Dog Sniff Searches and United States v. Thomas: The Second Circuit Takes a Needed Bite Out of Place

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I. Introduction

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

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.

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.


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, production and importation 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."\(^1\)

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.\(^2\) Scientific advances provide devices which become "everyday tools" of drug enforcement officers in the field.\(^3\)


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, \textit{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). \textit{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. \textit{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. Gerstenzang & Ostrow, \textit{supra} note 6, at 24, col. 1.

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

Another device relied on by enforcement officers is a DEA satellite communication system (SATCOM). \textit{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. \textit{Id.}

13. \textit{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." \textit{Id.} at 45.
Sophisticated practices to detect drugs currently include the use of dogs. Although governments and law enforcement agencies have utilized the dog’s sense of smell for centuries, the use of dogs to sniff for drugs is relatively recent. Today dogs are vital to drug control programs.

Despite their important contributions, innovative law enforcement techniques also raise serious fourth amendment questions. Use of devices, such as dogs, to locate drugs may infringe on an individual’s right to be protected against unreasonable searches.

At first blush, the abstract concept of a dog sniffing luggage at an airport might not seem

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, DEPT 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.

offensive. However, the inevitable extension of this investigative method seriously threatens individual privacy. 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. Thus, despite strong public pressure favoring drug control, United States v. Thomas imposed a fourth amendment limitation on law enforcement use of dogs to detect drugs. Only three years earlier, however, in United States v. Place, the Supreme Court held that the use of dogs to detect drugs in a public place was not a search. Since Place, courts analyzing dog sniffs have been divided on the question of whether individuals are entitled to any fourth amendment protection.

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.

20. See infra notes102-34 and accompanying text.
22. Id.
24. Id. at 707.
II. STATEMENT OF THE CASE

In United States v. Thomas, 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) violations. 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. One of the searches was of defendant Wheelings' Bronx apartment. The warrant to search Wheelings' apartment authorized a search for "narcotics and financial records, quantities of heroin traces, and other evidence." 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 to establish probable cause. The district court denied Wheelings' motion to suppress evidence obtained in the search of his apartment.

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

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. The Second Circuit agreed that the sniff was an illegal search. However, it upheld the district court because the law enforcement officers acted in good faith reliance on the search warrant.

III. REASONING OF THE COURT

A. Majority Opinion

The majority in United States v. Thomas held that the canine sniff outside Wheelings' apartment constituted an illegal search. Relying on the fourth amendment prohibition against "unreasonable government intrusions," the Second Circuit decided that sniffs by trained dogs outside private dwellings intrude "on a legitimate expectation of privacy." The Thomas court noted that courts consistently recognize that individuals possess a "heightened privacy interest" in their homes. Accordingly, Wheelings had a legitimate expectation that the contents of his apartment would remain private. Using a dog to detect contraband outside his door "impermissibly intruded on that legitimate expectation."

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)).
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. Taborda, 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 Taborda, 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*—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. The court stated that "It 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." A sniff of a home, according to the court, mandates a different result than an airport sniff. 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."

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." The police, by using a trained dog, may discover information they could not possibly obtain by use of their own senses. Wheelings, then, had an additional legitimate expectation that the contents of his apartment would not be sensed by such a superior instrument.

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.""

**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." According to the dissent, there are other circumstances in which a magistrate may properly consider a dog sniff as a "search."
which a sniff should be considered by the magistrate along with other evidence of probable cause. Therefore, Judge Davis would have left the question open in future cases.

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 ..." Not all government intrusions constitute searches. Yet, where a search occurs, the fourth amendment provides a safeguard against indiscriminate probes. Searches are illegal unless based on probable cause. When properly applied, the fourth amendment limits state intrusion into an individual's privacy.

Unfortunately, "[t]he course of true law pertaining to searches ...
has not—to put it mildly—run smoothly. Since its inception, the fourth amendment has undergone dramatic changes in interpretation. From 1920 to 1967, government intrusions into individual privacy were not considered to be searches unless there was an accompanying trespass. Individuals received no fourth amendment protection unless they had proprietary or possessory interests in the property searched. In Olmstead v. United States, 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." A search, then, required an actual physical invasion into a "constitutionally protected area."

In 1967, the Supreme Court repudiated the trespass doctrine. In Katz v. United States, 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. The fourth amendment was intended to "protect people, not places." 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.'"

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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. 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).
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 456. 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.
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.\textsuperscript{73} The government interest rests in preventing crime, while the individual interest rests in being left alone.\textsuperscript{74}

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.\textsuperscript{75} The police may not routinely search luggage without a warrant based on probable cause.\textsuperscript{76} However, when police have probable cause to believe contraband is located in an automobile, they may search luggage in the vehicle without a warrant.\textsuperscript{77} In such a circumstance, the government interest in prompt, effective discovery of contraband overrides the fourth amendment war-

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\textsuperscript{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. \textit{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. \textit{Id.} at 882-83.

\textsuperscript{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, \textit{supra} note 59, at 403.

\textsuperscript{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 \textit{Chadwick}, luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy").

\textsuperscript{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. \textit{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." \textit{Id.} at 11.

\textsuperscript{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. 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.

“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. An individual has no expectation of privacy in anything “that he knowingly exposes to the public.” The government interest in discovering contraband and preventing crime takes priority in such instances.

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 and binoculars 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 . . . ."\(^{85}\)

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 \textit{Terry v. Ohio},\(^{86}\) the Supreme Court held that officers may frisk a person they have stopped if they reasonably believe the person is armed and dangerous.\(^{87}\) 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.\(^{88}\)

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
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, 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. 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. Upon landing at La Guardia Airport, Place's behavior again aroused suspicion.

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.


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. 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” 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.

The Supreme Court held that the dog sniff was not a search. Initially, the Court confirmed that the fourth amendment protects an individual’s privacy interest in the contents of personal luggage. 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. Since luggage is a closed container, non-contraband items are not exposed to public view. The sniff is “much less intrusive than a typical search” because officers do not have to rummage through per-

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. 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. According to the Court, a canine sniff is *sui generis*.

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 and commentators have concluded that *Place* sanctioned sniffs of all inanimate objects wherever they are located. Exam-

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).


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.*
pies of that view in practice are United States v. Vermouth and United States v. DiCesare.

In Vermouth, a sniff of a rented locker at a private storage facility was held not to be a search. 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—the district court held that the use of dogs to determine the contents of his locker did not violate Vermouth's expectation of privacy. 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." 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."

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.111 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."112

Extending or relying on Place in this manner raises the Orwellian spectre of 1984.113 As Justice Brennan stated in United States v. Jacobsen:114 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."115

(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 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.


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.


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."\(^{116}\) For example, in *DiCesare*, defendant Marin was arrested with defendant DiCesare in DiCesare's apartment.\(^{117}\) Soon afterwards, the police went to Marin's apartment\(^{118}\) and found a large green suitcase in plain view.\(^{119}\) 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.\(^{120}\)

The defense in *DiCesare* advanced an argument that it is inappropriate to bring German Shepherd drug detecting dogs into a private residence.\(^{121}\) The Ninth Circuit considered the issue irrelevant to the case and rejected the argument.\(^{122}\) 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.\(^{123}\) The majority's suggestion that 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.*

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 and the public that dogs may be legally used for almost any purpose.\textsuperscript{125}

\textit{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.\textsuperscript{126} 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 \textit{Place} was decided, an exploratory search of an entire student population was approved in \textit{Doe v. Renfrow}.\textsuperscript{127} There, during a two and one-half hour investigation, 2780 students in an Indiana secondary school were sniffs in response to the fear of a growing drug problem.\textsuperscript{128}

[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 dogs is . . . reminiscent of the ugliest types of scenes that have occurred in police states.” \textit{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 . . . .” \textit{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, \textit{L.A. Herald Examiner}, Jan. 13, 1986, at A6, col. 1. After receiving a petition signed by 50 reporters, the publisher of the \textit{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.” \textit{Id.} The issue of the legality of bringing in the dogs was noticeably absent from this article.


128. \textit{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. \textit{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.129

The district court held that the sniffing by a trained drug detecting canine "was reasonable and not a search."130 Although the Renfrow holding has been criticized and rejected by several courts,131 the Supreme Court refused certiorari in Renfrow132 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.133 Under this approach, law enforcement officers could stand in an airport

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. Latexo 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).


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. Arguably, then, *Place* could be extended to the ultimate invasion—people sniffing.

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. . . .

. . . . The 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*, 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. The validity of Thomas, however, is questionable because the Supreme Court in *United States v. Place* seemingly closed the door on the sniff issue. Further, despite the Second Circuit's attempt to

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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 II), 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).


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.\(^{139}\) Second, the sniff itself, as in *Place*, was limited to the detection of the presence or absence of contraband.\(^{140}\) 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.\(^{141}\)

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\(^{139}\) 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. The majority there reasoned that the defendant was not embarrassed by the dog sniff since the intrusion was limited and discriminating. Therefore, no fourth amendment protection was warranted.

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, the Second Circuit began its analysis by considering whether the defendant, Wheelings, had an expectation of privacy which society would tolerate. 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. By consigning luggage to a carrier at an airport, individuals partially relinquish their privacy interests. The luggage will be handled by many people, pushed, prodded and possibly ripped and opened. 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.

gage is screened by x-ray machines and may be opened. Yet, "homes" are specifically designated by the fourth amendment for heightened protective treatment and the courts have historically recognized that protection. 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." Since the sniff related to Wheelings' home, the court concluded that he had a heightened expectation of privacy.

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. 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, 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.*

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. If the contents of Wheelings' apartment were "knowingly exposed" to the public, no constitutional protection would be available. 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 and Wheelings did not "knowingly expose" the contents of his apartment to the general public.

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

156. See supra notes 80-85 and accompanying text describing and explaining the plain view doctrine.
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, "well, 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).

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. 161

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. 162 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." 163 While individuals might reasonably expect that the odors of

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 Wheeling's 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.

[No 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 135, 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 and would not be “sensed” from outside their doors by a device more than forty times more sensitive than a human nose.

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.

D. The Fallibility of Dogs

While the Second Circuit appropriately analyzed the sniff in United States v. Thomas under traditional search and seizure principles, the
court inaccurately characterized dog sniffs as a discriminating technique. A dog is simply not the limited and discriminate instrument assumed by both the Place and the Thomas 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. 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. However, the Fifth Circuit has stated that a less than one hundred percent record would suffice. An explosives-trained detection dog with no drug sniffing training has even been found to be acceptable by the Tenth Circuit.

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

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.
rassment to the individual—a result Place sought to avoid. Further, a dog’s mistaken alert may very well expose items to the authorities other than the presence or absence of contraband. These items may subsequently be used against the individual. 

(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.


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. 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. In order to eliminate most of the "false positives," the test was discarded and a new one developed. 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." 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...
inside the fence but outside the home? Will a sniff of luggage be permissible while the luggage is in the hands of the owner? Will a sniff of a person ever be found constitutional?

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," United States v. Place distorts the expectation of privacy approach adopted in Katz v. United States 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 court, on the privacy interest involved to determine whether it is one which society will tolerate as reasonable. 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.

Once a court determines that there was a reasonable and actual ex-
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. The reduced standard finds its basis in cases such as *Terry v. Ohio*, where a "frisk" was allowed on reasonable suspicion that a suspect was armed and dangerous.

The suggested approach in deciding dog sniff cases is the same as the analysis used by the Colorado Supreme Court in *People v. Unruh*. 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. The court initially distinguished a sniff of a closed container at an airport "where an individual's belongings might be expected to undergo inspection." However, the court noted that a sniff of a stolen container held for safekeeping at police headquarters was a different matter. According to the Colorado court, an individual in the latter situation has an expectation of privacy. 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*, 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.

92. 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.


94. *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.


96. *Id.* at 2350.

97. *Id.*

98. *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.\textsuperscript{199} Having concluded that the sniff was a search, the \textit{Unruh} court then focused on the degree of suspicion required.\textsuperscript{200} 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.\textsuperscript{201}

A federal court analyzing similar facts might well conclude, under compulsion of the \textit{Place} decision, that the sniff is not a search. As the concurrence in \textit{Unruh} stated, "[l]ike the luggage in \textit{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, \textit{Place} applies with equal force to the facts of this case."\textsuperscript{202} The \textit{Unruh} majority, however, indicated that it was neither accepting nor rejecting \textit{Place}.\textsuperscript{203} \textit{Unruh} "leaves open the possibility that the \textit{Place} scenario might be found to be a 'search' under the [Colorado] constitutional counterpart to the Fourth Amendment."\textsuperscript{204} Nevertheless, the approach used by the \textit{Unruh} court illustrates the proper method of analysis in dog sniff cases in both state and federal courts.

The \textit{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.\textsuperscript{205} If tradi-
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 decision reaffirms traditional search and seizure principles. It uses the general Katz v. United States analysis to restrict the somewhat aberrant holding in United States v. Place 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. 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." Sniffing and biting at possessions can easily turn into "sniffing, snuffling, or otherwise molesting people." 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

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.
211. Id. (Reinhardt, J., concurring).
in that way, namely, by silent approaches and slight deviations from legal modes of procedure.\textsuperscript{212}

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