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# DOG SNIFF SEARCHES AND *UNITED STATES V. THOMAS*: THE SECOND CIRCUIT TAKES A NEEDED BITE OUT OF PLACE

## I. INTRODUCTION

The United States continues to wage war against drug trafficking.<sup>1</sup> Today, drugs arrive in this country by boat,<sup>2</sup> by plane<sup>3</sup> and by person. They are concealed in the false bottoms of aerosol cans and in the heels of shoes and are dissolved in liquor.<sup>4</sup> Smugglers use state-of-the-art equipment to mask their activities.<sup>5</sup> Herculean efforts to reduce drug production in this and other countries and to prevent importation into this country<sup>6</sup> have failed to eliminate the problem.<sup>7</sup> Notwithstanding

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1. President Reagan formed a Task Force Program to "destroy the operations of organizations engaged in drug trafficking in this country." *Organized Crime Drug Enforcement Task Force: Goals and Objectives*, 11 DRUG ENFORCEMENT, Summer 1984, at 3, 3. The Task Force Program is comprised of individuals from the United States Attorney's Office, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service, the United States Coast Guard and the United States Marshal's Office. *Id.*

In yet another attempt to curb drug trafficking, a high-level Western Hemisphere conference was announced in January, 1986. Williams, *U.S., Mexico Will Call Anti-Drug Conference*, L.A. Times, Jan. 4, 1986, pt. I, at 1, col. 2.

2. Florida has a 1300 mile coastline. Approximately 5000 boats each year attempt to bring drugs into the United States along this border. Miami alone has 800,000 registered pleasure craft. *A Losing Battle*, U.S. NEWS & WORLD REP., Mar. 25, 1985, at 52, 55.

3. In February, 1985, for example, approximately 2500 pounds of cocaine were found on a Colombian 747 aircraft. *Id.* at 55. Although the United States Customs Service is responsible for air border interdictions, it is too ill-equipped to be successful. May, *Customs Cuts Would Hurt Drug Fight, Official Says*, L.A. Times, Jan. 8, 1986, pt. I, at 16, col. 1. *See infra* note 7 and accompanying text.

4. *A Losing Battle*, *supra* note 2, at 55. United States Customs agents watch the way people walk. "If they walk funny, [an agent] tears their shoes apart . . ." *Id.* (quoting Regional Customs Comm'r Robert Battard).

5. Electronic detection devices, radio receivers, communication devices and high performance aircraft are used by smugglers. *Frontiers of Science*, 10 DRUG ENFORCEMENT, Fall 1983, at 43, 45.

6. The United States spent \$1.2 billion in 1985 in an attempt to combat the drug trade. *A Losing Battle*, *supra* note 2, at 52. In 1985, a three month "massive" air, sea and land campaign was launched in order to shut off the flow of Colombian and Caribbean drugs. Gerstenzang & Ostrow, *U.S. Launches Massive Caribbean Drug Drive*, L.A. Times, Nov. 2, 1985, pt. I, at 1, col. 3. The operation, Hat Trick II, targets all methods of drug smuggling and is intended to "stop all drug flow." *Id.* at 24, col. 1 (quoting "a Pentagon source").

7. Most smugglers simply are not caught. *A Losing Battle*, *supra* note 2, at 55. Interdiction has only successfully eliminated approximately one-tenth of United States bound illicit drugs. Gerstenzang & Ostrow, *supra* note 6, at 24, col. 1. The overwhelming odds against the

some remarkable successes in these efforts,<sup>8</sup> production<sup>9</sup> and importation<sup>10</sup> are on the increase. The result is that "[s]tamping out illicit drugs is like trying to control a glob of mercury: Press it, and it squirts off in all directions."<sup>11</sup>

In an attempt to counteract the ingenuity and sheer number of smugglers, Drug Enforcement Administration (DEA) agents increasingly turn to modern technology to assist them in drug detection.<sup>12</sup> Scientific advances provide devices which become "everyday tools" of drug enforcement officers in the field.<sup>13</sup>

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United States include "[e]conomic realities, corruption, threats, politics and nature itself." *A Losing Battle*, *supra* note 2, at 52.

To exacerbate the situation, congressional critics claim that the Reagan Administration's proposed drug enforcement budget cuts for 1987 will end the war on drugs, with smugglers emerging victorious. *May*, *supra* note 3, at 16, col. 1.

8. A Colombian eradication program destroyed 4000 hectares of marijuana in 1984. Thomas, *FY 1986 Assistance Requests for Narcotics Control*, 85 DEP'T ST. BULL. NO. 2099, at 62 (June 1985). South Florida agents captured 4.5 million pounds of marijuana and 44,000 pounds of cocaine in 1984. *A Losing Battle*, *supra* note 2, at 55. The Coast Guard captures two million pounds of marijuana a year. *Id.*

9. Although decreases in production are reported, the Assistant Secretary of State for International Narcotics Matters stated that "there were some disappointments" regarding the increase in production in some countries. Thomas, *supra* note 8, at 62. In 1984, of the 13 major drug-producing countries, seven increased their production of coca (cocaine), marijuana and opium poppy crops (heroin). *A Losing Battle*, *supra* note 2, at 52.

10. In 1985, heroin and marijuana imports were expected to increase 10% and cocaine 47% over the same figures for 1984. *Id.* The enormous profit potential, the variety of transportation routes and the relatively small amounts of drugs necessary to meet demand—40 tons of cocaine will supply the United States for a year—combine to keep production flowing. Gerzengang & Ostrow, *supra* note 6, at 24, col. 1.

11. *A Losing Battle*, *supra* note 2, at 56. Production springs up elsewhere in response to destruction of crops and laboratories. *Id.* In 1982, after heroin laboratories in Sicily were destroyed by the Italian government, Pakistan and Afghanistan took up the slack. *Id.*

12. For example, "Fat Albert" is one of three 200,000 cubic feet helium balloons currently in use in Florida to detect drug smugglers. *Eye in the Sky*, *TIME*, May 13, 1985, at 27, 27. The balloons are 175 feet long and are equipped with \$3.5 million in sophisticated radar equipment. The airborne radar allows the balloon to pick up traffic in "Smuggler's Alley," a band of the Caribbean sky not detectable to land-based radar. When a balloon sights a suspicious flight, a Customs plane is sent out after it. The Administration has agreed to allocate an additional nine million dollars for three more balloons. *Id.*

Another device relied on by enforcement officers is a DEA satellite communication system (SATCOM). *Frontiers of Science*, *supra* note 5, at 45. SATCOM is a portable, deployable unit, packaged in two suitcases, which provides digital communication capability for investigative personnel. The transmitter, receiver, terminal and antenna can be set up in 10 minutes in order to transmit messages through a satellite repeater. *Id.*

13. *Frontiers of Science*, *supra* note 5, at 43. "Major cases are no longer brought to [trial unless there is] significant technological evidence in the form of eavesdropping recordings, videotape recordings of criminal activities, radio-beacon assisted physical surveillance, low-light image-enhancement . . . and all of the peripheral equipment needed to operate or exploit those areas of advanced technology." *Id.* at 45.

Sophisticated practices to detect drugs currently include the use of dogs.<sup>14</sup> Although governments and law enforcement agencies have utilized the dog's sense of smell for centuries,<sup>15</sup> the use of dogs to sniff for drugs is relatively recent.<sup>16</sup> Today dogs are vital to drug control programs.<sup>17</sup>

Despite their important contributions, innovative law enforcement techniques also raise serious fourth amendment questions.<sup>18</sup> Use of devices, such as dogs, to locate drugs may infringe on an individual's right to be protected against unreasonable searches.<sup>19</sup> At first blush, the abstract concept of a dog sniffing luggage at an airport might not seem

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14. A dog's remarkable capability for detecting concealed items is well illustrated by the truffle hunting dog. C. HUBBARD, *DOGS IN BRITAIN* (1948). Truffles, an expensive delicacy, are actually fungi which flourish in winter about three inches below the surface of the ground. Truffle hunting dogs are capable of sniffing out this treat and have been used in England for hundreds of years. *Id.* at 336-38.

15. See generally C. HUBBARD, *supra* note 14. For hundreds of years, the dog has been used in a variety of ways. Bloodhounds were used in the 16th and 17th centuries at Scottish borders to track down sheep thieves and poachers. *Id.* at 352. Dogs were then allowed free access to any house where the trail of a felon led. *Id.* Dogs were also used during World War I to haul ammunition and supplies, carry messages and lead ambulances to wounded soldiers. *Id.* at 453. By the end of the hostilities, there were approximately 100,000 war dogs on all fronts. *Id.* In the 20th century, dogs have been used as part of K-9 units in order to aid police. Blue, a Los Angeles-based German shepherd, conducted 734 searches and captured 253 felony suspects. Freed, *Blue Penciled*, L.A. Times, Oct. 4, 1985, pt. II, at 1, col. 2. Nick Carter, a bloodhound, was responsible for trailing and capturing 600 criminals. C. HUBBARD, *supra* note 14, at 352. He held the record time for following a 104-hour old trail. *Id.*

16. Dogs were introduced to contraband-detection in 1970 in response to increasing drug traffic. U.S. CUSTOMS SERVICE, DEP'T OF TREASURY, TRAINING MANUAL 2-3 (1978) [hereinafter cited as TRAINING MANUAL]. Only one of 43 healthy and temperamentally sound dogs is selected for narcotics detection training. *Id.* at 34. The dog must demonstrate a bold attitude and "a very strong, almost frantic, desire to retrieve a thrown object." *Id.* at 35.

17. TRAINING MANUAL, *supra* note 16, at Intro. "The dog's part in aiding law enforcement officers in protecting society from the awesome drug problem is a most significant contribution that must never be overlooked." *Id.* Dogs are responsible for seizures of drugs worth hundreds of millions of dollars. *Id.* At airports, dogs are primarily used in baggage areas to examine containers on moving conveyor belts. *Id.* at 40. During training, dogs are placed on non-moving conveyor belts and encouraged to walk back and forth, while playing with a retrieving dummy. *Id.* at 35-36. The handler will excitedly tease the dog with the dummy before throwing it. When the dog retrieves it, the handler and the dog will play tug of war with the dummy. A good narcotics detection dog will carefully retrieve the dummy and display a possessive attitude towards it. *Id.* at 35.

18. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." U.S. CONST. amend. IV.

19. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (electronic listening device placed outside telephone booth to monitor conversation inside booth is a search). For further discussion of *Katz*, see *infra* notes 69-72 and accompanying text; cf. *United States v. Knotts*, 460 U.S. 2761 (1983) (use of "beeper" emitting radio signal to establish location of car on public roads does not violate driver's reasonable expectation of privacy).

offensive. However, the inevitable extension of this investigative method seriously threatens individual privacy.<sup>20</sup> The potential for erosion of privacy protections has increased due to the magnitude of the drug problem, the commitment of law enforcement to eradicating drugs and the public perception of drugs as evil. Technological advances which could not possibly have been envisioned by the framers of the Constitution must be accommodated to achieve social goals. Yet this accommodation must not trammel one of the most cherished rights of this country, the right to freedom from unwarranted government intrusions.

In March, 1985, the Court of Appeals for the Second Circuit acknowledged this danger by holding that a dog sniff *outside an individual's apartment* was a search.<sup>21</sup> Thus, despite strong public pressure favoring drug control, *United States v. Thomas*<sup>22</sup> imposed a fourth amendment limitation on law enforcement use of dogs to detect drugs. Only three years earlier, however, in *United States v. Place*,<sup>23</sup> the Supreme Court held that the use of dogs to detect drugs in a *public place* was not a search.<sup>24</sup> Since *Place*, courts analyzing dog sniffs have been divided on the question of whether individuals are entitled to any fourth amendment protection.<sup>25</sup>

This Note examines the validity of the *Thomas* decision in light of *Place*, and finds that the Second Circuit's holding—that sniffs do violate privacy protections in certain circumstances—is consistent with the holding in *Place*. The consistency arises from the distinct factual settings involved. *Place* involved a dog sniff at an airport, while the sniff in *Thomas* was of an individual's home. The differing governmental interests and expectations of individual privacy involved an analysis of the "search" definition in a new context, allowing, if not requiring, a different result. This Note concludes that *Place* should be limited to its facts, and that in the future, dog sniff cases should be decided according to a *Thomas* analysis with the possibility of a reduced standard of probable cause in appropriate situations.

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20. See *infra* notes 102-34 and accompanying text.

21. *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

22. *Id.*

23. 462 U.S. 696 (1983).

24. *Id.* at 707.

25. See, e.g., *United States v. Vermouth*, No. CR 83-731 (C.D. Cal. Apr. 12, 1984) (unpublished Findings of Fact) (sniff of private storage locker not a search), *aff'd*, No. 84-5111 (9th Cir. Aug. 9, 1985) (unpublished opinion), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966); *People v. Unruh*, 38 CRIM. L. REP. (BNA) 2349 (Colo. Jan. 21, 1986) (sniff of stolen container brought to police station for safe keeping is search requiring reasonable suspicion). For a discussion of these two cases, see, respectively, *infra* notes 104-09 & 195-204 and accompanying text.

## II. STATEMENT OF THE CASE

In *United States v. Thomas*,<sup>26</sup> James Wheelings was one of eight defendants convicted in the Southern District of New York of various drug, firearms and Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>27</sup> violations.<sup>28</sup> The evidence presented at trial included twenty-seven audio and video recordings, forty drug exhibits and hundreds of business and drug records obtained from various searches conducted over a nine-year period.<sup>29</sup> One of the searches was of defendant Wheelings' Bronx apartment.<sup>30</sup> The warrant to search Wheelings' apartment authorized a search for "narcotics and financial records, quantities of heroin traces, and other evidence."<sup>31</sup> The Drug Enforcement Administration (DEA) agent's affidavit underlying the search warrant relied in part on a positive alert by a drug detecting dog outside Wheelings' apartment<sup>32</sup> to establish probable cause.<sup>33</sup> The district court denied Wheelings' motion to suppress evidence obtained in the search of his apartment.<sup>34</sup>

On appeal to the Second Circuit, Wheelings contended that the evidence seized at his apartment should have been suppressed. He argued that the sniff itself was an illegal search and could not be used to support the probable cause determination, and that absent the sniff, the affidavit

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26. 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

27. 18 U.S.C. §§ 1961-1968 (1982), 18 U.S.C.A. §§ 1961-1968 (West Supp. 1985).

28. 757 F.2d at 1361. According to the evidence presented at trial, the defendants were involved in a huge narcotics ring run by the "Council." In addition to purchasing and selling large quantities of heroin, PCP, cocaine and marijuana, the Council allocated sales territories, adjudicated disputes among members and "routinely approved the murders of those suspected of being potential witnesses against the Council or of people who had been insubordinate." *Id.* at 1362. Five defendants were members of the "Council." The remaining three defendants, including defendant Wheelings, "were connected to the Council's business." *Id.*

29. *Id.* at 1365. In addition to the physical evidence, more than 121 witnesses testified for the government. *Id.*

30. *Id.* In Wheelings' apartment, DEA agents found documents "pertaining to auto registration, insurance, taxes and the like." *Id.* at 1366. A bulletproof vest also was found. *Id.*

31. *Id.* at 1365-66 (quoting search warrant at issue).

32. The court did not indicate the dog's exact location when he alerted outside Wheelings' apartment.

33. *Id.* at 1366. The affidavit also stated that Wheelings, upon notification of his arrest the previous day, quickly closed his apartment door so no one could enter, and that a reliable informant observed Wheelings processing and repackaging heroin in mills partially controlled by Wheelings between September and October, 1976, between June and December, 1980, and in 1981. In addition, Wheelings' apartment repeatedly was occupied by "high-ranking member[s] of a massive narcotics organization." Based on all of this evidence, the DEA agent stated that there was probable cause to believe that there would be evidence of drug trafficking in the apartment. *Id.* at 1366-67.

34. *Id.* at 1366.

was insufficient to establish probable cause.<sup>35</sup> The Second Circuit agreed that the sniff was an illegal search.<sup>36</sup> However, it upheld the district court because the law enforcement officers acted in good faith reliance on the search warrant.<sup>37</sup>

### III. REASONING OF THE COURT

#### A. Majority Opinion

The majority in *United States v. Thomas*<sup>38</sup> held that the canine sniff outside Wheelings' apartment constituted an illegal search.<sup>39</sup> Relying on the fourth amendment prohibition against "unreasonable government intrusions,"<sup>40</sup> the Second Circuit decided that sniffs by trained dogs outside private dwellings intrude "on a legitimate expectation of privacy."<sup>41</sup>

The *Thomas* court noted that courts consistently recognize that individuals possess a "heightened privacy interest" in their homes.<sup>42</sup> Accordingly, Wheelings had a legitimate expectation that the contents of his apartment would remain private.<sup>43</sup> Using a dog to detect contraband outside his door "impermissibly intruded on that legitimate expectation."<sup>44</sup>

35. *Id.* See *supra* note 33.

36. 757 F.2d at 1368.

37. *Id.* (citing *United States v. Leon*, 104 S. Ct. 3405, 3419 (1984)).

38. 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

39. *Id.* at 1367. Judges Newman and Davis concurred with the majority on this issue. *Id.* at 1372 (Newman, J., concurring in part and dissenting in part) (Judge Newman dissented on the issue of imposing cumulative sentences); *id.* at 1376 (Davis, J., concurring in part and dissenting in part). See *infra* notes 54-56 and accompanying text for a discussion of Judge Davis' dissenting and concurring opinion.

40. *Id.* at 1366 (quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)).

41. *Id.* (citing *Katz v. United States*, 389 U.S. 347 (1967)). In *Katz*, the defendant Katz was convicted of violating a federal statute which prohibited the transmission of betting information across state lines by telephone. 389 U.S. at 348. The Court held that attaching an electronic "bug" to the outside of a public telephone booth in order to hear and record Katz's conversation was a search. *Id.* at 353. What a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52. For further discussion of the *Katz* standard, see *infra* notes 69-72 and accompanying text.

42. 757 F.2d at 1366 (citing *United States v. Tabor*, 635 F.2d 131, 139-40 (2d Cir. 1980) (use of telescope to identify objects or activities which could not be identified without it was a search)); *United States v. Bonfiglio*, 713 F.2d 932, 937 (2d Cir. 1983) ("[I]t was not the enhancement of the senses *per se* that was held unlawful in *Tabor*, but the warrantless invasion of the right to privacy in the home."); *United States v. Knotts*, 460 U.S. 276, 282 (1983) (beeper used to track defendant's activities outside—but not inside—home not a search because "traditional expectation of privacy within a dwelling place" not disturbed).

43. 757 F.2d at 1367.

44. *Id.* at 1366. "[T]he very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions,

The Second Circuit distinguished the holding in *United States v. Place*<sup>45</sup>—that dog sniffs in public places are not searches—by contrasting the diminished expectation of privacy an individual maintains in the contents of luggage in the custody of an air carrier.<sup>46</sup> The court stated that “[i]t is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search.”<sup>47</sup> A sniff of a home, according to the court, mandates a different result than an airport sniff.<sup>48</sup> Although a dog sniff may be a discriminating and inoffensive technique in an airport, a practice which is “not intrusive in a public airport may be intrusive when employed at a person’s home.”<sup>49</sup>

Further, the court reasoned that the use of a dog is not a mere improvement of the human sense of smell, but a “significant enhancement accomplished by a different, and far superior, sensory instrument.”<sup>50</sup> The police, by using a trained dog, may discover information they could not possibly obtain by use of their own senses.<sup>51</sup> Wheelings, then, had an additional legitimate expectation that the contents of his apartment would not be sensed by such a superior instrument.<sup>52</sup>

The Second Circuit construed *Place* narrowly, as holding “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.” ’ ”<sup>53</sup>

### B. Dissenting Opinion

In his dissent, Judge Davis disagreed with the “strong implication (if not outright statement) that a canine sniff outside a dwelling can *never* be considered by a magistrate in support of a proposed search warrant.”<sup>54</sup> According to the dissent, there are other circumstances in

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society is prepared to respect his privacy.’ ” *Id.* (quoting *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980)).

45. 462 U.S. 696 (1983).

46. *Thomas*, 757 F.2d at 1366.

47. *Id.* (emphasis in original).

48. *Id.*

49. *Id.* Notwithstanding the discriminating nature of the sniff, it nonetheless “remains a way of detecting the contents of a private, enclosed space.” *Id.* at 1367.

50. *Id.*

51. *Id.*

52. *Id.* For further discussion of a dog as a superior, sensory instrument, see *supra* notes 14-18 and *infra* note 165.

53. 757 F.2d at 1367 (quoting *Place*, 462 U.S. at 707).

54. *Id.* at 1376 (Davis, J., concurring in part and dissenting in part) (emphasis in original). Nevertheless, the dissent agreed that under the facts of this case the magistrate should not have considered the sniff since the other evidence in support of probable cause was too weak. *Id.* (Davis, J., concurring in part and dissenting in part).



which a sniff should be considered by the magistrate along with other evidence of probable cause.<sup>55</sup> Therefore, Judge Davis would have left the question open in future cases.<sup>56</sup>

#### IV. ANALYSIS

##### A. Searches: An Historical Background

The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . ."<sup>57</sup> Not all government intrusions constitute searches.<sup>58</sup> Yet, where a search occurs, the fourth amendment provides a safeguard against indiscriminate probes.<sup>59</sup> Searches are illegal unless based on probable cause.<sup>60</sup> When properly applied, the fourth amendment limits state intrusion into an individual's privacy.<sup>61</sup>

Unfortunately, "[t]he course of true law pertaining to searches . . .

55. *Id.* (Davis, J., concurring in part and dissenting in part). However, the dissent did not cite any examples of such circumstances.

56. *Id.* (Davis, J., concurring in part and dissenting in part). See *infra* note 178 for discussion of Judge Davis' analysis of probable cause.

57. U.S. CONST. amend. IV. The fourth amendment evolved from the colonists' negative experiences with writs of assistance and general warrants which granted "sweeping power . . . to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). No evidence or suspicion was necessary for the issuance of a general search warrant. *Olmstead v. United States*, 277 U.S. 438, 449-50 (1928) (Reporter's summary of argument for the United States). English courts condemned general warrants and the House of Commons declared the practice illegal. *Id.* (Reporter's summary of argument for the United States). Writs of assistance, however, were authorized in the colonies in 1767. *Id.* (Reporter's summary of argument for the United States). "It is quite apparent that the principal, if not the sole peril in the minds of those who advocated the [fourth] amendment and against which its protection was intended was the use of general warrants and the writs of assistance." *Id.* at 450 (Reporter's summary of argument for the United States).

58. Traditionally, a "search implic[ed] a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way." 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1, at 222 (1978) (quoting 79 C.J.S. *Searches & Seizures* § 1 (1952)). The Supreme Court, however, has never comprehensively defined "search." *Id.* § 2.1, at 223.

59. For a discussion of fourth amendment searches, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974). If the activity is not a search, the "government enjoys a virtual carte blanche to do as it pleases." *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 476 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

60. *Spinelli v. United States*, 393 U.S. 410, 418-19 (1969) (probable cause necessary for search warrant). Probable cause is a "practical, nontechnical conception that need not be based on direct, first-hand, or 'hard' evidence. Nonetheless, there must be enough evidence reasonably to believe that evidence of illegal activity will be present at the specific time and place of the search." *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir.) (citation omitted), *cert. denied*, 106 S. Ct. 66 (1985).

61. The fourth amendment, therefore, is a "profoundly anti-government document." Amsterdam, *supra* note 59, at 353.

has not—to put it mildly—run smooth[ly].”<sup>62</sup> Since its inception, the fourth amendment has undergone dramatic changes in interpretation.<sup>63</sup> From 1920 to 1967, government intrusions into individual privacy were not considered to be searches unless there was an accompanying trespass.<sup>64</sup> Individuals received no fourth amendment protection unless they had proprietary or possessory interests in the property searched.<sup>65</sup> In *Olmstead v. United States*,<sup>66</sup> the Supreme Court held that eavesdropping on telephone conversations by tapping the wires was not a search because the “wires are not part of [one’s] house or office any more than are the highways along which they are stretched.”<sup>67</sup> A search, then, required an actual physical invasion into a “constitutionally protected area.”<sup>68</sup>

In 1967, the Supreme Court repudiated the trespass doctrine. In *Katz v. United States*,<sup>69</sup> the Court held that it was a search to attach an electronic eavesdropping device to the outside of a telephone booth in order to hear and record conversation inside the booth.<sup>70</sup> The fourth amendment was intended to “protect people, not places.”<sup>71</sup> The *Katz* standard, set out in Justice Harlan’s concurring opinion, focused on privacy interests rather than property. As interpreted in *Katz*, the Constitution will protect individuals who have “exhibited an actual (subjective) expectation of privacy and . . . the expectation [is] one that society is prepared to recognize as ‘reasonable.’”<sup>72</sup> In order to determine whether

62. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring) (landlord’s consent to search lessee’s apartment does not vitiate warrant requirement).

63. The problem partially stems from the fact that “[f]or clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product.” Amsterdam, *supra* note 59, at 349.

64. C. WHITEBREAD, *CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* § 13.02(a) (1980).

65. Compare *Goldstein v. United States*, 316 U.S. 114 (1942) (no trespass when dictaphone placed against office wall to hear conversations in office next door since no invasion of office) with *Silverman v. United States*, 365 U.S. 505 (1961) (trespass doctrine excluded eavesdropping evidence when “spike” microphone inserted under baseboard made contact with heating duct running throughout defendant’s house since actual invasion into house).

66. 277 U.S. 438 (1928).

67. *Id.* at 465. *Olmstead* imported and distributed contraband alcohol in violation of the prohibition acts. *Id.* The police discovered his involvement by using telephonic eavesdropping equipment. *Id.* at 456. The Court held that there was neither a search nor seizure because “[t]he insertions were made without trespass upon any property of the defendants.” *Id.* at 457.

68. *Silverman v. United States*, 365 U.S. 505, 512 (1961). Constitutionally protected areas were: “persons,” including bodies of persons and clothing; “houses,” including business offices, stores and garages; “papers,” including letters; and “effects,” including cars. 1 W. LAFAVE, *supra* note 58, § 2.1, at 351.

69. 389 U.S. 347 (1967). See *supra* note 41.

70. *Id.* at 353.

71. *Id.* at 351.

72. *Id.* at 361 (Harlan, J., concurring). Although the *Katz* standard expanded the scope of

society will tolerate a privacy interest, governmental interests are balanced against individual expectations of privacy.<sup>73</sup> The government interest rests in preventing crime, while the individual interest rests in being left alone.<sup>74</sup>

The balancing equation may result in a reduction of an individual's privacy expectations. For example, individuals generally have legitimate privacy interests in their luggage and effects.<sup>75</sup> The police may not routinely search luggage without a warrant based on probable cause.<sup>76</sup> However, when police have probable cause to believe contraband is located in an automobile, they may search luggage in the vehicle without a warrant.<sup>77</sup> In such a circumstance, the government interest in prompt, effective discovery of contraband overrides the fourth amendment war-

the fourth amendment, the vague nature of the standard rendered it "impossible to state with precision the degree of this expansion." 1 W. LAFAVE, *supra* note 58, § 2.1, at 229. The ultimate question of whether an individual possesses a reasonable expectation of privacy is a value judgment and is therefore not susceptible to an exact definition.

73. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), illustrates the proper focus of a fourth amendment inquiry. The Court held that the fourth amendment does not allow a roving border patrol to stop a car near the Mexican border to question the occupants regarding their immigration status when the only ground for suspicion was that the occupants looked Mexican. The Court carefully weighed the valid public interest in preventing illegal entry of aliens against interference with individual liberty. *Id.* at 883. While recognizing that the economic and social problems created by aliens are a legitimate public concern, the Court held that allowing the government to stop cars day or night on a city street or a busy highway would result in broad and unlimited discretion inconsistent with fourth amendment goals. *Id.* at 882-83.

74. The concern is that "if the particular form of surveillance practiced . . . is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, *supra* note 59, at 403.

75. *United States v. Chadwick*, 433 U.S. 1, 13 (1977) ("Luggage contents are not open to public view. . . . [L]uggage is intended as a repository of personal effects."); *see also* *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979) ("[A]s we observed in [*Chadwick*], luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy").

76. In *United States v. Chadwick*, 433 U.S. 1 (1977), the defendants were observed loading an unusually heavy footlocker onto a train bound for Boston. The footlocker was leaking talcum powder, a substance frequently used to mask the odor of marijuana or hashish. When the train arrived in Boston, federal agents arrested the defendants and seized the footlocker. More than an hour after the arrest, the agents opened and searched the footlocker without a warrant. The Court held the search invalid and noted the important privacy interests at stake. *Id.* at 15-16. When the defendants placed "personal effects inside a double-locked footlocker, [they] manifested an expectation that the contents would remain free from public examination." *Id.* at 11.

77. *See United States v. Ross*, 456 U.S. 798 (1982) (warrantless search of compartments and all containers within vehicle whose contents are not in plain view upheld if police stopping auto had probable cause to believe vehicle contained contraband).

rant requirement.<sup>78</sup> Similarly, if the police have reason to believe that lives are endangered or that evidence is in imminent danger of being destroyed, a warrantless search may be held based on these exigent circumstances.<sup>79</sup>

“Plain view” is another fourth amendment doctrine that justifies warrantless government intrusions. Under the plain view doctrine, it is not a search if a police officer, who has a right to be in a particular place, observes something that is exposed to the general public.<sup>80</sup> An individual has no expectation of privacy in anything “that he knowingly exposes to the public.”<sup>81</sup> The government interest in discovering contraband and preventing crime takes priority in such instances.<sup>82</sup>

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78. *Id.* Congress has always considered warrantless searches of vessels, wagons and carriages reasonable. *Id.* at 805 (citing *Carroll v. United States*, 267 U.S. 132, 150-51 (1925)).

79. “The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (upholding warrantless entry into house to search for armed robber).

Potential destruction of evidence may also justify otherwise illegal police activities. In *State v. Anaya*, 89 N.M. 302, 303, 551 P.2d 992, 993 (1976):

Officers obtained a search warrant to search the trailer occupied by defendants. The search party arrived a short distance from the trailer at 6:00 a.m. At 6:03 a.m., Lieutenant Montoya and Officer Lopez removed a piece from the skirting around the base of the trailer, crawled underneath and began sawing the sewer pipe beyond the confluence of the piping from the two bathrooms. Someone used one of the bathrooms. When the toilet was flushed the officers were sprayed with water and urine from the opening in the partially sawed pipe. Fearing their presence under the trailer had been discovered, by walkie-talkie, Lieutenant Montoya directed other officers to execute the search warrant. This message was received at 6:09 a.m. Officers arrived at the front door of the trailer at 6:10 a.m. The officers underneath the trailer heard the officers knock and identify themselves at the front door of the trailer. The officers underneath the trailer heard running followed by a second flush. They had just completed the severing of the pipe. They recovered two packets of heroin from the sewer pipe immediately after the second flush.

The court held that the defendants' previous post-arrest conduct—running for the bathroom—provided the “exigent circumstances” to justify severing the sewer line. *Id.* at 303, 551 P.2d at 993.

80. *Harris v. United States*, 390 U.S. 234 (1968) (per curiam). Harris was arrested for robbery as he entered a car. While securing the car, an officer opened the front door and noticed the registration on the metal stripping over which the car door closed. The registration was later used in prosecuting Harris. The Court held that opening the door was reasonable and the registration card was, therefore, in plain view. *Id.* at 235-36.

81. *Katz*, 389 U.S. at 351. See also *Oliver v. United States*, 466 U.S. 170 (1984). In *Oliver*, the Supreme Court held that the *Katz* standard of reasonable expectation of privacy does not extend to an open field owned by an individual. *Id.* at 181. Government intrusion on an open field is not a search. *Id.* at 183.

82. *Oliver v. United States*, 466 U.S. 170, 178-80 (1984). The majority holding of open access and visibility in *Oliver* is questionable in light of the characteristics of the field. This open field had a locked gate at the entrance, a no trespassing sign and was highly secluded—“bounded on all sides by woods, fences, and embankments and [could not] be seen from any point of public access.” *Id.* at 174. Thus, under the *Oliver* holding, even objects which are not

The plain view doctrine also extends to a law enforcement officer's use of some mechanical devices for sensory enhancement. Use of flashlights<sup>83</sup> and binoculars<sup>84</sup> has survived fourth amendment challenges on this basis: "Nothing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford them . . . ."<sup>85</sup>

The balancing process may also affect the "probable cause" standard used once government intrusion on privacy rises to the level of a search. For example, in *Terry v. Ohio*,<sup>86</sup> the Supreme Court held that officers may frisk a person they have stopped if they reasonably believe the person is armed and dangerous.<sup>87</sup> While the Court recognized that a frisk is a search, the Court reasoned that the officer's need for self-protection coupled with the fact that a frisk is not a "full-blown" search warranted a lesser standard than probable cause.<sup>88</sup>

In sum, the extent of fourth amendment protection depends on the balance struck between individual and government interests. While the courts will protect the right to privacy, they will give significant weight to governmental interests. In the balancing process, warrants may be required or disposed of, the probable cause standard may be raised or

in plain view may not warrant fourth amendment protection. This extension of the plain view doctrine illustrates the alarming erosion of fourth amendment rights in the name of government interest in preventing crime.

83. *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970). The fact that an officer "used a flashlight to pierce the nighttime darkness does not transform his obligation into a search. . . . The plain view rule does not go into hibernation at sunset." *Id.* at 189. See also *Texas v. Brown*, 460 U.S. 730, 740 (1983) ("[U]se of artificial means to illuminate a darkened area simply does not constitute a search.").

84. See, e.g., *People v. Vermouth*, 42 Cal. App. 3d 353, 361, 116 Cal. Rptr. 675, 680 (1974) (use of binoculars to observe marijuana plant on deck visible from neighbor's yard held not a search); *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973) (per curiam) (observing unloading of contraband from vehicles in the open held not a search), *cert. denied*, 416 U.S. 936 (1974).

85. *United States v. Knotts*, 460 U.S. 276, 282 (1983) (warrantless use of a beeper—an electronic signaling device—to monitor movements of a non-contraband item in an automobile over public highways not a search). But see *United States v. Karo*, 104 S. Ct. 3296, 3305 (1984) (warrantless monitoring by beeper after device unwittingly taken into private residence is a fourth amendment violation). See Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297 (1985).

86. 392 U.S. 1 (1968).

87. *Id.* at 30. In *Terry*, a policeman, after observing Terry and two others apparently "casing" a store, approached and asked for identification. When the suspects mumbled an answer, the officer grabbed Terry, patted down the outside of his clothes, felt a pistol and removed it. *Id.* at 5-7. Both the initial stop and the frisk were upheld. *Id.* at 30-31.

88. *Id.* at 24-25. "Unquestionably," Terry was entitled to constitutional protection as he walked down the street. *Id.* at 9. The question was "whether in all circumstances of this on-the-street encounter, his right to personal security was violated." *Id.*

lowered, and the definition of "search" may be narrowed or expanded. Novel factual situations undergo judicial tailoring within this general framework.

### B. *Are Sniffs Searches?*

#### 1. *United States v. Place*

In *United States v. Place*,<sup>89</sup> the Supreme Court considered the fourth amendment expectation of privacy in connection with a drug-detecting dog's sniff of luggage at a public airport.<sup>90</sup> In *Place*, Drug Enforcement Administration (DEA) agents in New York were notified by Miami law enforcement officers that Place had acted suspiciously while at Miami International Airport.<sup>91</sup> Upon landing at La Guardia Airport, Place's behavior again aroused suspicion.

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89. 462 U.S. 696 (1983).

90. *Id.* at 707. Prior to the *Place* decision, eight out of nine circuits which considered the issue had held under similar facts that a dog sniff was not a search. See *United States v. Race*, 529 F.2d 12, 14 (1st Cir. 1976) (air cargo warehouse sniff); *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982) (airport sniff), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980) (airport sniff), *cert. denied*, 450 U.S. 923 (1981); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.) (airport sniff), *cert. denied*, 452 U.S. 962 (1981); *United States v. Lewis*, 708 F.2d 1078, 1080 (6th Cir. 1983) (airport sniff); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980) (airport sniff); *United States v. Burns*, 624 F.2d 95, 101 (10th Cir.) (sniff in motel room), *cert. denied*, 449 U.S. 954 (1980); *United States v. Fulero*, 498 F.2d 748, 749 (D.C. Cir. 1974) (sniff at bus depot at port of entry). *But see United States v. Beale*, 674 F.2d 1327 (9th Cir. 1982) (airport sniff is a search), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). See *infra* note 138 for background of *Beale*.

Many state courts which had considered the issue prior to *Place* had also found the sniff not to be a search. See *State v. Morrow*, 128 Ariz. 309, 312, 625 P.2d 898, 901 (1981) (airport sniff); *People v. Mayberry*, 31 Cal. 3d 335, 342, 644 P.2d 810, 814, 182 Cal. Rptr. 617, 621 (1982) (airport sniff); *State v. Groves*, 65 Hawaii 104, 113, 649 P.2d 366, 372 (1982) (airport sniff); *People v. Price*, 54 N.Y.2d 557, 561, 431 N.E.2d 267, 269, 446 N.Y.S.2d 906, 908 (1981) (airport sniff); *State v. Wolohan*, 23 Wash. App. 813, 820, 598 P.2d 421, 425 (1979) (sniff of package at bus station).

91. 462 U.S. at 698. DEA agents were no doubt attempting to determine whether Place fit the drug courier profile—a subjective checklist which includes: arriving from a "source city," nervous behavior, a ticket purchased with cash, a ticket not purchased in the individual's name, and possession of large, brand-new suitcases. For a discussion of the drug courier profile, see *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983).

In *Place*, Miami law enforcement officers approached Place as he proceeded to the gate and asked for identification and his ticket. Place complied and consented to a search of his checked luggage. The officers did not search the luggage, however, because of the imminent departure of Place's plane. Place's remark to the officers that he recognized that they were police prompted agents to examine the address tags on his bags. Discrepancies were noted in the street addresses. Additional investigation revealed that the addresses were non-existent and that Place had given a telephone number which belonged to a third address on the same street. Miami officers then alerted New York DEA agents. 462 U.S. at 698.

The DEA agents approached Place and informed him that they believed he might be carrying narcotics.<sup>92</sup> When Place refused permission to search his two bags, the agents told him they were going to take the luggage in order to get a search warrant. The luggage was removed to Kennedy Airport and subjected to a dog sniff test minutes later. The dog "alerted"<sup>93</sup> to the smaller bag but reacted ambiguously to the larger bag. A search warrant was later secured for the smaller bag. This bag contained 1.125 grams of cocaine.<sup>94</sup>

The Supreme Court held that the dog sniff was not a search.<sup>95</sup> Initially, the Court confirmed that the fourth amendment protects an individual's privacy interest in the contents of personal luggage.<sup>96</sup> However, the Court reasoned that dog sniffs do not violate that privacy interest because of their non-intrusive manner and their limited disclosure of information.<sup>97</sup> Since luggage is a closed container, non-contraband items are not exposed to public view.<sup>98</sup> The sniff is "much less intrusive than a typical search" because officers do not have to rummage through per-

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92. At the time the agents identified themselves to Place, he responded that he had known immediately that they were "cops." Place also told the agents his bags had already been searched in Miami. The agents requested and received Place's identification. *Id.* at 698-99.

93. A dog "alerts" or "reacts positively" when it detects the scent of drugs in the air surrounding the target. *See* *United States v. Williams*, 726 F.2d 661, 664 (10th Cir.) (airport sniff not a search), *cert. denied*, 104 S. Ct. 3523 (1984). Classic alert behavior is to circle the target. If the target is a suitcase, the dog might show interest by scratching and biting the suitcase. *Id.*

94. *Place*, 462 U.S. at 699. The sniff in *Place* occurred late Friday afternoon. The agents then retained the baggage until Monday morning when they conducted a search with a warrant. *Id.*

95. *Id.* at 707. The Court did find, however, that there was a seizure of Place's luggage. Although a brief detention of personal effects is only minimally intrusive of fourth amendment rights, given "strong countervailing governmental interests . . . based only on specific articulable facts that the property contains contraband or evidence of a crime," the Court found the length of detention of Place's luggage unreasonable in the absence of probable cause. *Id.* at 706-07.

96. *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 13 (1977)). *See supra* notes 76-77 for a discussion of *Chadwick*.

97. *Id.* at 707. Some courts and commentators considered the Supreme Court's pronouncement on sniffs to be dictum and not binding. *See, e.g., United States v. Beale*, 731 F.2d 590, 593 (9th Cir. 1983), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). *See infra* note 138 for background of *Beale*. *See also* Note, *United States v. Place: Is There any Room in This Place for a Sniffing Dog?*, 7 CRIM. JUST. J. 141 (1983). However, as the Ninth Circuit pointed out in reversing *Beale*, 736 F.2d at 1291, the Supreme Court has clearly directed courts to follow its pronouncement in *Place*. For example, in *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court characterized its statement in *Place* as a holding, stating that the "Court [in *Place*] held that subjecting luggage to a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." *Id.* at 123 (emphasis added) (citing *Place*, 462 U.S. at 707).

98. *Place*, 462 U.S. at 707.

sonal effects.<sup>99</sup> Further, only limited information regarding the presence or absence of drugs is revealed. Therefore, a sniff insures that the owner of the luggage is not embarrassed or inconvenienced.<sup>100</sup> According to the Court, a canine sniff is *sui generis*.<sup>101</sup>

## 2. Implications of *Place*

After *Place*, fact patterns developed that required courts to decide the question of whether a sniff will ever violate the fourth amendment. Some courts<sup>102</sup> and commentators<sup>103</sup> have concluded that *Place* sanctioned sniffs of all inanimate objects wherever they are located. Exam-

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99. *Id.*

100. *Id.* It is arguable whether the sniff's "limited disclosure" insures that the owner of luggage will not be embarrassed. For example, in one drug case, *The Miami Herald* reported that dogs alerted to cocaine on part of \$1.3 million in bills seized in connection with a money-laundering operation. A witness for the defense, a toxicologist, attempted to show that all money is tainted by analyzing money taken from seven different Florida banks. All of these bills had traces of cocaine. Nonetheless, the defendant was convicted. Landers, *Look who has cocaine*, *The Miami Herald*, Feb. 19, 1985, § C, at 1, col. 1.

*The Miami Herald* decided to conduct its own experiment. Eleven prominent citizens (including Archbishop Edward McCarthy; Jeb Bush, Chairman of the Dade County Republican Party; and Polly De Hirsh Meyer, Dade County philanthropist) volunteered \$20 bills in their possession for analysis. Of the 11 bills, 10 had traces of cocaine. (The eleventh bill had been in circulation a very short time.) Cocaine is apparently so pervasive in Florida that most people will be in daily contact with it via the money they handle. *Id.* at 2, col. 1.

While each of the 11 \$20 bills contained only microscopic traces of cocaine, it is possible for a drug detecting dog to alert to cocaine-tainted bills carried by innocent people. For example, an alert to a businessman who is carrying a large amount of cash in his briefcase would subject the businessman to the very "embarrassment and inconvenience" *Place* sought to avoid. See also *infra* notes 169-83 and accompanying text for a discussion of the fallibility of dogs.

101. The holding in *Place* has been criticized by commentators and judges. The Court's decision on the sniff issue "can hardly be characterized as an informed one." 1 W. LAFAVE, *supra* note 58, § 2.2(f), at 117 (Supp. 1985). The sniff issue should not have been decided since it was never briefed or argued before the Court. *Place*, 462 U.S. at 711 (Brennan, J., concurring). Further, the issue was "wholly unnecessary to [the] judgment" since the Court "ultimately held that the defendant's luggage had been impermissibly seized." *United States v. Jacobsen*, 466 U.S. 109, 135 (Brennan, J., dissenting).

102. See, e.g., *United States v. Vermouth*, No. CR 83-731 (C.D. Cal. Apr. 12, 1984) (unpublished Findings of Fact) (sniff of storage locker not a search) (relying on *United States v. Place*, 462 U.S. 696 (1983)), *aff'd*, No. 84-5111 (9th Cir. Aug. 9, 1985) (unpublished opinion), *petition for cert. filed*, 59 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966). See *infra* notes 106-10 and accompanying text. See also Note, *supra* note 97, at 150, in which the author discusses *United States v. Beale*, 731 F.2d 590 (9th Cir. 1983), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984), and notes, "[i]t appeared that the rationale behind the Ninth Circuit decision was the mistaken belief that *Place* advocated dog sniff investigations with few judicial guidelines."

103. See, e.g., Note, *supra* note 97, at 141. *Place* appeared to be the "death knell on the issue of whether dog sniffing of inanimate objects in a public place invoked the Fourth Amendment." *Id.*



ples of that view in practice are *United States v. Vermouth*<sup>104</sup> and *United States v. DiCesare*.<sup>105</sup>

In *Vermouth*, a sniff of a rented locker at a private storage facility was held not to be a search.<sup>106</sup> Despite the defendant's apparent attempt to insure privacy—the defendant's locker was locked and the facility was protected by an elaborate security system<sup>107</sup>—the district court held that the use of dogs to determine the contents of his locker did not violate Vermouth's expectation of privacy.<sup>108</sup> According to the court, the holding in *Place* was "persuasive and binding" and a factor which "convinced the court that the employment of a narcotic detection dog to sniff a storage locker did not constitute a search within the meaning of the Fourth Amendment."<sup>109</sup> In affirming the district court, the Ninth Circuit applied *Place* to private areas, contending that any difference between dog searches in private as opposed to public areas would be "a distinction without significance."<sup>110</sup>

104. No. CR 83-731 (C.D. Cal. Apr. 12, 1984) (unpublished Findings of Fact), *aff'd*, No. 84-5111 (9th Cir. Aug. 9, 1985) (unpublished opinion), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966).

105. 765 F.2d 890 (9th Cir. 1985).

106. No. CR 83-731, record at 48. In early 1983, the Santa Barbara Sheriff's Office was investigating burglaries at various storage sheds in and around Goleta, California, a community approximately 10 miles north of Santa Barbara. The break-ins were approximately 30 miles from the storage facility involved in this case. During the investigation of these burglaries, the sheriff's office, suspecting that the burglaries might be related to storage of marijuana, arranged to bring United States Customs' drug detecting dogs to Santa Barbara to search The Storage Place, a facility where defendant had rented a locker. No burglaries had occurred there. *Id.* at 19-21.

The owner of the storage facility gave permission for the dogs to enter the property. The dogs were allowed to randomly search up and down the rows of storage lockers and consequently alerted to several storage lockers. The agents then obtained search warrants for the lockers. Upon opening defendant's locker, a late-model Mercedes was discovered. *Id.* at 34. The agents pushed the car out of the locker and, after an hour, and with the help of the storage facility's owner, pried open the trunk. Among other incriminating evidence found in the trunk were two locked footlockers containing approximately 50 pounds of cocaine. *Id.* at 35.

107. *Petition for Writ of Certiorari* at 3-4 n.1, *United States v. Vermouth*, No. 84-5111 (9th Cir. Aug. 9, 1985), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966). The elaborate security system was designed to insure that not even the public could enter the grounds of The Storage Place. The facility was surrounded by a wire fence topped by four separate strands of barbed wire. The entry gate was locked at all times and access was limited by a push-button combination lock. Each time that entry was made, a record of the entry printed out on a tape. Additionally, a film record was made of each car entering the premises. After business hours, the facility was patrolled by four guard dogs inside and one dog outside the fence. Unlike some other storage businesses, The Storage Place was only open during normal business hours and even customers could not enter after hours. *Id.*

108. No. CR 83-731, record at 48.

109. *Id.* at 48-49 (emphasis added). The Storage Place, however, is clearly distinguishable from a "public" place such as the airport in *Place*. See *supra* note 107 and accompanying text.

110. *United States v. Loomis*, No. 84-5167 (9th Cir. Aug. 9, 1985) (unpublished opinion)

In *DiCesare*, the court held that a sniff of a car trunk did not violate the defendant's fourth amendment rights.<sup>111</sup> The Ninth Circuit did not consider whether the owner of the car had a privacy interest in the trunk of the car or whether the sniff occurred in a "public place." Rather, the court, relying on *Place*, disposed of the entire issue in one sentence: "The canine's sniff of the trunk was not 'a search' requiring probable cause."<sup>112</sup>

Extending or relying on *Place* in this manner raises the Orwellian spectre of 1984.<sup>113</sup> As Justice Brennan stated in *United States v. Jacobsen*:<sup>114</sup> Under the rationale of *Place*, "if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present."<sup>115</sup>

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(consolidated with *United States v. Vermouth*, No. 84-5111 (9th Cir. Aug. 9, 1985) (unpublished opinion), *petition for cert. filed*, 59 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966)). However, as the petition for the writ of certiorari stated:

If this Court sanctions the use of dogs to search hundreds of storage lockers in a high-security area without probable cause or reasonable suspicion, it is not unreasonable to expect that prosecutors will come before this Court tomorrow with the argument that after obtaining permission from the landlord dogs can run down the halls of security apartment buildings examining the doors of all of the residential units.

Petition for Writ of Certiorari at 11, *United States v. Vermouth*, No. 84-5111 (9th Cir. Aug. 9, 1985), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966).

111. 765 F.2d at 897. Police had observed DiCesare and an associate, Flannery, drive in DiCesare's car to the home of a suspected drug dealer. DiCesare then went to Flannery's apartment, took Flannery's car, returned home and placed a suitcase in the trunk of Flannery's car. A drug detecting dog was brought in in order to sniff the trunk. The dog's positive alert, the suspicious activity of DiCesare and Flannery preceding the alert, and a record of secretive meetings at which DiCesare participated and appeared to be using cocaine provided the evidence to establish probable cause for issuing warrants to search DiCesare's apartment, and Flannery's car and apartment. The suitcase in Flannery's trunk contained a balance scale and six pounds of cocaine. Flannery's apartment contained cocaine, drug paraphernalia and notes related to cocaine trafficking. *Id.* at 893-94.

112. 765 F.2d at 897 (citations omitted). It appears that the Ninth Circuit finally acquiesced to *Place*'s "no-search" rationale after a tedious encounter with the Supreme Court over the issue in *United States v. Beale*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). See *infra* note 138. *Beale* and *Place*, however, were factually similar. In contrast, the facts in *DiCesare* are distinguishable from both *Place* and *Beale*. See *supra* notes 91-94 and accompanying text for discussion of facts of *Place*; see *infra* note 138 for discussion of facts of *Beale*.

113. G. ORWELL, 1984 (1949). In 1984, Orwell explores the bleak prospects of a fictional totalitarian state. *Id.* See also *United States v. Beale*, 674 F.2d 1327 (9th Cir. 1982), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). "Nothing would invoke the spectre of a totalitarian police state as much as the indiscriminate blanket use of trained dogs." *Id.* at 1336 n.20.

114. 466 U.S. 109, 138 (1984).

115. *Id.* (Brennan, J., dissenting). In *Jacobsen*, DEA agents took a small sample of powder from a package addressed to the defendant which had been intercepted by Federal Express. The agents submitted the contents to a chemical field test to determine whether the substance was cocaine. *Id.* at 111-12. The Court held that no violation of any legitimate interest in

In addition to sanctioning sniffs of all inanimate objects, the talismanic words of *Place* could justify dogs being brought into people's homes "to sniff and bite our clothes, beds, chairs, cradles, or whatever other possessions we keep in our homes."<sup>116</sup> For example, in *DiCesare*, defendant Marin was arrested with defendant DiCesare in DiCesare's apartment.<sup>117</sup> Soon afterwards, the police went to Marin's apartment<sup>118</sup> and found a large green suitcase in plain view.<sup>119</sup> The police secured the premises and brought a drug detecting dog into the apartment. The dog reacted positively to the suitcase. Based on the sniff and the holding in *Place*, a search warrant was issued for the suitcase and apartment.<sup>120</sup>

The defense in *DiCesare* advanced an argument that it is inappropriate to bring german shepherd drug detecting dogs into a private residence.<sup>121</sup> The Ninth Circuit considered the issue irrelevant to the case and rejected the argument.<sup>122</sup> The majority suggested that had they addressed the issue, they would have found that the invasion of homes by dogs might not be terribly offensive.<sup>123</sup> The majority's suggestion that

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privacy occurred because the chemical test merely disclosed the absence or presence of contraband. *Id.* at 123. The Court analogized the chemical test to sniff tests which are not fourth amendment violations and stated that the holding was "dictated" by *Place*. *Id.* at 123-24.

The dissent viewed the majority as having adopted a general rule that a surveillance technique does not constitute a search if it only reveals whether or not an individual possesses contraband. *Id.* at 136-37 (Brennan, J., dissenting). According to the dissent, such a rule would support much more intrusive searches since the use of the technique, accuracy of the technique and the privacy interest upon which it intrudes would become irrelevant, as the emphasis shifted to the nature of the object of the search and its legality or illegality. *Id.*

116. *DiCesare*, 765 F.2d at 901 (Reinhardt, J., concurring).

117. *Id.* at 894. The government began investigating DiCesare in January 1983, after DiCesare and his wife insisted on depositing large amounts of cash in a Los Angeles bank but refused to file mandatory currency reports. In July 1983, the police seized approximately 33 pounds of cocaine in a hotel room. DiCesare arrived at the hotel room and was arrested but later released. He was placed under surveillance and secretive meetings were observed. *Id.* at 893. DiCesare's apartment was subsequently searched pursuant to a warrant. Large quantities of cash, cocaine, other narcotics trafficking paraphernalia and several envelopes containing large amounts of money addressed to an attorney were found in the apartment. *Id.* at 894.

118. *Id.* The avowed purpose of their entrance was to return a small child who was with Marin at the time of his arrest. *Id.*

119. For a discussion of the plain view doctrine, see *supra* notes 80-85 and accompanying text.

120. 765 F.2d at 896-97.

121. *Id.* at 897.

122. *Id.* The court concluded that they did not need to reach that issue. *Id.*

123. *Id.* at 899-900 n.1; *id.* at 903 n.1 (Reinhardt, J., concurring). In a scathing concurring opinion, Judge Reinhardt took the majority to task for failing to address an activity which was "an unprecedented and outrageous violation of individual rights." *Id.* at 901 (Reinhardt, J., concurring). Raising 1984 concerns, Judge Reinhardt stated that the image of the police state was as clear as it was in Nazi Germany when dogs were used by Hitler to locate Jews in order to complete the "Final Solution." *Id.* at 902 (Reinhardt, J., concurring). "The intrusion of . . .

invasion of homes may not be terribly offensive, coupled with its decision not to address the issue at all, reinforces the attitude of law enforcement officials<sup>124</sup> and the public that dogs may be legally used for almost any purpose.<sup>125</sup>

*Place* also may serve as the foundation for even more abusive use of dogs. Dogs may not be limited to sniffing objects—whether in public places or in homes.<sup>126</sup> Mass sniffs of *people* may be permitted as the government's interest in curtailing drug traffic grows. This type of conduct is not a fanciful hypothetical. Even before *Place* was decided, an exploratory search of an entire student population was approved in *Doe v. Renfrow*.<sup>127</sup> There, during a two and one-half hour investigation, 2780 students in an Indiana secondary school were sniffed in response to the fear of a growing drug problem.<sup>128</sup>

[Students] were required to sit quietly in their seats with their belongings in view and their hands upon their desks. They were forbidden to use the washroom unless accompanied by an escort. . . .

The dogs were led up and down each aisle of the classroom, from desk to desk, and from student to student. Each student was probed, sniffed, and inspected by at least 1 of the

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dogs is . . . reminiscent of the ugliest types of scenes that have occurred in police states." *Id.* at 901 (Reinhardt, J., concurring).

124. "[T]he Los Angeles Police Department apparently believes it is free to use dogs to search people's homes, [and] the United States Attorney agrees . . ." *Id.* at 901 (Reinhardt, J., concurring).

125. For example, as part of a drug crackdown, Capital Cities-ABC, Inc. announced that it would send drug detecting dogs into its newspaper and television offices. *Publisher Reconsiders Using Drug-Sniffing Dogs*, L.A. Herald Examiner, Jan. 13, 1986, at A6, col. 1. After receiving a petition signed by 50 reporters, the publisher of the *Kansas City Star* and *Kansas City Times* stated, "[i]f this is going to cause anybody discomfort, I'm certainly willing to sit down and talk about it." *Id.* The issue of the legality of bringing in the dogs was noticeably absent from this article.

126. Many courts have already expressed approval of random dragnet searches. See *State v. Wolohan*, 23 Wash. App. 813, 818, 598 P.2d 421, 424 (1979) (allowing indiscriminate, exploratory search of a Greyhound bus packaging area where release of odors from defendant's package negated expectation of privacy). See also *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (approving mass sniffs of school children), *rev'd on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); *State v. Morrow*, 128 Ariz. 309, 311, 625 P.2d 898, 900 (1981) (upholding random sniffs at airport by dog whose handler was just keeping dog in practice).

127. 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

128. *Id.* at 1015. From September 1978 to March 1979, school officials recorded 21 instances of drug-related incidents among the students. Thirteen such incidents occurred within the four-week period prior to the sniff. Additionally, during the same four-week period faculty and parents reported daily concern over the drug problem. *Id.*

14 german shepherds detailed to the school. When the search team assigned to petitioner's classroom reached petitioner, the police dog pressed forward, sniffed at her body, and repeatedly pushed its nose and muzzle into her legs. The uniformed officer then ordered petitioner to stand and empty her pockets, apparently because the dog "alerted" to the presence of drugs. . . . The dog again sniffed her body, and again it apparently "alerted." Petitioner was then escorted to the nurse's office for a more thorough physical inspection.

. . . After denying that she had ever used marihuana, petitioner was ordered to strip. She did so, removing her clothing in the presence of . . . two women. The women then looked over petitioner's body, inspected her clothing, and touched and examined the hair on her head. Again, no drugs were found. Petitioner was subsequently allowed to dress and was escorted back to her classroom.<sup>129</sup>

The district court held that the sniffing by a trained drug detecting canine "was reasonable and not a search."<sup>130</sup> Although the *Renfrow* holding has been criticized and rejected by several courts,<sup>131</sup> the Supreme Court refused certiorari in *Renfrow*<sup>132</sup> and has never decided the issue.

Although the majority in *Place* stressed the non-intrusive nature of the sniff technique as applied to an inanimate object, a heightened governmental interest in the prevention of drug trafficking might be used to justify a diminished expectation of privacy in an individual's body.<sup>133</sup> Under this approach, law enforcement officers could stand in an airport

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129. *Renfrow*, 451 U.S. 1022, 1023-24 (Brennan, J., dissenting from denial of certiorari) (footnote omitted). The dogs alerted 50 times. However, only 17 students were in possession of contraband. *Id.* It is interesting to note that the dog who alerted to the plaintiff was apparently reacting to the lingering odor on plaintiff's body of plaintiff's dog who was in heat. *Id.* at 1024 n.1. See *infra* notes 169-83 and accompanying text for discussion of reliability and validity of dogs.

130. 475 F. Supp. at 1022.

131. See, e.g., *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 479 (5th Cir. 1982) (dog sniff of students in class was a search), *cert. denied*, 463 U.S. 1207 (1983). There the dogs actually "put their noses right up against the children's bodies." *Id.* at 478-79. "Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human[.]" particularly when done to an adolescent. *Id.* at 479. See also *Jones v. Latexco Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980). There, the court held that a sniff of public school students was a search because the dog was able to "detect odors completely outside the range of the human sense of smell [which] replaced, rather than enhanced, the perceptive abilities of school officials." *Id.* at 232-33 (footnote omitted).

132. 451 U.S. 1022 (1981).

133. See *supra* notes 126-32 and accompanying text for a discussion of *Renfrow*. See also *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985). There, the Supreme Court held that reasonable suspicion of alimentary canal drug smuggling was sufficient to support a

and have dogs sniff every arriving and departing passenger. The government would assert that a sniff test is less intrusive than a full search or a strip search. Indeed, the court in *Renfrow* found the sniff of a person not to be intrusive at all.<sup>134</sup> Arguably, then, *Place* could be extended to the ultimate invasion—people sniffing.

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16-hour detention of an individual in order to have her produce a bowel movement. *Id.* at 3311.

Customs inspectors concluded that de Hernandez fit the drug courier profile and was a balloon swallower—a person who smuggles drugs by swallowing balloons filled with drugs. *Id.* at 3307. She arrived at Los Angeles Airport with \$5000 in cash and no hotel reservations. She stated that the purpose of her trip was to purchase goods for her husband's store in Bogota, but had no appointments with vendors.

Subsequent to a strip search, she was given the option of returning to Colombia, agreeing to an x-ray or remaining under detention until she produced a monitored bowel movement. She chose to return to Bogota, but was unable to be placed on a plane the next morning. The inspectors then told her that she would be detained. Sixteen hours after she had landed, she had not produced a bowel movement. *Id.* at 3307-08. She had refused all food and drink and exhibited signs of discomfort “consistent with ‘heroic efforts to resist the usual calls of nature.’” *Id.* at 3308 (quoting *United States v. Montoya de Hernandez*, 731 F.2d 1369, 1371 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304 (1985)). A court order was then sought and a rectal examination was performed. A balloon containing a foreign substance was removed. De Hernandez was arrested and shortly thereafter passed 88 balloons containing 528 grams of cocaine. *Id.*

The Supreme Court stated that the fourth amendment balance between government interests and individual privacy rights is “struck much more favorably to the Government at the border,” *id.* at 3310, and that governmental interests “in stopping smuggling at the border are high indeed.” *Id.* at 3311.

The dissent characterized the entire episode as “‘disgusting and saddening.’” *Id.* at 3313 (Brennan, J., dissenting) (quoting *United States v. Holtz*, 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting) (“disrobing and search of a woman by United States border police”)). The dissent further stated:

[I] do not imagine that decent and law abiding international travelers have yet reached the point where they “expect” to be thrown into locked rooms and ordered to excrete into wastebaskets, held *incommunicado* until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures—all on nothing more than the “reasonable suspicion of low ranking enforcement agents. . . .

. . . .

. . . [T]he crux of my disagreement is this: We have learned in our lifetimes, time and time again, the inherent dangers that result from coupling unchecked “law enforcement” discretion with the tools of medical technology.

*Id.* at 3321-22 (Brennan, J., dissenting).

134. The court in *Renfrow* noted the diminished aspect of privacy inherent in a public school and the school's right and duty to supervise. 475 F. Supp. at 1022. “The student's right to be free from unreasonable search and seizure must be balanced with the necessity for the school officials to be able to maintain order and discipline in their schools and to fulfill their duties under the *in loco parentis* doctrine to protect the health and welfare of their students.” *Id.* at 1023 (quoting *M. v. Board of Educ.*, 429 F. Supp. 288, 292 (S.D. Ill. 1977)).

### C. *The Thomas Limitation*

#### 1. *The Thomas* decision

In *United States v. Thomas*,<sup>135</sup> the Second Circuit limited law enforcement use of dogs by holding that a sniff does violate the fourth amendment in certain situations, specifically, where the sniff is of a person's home.<sup>136</sup> The validity of *Thomas*, however, is questionable because the Supreme Court in *United States v. Place*<sup>137</sup> seemingly closed the door on the sniff issue.<sup>138</sup> Further, despite the Second Circuit's attempt to

135. 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); see *supra* notes 38-56 for a thorough discussion of *Thomas* and its majority and minority opinions.

136. *Id.* at 1366-67.

137. 462 U.S. 696 (1983); see *supra* notes 89-101 and accompanying text.

138. The history of *Beale* is illustrative. The Ninth Circuit reached the conclusion that dog sniffs are not searches after a tedious encounter with the Supreme Court on this issue. "I think [*Place*] leaves no room for application of the fourth amendment to dog sniffs of luggage located in a public place." *United States v. Beale (Beale I)*, 731 F.2d 590, 596 (9th Cir. 1983) (footnote omitted) (Reinhardt, J., dissenting), *withdrawn*, 728 F.2d 411 (9th Cir.), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984).

Prior to *Place*, the Ninth Circuit had been the only circuit which had considered the issue to hold that a sniff is a search. See *supra* note 90. Based on a fact situation similar to *Place*, the Ninth Circuit had held that a sniff is a fourth amendment intrusion. *United States v. Beale (Beale I)*, 674 F.2d 1327, 1335 (9th Cir. 1982), *cert. granted, vacated and remanded*, 463 U.S. 1202 (1983), *vacated and remanded, Beale II*, 731 F.2d 590 (9th Cir. 1983), *withdrawn*, 728 F.2d 411 (9th Cir.), *rev'd en banc, Beale III*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). *Beale* had aroused suspicion at a Florida airport. A detective approached *Beale* and a male companion, asked some questions and left. The detective then went to the baggage area and ordered *Beale's* luggage "sniffed." The dog alerted to *Beale's* suitcase. Authorities in San Diego were notified since *Beale* and his companion had already boarded a San Diego bound plane. *Beale I*, at 1328-29.

At the San Diego airport, another dog alerted to *Beale's* suitcase and *Beale* and his companion were arrested. Subsequently, a search pursuant to a warrant uncovered approximately 961 grams of cocaine in *Beale's* shoulder bag and approximately 137 grams of marijuana in his suitcase. *Id.* at 1329.

The Ninth Circuit held that the "use of a canine's keen sense of smell to detect the presence of contraband within personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause." *Id.* at 1335 (emphasis in original) (footnotes omitted).

The government petitioned for certiorari and the United States Supreme Court vacated and remanded for reexamination, in light of *Place*, 462 U.S. 626 (1983). *United States v. Beale*, 463 U.S. 1202 (1983). On remand, in *Beale II*, the Ninth Circuit distinguished *Place*. *Beale II*, 731 F.2d at 592. The *Beale II* court determined that *Place* focused on: "(1) [w]hether the seizure and detention of a traveler's luggage, located in an airport, may be effected without a warrant and on less than probable cause; and (2) if so, to what extent the seizure and detention are limited by the Fourth Amendment." *Id.* *Beale II* focused on a different issue—under conditions where there is a detention of luggage, is a sniff a fourth amendment intrusion? The court noted that "no federal court has yet upheld a canine investigation in the face of a record demonstrating a lack of prior individualized suspicion." *Id.* at 594 (emphasis in original) (footnote omitted). The court interpreted the statement in *Place*,

distinguish *Place* in *Thomas*, the factual situations in the two cases are arguably more similar than disparate. First, in *Thomas*, the area outside defendant Wheelings' apartment; whether it was a hallway or a street, was a public place; the dog did not enter the apartment, but only sniffed the air outside.<sup>139</sup> Second, the sniff itself, as in *Place*, was limited to the detection of the presence or absence of contraband.<sup>140</sup> Finally, since no officer "rummaged" through Wheelings' apartment, he was saved embarrassment. The conduct in *Thomas*, then, fits neatly into the *Place* definition of a sniff—a limited, discriminate, non-intrusive, non-embarrassing investigatory technique which occurred in a public place.

However, despite the appearance of irreconcilability, *Thomas* is consistent with *Place* because of the Second Circuit's narrow interpretation of the Supreme Court's holding. By reasoning that *Place* only applied to airport sniffs, the Second Circuit was able to find that sniffs which take place at locations other than airports necessitate different treatment.<sup>141</sup>

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that a sniff is not a search, *Place*, 463 U.S. at 707, as dictum and decided that the dictum must be viewed in the whole context of the *Place* decision, rather than in isolation. The Ninth Circuit then reiterated its prior position of requiring articulable suspicion prior to a sniff. *Id.* at 593, 595. "The effect of holding that a canine sniff investigation requires no articulable suspicion in circumstances in which the luggage is not detained . . . in order [to sniff], would be to encourage the indiscriminate use of roving trained dogs at public airports. We decline to reach this result." *Id.* at 595 (footnote omitted). The Ninth Circuit vacated and remanded. *Id.* at 596.

The panel's decision was subsequently withdrawn and a hearing en banc was granted. *United States v. Beale*, 728 F.2d 411 (9th Cir. 1984). On rehearing en banc, the Ninth Circuit held, according to *Place*, that the sniff of Beale's luggage was not a search. *United States v. Beale (Beale III)*, 736 F.2d 1289 (9th Cir.), cert. denied, 105 S. Ct. 565 (1984). Beale was neither detained nor inconvenienced in any way. *Id.* at 1292. Interference with his luggage was de minimus. *Id.* Finally, the sniff, according to the court, disclosed only the presence or absence of contraband. *Id.* at 1291.

Dissenting, Judge Pregerson stated the following:

[The majority] denigrates the reasonable expectation of privacy that travelers retain in their luggage. Second, it fails adequately to explain how an obvious intrusion into someone's personal effects—his suitcases—is not a search. Finally, [it] never even reaches the critical question . . . : whether the sniff, if not a full-blown search, nonetheless constitutes an investigatory stop triggering the more modest Fourth Amendment standards of *Terry v. Ohio*.

*Id.* at 1292 (Pregerson, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). See *supra* notes 86-88 and accompanying text for a discussion of *Terry*.

139. 757 F.2d at 1367.

140. The Supreme Court in *Place* considered limited disclosure dispositive. "[T]he sniff discloses only the presence or absence of narcotics, a contraband item." 462 U.S. at 707. For an opposing viewpoint, see *infra* notes 169-83 and accompanying text. A technique that determines only the presence or absence of contraband may be less intrusive than a traditional technique. However, "the fact remains that such a technique does intrude." *United States v. Jacobsen*, 466 U.S. 109, 141 (1984) (Brennan, J., dissenting).

141. *Thomas*, 757 F.2d at 1366.



## 2. The expectation of privacy

In *Place*, the Supreme Court focused primarily on the manner and degree of the government intrusion inherent in a dog sniff search.<sup>142</sup> The majority there reasoned that the defendant was not embarrassed by the dog sniff since the intrusion was limited and discriminating.<sup>143</sup> Therefore, no fourth amendment protection was warranted.<sup>144</sup>

In contrast, the Second Circuit's approach in *Thomas*, focused on whether and to what extent the sniff infringed on the defendant's expectation of privacy. Relying on *United States v. Katz*,<sup>145</sup> the Second Circuit began its analysis by considering whether the defendant, Wheelings, had an expectation of privacy which society would tolerate.<sup>146</sup> The *Thomas* court recognized that the result in *Place* could be justified by the already diminished expectation of privacy attached to luggage consigned to a common carrier at a public airport.<sup>147</sup> By consigning luggage to a carrier at an airport, individuals partially relinquish their privacy interests.<sup>148</sup> The luggage will be handled by many people, pushed, prodded and possibly ripped and opened.<sup>149</sup> Further, in order to prevent skyjacking, lug-

142. 462 U.S. at 707. "[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search." *Id.* The Supreme Court, however, failed to consider the Ninth Circuit's view that the degree of intrusiveness has no effect on the individual's expectation of privacy. *United States v. Beale (Beale II)*, 731 F.2d 590, 595 (9th Cir. 1983), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984); see *supra* note 138 for a complete discussion of the history and significance of *Beale*.

143. 462 U.S. at 707. The sniff, then, was considered *sui generis*. *Id.* But see *United States v. Jacobsen*, 466 U.S. 109, 136 (1984) (Brennan, J., dissenting), in which the dissent noted, "[n]either the Court's knowledge nor its imagination regarding criminal investigative techniques proved very sophisticated, for within one year [after *Place*] we have learned of another investigative procedure that shares with the dog sniff the same defining characteristics that led the Court to suggest that the dog sniff was not a search." *Id.* (Brennan, J., dissenting). See *supra* note 115 for a discussion of *Jacobsen*.

144. *Place*, 462 U.S. at 707. But see Justice Blackmun's concurring opinion in which he stated: "While the Court has adopted one plausible analysis of the issue, there are others. For example, a dog sniff may be a search, but a minimally intrusive one that could be justified . . . upon mere reasonable suspicion." *Id.* at 723 (Blackmun, J., concurring).

145. 389 U.S. 347 (1967); see *supra* note 41.

146. *Thomas*, 757 F.2d at 1366.

147. *Id.*

148. See *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). "There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta." *Id.* at 462. See also *United States v. Chadwick*, 433 U.S. 1 (1976). "Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel." *Id.* at 13.

149. Expectation of privacy with respect to luggage "declines as the anticipated public access to the baggage increases." *United States v. Bronstein*, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918 (1976).

gage is screened by x-ray machines and may be opened.<sup>150</sup> Yet, "homes" are specifically designated by the fourth amendment for heightened protective treatment and the courts have historically recognized that protection.<sup>151</sup> The *Thomas* court conceded that a sniff at an airport may not be considered a search, but explained that a practice which is not intrusive in a public airport may be intrusive "at a person's home."<sup>152</sup> Since the sniff related to Wheelings' home, the court concluded that he had a heightened expectation of privacy.<sup>153</sup>

It may be irrefutable that the most stringent constitutional protection is afforded the interior of a home. However, the sniff in *Thomas* did not occur *inside* Wheelings' apartment.<sup>154</sup> Nonetheless, the holding is based on the rationale that individuals have an expectation that the contents of their homes will not be sensed by a device outside their homes. A closed door should convey the same message as closed drapes or window shades—privacy is anticipated. Wheelings, unlike Place, did not expose the contents of his apartment to the public. He did not surrender a modicum of his expectation of privacy. Implicit in the Second Circuit's holding in *Thomas* is the recognition that the reduction in the privacy interest directly corresponds to the increased governmental interest at stake. For example, since major airports are commonly used to smuggle large amounts of contraband,<sup>155</sup> the governmental interest in curbing drug smuggling may have a high priority at an airport. However, the

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150. The high governmental interest in preventing skyjacking also justifies magnetometer searches at airports. Magnetometers ascertain whether there is metal in a hidden space by detecting changes in the magnetic field surrounding the area of the hidden space. *United States v. Bronstein*, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918 (1976). Courts have consistently held that use of a magnetometer to detect metal, is minimally intrusive. *See, e.g.*, *United States v. Doran*, 482 F.2d 932 (9th Cir. 1973); *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

151. A reasonable expectation of privacy in one's home has been recognized as traditional and fundamental.

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

*United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting) (footnote omitted), *aff'd*, 343 U.S. 747 (1952).

This zone of privacy is also clearly defined in constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated . . ." U.S. CONST. amend. IV.

152. 757 F.2d at 1366.

153. *Id.* at 1367.

154. *Id.* at 1366. In fact, the sniff occurred outside Wheelings' apartment. *Id.*

155. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 704 (1983).

same governmental concerns are simply not present when a person's home is involved.

### 3. The plain view doctrine

Notwithstanding the recognized constitutional protection traditionally afforded the home, the plain view doctrine could have operated to reduce Wheelings' legitimate expectation of privacy.<sup>156</sup> If the contents of Wheelings' apartment were "knowingly exposed" to the public, no constitutional protection would be available.<sup>157</sup> For example, if Wheelings left his door wide open and a police officer walked by, glanced in and saw evidence of criminal activity, no search would have occurred. In fact, strict analysis of the search of Wheelings' apartment under the plain view doctrine leads to the conclusion that the sniff was properly considered a search. Nothing inside Wheelings' apartment was directly observable by a policeman<sup>158</sup> and Wheelings did not "knowingly expose" the contents of his apartment to the general public.<sup>159</sup>

Courts which have addressed the plain view doctrine in connection with dog sniffs have held, however, that *observable sights* encompass detectable odors.<sup>160</sup> The courts adopting the "plain smell" doctrine hold

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156. See *supra* notes 80-85 and accompanying text describing and explaining the plain view doctrine.

157. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

158. The Supreme Court is currently deciding the issue of whether government agents may conduct warrantless overflights of private property to collect information to which they ordinarily would not be privy. *California v. Ciraolo*, No. 84-1513 (U.S. argued Dec. 10, 1985), 38 CRIM. L. REP. (BNA) 4123 (Dec. 18, 1985). In *Ciraolo*, the police had received an anonymous tip that defendant had marijuana plants growing in his backyard. The on-foot investigation was unsuccessful because the yard was enclosed by a six foot fence and an inner 10 foot fence. The police officer then flew over the yard at 1000 feet, observed the marijuana plants and photographed them. Subsequently, he procured a search warrant and seized the plants. Counsel for the government argued that the defendant's plants were not concealed from public view and police may use their own eyes to detect criminal activity. *Id.* at 4124.

During defendant's argument, Justice O'Connor commented, "[w]ell, it may be in this age of air travel, that anyone who doesn't cover his backyard is waiving his privacy expectation." *Id.* at 4124. Counsel for defense argued that the "Fourth Amendment is the protection against the 'shroud of darkness' that the government wishes to place over the backyards of America." *Id.* at 4125.

159. See *People v. Mayberry*, 31 Cal. 3d 335, 349, 644 P.2d 810, 818, 182 Cal. Rptr. 617, 625 (1982) (Bird, C.J., dissenting). There, the Chief Justice argued that contraband in luggage that was sniffed was not exposed to the public unless the "public" is interpreted as "meaning specially trained dogs." *Id.* (Bird, C.J., dissenting). Nor did the appellant in that case knowingly expose "contraband to the public, since he, not being a . . . trained dog himself, would not have known that any aroma was escaping from his luggage." *Id.* (Bird, C.J., dissenting).

160. See, e.g., *United States v. Bronstein*, 521 F.2d 459, 461 (2d Cir. 1975) (sniff not a search), *cert. denied*, 424 U.S. 918 (1976).

If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of

that if an odor is detectable, if it wafts in the air, it is essentially in plain view.<sup>161</sup>

Although the *Thomas* court did not explicitly refer to the plain view doctrine, the court did address the doctrine through the related issue of sensory enhancement. The majority in *Thomas* implicitly recognized that there are tensions between sensory enhancement and fourth amendment rights that are difficult to reconcile. According to the court, a sniff of a home discloses to law enforcement officers information about the contents of a home that they could not obtain by using their own senses.<sup>162</sup> The use of a dog is "not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument."<sup>163</sup> While individuals might reasonably expect that the odors of

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the bags would be tantamount to an unlawful search. . . . We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.

*Id.* (citations omitted).

161. *See, e.g., State v. Goodley*, 381 So. 2d 1180, 1182 (Fla. Dist. Ct. App. 1980) (defendant had "no constitutionally cognizable right to the inviolability of the aromatic molecules which surrounded his luggage"); *State v. Rogers*, 43 N.C. App. 475, 480, 259 S.E.2d 572, 576 (1979) (dog sniff of defendant's safety deposit box in bank not a search but rather "monitoring of the air in an area open to the public"); *People v. Price*, 54 N.Y.2d 557, 562, 431 N.E.2d 267, 269, 446 N.Y.S.2d 906, 908 (1981) (when scent is released into air, one has no expectation of privacy in items or surrounding air).

162. *Thomas*, 757 F.2d at 1367. The officers were unable to detect any odor of narcotics using their own senses. It is noteworthy that although the dog "alerted," no drugs were found inside Wheelings' apartment. *Id.* at 1366. *See infra* notes 165 & 169-83 and accompanying text for a discussion on reliability and validity of dogs.

163. *Thomas*, 757 F.2d at 1367. A dog cannot be compared to a flashlight or binoculars. *See supra* notes 83-84 and accompanying text. Sniffs more closely resemble electronic eavesdropping devices and as such should be considered searches.

[N]o real distinction can be drawn between the use of specially trained dogs with superior olfactory powers and the use of an electronic instrument which registers a smell which a human cannot perceive. In this respect . . . [the sniff] is comparable to [the electronic eavesdropping of] *Katz* where the electronic device attached to the outside of the enclosed telephone booth constituted a search even though there was no physical intrusion into the enclosure.

*State v. Elkins*, 47 Ohio App. 2d 307, 311, 354 N.E.2d 716, 718 (1976) (citing *Katz v. United States*, 389 U.S. 1 (1968); *see supra* note 41). The government agents in *Katz* were "merely gathering that which 'leaked' out of the phone booth into 'the airspace surrounding' the telephone booth. Nevertheless, the Fourth Amendment was held to apply to their activities." *People v. Mayberry*, 31 Cal. 3d 335, 351, 644 P.2d 810, 820, 182 Cal. Rptr. 617, 627 (1982) (Bird, C.J., dissenting).

*See also United States v. Karo*, 104 S. Ct. 3296 (1984) (monitoring of beeper in private home was a search); *United States v. Bronstein*, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring) (The police officers' senses were "replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by a hidden microphone in areas where he could not otherwise hear because of the inaudibility of the sounds."), *cert. denied*,

corned beef and cabbage would drift outside their dwellings and alert passersby to the dinner menu, they do have a legitimate expectation that the contents of their apartments would otherwise remain private<sup>164</sup> and would not be "sensed" from outside their doors by a device more than forty times more sensitive than a human nose.<sup>165</sup>

The *Thomas* court found that the dramatic sensory enhancement by the dog's nose precluded use of the plain view doctrine in this case as an exception to the warrant requirement. Moreover, unlike the Supreme Court in *Place*, the Second Circuit realized that an individual's expectation of privacy and subsequent fourth amendment protection should not be dependent on the sophistication of available technology.<sup>166</sup>

#### D. The Fallibility of Dogs

While the Second Circuit appropriately analyzed the sniff in *United States v. Thomas*<sup>167</sup> under traditional search and seizure principles, the

424 U.S. 918 (1976). The *Karo* Court concluded that while the electronic monitoring device was less intrusive than a full search, it also revealed facts that the government was interested in knowing but could not have discovered without a warrant. 104 S. Ct. at 3303-04.

164. "[S]urely there comes a point where it can be said that a person has "justifiably relied" upon the privacy of his premises even though he has not taken the extraordinary step of sealing off every minute aperture in that structure.'" *People v. Mayberry*, 31 Cal. 3d 335, 349, 644 P.2d 810, 819, 182 Cal. Rptr. 617, 626 (1982) (Bird, C.J., dissenting) (quoting 1 W. LAFAYETTE, *supra* note 59, at 253-54 (footnote omitted)).

165. See *United States v. Beale*, 674 F.2d 1327, 1333 (9th Cir. 1982), *rev'd en banc*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). The court recognized the dog's superior olfactory capabilities, but erred in its mathematics. It stated that the dog's nose is eight times more sensitive than the human nose. *Id.* In fact, a human has approximately five million olfactory sensory cells inside the nose; a german shepherd dog has approximately 220 million. TRAINING MANUAL, *supra* note 16, § I.G.5, at 34. Almost one-eighth of the dog's brain and more than one-half of the internal nose is olfactory. In sharp contrast, the human olfactory lobes are considerably smaller and the area of cells is one square inch. *Id.* at 33.

166. As Justice Brandeis has stated:

In the application of a Constitution . . . our contemplation cannot be only of what has been but of what may be. . . .

. . . Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

. . . Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in the court and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

. . . . The makers of our Constitution . . . conferred, as against the Government, the right to be let alone . . . . To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Olmstead v. United States*, 277 U.S. 438, 473-74, 478 (1928) (Brandeis, J., dissenting).

167. 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

court inaccurately characterized dog sniffs as a discriminating technique.<sup>168</sup> A dog is simply not the limited and discriminate instrument assumed by both the *Place*<sup>169</sup> and the *Thomas*<sup>170</sup> courts. There is a further fundamental, factual inaccuracy in the premise accepted by courts that dogs are infallible instruments.

Although courts concede the necessity of a well-trained, reliable and accurate dog to perform a sniff, there are no uniform recognized standards among the courts to define these terms.<sup>171</sup> The Second Circuit has found that a dog's alert to luggage established probable cause given the dog's record of correctly alerting to drugs one hundred percent of the time.<sup>172</sup> However, the Fifth Circuit has stated that a less than one hundred percent record would suffice.<sup>173</sup> An explosives-trained detection dog with *no* drug sniffing training has even been found to be acceptable by the Tenth Circuit.<sup>174</sup>

To compound the problem, trained dogs alert to substances other than contraband.<sup>175</sup> Therefore, a mistaken alert may also cause embar-

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168. *Id.* at 1366-67. See *infra* note 170.

169. 462 U.S. at 707. The Supreme Court simply assumes the dog is reliable. *Id.*

170. 757 F.2d at 1366-67. Although the Second Circuit did not have to reach the issue of reliability under the facts before it, the court did comment that a dog sniff is a discriminating method since it discloses only the presence or absence of narcotics. *Id.*

171. Additionally, although courts use the words "reliability" and "accuracy" interchangeably, they are not synonymous. In order for a test to be valid, it must be reliable; however, the converse is not true, for results can be entirely consistent without predicting anything. See A. ANASTASI, *PSYCHOLOGICAL TESTING* 71-78, 99-157 (3d ed. 1968) for a thorough discussion of reliability and validity. Reliability refers to the degree to which a test consistently yields the same results regardless of the validity of predictions. *Id.* at 71. Accuracy is subsumed under validity. Validity is the degree to which a test predicts or measures accurately that which it is supposed to predict or measure. *Id.* at 99. See Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917 (1975) for a discussion of the validity and reliability of polygraph tests.

172. *United States v. Waltzer*, 682 F.2d 370, 372 (2d Cir. 1982), *cert. denied*, 463 U.S. 1210 (1983). The dog was described as "the able, canny canine, Kane, with the perfect record—all hits and no misses." *Id.* at 374 (Oakes, J., concurring). But see *United States v. Young*, 745 F.2d 733, 756 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1842 (1985), where, in 1984, the able, canny Kane was "barking up the wrong tree" when he mistakenly alerted to drugs.

173. *Horton v. Goose Creek Indep. School Dist.*, 693 F.2d 524, 525 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983). "[I]f a dog occasionally alerts because contraband was formerly, although no longer, present, we cannot say . . . the defendant has not met the test." *Id.*

174. *United States v. McCranie*, 703 F.2d 1213 (10th Cir.), *cert. denied*, 464 U.S. 992 (1983). Contents of a suitcase (cocaine) were not excluded as evidence when based on a sniff by that dog. The dog had graduated first in his explosives sniffing class and had been reliable in 98.9% of explosive searches. However, he had no formal drug detecting training. *Id.* at 1215-16. The court found that the times when the dog mistakenly alerted to explosives, drugs were found. *Id.* The trial court observed that the dog had "minored in drugs and majored in explosives." *Id.* at 1216.

175. See *Jones v. Latexco Indep. School Dist.*, 499 F. Supp. 223, 228 n.2 (E.D. Tex. 1980)

rassment to the individual—a result *Place* sought to avoid.<sup>176</sup> Further, a dog's mistaken alert may very well expose items to the authorities other than the presence or absence of contraband.<sup>177</sup> These items may subsequently be used against the individual.<sup>178</sup>

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(noting that dogs respond to tobacco, lighter fluid, non-prescription drugs and odors of other animals). See also *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) (dog alerted to odor on plaintiff's body of plaintiff's dog who was in heat); *supra* notes 127-34 and accompanying text.

176. *Place*, 462 U.S. at 707. In *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd on other grounds*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), of the 50 students to which that dog alerted, only 17 were in possession of drugs. Yet all 50 were strip-searched. See *supra* notes 128-29.

In *United States v. Bronstein*, 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976), the court noted that although a dog may be in error and fail to detect marijuana, the mistake generally favors the suspect and precludes search and arrest. *Id.* *Bronstein*, however, did not address the issue of a dog who alerts to substances *other* than drugs. In such a case the test would not favor the suspect. The Eleventh Circuit did note this issue and questioned the general validity of the sniff test. *United States v. Brown*, 731 F.2d 1491, 1492 n.1 (11th Cir.), *modified*, 743 F.2d 1505 (1984). There, the bag the defendant had checked in was retrieved and subjected to a sniff test. Although the dog reacted positively, the bags contained no drugs. The court stated that given the result of the test in that case, the assumption in *Place* that dog sniff tests are highly reliable should "give us pause." *Id.* But see *Horton v. Goose Creek Indep. School Dist.*, 693 F.2d 524, 525 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983), where the court stated that the number of times a dog alerts when contraband is no longer present, as well as the number of times he alerts to harmless substances, are merely factors to be considered in a general determination of the dog's "reliability." A dog's incorrect alert on several occasions would not be sufficient to render the results of the sniff test "unreliable." *Id.*

177. Although no drugs were found in Wheelings' apartment, other items discovered when the police were in the apartment were admitted into evidence. *Thomas*, 757 F.2d at 1366.

178. See generally *United States v. Thomas*, 757 F.2d 1359 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

If a sniff is a search, the accuracy of the dog may be litigated in an attempt to suppress evidence admitted based on the dog's alert. Even if the sniff itself is not a search, the results are often used as a basis for probable cause prior to the issuance of a warrant. See Judge Davis' dissent in *Thomas*, 757 F.2d at 1376. Judge Davis' statement that a sniff should be used only in support of a warrant when there is other evidence strong enough to establish probable cause misses the point. A positive alert would add to the probable cause only if the sniff was not a search. Judge Davis' application of the probable cause requirement is thus distorted. See *Commonwealth v. White*, 374 Mass. 132, 136-39, 371 N.E.2d 777, 780-82 (1977), *aff'd*, 439 U.S. 280 (1978) (*per curiam*) (use of warrant does not sanitize information gathered in violation of a constitutional right).

See *United States v. DiCesare*, 765 F.2d 890 (9th Cir. 1985); *United States v. Spetz*, 721 F.2d 1457, 1464 (9th Cir. 1983). See *supra* notes 111-25 for a discussion of *DiCesare*. In *Spetz*, the defendant challenged a search under a warrant of a van pak located in a customs area of a yard. The search was based on an earlier dog search of the van. *Spetz* held that misstatements as to the past performance of the dogs were immaterial in this particular case. 721 F.2d at 1464. One dog was portrayed as being accurate 60 of 66 times (90.9%), while actually his accuracy record was 56 of 61 occasions (91.8%). *Id.* The dog's ability was thus understated. The other dog was portrayed as being two for two, while his record was actually two for six. *Id.* The court concluded that these particular figures "would not have affected the magistrate's

Evidence from dog sniff searches should not be admissible unless the dog's training, reliability and accuracy have been demonstrated.<sup>179</sup> Scientific devices which are invalid are discarded.<sup>180</sup> For example, chemical tests are used by agents as field tests when it is important to determine immediately whether there is any indication of the presence or absence of a particular drug. The cocaine field test proved to be a failure because the test could not distinguish cocaine from quinine, lidocaine, procaine and methapyrilene.<sup>181</sup> In order to eliminate most of the "false positives," the test was discarded and a new one developed.<sup>182</sup> A subjective dog sniff, then, should not be held to any lesser standard than an objective scientific test.

The assumption by the courts that dog sniff tests are valid and reliable should "give us pause."<sup>183</sup> By glossing over the question of the dog's fallibility, courts are ignoring the potential for egregious harm to individuals from inaccurate and indiscriminate sniffs.

## V. RECOMMENDATIONS

A spectrum of possible situations exists where dog sniffs might raise fourth amendment concerns. For example, will a sniff of a hall outside a defendant's apartment be permissible where the apartment is located in a security building and the manager gives consent? Is a resident of a building that lacks a security system protected from random sniffing expeditions by local police agencies? If high shrubs or a fence surround a private home, can a law enforcement officer legally use a dog to sniff

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judgment of the dog's reliability." *Id.* Implicit in the court's holding is the assumption that where a search warrant is based upon a prior dog search, the reliability of the dog search is a material issue and any facts significantly altering a magistrate's judgment of reliability are material. *See also Horton*, 693 F.2d at 525 (remanded to district court for evaluation of dog's reliability so that trial court could determine whether dog's alert gave rise to reasonable suspicion that drugs were present).

179. For example, where in one case the performance of a dog, Ali, was litigated, discovery established that Ali was accurate only 38% of the time. Brief for Appellant at 36, *United States v. Vermouth*, No. 84-5111 (9th Cir. Aug. 9, 1985), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-911). Ali's handler, however, represented that the dog was infallible. The prosecution also proceeded to vouch for the "unerring accuracy and reliability of the dog[s]." *Id.* "[A]n honest evaluation of the dog[s] would have precluded a magistrate from finding probable cause to issue the warrant." *Id.* *See People v. Mayberry*, 31 Cal. 3d 335, 342, 644 P.2d 810, 814, 182 Cal. Rptr. 617, 621 (1982) (It is proper to require "an adequate demonstration of the dog's training and experience in narcotics detection before the dog's reactions to a particular suitcase . . . is admitted into evidence."). *See supra* note 178.

180. *See Frontiers of Science*, 10 DRUG ENFORCEMENT, Fall 1983, at 43.

181. *Id.*

182. *Id.*

183. *United States v. Brown*, 731 F.2d 1491, 1492 n.1 (11th Cir.), *modified*, 743 F.2d 1505 (1984); *see supra* note 177.



inside the fence but outside the home? Will a sniff of luggage be permissible while the luggage is in the hands of the owner?<sup>184</sup> Will a sniff of a person ever be found constitutional?<sup>185</sup>

By focusing solely 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 was concealed,"<sup>186</sup> *United States v. Place*<sup>187</sup> distorts the expectation of privacy approach adopted in *Katz v. United States*<sup>188</sup> and takes a dangerous step towards the reduction of fourth amendment rights. In deciding cases which involve sniffs at locations other than airports, courts should focus, as did the *United States v. Thomas*<sup>189</sup> court, on the privacy interest involved to determine whether it is one which society will tolerate as reasonable.<sup>190</sup> Additionally, the courts should examine whether the expectation of privacy is legitimate by focusing on the manner in which the individual attempted to preserve the privacy of the item involved in the search situation. In this latter inquiry, the nature of the item—whether contraband or not—should have no bearing on the question of privacy.<sup>191</sup>

Once a court determines that there was a reasonable and actual ex-

184. It is arguable that a sniff of objects while the objects are in possession of the owner is as objectionable, harrowing and offensive as a body sniff. 1 W. LAFAYE, *supra* note 58, § 2.2, at 119 (Supp. 1985). It also may amount to a public accusation of a crime. *Id.*

185. See *supra* notes 127-35 and accompanying text. The emotionally charged issue of people sniffing is well illustrated by a recent school board meeting in San Bernardino, California, where the purchase of a drug-sniffing dog was under consideration. KABC Channel 7 News, 11 p.m. broadcast (Oct. 1, 1985). While the very large german shepherd gave a demonstration, an irate parent yelled, "[i]f you ever let that dog loose on my kid, I'll kill him." *Id.* Hardy Brown, a school board member, also voiced concern about injury which could be caused by an excited dog. *Id.*

186. *United States v. Jacobsen*, 466 U.S. 109, 137 (1984) (Brennan, J., dissenting) (1984). Under the interpretation of the fourth amendment suggested in *Place* and applied in *Jacobsen*, surveillance techniques, such as the sniff, would never be searches and could then be freely pursued by police. *Id.* (Brennan, J., dissenting). The limited nature of the intrusion should not be used to determine whether the sniff is a search—as did the *Place* court—but rather, to determine the appropriate standard of probable cause.

187. 462 U.S. 696 (1983); see *supra* notes 89-101.

188. 389 U.S. 347 (1967); see *supra* note 41.

189. 757 F.2d 1359, *cert. denied*, 106 S. Ct. 66 (1985); see *supra* notes 142-55 and accompanying text.

190. The offensiveness of the method used should also be a factor in fourth amendment inquiries. "The Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation." *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

191. *United States v. Jacobsen*, 466 U.S. 109, 139 (1984) (Brennan, J., dissenting). The Court has never looked to the identity of the concealed item in order to determine whether a privacy expectation exists. *Id.* In *Katz*, the fact that the conversations were of an incriminating nature did not alter the holding. *Id.* (Brennan, J., dissenting) (citing *Katz*, 389 U.S. at 351-52).

pectation of privacy, the next question should be what degree or level of "probable cause" is required for the search to be considered constitutionally valid under the fourth amendment. In ascertaining the appropriate level of probable cause, the intrusiveness of the search should be balanced against the legitimate government interests at stake. Some situations may permit a reduced standard of probable cause.<sup>192</sup> The reduced standard finds its basis in cases such as *Terry v. Ohio*,<sup>193</sup> where a "frisk" was allowed on reasonable suspicion that a suspect was armed and dangerous.<sup>194</sup>

The suggested approach in deciding dog sniff cases is the same as the analysis used by the Colorado Supreme Court in *People v. Unruh*.<sup>195</sup> There, the court held that it was a search to sniff a container stolen from an individual's home and taken to a police station.<sup>196</sup> The court initially distinguished a sniff of a closed container at an airport "where an individual's belongings might be expected to undergo inspection."<sup>197</sup> However, the court noted that a sniff of a stolen container held for safekeeping at police headquarters was a different matter.<sup>198</sup> According to the Colorado court, an individual in the latter situation has an expectation of

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192. The *Place* Court should have concluded that the sniff was a search based on the acknowledged reasonable expectation of privacy in luggage. Using the approach of *Terry v. Ohio*, 392 U.S. 1 (1968), the Court could then have balanced the high governmental interest in eliminating drug smuggling and the high number of smugglers who use airports against the relatively minor nature of the sniff and the relative inconvenience to the owner of the luggage. This analysis might have resulted in a finding that sniffs at airports require reasonable suspicion.

In *United States v. Beale (Beale II)*, 731 F.2d 590, 596 (9th Cir. 1983), *rev'd en banc*, *Beale III*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 105 S. Ct. 565 (1984), the court initially used a reduced standard and held that a sniff of luggage at an airport was a search requiring reasonable suspicion. *See supra* note 138. Although *Place* eventually dictated that the sniff in *Beale* was not a search, *Beale III*, 736 F.2d at 1289, the reduced standard could be viable under a different fact pattern. For example, the sniff of The Storage Place in *United States v. Vermouth*, No. 84-5111 (9th Cir. Aug. 9, 1985) (unpublished opinion), *petition for cert. filed*, 54 U.S.L.W. 3912 (U.S. Dec. 4, 1985) (No. 85-966), and the sniff of the trunk in *United States v. DiCesare*, 765 F.2d 890 (9th Cir. 1985), should have been searches requiring reasonable suspicion. *See supra* notes 102-11 and accompanying text.

193. 392 U.S. 1 (1961).

194. *Id.* at 30; *see supra* notes 87-88 and accompanying text. *See also* *Schmerber v. California*, 384 U.S. 757, 767-70 (1966) (Searches which invade the body—e.g., extraction of blood by needle—require greater justification than external body searches. Internal searches significantly intrude upon dignity and privacy interests.). Exigent circumstances may also justify a reduced standard; *see supra* note 79.

195. 38 CRIM. L. REP. (BNA) 2349 (Colo. Jan. 21, 1986).

196. *Id.* at 2350.

197. *Id.*

198. *Id.* "The fact that the safe legitimately came into the hands of the police through a series of events beyond the defendant's control or knowledge does not diminish his privacy interests in the contents of the safe." *Id.*

privacy in the item.<sup>199</sup>

Having concluded that the sniff was a search, the *Unruh* court then focused on the degree of suspicion required.<sup>200</sup> After balancing the government interest in curbing drug trafficking and use against the selectivity and non-intrusive nature of the sniff, the court held that reasonable suspicion was the appropriate standard in this case.<sup>201</sup>

A federal court analyzing similar facts might well conclude, under compulsion of the *Place* decision, that the sniff is not a search. As the concurrence in *Unruh* stated, "[l]ike the luggage in *U.S. v. Place*, the locked safe was not in the defendant's home at the time of the dog sniff but at the police station. The defendant did not demand the return of the safe nor object to the safe being in the temporary custody of the police. Therefore, *Place* applies with equal force to the facts of this case."<sup>202</sup> The *Unruh* majority, however, indicated that it was neither accepting nor rejecting *Place*.<sup>203</sup> *Unruh* "leaves open the possibility that the *Place* scenario might be found to be a 'search' under the [Colorado] constitutional counterpart to the Fourth Amendment."<sup>204</sup> Nevertheless, the approach used by the *Unruh* court illustrates the proper method of analysis in dog sniff cases in both state and federal courts.

The *Thomas* court had no reason to consider anything less than a probable cause standard because of the established privacy interest attached to the home. However, other fact patterns will not be as clear-cut. If the state is able to show a high interest in a minor intrusion, the court could justify that intrusion on less than probable cause.<sup>205</sup> If tradi-

199. *Id.* The court declined to accept the per se rule of *Place*. *Id.*

200. *Id.* The court noted that "the nature of a particular search is relevant to the question of whether the search was reasonable." *Id.*

201. *Id.* The balance tipped in favor of the government since the governmental interest here was "compelling." *Id.*

202. *Id.* (Rovira, J., specially concurring).

203. *Id.* at 2349-50.

204. *Summary and Analysis—Warrant Unnecessary: Dog Sniff was a "Search," But Reasonable Suspicion Justified It*, 38 CRIM. L. REP. (BNA) 1073 (Feb. 12, 1986).

205. *See supra* notes 134 & 151. A reduced standard should not be confused with a sliding scale of probable cause. A true sliding scale of probable cause could have a devastating effect on the fourth amendment. Amsterdam, *supra* note 58, at 394. Permutations of possible fact patterns are endless. To apply a sliding scale to each one would give the "cop on the beat" no guidance. More slide than scale would result. *Id.* The fourth amendment would be turned into one giant Rorschach blot. *Id.* at 393.

While some might fear that the reduced standard is a watering down of constitutional guarantees, *see, e.g., Terry v. Ohio*, 392 U.S. 1, 39 (1961) (Douglas, J., dissenting), the fear should more properly be viewed as an erosion of fourth amendment protection. *United States v. Beale (Beale III)*, 736 F.2d 1289, 1295 (9th Cir.) (Pregerson, J., dissenting), *cert. denied*, 105 S. Ct. 565 (1984). Constitutional guarantees could be "defined . . . out of existence." *Id.* (Pregerson, J., dissenting).

tional privacy interests are implicated, as in *Thomas*, then probable cause must be retained as the fourth amendment standard.

## VI. CONCLUSION

The *United States v. Thomas*<sup>206</sup> decision reaffirms traditional search and seizure principles. It uses the general *Katz v. United States*<sup>207</sup> analysis to restrict the somewhat aberrant holding in *United States v. Place*<sup>208</sup> by reintroducing privacy expectations into the search equation. It also curbs the trend toward unlimited use of dogs by eliminating the indiscriminate use of "plain view" in sniff situations. The Second Circuit implicitly recognized that something detected by means of a canine sniff is not actually in plain view, given the fact that it simply could not have been discovered without the technique. In essence, the *Thomas* court struck an appropriate balance under the facts of the case between personal privacy and the curtailment of drug trafficking. Thus, it recognized the threat that "man's best friend" poses to peace of mind in a "man's castle"—his home.

In continuing to safeguard fundamental privacy protections, courts must exercise extreme caution because as the governmental interest increases, the privacy interest that society is willing to tolerate, as well as the protection of the fourth amendment, may decrease. Drugs are a major concern to the public.<sup>209</sup> The use of dogs by police, and acceptance of their use by the public, is becoming commonplace. The trend of some courts appears to favor the ultimate invasion—people sniffing.

Yet the use of a dog simply cannot be analogized to other technical devices. A dog is an animal that is unable to "appreciate the finer contours of the fourth amendment."<sup>210</sup> Sniffing and biting at possessions can easily turn into "sniffing, snuffing, or otherwise molesting people."<sup>211</sup>

Any inquiry regarding dog sniffs must weigh the valid concerns of the public in eradicating drugs against the dangers of too much police discretion and the potential invasion of significant privacy interests. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing

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206. 757 F.2d 1359 (2d Cir.), cert. denied, 106 S. Ct. 66 (1985).

207. 389 U.S. 347 (1967); see *supra* note 41.

208. 462 U.S. 696 (1983); see *supra* notes 89-101 and accompanying text.

209. The drug crisis has been called "a cancer" by Mexican President Miguel de la Madrid Hurtado. Lamar Jr., *Deadly Traffic on the Border*, TIME, Mar. 18, 1985, at 23, 23. See *supra* notes 1-11 and accompanying text.

210. *United States v. DiCesare*, 765 F.2d 890, 902 (9th Cir. 1985) (Reinhardt, J., concurring).

211. *Id.* (Reinhardt, J., concurring).

in that way, namely, by silent approaches and slight deviations from legal modes of procedure."<sup>212</sup>

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212. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

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