Although the majority uses the language from *Katz*, the opinion makes only passing reference to it in two footnotes.[71]

The *Jacobsen* Court began its opinion by stating that the original opening of the package, if conducted by the government, would have assuredly required a warrant.[72] Because the parties were private em-

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65. *Id.* at 750.

66. In a compelling article, *When is a Search not a "Search?" Fourth Amendment Doublethink*, *supra* note 25, Professor Burkoff asks:

> Did the Supreme Court majority truly believe that Smith knew (or should have known) that he was communicating the numbers he dialed to the police when he made his phone calls? Frankly that's a difficult conclusion to accept, difficult even if one accepts arguendo the equally dubious proposition that Smith knew (or should have known) that the telephone numbers he dialed were routinely intercepted by the telephone company.

Id. at 538. The next question that ought to be asked, following Burkoff's reasoning, is whether society is entitled to believe that the numbers taken down by the telephone company are to remain private between the company and its customer? Society expects that police should have to get a warrant before examining their private telephone records. Therefore, in *Smith* there was a far less intrusive method of investigation available to the police (i.e. a warrant).

67. Katz v. United States, 389 U.S. at 352.

68. 466 U.S. 109 (1984).

69. *Id.* at 120.

70. *Id.* at 122-25.

71. *Id.* at 118 n.14, 122 n.22.

72. "Even when government agents may lawfully seize such a package to prevent

ployees of Federal Express, however, the Fourth Amendment did not apply to the original search.[73] The Court then applied the "assumption of risk" principle: "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."[74] The Court ruled that once the Federal Express employees told the DEA what they had seen, the defendant's original expectation of privacy in the package was frustrated.

As to the reopening of the package, the Court measured the reasonableness of DEA actions in light of what the DEA already knew; for instance, the package contained some suspicious bags of white powder.[75] Based on what the DEA learned from Federal Express, the Court concluded that Jacobsen had no privacy interest in the package and thus reopening the package was not a search.

Turning to the question of whether the field test was a search, the Court asserted that the limited information learned from such a test was not enough to be termed a search. Relying heavily on dictum in *United States v. Place*[76] that a dog sniff was not a search, the Court found that merely detecting the presence or nonpresence of drugs could not compromise any "legitimate interest in privacy."[77] It is unclear, however, how the majority finesses the question of slicing

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loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package." *Id.* at 114.

73. *Id.* at 115.

74. *Id.* at 117. The Court continued:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.

Id. (citing United States v. Miller, 425 U.S. 435, 443 (1976)). It is difficult to understand how the defendant here had assumed a risk when he was not aware, nor could he be, that the Federal Express employees had opened his package. As Justice Marshall argued in *Smith v. Maryland*, "It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative." Smith v. Maryland, 442 U.S. 735, 750 (Marshall, J., dissenting).

75. "The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." United States v. Jacobsen, 466 U.S. at 115.

76. 462 U.S. 696, 706-07 (1983). *See infra* Part II.

77. United States v. Jacobsen, 466 U.S. at 123. "Congress has decided—and there is no real question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* It is interesting to note that the use of metal detectors, which presumably only detect the presence of metal, are searches under the Fourth Amendment. *See* United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972).

the bags open to remove a portion of the powder for testing. Surely, some privacy interest is implicated when the bag is opened. Whereas a dog sniff in *Place* did not require any physical intrusion into Place's luggage, the bag in *Jacobsen* had to be opened in order to conduct the field test. Apparently, this was not significant in reaching a determination as to whether a search had occurred upon field testing the powder.

Justice White dissented from the Court's assertion that Jacobsen's expectation of privacy was frustrated after the Federal Express employees had already opened the package.[78] Citing *Walter v. United States*,[79] he stated: "[T]his conclusion cannot rest on the proposition that the owner no longer has a subjective expectation of privacy since a person's expectation of privacy cannot be altered by subsequent events of which he was unaware."[80] Justice Brennan, also dissenting in *Jacobsen*, reiterated his objections to *Place* and added: "Presumably, the premise of *Place* was that an individual could not have a reasonable expectation of privacy in the presence or absence of narcotics in his luggage."[81] Justice Brennan particularly disliked the method by which the majority withdrew a sophisticated surveillance technique from Fourth Amendment review.[82]

By manipulating Justice Harlan's expectation of privacy test, the Court circumvents the Fourth Amendment warrant requirement. If there is no search, no warrant is required. The Court in *Smith* and *Jacobsen* was disingenuous, at the least, when it acknowledged on the one hand that certain police techniques were intrusive upon the individual (albeit minimally so), yet found that the individual had "assumed the risk" that the information he sought to keep private would be discovered. In *Smith*, the Court imposed its substantive judgment upon the facts and determined that no one could have an expectation that the numbers he dialed on his residential telephone would not be disclosed to the police.[83]

In *Jacobsen*, the Court stretched the doctrine of assumption of risk to its extreme. It seems absurd to believe that Jacobsen as-

78. Justice White concurred in Part III of the opinion, which found that the field test was constitutionally permissible, and concurred in the judgment, because he would have accepted the Magistrate's findings that the bags were in plain view when the DEA arrived. United States v. Jacobsen, 466 U.S. at 126, 127.

79. 447 U.S. 649, 659 (1980).

80. United States v. Jacobsen, 466 U.S. at 132 (White, J., concurring in part and concurring in the judgment).

81. *Id.* at 135 (Brennan, J., dissenting). A more complete discussion of Justice Brennan's disagreement with the majority's analysis in *Place* and *Jacobsen* will be taken up in Part III as part of the criticism of the Court's recent approach to redefining Fourth Amendment protections.

82. *Id.* at 140-41.

83. Assuming Smith knew he was violating the law when he made threatening phone calls, it is hard to believe that Smith would have made those calls from his home if he were aware the numbers were being recorded.

sumed the risk that the Federal Express employees would disclose the contents of his package when he was unaware the package had been opened. Clearly, members of the general populace would be chilled to learn that every time they send a package through a private carrier, the senders assume the risk that the package could be opened and searched by law enforcement officials. This is inconsistent with Supreme Court decisions holding that first class packages are protected from warrantless searches.[84]

It is interesting to note how the Court applied the test Justice Harlan articulated in *Katz* to *Jacobsen* and *Smith*. Jacobsen failed the first prong of Harlan's test; the Court decided that Jacobsen could not have had a subjective expectation of privacy in a package that had already been opened by Federal Express employees. Smith failed both prongs of Harlan's test. First, the Court decided that Smith could not have had a subjective expectation of privacy in the telephone numbers he dialed because he knew the numbers were recorded by the telephone company. Second, the Court reasoned that even if Smith had had an expectation of privacy, that expectation was an unreasonable one.

Clearly, the Court ignored Justice Harlan's Fourth Amendment analysis which must "transcend the search for subjective expectations, or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[85] The Court also ignored the public's legitimate belief that sealed packages may not be opened without a warrant, whereas Justice Harlan could have found that the public has never believed that a sender assumes the risk that a package could be opened and searched. Harlan could also have found that the public has not assumed the risk that numbers dialed from their private telephones would be released to the police. By refusing to acknowledge that the conduct in question was a search, the Court avoided the flat prohibition of warrantless searches outlined in *Katz*.

C. *Warrantless Searches: Reasonable Under All the Circumstances*

The Supreme Court recently demonstrated a willingness to evade the warrant requirement by declaring that a search was a reasonable one under all the circumstances.[86] The Court has established that if

84. The law on this is clear. *See* Ex parte Jackson, 96 U.S. 727 (1877); Oliver v. United States, 239 F.2d 818 (8th Cir. 1957). Mail matter other than first-class mail is not entitled to the same Fourth Amendment protection. *See* Webster v. United States, 92 F.2d 462 (6th Cir. 1937).

85. United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

86. *See* O'Connor v. Ortega, 480 U.S. 709, 719-20 (1987); New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985).

the search is deemed reasonable, no warrant is required. When the Court applies the "reasonableness test," it implicitly acknowledges that a search occurred. Thus, the Fourth Amendment already applies and the only issue remaining is whether a warrant should have been issued. The following cases, *New Jersey v. T.L.O.*[87] and *O'Connor v. Ortega*,[88] demonstrate the shift from denying the existence of a search in the first instance towards examining searches under a standard of reasonableness.

In *New Jersey v. T.L.O.*, the Court upheld the legality of a search of a student's purse conducted by a school official. The student was caught smoking in a school lavatory, whereupon she was taken to the assistant vice principal, who opened the student's purse and searched through it for cigarettes. He found cigarettes, rolling papers, and a small amount of marijuana. In addition, several letters in the purse implicated her in dealing drugs. No warrant was ever obtained. Thereafter, the student was brought up on delinquency charges. The juvenile court denied her motion to suppress the evidence taken from her purse, but the New Jersey Supreme Court reversed, holding that the assistant vice principal did not have reasonable grounds to search the purse.[89]

In order to determine whether a search had occurred, the Supreme Court used a balancing test, weighing the student's legitimate expectations of privacy against the school's legitimate need to maintain an environment conducive to learning.[90] Although the Supreme Court acknowledged that a search did occur and that school children do have legitimate expectations of privacy in their personal belongings, the Court held that the search was reasonable.[91] The majority does not begin its analysis of reasonableness by using *Katz* as the starting point. Indeed, any discussion of *Katz* is conspicuously absent. Instead the Court relied heavily on *Terry v. Ohio*[92] to create another exception to the warrant requirement, although the Court never acknowledged it as such.[93]

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87. 469 U.S. 325 (1985).

88. 480 U.S. 709 (1987).

89. State in Interest of T.L.O., 463 A.2d 934, 942 (N.J. 1983).

90. 469 U.S. at 340.

91. *Id.* at 338-43.

92. 392 U.S. 1 (1967). *Terry* permits officers, during a lawful stop, to frisk the outer clothing of a suspect. If anything like a weapon is felt, the officer may remove that weapon from the suspect. The Court's reasoning in creating this exception to the warrant requirement was that officers should be permitted to prevent harm to themselves or to innocent bystanders. It is important to remember that *Terry* allowed only frisks for weapons and did not entitle the officer to remove anything else from a suspect's clothing. Thus, although the frisk represents an intrusion upon a person's privacy, a balance was struck in favor of a frisk because of the exigent circumstances involved in an on-the-spot investigation.

93. The warrant requirement was considered an undue interference with the school's ability to impose informal disciplinary procedures. New Jersey v. T.L.O., 469

Citing *Camara v. Municipal Court*,[94] the Court stated "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.' "[95] The Court conceded that searching a student's purse was a serious invasion of her privacy but asserted that the circumstances as a whole warranted such invasion.[96] The school setting, however, "requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[97] The warrant requirement was considered an undue interference with the school's ability to impose informal disciplinary procedures.[98] The search was reasonable because of the compelling state interest, notwithstanding the lack of probable cause to search.[99]

In a more recent case, *O'Connor v. Ortega*,[100] a plurality used the reasonableness balancing test to conclude that a government employer's search of an employee's locked desk and file cabinets was reasonable.[101] The Court remanded the case, however, to determine whether the supervisor was justified in entering the office and whether the scope of the search was reasonable.[102]

The Court held that expectations of privacy differ depending on the context of the search. Thus, in the workplace, public employees' "expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures or by legitimate regulation."[103] As a practical matter, however, the Court accepted the lower court's decision that Ortega had a legiti-

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U.S. at 340.

94. 387 U.S. 523 (1967).

95. New Jersey v. T.L.O., 469 U.S. at 337 (quoting Camara v. Municipal Court, 387 U.S. at 536-37).

96. *Id.* at 337-38, 343-48.

97. *Id.* at 340.

98. *Id.* at 341.

99. Justice Brennan in his dissent correctly pointed out that

> full scale searches—whether conducted in accordance with the warrant requirement or pursuant to one of its exceptions—are "reasonable" in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched.

Id. 354 (citing Beck v. Ohio, 379 U.S. 89, 91 (1964); Wong Sun v. United States, 371 U.S. 471, 479 (1963); Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

100. 480 U.S. 709 (1987).

101. *Id.* at 725-26.

102. The employee, Dr. Ortega, was suspected of improprieties. While he was on paid administrative leave, the supervisor entered his office and searched his desk and file cabinets, and seized items, including a Valentine's Day card, a photograph, and a book of poetry. Dr. O'Connor maintained that the purpose of the search was to secure state property and to search for evidence to use against him in administrative disciplinary proceedings. No warrant was obtained. *Id.* at 712-14, 729.

103. *Id.* at 717.

mate expectation of privacy in his desk and files.[104] Notwithstanding Ortega's expectation, the Court proceeded to examine the government's justifications for work-related intrusions and found them to be reasonable.[105] The Court determined that the state needed to provide efficient and proper operation in the workplace and had a right to investigate misconduct as long as the search was reasonable.[106] The Court remanded the case for a determination on whether the conduct was reasonable under all the circumstances.[107]

Four of the Justices dissented from the majority.[108] Justice Blackmun disagreed that the "special need" exception in *T.L.O.* was controlling. He wrote that "no 'special need' exists here to justify dispensing with the warrant and probable cause requirements."[109] In addition, the dissenting Justices pointed out the plurality's failure to balance the warrant requirement against the government interest.[110] It stated, "By ignoring the specific facts of this case, and by announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches."[111] Thus, the dissenting Justices emphasized that while Ortega was away for two weeks, a warrant easily could have been obtained.[112]

The following table summarizes the foregoing discussion of the six Fourth Amendment cases.

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104. *Id.* at 717-18.

105. *Id.* at 720-21.

106. *Id.* at 723-24.

107. *Id.* at 729.

108. Justice Blackmun joined by Justice Brennan, Justice Marshall, and Justice Stevens, dissented.

109. *Id.* at 742 (Blackmun, J., dissenting).

110. *Id.* at 745.

111. *Id.* at 748.

112. Indeed, the question should be asked whether, under these circumstances, requiring the hospital to obtain a warrant would have been unreasonable. After all, there was not any opportunity for Ortega to destroy evidence because Ortega was forced to take administrative leave.

CASE AND FACTS:	4TH AMENDMENT ANALYSIS:	HOLDING:
KATZ Recording telephone conversations	1. Exhibit actual expectation of privacy 2. Society recognizes expectation as reasonable	If no exception, search without a warrant is unreasonable *per se*. Self-imposed restraint is insufficient.
MINCEY Search of murder scene	1. Taking suspect into custody did not lessen his expectancy of privacy in his house. 2. No exigent circumstances	No Exception + No warrant = per se unreasonable
SMITH Recording telephone numbers	1. No actual expectation of privacy 2. Even if such expectation existed, it was unreasonable 3. Assumption of risk	No search, therefore no warrant necessary
JACOBSEN Opening package and field test	1. Once private search conducted, expectation of privacy is frustrated 2. Assumption of risk 3. Field test did not compromise legitimate privacy interest	No search, therefore no warrant necessary
T.L.O. Opening purse and reading letters	Balance legitimate expectation of privacy with school's legitimate need to maintain learning environment	Reasonable search, no warrant necessary
ORTEGA Looking through desk and files	Balance expectation of privacy with Hospital's need to provide efficient operation of workplace	Reasonable search, no warrant necessary

II. CANINE SNIFFS UNDER THE FOURTH AMENDMENT

In *United States v. Place*, the Supreme Court adopted the analysis that canine sniffs do not invade one's expectation of privacy and thus do not constitute "searches."[113] Although the issue ultimately decided in that case concerned whether a seizure had occurred, the Court gratuitously offered its analysis of dog sniffs in dicta.[114] One year later, in 1984, the Court used the same analysis to determine the existence of a search in *United States v. Jacobsen*,[115] thus ce-

113. 462 U.S. 696 (1983).
114. *Id.* at 707.
115. 466 U.S. 109, 123-24 (1984).

menting *Place* in Fourth Amendment jurisprudence. Most of the federal courts since *Place* have upheld the use of canine sniffs without warrants.[116] Some factual situations in which the sniffs arise, however, differ from the facts in *Place*.[117] These differences underscore the difficulty of applying the analysis in *Place* to subsequent cases.

Because the Court in *Place* did not fully examine the issue of dog sniffs, it is unclear whether sniffs are never searches or whether sniffs are not searches only when conducted in airports. The Court in *Jacobsen* made it clear, however, that some police techniques (field tests and dog sniffs) are deemed outside the purview of the Fourth Amendment because of the limited nature of the intrusion. Thus, if a police technique reveals only the presence or absence of contraband, the Court does not recognize a search. This is so, apparently, notwithstanding the defendant's legitimate expectation of privacy in the area or object that is subjected to the sniff.

Perhaps society is prepared to accept canine sniffs as another price of the drug war. That is, if sniffs will help stop the influx and use of drugs in society, potential violations of the Fourth Amendment are a small price to pay. Under this view, however, there is a risk that certain police investigative techniques will be completely unreviewable by the judicial system.[118] The government is necessarily given wide discretion to make on the spot judgments without the use of a neutral magistrate. Such unreviewable discretion is disturbing because there are better ways to accomplish both drug detection and judicial review of police conduct without abandoning Fourth Amendment analysis.[119]

This Part will review the cursory examination afforded to canine sniffs by the Supreme Court in *United States v. Place*. Thereafter, this Part will examine the analyses used by federal courts in cases involving dog sniffs decided subsequent to *Place*. A few state court decisions will be reviewed as well because they demonstrate some courts' apparent willingness to interpret state provisions securing people from unreasonable searches more broadly than the Supreme Court interprets the United States Constitution regarding unreasonable searches. Although the analysis used in *Place* is followed in the

116. *See infra* notes 33-49 and accompanying text.

117. *See infra* note 149 and accompanying text.

118. *See* United States v. Jacobsen, 466 U.S. 109, 136-37 (1984) (Brennan, J., dissenting).

119. As this Comment argues, the United States Supreme Court should recognize that sniffs are searches. Once this is established, the Court could then proceed to analyze each case on its own facts, as it apparently wants to do. The warrantless sniff would be reasonable if the police have a reasonable suspicion of the presence of drugs in the area sniffed. In certain circumstances where the public expects a high degree of privacy, such as a sniff of a home or a person, the police would have to show probable cause before proceeding.

majority of state dog sniff cases, a large number of states have not yet faced this issue. Therefore, challenges of dog sniffs under state constitutions may be more successful than challenges based on the United States Constitution.

A. United States v. Place

The relevant facts of *Place* are as follows: A "suspicious-looking" traveller was pulled aside by DEA officers in La Guardia Airport. The officers asked for identification and told Place that he was suspected of carrying narcotics. Place refused to consent to a search of his luggage. The agents then took the luggage to Kennedy Airport and subjected it to a sniff test. The police dog reacted positively and a warrant was obtained. Officials found cocaine in the suitcase and Place was ultimately convicted for possession of narcotics.[120] The Supreme Court reversed Place's conviction because the ninety-minute detention of Place's luggage exceeded the bounds of a *Terry* stop.[121] The dog sniff, however, was not violative of the Fourth Amendment because it was not a "search."[122]

The Court focused its examination on the limited investigative nature of a sniff. Because a sniff does not require opening the luggage and rummaging through its contents, a sniff was deemed "much less intrusive than a typical search."[123] Indeed, "the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[124]

Three Justices disagreed with the majority's dictum that stated a dog sniff was not a search. Comparing dog sniffs to electronic recording devices, Justice Brennan concluded that a sniff was more intrusive than a bugging device.[125] In a separate concurrence, Justice

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120. United States v. Place, 462 U.S. at 696-99.

121. *Id.* at 709. In addition to permitting a pat-down frisk of the outer clothing, *Terry v. Ohio* permits the police to stop a person to ask questions in the pursuit of an investigation upon a reasonable suspicion that the person is engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 10-11 (1968).

122. United States v. Place, 462 U.S. at 707.

123. *Id.*

124. *Id.*

125. *Id.* at 719-20 (Brennan, J., concurring in result). The following year in *United States v. Jacobsen*, Justice Brennan expanded on his difficulty with the majority's decision:

> What is most startling about the Court's interpretation of the term "search", both in [*Jacobsen*] and in *Place*, is its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed. Combining this approach with the blanket assumption, implicit in *Place* and explicit in [*Jacobsen*] that individuals in our society have no reasonable expectation of privacy in the fact that they have

Blackmun faulted the Court for reaching a hasty decision on the issue of dog sniffs.[126] Justice Blackmun suggested that the Court's decision, while plausible, failed to address other possible approaches.[127] He particularly objected to deciding an issue that had not been raised or argued by either of the parties.[128]

The majority in *Place* did not engage in the Fourth Amendment analysis that was used in *Katz*. Instead, it focused only on the nature of the technique used. Nowhere was there a discussion of balancing Place's legitimate expectation of privacy in his locked luggage with the extent of the intrusion. This type of cursory analysis invites the criticism that has been aimed at recent Fourth Amendment decisions.[129] Namely, the Court believes that no one may have a legitimate expectation of privacy in contraband. In other words, the illegal nature of the contraband necessarily determines the absence of any legitimate expectation of privacy.[130]

The approach used by the majority was similar to that used in *Smith* and *Jacobsen*[131] in that because there was no search, no warrant was required. The similarity in approach, however, stops there. At least in those cases the Court analyzed the defendant's privacy expectation even if none was found. It would be surprising indeed, if the Court determined that Place had no legitimate expectation of privacy in his luggage. The Court conceded that the sniff was intrusive but *less* intrusive than a typical search. Thus, even though the two-part test of *Katz* would appear to indicate there was a search, the Court held there was no search.[132]

> contraband in their possession, the Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possesses contraband.

466 U.S. 109, 137 (1983) (Brennan, J., dissenting).

126. United States v. Place, 462 U.S. at 723 (Blackmun, J., concurring in judgment).

127. "For example, a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion." *Id.*

128. *Id.*

129. *See* Justice Brennan's dissent in *Jacobsen*, 466 U.S. at 133-43. Justice Brennan argued that the majority's focus on the nature of the item sought and revealed through the dog sniff results in the theory that individuals have no reasonable expectation of privacy in the fact that they are carrying contraband. This, he argued is contrary to the "fundamental principle that '[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.' " *Id.* at 140 (quoting Byars v. United States, 273 U.S. 28, 29 (1927)).

130. *See supra* note 77.

131. *See supra* Section B, Part I.

132. Place exhibited an actual expectation of privacy when he refused to consent to have his luggage searched. An expectation of privacy in one's luggage is probably recognized as reasonable by society. Thus, under *Katz*, a search occurred. A proper analysis would have then determined whether the police had demonstrated an articulable suspicion that Place's luggage contained drugs that justified the warrantless search.

B. *Post*-Place: *Federal Courts*

Many federal courts have followed the Supreme Court's reasoning in *Place* and *Jacobsen*.[133] The United States Court of Appeals for the Second Circuit, however, held that a dog sniff conducted outside of an apartment did invade a substantial liberty interest and the sniff was an impermissible warrantless search.[134] Decisions of other circuit courts have generally ignored the location where the sniff occurs. Often, the federal courts quote from the Supreme Court's analysis in *Place* stating that a dog sniff is not a "search" within the meaning of the Fourth Amendment.[135] For example, sniffs of mail packages[136] and train compartments[137] are treated alike. A few federal court opinions have attempted to reconcile the Second Circuit's decision in *United States v. Thomas*,[138] that a dog sniff outside an apartment constituted a search, with the Supreme Court's opinion in *Place*. In so doing, they implicitly acknowledge that there may be certain circumstances in which a dog sniff might be considered a search.[139] Thus, the issue of whether *Place* applies regardless of the circumstances, or whether *Place* should be limited to certain public

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133. *See* discussion *infra* notes 135-49 and accompanying text.

134. United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). Specifically, the court held:

> 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. The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Id. at 1367 (quoting United States v. Place, 103 S. Ct. 2637, 2644-45 (1983) (citation omitted).

135. The portion of the *Place* opinion that is most often cited is 462 U.S. at 707. *See, e.g.*, United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir. 1992); United States v. Morales-Zamora, 914 F.2d 200, 203-04 (10th Cir. 1990); United States v. Fifty-Three Thousand Eighty-Two Dollars in U.S. Currency, 773 F. Supp. 26, 30 (E.D. Mich. 1991); United States v. Sklar, 721 F. Supp. 7, 13 (D. Mass. 1989).

136. United States v. England, 971 F.2d 419 (9th Cir. 1992); Garmon v. Foust, 741 F.2d 1069 (8th Cir. 1984); United States v. Sklar, 721 F. Supp. 7 (D. Mass. 1989).

137. United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988); United States v. Liberto, 660 F. Supp. 889 (D.D.C. 1987).

138. 757 F.2d 1359 (2d Cir. 1985).

139. *See* United States v. Stone, 866 F.2d 359, 363 n.1 (10th Cir. 1989) ("[United States v. Thomas,] based as it was, on the 'heightened expectation of privacy' in the home, is distinguishable."); United States v. Liberto, 660 F. Supp. 889, 891 (D.D.C. 1987) (declining to extend the *Thomas* holding to train roomette); United States v. Sklar, 721 F. Supp. 7, 14 (D. Mass. 1989) ("The Court is convinced that the privacy interest asserted by Sklar is more akin to that discussed by the Supreme Court in *Place* (luggage) than that discussed by the Second Circuit in *Thomas* (apartment).").

places, is not entirely closed.

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*.[140] In addition, consistent with the limited privacy expectation afforded to persons travelling across United States borders, the use of drug-sniffing dogs by border police has been held not to be a search.[141]

The more difficult problem arises when the circumstances under which the dog sniff occurred implicate a higher expectation of privacy. For example, in the future there may be division among the circuits as to whether a dog may jump inside a car to sniff for drugs.[142] Furthermore, in light of the Second Circuit's opinion in *United States v. Thomas*,[143] there may be disagreement over whether a sniff outside of one's residence constitutes a search.[144]

Another problem arises when roaming police dogs indiscriminately sniff everything in sight. Several courts have intimated that Justice Brennan's dissent in *Jacobsen*, warning of the consequences of the

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140. *See generally* United States v. Maldonado-Espinosa, 968 F.2d 101 (1st Cir. 1992) (airline luggage); United States v. Harvey, 961 F.2d 1361 (8th Cir. 1992) (bus luggage); United States v. Glover, 957 F.2d 1004 (2d Cir. 1992) (bus luggage); United States v. Ferguson, 935 F.2d 1518 (7th Cir. 1991) (train luggage); United States v. Riley, 927 F.2d 1045 (8th Cir. 1991) (airline luggage); United States v. Mondello, 927 F.2d 1463 (9th Cir. 1991) (airline luggage); United States v. Lovell, 849 F.2d 910 (5th Cir. 1988) (airline luggage); United States v. Lewis, 708 F.2d 1078 (6th Cir. 1983) (airline luggage); United States v. Doe, 786 F. Supp. 1073 (D.P.R. 1991) (airline luggage).

141. *See, e.g.*, United States v. Taylor, 934 F.2d 218 (9th Cir. 1991).

142. Although the Tenth Circuit held that a dog jumping inside a validly stopped vehicle was not a search, it did acknowledge that:

> [E]ven though the police could use a trained dog to sniff the exterior of [the] automobile, the [use of the] dog created a troubling issue under the Fourth Amendment when it entered the hatchback. People have a reasonable expectation of privacy in the interiors of their automobiles; police may not search an automobile unless they have probable cause to believe it contains contraband.

United States v. Stone, 866 F.2d 359, 363 (10th Cir. 1989). The Tenth Circuit concluded that because there was no evidence that the dog was encouraged to climb into the car, it was not a search. On the other hand, the Federal District Court for the Eastern District of Texas recently held:

> The placing of a dog inside the trunk and passenger compartment of a car must be considered an invasive search requiring probable cause. Just as an officer could not enter the passenger compartment or trunk of a vehicle to conduct a search without probable cause, neither can a canine be placed inside a car on less than this standard.

United States v. Thomas, 787 F. Supp. 663, 684 (E.D. Tex. 1992).

143. *See supra* note 134.

144. *See also* United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988). Although the court held that bringing a dog into a train roomette to smell the interior was permissible, the court stated, "*Place* obviously did not sanction the indiscriminate, blanket use of trained dogs in all contexts." *Id.* at 857.

majority's position, will be taken seriously if the need arises.[145] This warning has not prevented some courts from concluding, however, that canine sniffs of luggage[146] and lawfully stopped cars,[147] regardless of probable cause, are not searches. This conclusion might be extended to sniffs of mail packages, although in recent cases, dog sniffs of packages have occurred when there was a reasonable suspicion that a particular parcel contained drugs.[148]

The vast majority of federal court decisions that address dog sniffs arise in the context of sniffing luggage. Thus, these cases would require only a plain application of the dicta in *Place*. Courts seem to be digressing, however, from the assertion in *Place* that sniffs are never searches. Some courts have acknowledged that sniffs occurring in areas traditionally recognized as having heightened privacy expectations might be searches.[149] To date, however, only the Second Circuit has limited *Place's* holding to public places where people have lessened expectations of privacy.

C. *Post*-Place: *State Courts*

Most state courts that have considered dog sniffs under the Fourth Amendment within the past ten years have applied the Su-

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145. As Justice Brennan notes in *Jacobsen*:

> [U]nder the Court's analysis in [*Jacobsen* and *Place*], law enforcement officers could release a trained cocaine-sensitive dog . . . to roam the streets at random, alerting the officers to people carrying cocaine. . . . Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court's approach, to the police setting up such a device on a street corner and scanning all passersby.

United States v. Jacobsen, 466 U.S. at 138 Brennan, J., dissenting). To this set of horrible hypotheticals, the Tenth Circuit responded, "this type of canine confrontation is not before us, however, and we reserve the question of the constitutionality of such hypothetical situations for another day." United States v. Morales-Zamora, 914 F.2d 200, 205 (10th Cir. 1990). *See also* United States v. Decker, 956 F.2d 773, 779 (8th Cir. 1992) ("More pointedly, the propriety of Hicks' deployment of a drug-sniffing dog must be resolved, particularly with respect to whether reasonable suspicion must exist in order to justify a canine sniff.").

146. *See* United States v. Maldonado-Espinosa, 968 F.2d 101 (1st Cir. 1992); United States v. Harvey, 961 F.2d 1361 (8th Cir. 1992); United States v. Doe, 786 F. Supp. 1073 (D.P.R. 1991).

147. *See* United States v. Taylor, 934 F.2d 218, 221 (9th Cir. 1991); United States v. Rodriguez-Mordes, 929 F.2d 780 (1st Cir. 1991).

148. *See* United States v. England, 971 F.2d 419 (9th Cir. 1992); Garmon v. Foust, 741 F.2d 1069 (8th Cir. 1984); United States v. Sklar, 721 F. Supp. 7 (D. Mass. 1989). *But cf.* United States v. Decker, 956 F.2d at 777 (holding that decision by a DEA agent to allow a canine sniff of a package must be reasonable).

149. *See* United States v. Morales-Zamora, 914 F.2d 200, 205 (10th Cir. 1990); United States v. Stone, 866 F.2d 359, 363 (10th Cir. 1989); United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988); United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985); United States v. Sklar, 721 F. Supp. at 14; United States v. Liberto, 660 F. Supp. 889, 891 (D.D.C. 1987).

preme Court's analysis in *Place* when deciding whether sniffs are searches.[150] Some state courts have declined to follow the Supreme Court's ruling and have instead proceeded to interpret independently their own state constitutions.[151] Perhaps, given the apparent willingness of the federal courts to adopt the Supreme Court's analysis in *Place* at face value, state courts are the only remaining fora where a defendant's claim that a sniff invaded a legitimate expectation of privacy may be sustained.

State v. Phaneuf[152] is a good example of a state's adoption of the *Place* Fourth Amendment analysis with respect to dog sniffs.[153] In an opinion just as cursory as the Supreme Court's opinion in *Place*, the Maine Supreme Judicial Court, sitting as the Law Court, upheld Phaneuf's conviction for drug possession that was based on a dog sniff of a package that had been mailed to Phaneuf.

In 1987, the postal inspector in Boston informed the United States Attorney's office that Raymond Phaneuf was suspected of sending and receiving drugs from the Blaine Post Office in Maine. The postmaster and the Maine State Police were notified. When the

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150. *See* State v. Paredes, 810 P.2d 607 (Ariz. Ct. App. 1991) (canine sniff of outside of car is not search); People v. Salih, 173 Cal. App. 3d 1009 (1985) (canine sniff of UPS package not a search); People v. Unruh, 713 P.2d 370 (Colo. 1986); State v. Hammond, 1993 Del. Super. LEXIS 156 (Del. Super. Ct. 1993) (canine sniff of UPS package not a search); Joseph v. State, 588 So. 2d 1014 (Fla. Dist. Ct. App. 1991) (use of sniff dog during normal course of traffic stop does not constitute search); State v. Snitkin, 681 P.2d 980 (Haw. 1984) (sniff of sealed container not a search under state constitution); People v. Statham, 568 N.E.2d 183 (Ill. App. Ct. 1991) (exposure of luggage to a canine sniff is not search); State v. Daly, 789 P.2d 1203 (Kan. 1990); State v. Rose, 604 So. 2d 974 (La. App. 1992) (canine sniff of luggage not a search); State v. Phaneuf, 597 A.2d 55 (Me. 1991) (canine sniff of package was not a search); Titow v. State, 542 A.2d 397 (Md. App. 1988) (may subject luggage to canine sniff if detention is less than 90 minutes); State v. Morrison, 500 N.W.2d 547 (Neb. 1993) (canine sniff of luggage not a search); State v. Cancel, 607 A.2d 199 (N.J. Super. Ct. App. Div. 1992) (canine sniff of luggage not a search); State v. Villanueva, 796 P.2d 252 (N.M. Ct. App. 1990); State v. McDaniels, 405 S.E.2d 358 (N.C. Ct. App. 1991) (canine sniff of exterior of briefcase not a search); State v. Riley, 1993 Ohio App. LEXIS 3284 (Ohio Ct. App. 1993) (canine sniff of exterior of car not a search); State v. Slowikowski, 743 P.2d 1126 (Or. Ct. App. 1987) (dog sniff outside storage locker not a sniff); Commonwealth v. Johnson, 530 A.2d 74 (Pa. 1987); Strout v. State, 688 S.W.2d 188 (Tex. Ct. App. 1985) (dog sniff outside semi-public locker did not intrude upon a legitimate expectation of privacy and thus was not a search); Brown v. Commonwealth, 421 S.E.2d 877 (Va. Ct. App. 1992) (canine sniff of automobile not a search).

151. *See* Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985); State v. Pellicci, 580 A.2d 710 (N.H. 1990); People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990); Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993) (all holding that dog sniffs are searches).

152. 597 A.2d 55 (Me. 1991).

153. It should be noted that the Maine Supreme Judicial Court has never independently adopted a broader exclusionary rule for the Maine State Constitution. *See* State v. Veglua, 620 A.2d 276, 278 (Me. 1993) ("To date we have neither accepted nor rejected a separate exclusionary rule for violation of the State Constitution, much less exceptions to such a rule."). *See also* State v. Tarantino, 587 A.2d 1095, 1098 (Me. 1991); State v. Thornton, 485 A.2d 952 (Me. 1984).

detectives arrived at the Blaine Post Office, they were shown a package that was addressed to Phaneuf. The postmaster agreed to detain the package until it could be subjected to a dog sniff. A subsequent dog sniff indicated that the package contained contraband. Phaneuf was informed that his package could be picked up at the post office. As he left the post office with the package, the detectives asked Phaneuf to return to the post office where he was advised of his *Miranda* rights. Phaneuf waived his rights and admitted that the package contained cocaine.[154]

The Law Court relied on *Place* and *Jacobsen* to hold that the sniff did not violate Phaneuf's Fourth Amendment rights. Citing *Jacobsen*, the Law Court asserted that "[c]ongress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate; thus government conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest."[155] The Law Court similarly disposed of Phaneuf's claim that he had a heightened expectation of privacy in first class mail.[156]

Justice Glassman, dissenting, disagreed with the majority's use of Supreme Court dictum and found that the facts of *Place* and *Jacobsen* were clearly distinguishable. Justice Glassman reasoned that appropriate security measures inside a public air terminal reduce travellers' legitimate expectation of privacy in their luggage.[157] Justice Glassman distinguished *Jacobsen* because there the drugs were in plain view.[158] Glassman drew support from the United States Supreme Court's admission in *Jacobsen* that had the government opened the package the first time without a warrant, the search would have been presumptively unreasonable.[159] Having disposed of the two cases, Justice Glassman stated that the *Katz* test should have been controlling to determine the existence of a search.[160]

Two other state cases demonstrate an alternative to the Supreme Court's Fourth Amendment analysis of dog sniffs. First, in *State v. Pellicci*,[161] the Supreme Court of New Hampshire refused to adopt the *Place* rationale for determining whether a canine sniff constituted a search under the New Hampshire Constitution's search and seizure provision.[162] Instead, the New Hampshire Supreme Court fo-

154. State v. Phaneuf, 597 A.2d at 56-57.
155. *Id.* at 57 (citing United States v. Jacobsen, 466 U.S. 109, 123 (1984)).
156. *Id.*
157. *Id.* at 58 (Glassman, J., dissenting).
158. *Id.*
159. *Id.* at 59.
160. *Id.*
161. 580 A.2d 710 (N.H. 1990).
162. The New Hampshire Supreme Court stated: "[A]s Pellicci correctly argues, we have held our Constitution may be more protective of individual rights than the Federal Constitution." *Id.* at 715.

cused on the state interpretation of "search" and concluded:

> Employing a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search in these terms. . . . The sniff, in short, was a prying by officers into the contents of Pellicci's possession which, concealed as they were from public view, could not have been evident to the officers before the prying began.[163]

Although the court held that the sniff was a search, it also determined that the limited nature of the sniff was reasonable in Pellicci's case in part because it was based on "a reasonable and articulable suspicion of imminent criminal activity."[164]

In another recent state decision, *People v. Dunn*,[165] the Court of Appeals of New York held that although a canine sniff outside someone's apartment did not constitute a search under the Fourth Amendment to the United States Constitution, the sniff was a search within the meaning of the New York Constitution. The New York Court of Appeals' rationale was that the dog sniff enabled the police "to obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy."[166] The court of appeals rejected the Supreme Court's assertion that the limited information learned through a dog sniff means a search has not occurred. It stated, "[u]nlike the Supreme Court, we believe that the fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on whether it constitutes a search."[167] The Court likened sniffing odors to the sound waves gathered by the surveillance in *Katz*.[168]

Like *Pellicci*, the search in *Dunn* was deemed reasonable because the police had a reasonable suspicion that the defendant's apartment contained drugs.[169] Notwithstanding the fact that the search was constitutional, by holding generally that sniffs are searches, the court of appeals precluded roving canine sniffs without justification.[170] This view is far more protective of individual rights than the

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163. *Id.* at 716. Under the New Hampshire Constitution "[a] search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed." *Id.*

164. *Id.* at 717 (citing State v. McCann, 467 A.2d 571, 573 (N.H. 1983)). In *Pellicci*, each of the presiding four justices had different ideas about whether the sniff was a search and if so, whether it was reasonable. Justice Brock, concurring specially, would hold that the sniff was a limited search. *Id.* at 721. Justice Thayer, concurring specially, would hold that the sniff was not a search. *Id.* at 723. Justice Batchelder, dissenting, would hold that the sniff was an unreasonable search. *Id.* at 726.

165. 564 N.E.2d 1054 (N.Y. 1990).

166. *Id.* at 1058.

167. *Id.* at 1057.

168. *Id.* at 1058.

169. *Id.* at 1059.

170. "To hold otherwise [that a sniff is not a search], we believe would raise the specter of the police roaming indiscriminately through the corridors of public housing

Place analysis because it provides some judicial review of dog sniffs. In egregious cases, therefore, the New York Court of Appeals' approach would allow for the possibility of an unconstitutional dog sniff.

There are few state court decisions which hold sniffs to be searches compared with the significantly larger number of states which hold sniffs are not searches.[171] However, since a large number of states have not even addressed this issue since *Place* was decided, it stands to reason that these states may yet diverge from the Supreme Court's interpretation that a sniff is not a search. Furthermore, many of the states that have followed *Place* have done so on federal constitutional grounds. They are not foreclosed therefore from deciding future dog sniff cases on state grounds if the issue is properly raised.

III. CANINE SNIFFS SHOULD BE DEEMED SEARCHES

This Part will examine the effects of *Place* and *Jacobsen* on Fourth Amendment jurisprudence regarding dog sniffs. It is important to note that the discussion is centered on searches (or lack thereof) in the context of illegal drug activity. This is because the heightened public and political furor about the "war on drugs" has created a separate and distinct pressure point on the Fourth Amendment.[172] In fact, the vast majority of Fourth Amendment cases in the beginning of this century concerned prohibition and the illegal trafficking in alcohol.[173] And history often repeats itself.

Section A will examine the significance of deeming investigative techniques used by law enforcement as "non-searches." Section B will attempt to delineate the point of incongruence between *Place/Jacobsen* and *Katz*. Section C will offer some suggestions for how dog sniffs might be brought under the umbrella of the Fourth Amendment in a workable fashion. In so doing, however, the emphasis will be on individual rights as opposed to the current scheme of deferring to the seemingly insurmountable compelling government interest.

A. Consequences of Deeming Investigative Techniques "Non-Searches"

Picture the following scenarios: A thirteen-year-old girl is strip-searched at school when a dog sniff positively alerts school officials

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projects with trained dogs in search of drugs. . . . Such an Orwellian notion would be repugnant under our State Constitution . . . ." *Id.* at 1058 (citations omitted).

171. *Compare supra* note 150 with note 151.

172. *See generally*, Larkosh, *supra* note 30.

173. *See* Larkosh, *supra* note 30 at 1032 ("The Prohibition cases of the 1920s reflect the Court's tendency to sanction and encourage increasingly intrusive methods utilized by law enforcement officials.").

to the presence of drugs. No drugs were actually found but it is later learned that she had played with her own dog who was in heat.[174] The dog alerted to some fifty students, only seventeen of whom actually possessed drugs.[175] In Florida, the Highway Patrol sets up roadblocks to stop 1,500 vehicles for safety inspections as a drug detecting dog walks around the vehicles. One drug arrest is made.[176] These situations actually occurred. Picture further: Police are stationed at every street corner, armed with drug-detecting canines to sniff everyone walking past. Police install pen registers on every suspected drug user's private telephone line.[177] Enthusiastic Federal Express employees open every suspicious package and then call in the Drug Enforcement Agency.[178] Police stop everyone carrying cash in their wallets.[179] Under current Supreme Court Fourth Amendment jurisprudence, these techniques are not considered searches. Thus the Fourth Amendment would not be implicated.

These hypotheticals seem offensive to our notions of privacy. According to the majority in *Place*, however, none of these investigative techniques would violate the Fourth Amendment. Sadly, a majority of the public seems to believe that these techniques are warranted because of the perceived exigencies of the "drug war."[180]

In fact, the effectiveness of intrusive investigative techniques is questionable when one considers that the amount of drugs entering the country has only increased in recent years.[181] In 1987, the Office of Technology Assessment concluded:

> Despite a doubling of Federal expenditures on interdiction over the past five years, the quantity of drugs smuggled into the United

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174. Doe v. Renfrow, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979), *remanded in part and aff'd in part*, 631 F.2d 91 (7th Cir. 1980) (per curiam).

175. *See* LAFAVE, *supra* note 17, § 2.2(f), at 372 (1987).

176. Prendergast, *Highway Drug Searches Raise Questions*, FORT LAUDERDALE NEWS & SUN-SENTINEL, Feb. 26, 1984, at A16.

177. *See* Smith v. Maryland, 442 U.S. 735, 737 (1979) (pen register of suspected thief's telephone).

178. *See* United States v. Jacobsen, 466 U.S. at 111 (Federal Express employees opened damaged package).

179. *See* LAFAVE, *supra* note 17, § 2.2(f) n.199 (Supp. 1993). "It has been estimated that most of the cash in circulation (the estimates range from 70% to 97% of all bills) contains sufficient quantities of cocaine to alert a trained dog. Thus it sometimes happens in practice that a drug dog alert will lead to nothing but currency." *Id.* (citations omitted). *See also* Mark Curriden, *Courts Reject Drug-Tainted Evidence*, A.B.A. J., Aug. 1993, at 22. This article discusses courts' willingness to overturn drug possession convictions based upon trace amounts of cocaine on U.S. currency. Apparently, the latest estimate is that cocaine is on 70% of all U.S. currency. *Id.*

180. *See* Larkosh, *supra* note 30 at 1041 (citing Sonnett, *War on Drugs—or the Constitution?*, TRIAL, Apr. 1990, at 27 (citing *Washington Post*-ABC News poll, Sept. 8, 1989)) (62% of Americans are willing to give up some freedoms to aid war on drugs, 52% would approve of warrantless searches of homes, 67% would sanction random stops of vehicles, 55% supported mandatory drug tests for all Americans).

181. *See* Wisotsky, *supra* note 24, at 894.

> States is greater than ever. . . . There is no clear correlation between the level of expenditures or effort devoted to interdiction and the long-term availability of illegally imported drugs in the domestic market.[182]

This is not to say that the war on drugs is without merit nor that the war should not be fought. The Constitution, however, must not be sacrificed in the process.

In the Author's opinion, the Court's present Fourth Amendment analysis dilutes in unprecedented ways the public's protection from government incursion. When a technique is deemed "not a search," any Fourth Amendment inquiry is foreclosed. As a result, a whole class of police action is removed from judicial scrutiny. This class now has a stamp of endorsement from the Supreme Court. A technique that may have been used by an officer disregarding the warrant requirement, a technique approved by the Court, may become widely used in our society.[183] If a dog sniff is not a search under any circumstances, dogs may be employed in situations perhaps never previously conceived. This Comment suggests that the Court use greater scrutiny when deeming a particular technique not a search.

B. A Breakdown of Fourth Amendment Analysis

Place[184] stands for three propositions. First, a defendant never has a legitimate expectation of privacy in drugs. Second, a dog sniff is constitutionally permissible because it is limited to the detection of drugs.[185] Third, the sniff's limited intrusiveness is outweighed by the governmental interest involved.

Taking the first proposition, the Court in *Jacobsen* expounded on *Place* with the following statement: "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other

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182. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE BORDER WAR ON DRUGS at 1, 3 (1987).

183. *See* United States v. Jacobsen, 466 U.S. at 138 (Brennan, J., dissenting). "Because the requirements of the Fourth Amendment apply only to 'searches' and 'seizures,' an investigative technique that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use." *Id.* at 136-37.

184. As originally decided and later explained in *United States v. Jacobsen*, *id.* at 123-25. See *supra* Part II of this Comment for discussion of *Place* and *Jacobsen*.

185. *Id.* at 137 (Brennan, J., dissenting).

> Combining this approach with the blanket assumption, implicit in *Place* and explicit in [*Jacobsen* is] that individuals in our society have no reasonable expectation of privacy in the fact they have contraband in their possession, the Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possess contraband.

Id.

arguably 'private' fact, compromises no legitimate privacy interest."[186] On close examination, however, this approach does not comport with the principle articulated in *Katz*. Katz was held to have a legitimate expectation of privacy in his telephone conversation,[187] regardless of the *illegality* of the *content* of that conversation. Place, on the other hand, was afforded no legitimate expectation of privacy in locked luggage because of the illegal nature of drugs contained therein. Here is a classic case of what Professor Burkoff labels "doublethink."[188] A sniff would not have been a "search" if Place's suitcase had contained drugs, but if Place had no drugs in his suitcase, he would have had a legitimate expectation of privacy in his suitcase. Perhaps then a dog sniff would be a search. Basing the existence of a search on whether the suitcase contained drugs and not on the physical act of looking for drugs is illogical and inconsistent with *Katz*.[189]

The Court finessed this dilemma by acknowledging that although the owner possesses an interest in privacy,[190] the information obtained by a sniff is "limited" in that the sniff only detects the presence or absence of drugs. This does not solve the dilemma. On one hand, the Court disavowed the right to privately possess drugs. On the other, it suggested that although there is a privacy interest in luggage, a dog sniff is not a search because of its limited intrusiveness. Justice Brennan criticized the Court's novel approach:

> It is certainly true that a surveillance technique that identifies only the presence or absence of contraband is less intrusive than a technique that reveals the precise nature of an item regardless of whether it is contraband. But by seizing upon this distinction alone to conclude that the first type of technique, as a general matter, is not a search, the Court has foreclosed any consideration of the circumstances under which the technique is used, and may well have paved the way for technology to override the limits of law in the area of criminal investigation.[191]

By seizing on the limited nature of the dog sniff to conclude a search

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186. *Id.* at 123. One can only infer from this broad statement that because Congress has deemed drug possession illegal, one never has a legitimate expectation of privacy in drugs.

187. Katz v. United States, 389 U.S. at 353.

188. *See generally* Burkoff *supra* note 25.

189. *See* United States v. Jacobsen, 466 U.S. at 135 (Brennan, J., dissenting) ("Presumably, the premise of *Place* was that an individual could not have a reasonable expectation of privacy in the presence or absence of narcotics in his luggage."). Katz was afforded constitutional protection, regardless of the content of his speech. *See supra* notes 33-40 and accompanying text.

190. "We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." United States v. Place, 462 U.S. at 707.

191. United States v. Jacobsen, 466 U.S. at 137-38 (Brennan, J., dissenting).

had not occurred, the Court deviated from its own analysis in *Katz*. *Katz* rejected the government's contention that the lack of physical penetration precluded operation of the Fourth Amendment. It stated, "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[192] It is troubling that the Court in *Place* found the lack of physical intrusion into the suitcase controlling on the issue of whether a search had occurred. If the Fourth Amendment protects "people and not places," the inquiry should have focused on Place and his reasonable expectations of privacy, without regard to the contents of his suitcase. The Court's response to this issue was given in *Jacobsen*: no one has a legitimate expectation of privacy in drugs.[193]

Thus, the first and second propositions of *Place* are irretrievably linked. First, a person never has a reasonable expectation of privacy in drugs and, second, because a dog sniff is limited in terms of the information obtained, a dog sniff is not a search. The third proposition is more implicit than explicit. It appears that the Court applied a balancing test to determine whether or not the limited intrusiveness of a sniff outweighed any privacy expectation in luggage.

The fallacy upon which the balancing test relied is that the Court compared a sniff to a full-blown search when it stated "[t]hus, the manner in which information is obtained through [dog sniffs] is much less intrusive than a typical search. . . . This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[194] To be sure, a sniff is *less* intrusive than pawing through someone's private belongings, but the comparison itself acknowledged that a sniff entails a measure of intrusiveness. The question of search, then, is determined by a sliding scale of intrusiveness; that is, if the sniff is only "minimally" intrusive, the technique is not a search. This is not an unreasonable proposition but it raises the suspicion that once technology has developed minimally intrusive methods to obtain information about citizens, then the Fourth Amendment will become a dead letter.[195]

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192. Katz v. United States, 389 U.S. at 353 (1967).

193. *See* United States v. Jacobsen, 466 U.S. at 123 (1984).

194. United States v. Place, 462 U.S. at 707 (1983).

195. Professor LaFave, in response to the Court's holding in Smith v. Maryland (holding that the use of a pen register was not a search), stated that *Smith* "announced, in effect, the ominous proposition that modern technology cannot add to one's justified expectation of privacy, but can only detract from it." LAFAVE, *supra* note 17, § 2.7(b), at 506 (2d ed. 1987).

There is something inherently offensive about applying balancing tests to protections of the Fourth Amendment.[196] The protections guaranteed by this Amendment are fundamental to individual freedom. Although the Fourth Amendment should protect the individual from government encroachment, the Court more often emphasizes the compelling government interest when sustaining government action.[197] Moreover, in the area of drug enforcement, the fact is that the government is fighting a losing battle.[198] But the more society worries about the "war on drugs" and crime, the heavier the reasonableness balance is tipped in favor of the government. Under this type of analysis, requiring a warrant will always be regarded as unreasonably burdensome. The warrant requirement should not so easily be put aside for the convenience of law enforcement. After all, the purpose of the warrant requirement is to prevent enforcement officials from exercising on-the-spot discretion in evaluating whether their actions are reasonable. Rather, the decision to search should be made by a neutral official.[199]

In the context of the Fourth Amendment, civil libertarians always begin from a point of weakness; namely, the defendant is seeking exclusion of incriminating evidence. There is usually no question that the defendant was in possession of drugs; therefore, it is difficult for the defendant to overcome the presumption of guilt.[200] Notwithstanding this presumption, Justice Scalia recently authored a majority opinion that stated, "there is nothing new in the realization that the Court sometimes insulates the criminality of a few in order to protect the privacy of us all."[201] This is the true purpose of the Fourth Amendment—to protect society as a whole from government

196. *See* United States v. Place, 462 U.S. at 718 (there are only "isolated exceptions to the general rule that the Fourth Amendment itself has already performed the constitutional balance between police objectives and personal privacy.") (Brennan, J., concurring in result) (quoting Michigan v. Summers, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting)).

197. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985).

198. *See* Wisotsky, *supra* note 24, at 894.

199. In Justice Jackson's words, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948).

200. Although law enforcement misconduct is not politically desirable, it is an unfortunate fact of life that, in general, the only time that courts deal with police search and seizure abuses is when the misconduct has been productive, i.e., has netted, however fortuitously, evidence of criminal activity which is the subject of suppression proceedings.

Burkoff, *supra* note 25, at 523-24. *See also* Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) ("Rights secured by the Fourth Amendment are particularly difficult to protect because their 'advocates are usually criminals.' ") (citing Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting)).

201. Arizona v. Hicks, 480 U.S. 321, 329 (1987).

intrusion, sometimes at the expense of a small number of criminals slipping through the cracks. The net result of enforcing the Fourth Amendment would be to raise the standard of government conduct. In the realm of drugs, however, the Court has committed all society to bear the brunt of intrusive government activity to "win the war." We are now subjected to sniffing dogs in the airport, in the mailroom, at school and perhaps even in our homes—all this, because a sniff is not a search.

As demonstrated in Parts I and II, when an investigative technique is deemed to fall outside the Fourth Amendment, there can be no subsequent judicial determination of the appropriate use of that technique. Each decision that implicitly approves of a technique in the first instance means that the technique can be adopted on a wholesale basis. In other words, because the Court has deemed that dog sniffs are not searches, police have broad discretion to use police dogs, unfettered by judicial control.

C. A Better Way

If the Supreme Court had acknowledged that a dog sniff was a search, a wholly different analysis could have been adopted. The question still remaining is what type of analysis should the Court have engaged in to evaluate the search? Clearly, responsible use of police dogs is an efficient and minimally intrusive method to obtain information about the presence or absence of drugs. The point is not to exclude the use of dogs, but rather to regulate their use by acknowledging the relative interests of the individual and government.

Once a search is acknowledged, courts should then focus upon the expectation of privacy held by the individual in the area sniffed, and balance this interest against the legitimate need for the intrusion. Thus, a canine sniff of luggage may be reasonable if the police can point to a reasonably articulable suspicion that the luggage contains drugs. Alternatively, courts may conclude that a passenger has a reduced expectation of privacy in their luggage, which makes the government's pressing need to stem the importation of drugs more important. Courts may also require the government to show probable cause to believe the presence of drugs in order to justify a warrantless canine sniff of a person or of a home. This would be consistent with the traditionally higher expectation of privacy accorded to homes and persons. On the other hand, a police dog stationed on every street corner, sniffing pedestrians clearly would be inappropriate. Acknowledging that the sniff is a search allows the courts to require differing justifications depending upon the intrusion, and subjects police conduct to judicial scrutiny.

Pennsylvania has recently adopted such an approach. In *Com-*

monwealth v. Johnston,[202] the Pennsylvania Supreme Court rejected the United States Supreme Court's approach to dog sniffs in *Place* and proceeded to acknowledge that a canine sniff was a search under its state constitution. In *Johnston*, police suspected that a warehouse was being used to store drugs. Because the police did not know which locker contained drugs, the police walked a drug-sniffing canine through the corridor, whereupon the dog indicated to the locker containing the marijuana. The Pennsylvania Supreme Court agreed with Justice Brennan's dissent in *Place* and argued that there should be no balancing of the relative interests in order to determine whether a search had occurred because the balance had already been struck by the Fourth Amendment itself.[203] The question instead was whether the search implicated the Fourth Amendment's warrant requirement.

This analysis, the court explained, necessarily required a balancing test.[204] The court acknowledged that a warrant should not be required for all dog sniffs alike but further stated: "[I]t is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason."[205] Thus, the main objection of the Pennsylvania Supreme Court to the majority holding in *Place* was that *Place* did not provide for any judicial review of the use of police dogs.[206]

The court decided that there was a middle ground to be struck between rejecting the use of all dog sniffs and exempting all sniffs from the purview of the Fourth Amendment. Rather, in order to use the dog without a warrant, the police must "articulate reasonable grounds" for believing that drugs were present in the area sniffed, and show that they were lawfully present in the place where the sniff was conducted.[207] Applying this test to the facts in *Johnston*, the court held that the use of the dog was constitutional.[208]

The Pennsylvania Supreme Court recently reaffirmed its decision in *Johnston* and further held that the use of a police dog to sniff a person required probable cause. In *Commonwealth v. Martin*,[209] the court held unconstitutional under the state constitution the use of a dog to sniff a satchel carried by the Defendant. In applying a stricter standard than the one adopted in *Johnston*, the court stated:

> In this case, however, the search is that of a person, not a place,

202. 530 A.2d 74 (Pa. 1987).
203. *Id.* at 78.
204. *Id.* at 79.
205. *Id.*
206. The Pennsylvania Supreme Court stated: "The consequence of this holding [in *Place*], of course, is that police use of narcotics detection dogs in the context of *Place* facts need not be justified or explained under the Fourth Amendment." *Id.*
207. *Id.*
208. *Id.* at 80.
209. 626 A.2d 556 (Pa. 1993).

> and accordingly, we believe that different interests are implicated. . . .
>
> Because the search in this case involved Martin's person, we believe that in addition to being lawfully in place at the time of the search, the police must have probable cause to believe that a canine search of a person will produce contraband or evidence of a crime. Reasonable suspicion of criminal activity will not suffice.[210]

The dog sniff at issue in the case failed this stricter standard. Therefore, not only was the Pennsylvania Supreme Court willing to reject the United States Supreme Court's analysis and to independently interpret its state constitution, but the Pennsylvania court was also actively engaged in developing a distinct Fourth Amendment jurisprudence for dog sniffs. Over time, the Pennsylvania court will assuredly have to elaborate further upon the standards required by the police when novel dog search situations present themselves for review.

The most recent word from the Pennsylvania Supreme Court is noteworthy for another reason. The majority in *Martin* drew a connection between the war on drugs and the shrinking scope of Fourth Amendment jurisprudence:

> We are mindful that government has a compelling interest in eliminating the flow of illegal drugs into our society, and we do not seek to frustrate the effort to rid society of this scourge. But all things are not permissible even in the pursuit of a compelling state interest. The Constitution does not cease to exist merely because the government's interest is compelling. A police state does not arise whenever crime gets out of hand.[211]

In an equally unequivocal tone, Justice Cappy concurred with the following:

> To reason that absent probable cause, a dog, cat, or any other animal sniffing a person or the personal belongings which that citizen is carrying, is anything other than an insufferable intrusion, is in my view, unacceptable . . . .
>
> . . . .
>
> Much has been compromised in the name of the war on drugs. But let it ring clear that in Pennsylvania, no matter how well intended or compelling the government interest in ridding ourselves of the illicit drug trade, our unwavering belief in the sanctity and integrity of personal privacy constrains us to conclude that no citizen should be subjected to a governmental intrusion of this nature, absent probable cause.[212]

Clearly, the Pennsylvania Supreme Court is willing to take only so much Fourth Amendment jurisprudence from the United States Su-

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210. *Id.* at 560.
211. *Id.* at 561.
212. *Id.* at 563 (Cappy, J., concurring).

preme Court. In addition, *Martin* marks a possible turning point in the war on drugs; Pennsylvania refuses to subscribe to the view that all of our privacy interests should be sacrificed in the face of a compelling governmental interest. Nor will the presence or absence of a search depend upon the nature of the item sought. Rather, at least in Pennsylvania, the people's right to privacy from the intrusive canine nose is superior to government interests that cannot be clearly justified according to judicially recognized standards of government conduct.

CONCLUSION

It is not the Author's intention to characterize the use of drug sniffing dogs as unreasonable. The amount of drug use, smuggling, and the inevitable accompanying violence is crippling inner cities and rural areas alike. The Author, however, takes issue with the United States Supreme Court's method for denying that a sniff is a search. To not label a sniff a search is disingenuous at best and at worst rejects the well-reasoned Fourth Amendment analysis set forth in *United States v. Katz*. Instead of stating a hasty assertion, the Court would better serve the Fourth Amendment by reexamining the issue using *Katz* as its starting point of analysis. People hold expectations of privacy which should not depend upon the nature of the item sought. In other words, the illegal nature of the item should be irrelevant as to the issue of whether a person holds a legitimate expectation of privacy in the area intruded upon by law enforcement officers. The Court would remain true to the spirit of the Constitution if it deemed a sniff a search, and then followed Pennsylvania's recent approach to analyzing canine sniffs. The Supreme Court should be wary of removing a class of investigative tools from the Fourth Amendment purview since absolute removal precludes judicial inquiry into the reasonableness of the official action. In drawing false distinctions between what is and what is not a "search," the Court has left a significant amount of discretion with law enforcement officials to judge the reasonableness of their own conduct.

Clearly, a handful of states have rejected the Supreme Court's analysis in *United States v. Place*. Even if the Supreme Court does not revisit the dog sniff issue in *Place*, defendants still have a viable opportunity to challenge the use of sniffing dogs in state courts on state grounds. Many state courts have not yet had the opportunity to analyze the constitutionality of dog sniffs. If more states follow the Pennsylvania Supreme Court's lead in reevaluating how much government intrusion the Fourth Amendment (or the state's equivalent), is capable of withstanding in the name of the "war on drugs," the Supreme Court may well be forced to revisit its decision in *Place*.

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