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**A WHIFF OF THINGS TO COME:
THE UNREASONABLENESS OF DOG
SNIFFS IN *ILLINOIS V. CABALLES***

I. INTRODUCTION

Another morning, another day at work, another commute. Or so he thought. On Tuesday morning, Michael Smith¹ sat down for breakfast, gathered his briefcase, and kissed his children goodbye before starting his commute to work. Running ten minutes behind schedule, Michael rushed downtown driving 75 miles per hour on a 65 mile per hour freeway. Though disappointed, Michael could not feign surprise when a Highway Patrol officer pulled him over for what Michael could only assume was his speeding. However, soon after, another officer arrived at the scene with a large dog and began making his way around Michael's car. That Tuesday morning, what began as an ordinary commute for Michael quickly turned into an event that shattered his sense of security and any belief he might have held in a constitutional right to privacy.

On January 24, 2005, the U.S. Supreme Court decided *Illinois v. Caballes*,² concluding that a dog sniff that is conducted during a lawful traffic stop does not implicate the Fourth Amendment where it reveals no information other than the location of an illegal substance.³ The Court determined that the use of a narcotics-detecting dog to sniff around the outside of a vehicle does not constitute a cognizable infringement on the driver's Fourth Amendment rights.⁴ In the process, the Court overturned the decision of the Illinois Supreme Court.⁵

This Case Comment will begin by discussing the factual and

1. This character and story are creations of the author and are not intended to depict any real person or case.

2. 543 U.S. 405 (2005).

3. *Id.* at 409.

4. *Id.*

5. *Id.* at 410.

procedural history of *Caballes*. Next, it will summarize the Court's decision and reasoning. This Comment will then analyze the Court's decision. It will argue that the Court erred in not applying the test set forth in *Terry v. Ohio*,⁶ which determines whether searches and seizures are reasonable under the Fourth Amendment. Finally, this Comment will conclude that the Court's flawed reasoning in *Caballes* risks undercutting the privacy protections intended for our nation's citizens by the framers of the Constitution.

II. CASE BACKGROUND

On November 12, 1998, Illinois State Trooper Daniel Gillette stopped Roy Caballes on the highway for driving 71 miles per hour in a 65 mile per hour zone.⁷ When Gillette radioed the police dispatcher to report the stop, State Trooper Craig Graham overheard the transmission.⁸ Graham, a member of the Illinois State Police Drug Interdiction Team, announced that he would report to the scene to conduct a canine sniff for narcotics.⁹ Meanwhile, Gillette approached Caballes' car, informed him that he was speeding, and requested Caballes' driver's license, registration, and proof of insurance.¹⁰

Gillette testified that as he was speaking to Caballes, he noticed a map on the front passenger seat, an open ashtray, two suits hanging in the back seat, and the smell of air freshener. He also noted that there were no visible signs of luggage.¹¹ Gillette instructed Caballes to pull his car off to the shoulder and to come to the squad car since it was raining.¹² He then told Caballes that he would only write a warning ticket for the speeding violation.¹³ Gillette called the police dispatcher to ascertain the validity of Caballes' license and to check for outstanding warrants.¹⁴ While waiting for the results of his request, Gillette asked Caballes about his destination and why he was

6. 392 U.S. 1 (1968).

7. *People v. Caballes*, 802 N.E.2d 202, 203 (Ill. 2003).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

“dressed up.”¹⁵ Caballes responded that he was moving to Chicago and attributed his attire to his job as a salesman.¹⁶ According to Gillette, Caballes acted unusually nervous despite facing a mere warning ticket.¹⁷

Upon receiving notice from the dispatcher that Caballes’ license was valid, Gillette requested Caballes’ criminal history.¹⁸ He also sought permission to search the vehicle, which Caballes denied.¹⁹ When Gillette then asked Caballes if he had ever been arrested, Caballes replied that he had not.²⁰

However, the dispatcher reported soon thereafter that Caballes had two prior arrests for distribution of marijuana.²¹ While Caballes waited in the squad car, Gillette proceeded to write the warning ticket.²² While Gillette was writing the citation, Graham arrived with a drug-detection dog and began a sniff of Caballes’ vehicle.²³ Within a minute, the dog alerted at the trunk of the car.²⁴ Gillette’s subsequent search of the trunk revealed marijuana, and the two officers arrested Caballes.²⁵ The entire incident took less than ten minutes.²⁶

Caballes was charged with one count of cannabis trafficking in violation of the Illinois Cannabis Control Act.²⁷ Caballes filed a motion to suppress the marijuana found in the trunk and to quash his arrest.²⁸ However, the trial court denied the motion, concluding that Officers Gillette and Graham had not unnecessarily prolonged the traffic stop and that the canine alert was sufficiently reliable to

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Illinois v. Caballes*, 543 U.S. at 406.

23. *People v. Caballes*, 802 N.E.2d at 203.

24. *Id.*

25. *Id.*

26. *Illinois v. Caballes*, 543 U.S. at 406.

27. *People v. Caballes*, N.E.2d at 203 (citing Cannabis Control Act, 720 ILL. COMP. STAT. ANN. § 550/5.1(a) (West 1998)).

28. *Id.*

provide the requisite probable cause for opening Caballes' trunk.²⁹ The appellate court affirmed this decision, holding that the officers did not need reasonable articulable suspicion in order to conduct the dog sniff.³⁰ That court also held that although the criminal history check prolonged Caballes' detention, the delay was *de minimis*.³¹ The Illinois Supreme Court, however, reversed.³² It acknowledged that the initial traffic stop was undisputedly proper, but nevertheless held that the police officers "impermissibly broadened the scope of the traffic stop . . . into a drug investigation" when they conducted the canine sniff without any "specific and articulable facts" to suggest drug activity.³³

The U.S. Supreme Court granted certiorari to decide "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."³⁴ In a six-to-two decision³⁵ written by Justice Stevens, the Court held that a dog sniff does not violate the Fourth Amendment where it is conducted during a lawful traffic stop and reveals no information other than the location of an illegal substance.³⁶

III. REASONING OF THE SUPREME COURT

A. *Valid Fourth Amendment Seizure*

In concluding that the canine sniff did not infringe upon Caballes' Fourth Amendment rights, the Court began its analysis by recognizing that the initial seizure of Caballes was lawful.³⁷ Officer Gillette initiated the traffic stop when he observed Caballes violating

29. *Illinois v. Caballes*, 543 U.S. at 407.

30. *People v. Caballes*, 802 N.E.2d at 203–04.

31. *Id.* at 204.

32. *Id.* at 205.

33. *Id.* at 204 (citing *People v. Cox*, 782 N.E.2d 275 (Ill. 2002)).

34. *Illinois v. Caballes*, 543 U.S. at 407 (citing *Petition for Writ of Certiorari* at i, *Illinois v. Caballes*, 541 U.S. 972 (2004) (No. 03-023), 2003 WL 23119168).

35. Chief Justice Rehnquist did not participate in the consideration of the case. *Id.* at 410.

36. *Id.*

37. *Id.* at 407.

the posted speed limit, and as such, his decision to pull Caballes over was based upon probable cause.³⁸ At the same time, the Court noted that a seizure that begins lawfully may nevertheless violate the Fourth Amendment if the manner in which the officers carry out the seizure unreasonably infringes upon an individual's constitutional rights.³⁹ For instance, when officers seize an individual for the sole purpose of issuing a ticket, that seizure may become unlawful if the officers detain the individual for a time period longer than is reasonably necessary to complete that task.⁴⁰ The Court referred to *People v. Cox*,⁴¹ in which the Illinois Supreme Court stated that a canine sniff that unreasonably prolonged a traffic stop gave rise to an unconstitutional seizure.⁴² The U.S. Supreme Court distinguished *Caballes* from *Cox* on the grounds that the officers had unlawfully detained Cox.⁴³ The *Caballes* Court then adopted the state supreme court's holding that the ordinary course of activities incident to a traffic citation justified the duration of Caballes' stop.⁴⁴

B. No Legitimate Privacy Interest in Contraband

The U.S. Supreme Court repudiated the Illinois Supreme Court's holding that the police officers unlawfully transformed a traffic stop into a drug investigation by introducing a canine sniff.⁴⁵ In doing so, the Court reaffirmed its earlier decisions that contraband does not merit the protection of the Fourth Amendment.⁴⁶ The Court relied on its decision in *United States v. Jacobsen*,⁴⁷ in which it held that governmental conduct does not amount to a search unless it infringes upon a legitimate interest in privacy.⁴⁸ Under that ruling, an interest

38. *Id.* at 408.

39. *Id.* at 407 (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

40. *Id.*

41. 782 N.E.2d 275 (Ill. 2002).

42. *Illinois v. Caballes*, 541 U.S. at 407–08 (citing *People v. Cox*, 782 N.E.2d 275 (Ill. 2002)).

43. *See id.*

44. *Id.* at 408.

45. *Id.*

46. *Id.* at 408–09 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983)).

47. 466 U.S. 109 (1984).

48. *See Illinois v. Caballes*, 541 U.S. at 408 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

in possessing contraband was not considered legitimate for Fourth Amendment purposes.⁴⁹ Consequently, the Court held in *Jacobsen* that official conduct that merely reveals the possession of contraband could not be considered a search.⁵⁰

The Court likewise pointed to its holding in *United States v. Place*⁵¹ to support its conclusion that a sniff by a drug-detecting dog does not invade an individual's legitimate interest in privacy.⁵² In *Place*, law enforcement agents took custody of the defendant's luggage at an airport and subjected the bags to a "sniff test" using a drug-detecting canine, subsequently revealing a large quantity of cocaine.⁵³ The officers conducted the sniff after noticing discrepancies on the defendant's luggage address tags, leading them to suspect illegal drug activity.⁵⁴ The *Place* Court concluded that the dog sniff of the defendant's luggage did not constitute a "search" warranting protection under the Fourth Amendment.⁵⁵ The Court reasoned that the canine sniff did not require officers to open the luggage and was thus "less intrusive than a typical search."⁵⁶ It therefore treated the canine sniff as *sui generis*, explaining that the dog sniff disclosed limited information about the contents of the luggage since it only indicated the presence or absence of drugs.⁵⁷

In contrast to the limited searches in *Jacobsen* and *Place*, the Court discussed the broader search at issue in *Kyllo v. United States*.⁵⁸ In *Kyllo*, agents scanned a home using a thermal-imaging

49. *Jacobsen*, 466 U.S. at 123 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

50. *Id.* at 124.

51. 462 U.S. 696 (1983).

52. *See Illinois v. Caballes*, 543 U.S. at 409 (citing *United States v. Place*, 462 U.S. 696, 696 (1983)).

53. *Place*, 462 U.S. at 698–99.

54. *Id.* at 698.

55. *Id.* at 707.

56. *Id.*

57. *Id.* Interestingly, the Supreme Court ultimately held that the seizure of the defendant's luggage nevertheless violated the Fourth Amendment because the ninety-minute seizure was unreasonably long. *Id.* at 709–10. The Court therefore premised its holding on the duration of the seizure rather than any intrusion on individual privacy interests. *Id.*

58. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (citing *Kyllo v. United States*, 533 U.S. 27 (2001)).

device in order to detect high-intensity lamps used for growing marijuana,⁵⁹ an action that the Court concluded amounted to an unlawful search.⁶⁰ The Court reasoned that while the device detected illegal activity—the cultivation of marijuana—it was also capable of detecting perfectly legal activity as well.⁶¹

Relying on the aforementioned decisions, the Court stated that the dog sniff in the instant case did not compromise any privacy interest that Caballes might have had in the contents of his trunk.⁶² The *Caballes* Court reaffirmed the distinction between the expectations of privacy in lawful activities and unlawful activities, characterizing only the former as legitimate.⁶³ Moreover, the officers in the present case conducted the canine sniff during a lawful traffic stop,⁶⁴ and the procedure did not reveal any information other than the location of marijuana—a contraband item.⁶⁵ Consequently, the Court concluded that any invasion of Caballes' privacy expectations did "not rise to the level of a constitutionally cognizable infringement"⁶⁶ and therefore was not a search.

IV. ANALYSIS

A. The Dog Sniff of Caballes' Trunk Constituted a Search

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶⁷ Courts have interpreted Fourth Amendment "effects" as including automotive vehicles and have accordingly scrutinized the reasonableness of searches and

59. *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001).

60. *Id.* at 40.

61. For instance, the Court pointed out that the device could potentially detect details such as when an individual was taking a bath or whether one had left a light on. *Id.* at 38. The Court also found it significant that the agents utilized the thermal-imaging device upon the outer limits of a home, an area that the Court has generally afforded special protection. *Id.* at 40 (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)).

62. *Illinois v. Caballes*, 543 U.S. at 410.

63. *Id.* at 409–10.

64. *See supra* Part III.A.

65. *Illinois v. Caballes*, 543 U.S. at 410.

66. *Id.* at 409.

67. U.S. CONST. amend. IV.

seizures of automobiles.⁶⁸ It is important to note, however, that the Constitution does not forbid all searches and seizures. Rather, only those searches that are unreasonable implicate the Fourth Amendment's protections.⁶⁹

The Court in the instant case correctly adopted the Illinois Supreme Court's conclusion that the officers had properly seized Caballes.⁷⁰ Generally, a "seizure" for Fourth Amendment purposes occurs whenever a police officer approaches an individual and restricts his liberty to walk away.⁷¹ The Court has previously held that a routine traffic stop constitutes a seizure within the meaning of the Fourth Amendment.⁷² By that definition, Officer Gillette reasonably seized Caballes for speeding.⁷³

However, while the Court may have properly classified the stop as a seizure, it greatly erred in finding that the subsequent dog sniff did not constitute a search that infringed upon legitimate privacy interests. Not only are canine sniffs invasive, their accuracy is also questionable. Moreover, one cannot justify their use under the "normal enhancement" or "plain smell" theories. As such, the Court incorrectly categorized the canine sniff of Caballes as a non-search.

1. A Drug-Detecting Dog Sniff is Invasive, Intimidating, and May Produce False Positives

That an individual has no right to possess contraband, standing alone, is difficult to dispute. According to the U.S. Supreme Court, no search thus occurs where a dog that is only capable of detecting contraband discovers narcotics.⁷⁴ Likewise, there is no search where the dog does not detect contraband since it simply walked around the car and failed to alert to anything.

68. *See, e.g.,* *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Preston v. United States*, 376 U.S. 364, 366–67 (1964); *United States v. Maple*, 348 F.3d 260, 261 (D.C. Cir. 2003).

69. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

70. *People v. Caballes*, 802 N.E.2d 202, 204 (Ill. 2003).

71. *Terry*, 392 U.S. at 16.

72. *See Whren v. United States*, 517 U.S. 806, 809–10 (1996); *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

73. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

74. *Id.* at 410.

However, regardless of what a drug-detecting canine may or may not find, introducing a dog into a person's presence is undoubtedly invasive.⁷⁵ As Justice Ginsburg notes in her dissenting opinion, drug-detecting dogs are intimidating animals.⁷⁶ In the context of traffic stops, introducing the canines to the scene causes the stop to become "broader, more adversarial, and (in at least some cases) longer."⁷⁷ In addition, there is also the "embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs."⁷⁸

Not only is the use of drug-sniffing dogs potentially accusatory and humiliating, it also runs the risk of producing false positives. In his dissent, Justice Souter elaborates on this issue, stating that a "dog that alerts hundreds of times will be wrong dozens of times."⁷⁹ He points to studies that reveal error rates ranging from 12.5 percent to 60 percent, depending on the duration of the search.⁸⁰ Perhaps a number of false positives, when compared to the quantity of accurate sniffs, does not seem that appalling. After all, police officers are only human and make mistakes themselves as well. Moreover, a canine's alert may provide the probable cause necessary to conduct a search and thus serves an important purpose.⁸¹ However, a false alert can be quite offensive to the innocent victim. From that individual's perspective, the intimidation, humiliation, and accusatory nature of a canine sniff are likely multiplied.

The risk of false positives also undermines the Court's rationale for concluding that a dog sniff does not qualify as a search. In finding that the sniffs by well-trained drug-detection dogs in *Jacobsen* and *Place* did not constitute Fourth Amendment searches, the Court reasoned that the sniffs disclosed nothing more than the

75. See, e.g., *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004) (McKay, J., dissenting) ("[D]rug dogs are not lap dogs. They typically are large, and to many ordinary innocent people, fearsome animals.").

76. *Illinois v. Caballes*, 543 U.S. at 421 (Ginsburg, J., dissenting).

77. *Id.*

78. *Id.*

79. *Id.* at 412 (Souter, J., dissenting).

80. *Id.*; see also *United States v. \$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003) (noting that almost 80 percent of all currency in circulation has drug residue, to which drug-sniffing dogs will alert if the currency is carried in large quantities).

81. *Illinois v. Caballes*, 543 U.S. at 413 (Souter, J., dissenting).

presence or absence of narcotics and thereby revealed no other “private” information.⁸² Yet this logic assumes that the dog sniffs are one-hundred percent accurate. In fact, the accuracy of canine drug sniffs has often been called into question.⁸³ As Justice Souter pointed out in dissent, even the most well-trained drug-detecting canine is ultimately a fallible creature.⁸⁴ A dog sniff is thus the “first step in a process that may disclose ‘intimate details’ without revealing contraband”⁸⁵ and in this sense resembles the thermal-imaging device in *Kyllo*.⁸⁶ Even false alerts lead to full-scale searches and may consequently result in offensive and unjustifiable invasions into one’s privacy.⁸⁷ In light of the error rates,⁸⁸ it becomes clear that dog sniffs may not be as benign as the Court would have us believe.

2. A Narcotics-Detecting Dog Does Not Qualify as a Normal Enhancement

One might argue that a drug-detecting canine is a mere “enhancement” of the officer’s senses. Courts have indicated that government officials do not perform an impermissible Fourth Amendment search by the mere fact that they utilize “sense-enhancing” tools or instruments to help them detect illegal items.⁸⁹ For instance, the Ninth Circuit has held that an officer’s use of a flashlight to look into a car at night does not constitute a search.⁹⁰ The Fourth Circuit has similarly concluded that the use of binoculars to observe illicit activity does not turn the observation into a search.⁹¹

82. *See supra* text accompanying notes 46–57; *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (“[G]overnmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”).

83. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. at 411–12 (Souter, J., dissenting) (citing several examples of false positives).

84. *Id.* at 411–13.

85. *Id.* at 413.

86. *See supra* text accompanying notes 58–60.

87. *See, e.g.*, *Doe v. Renfro*, 475 F.Supp. 1012, 1017 (N.D. Ind. 1994) (describing false alerts that led to strip searches of students for drugs).

88. *See supra* text accompanying note 79.

89. *United States v. Bronstein*, 521 F.2d 459, 462 n.3 (2d Cir. 1975).

90. *See United States v. Hood*, 493 F.2d 677, 680 (9th Cir. 1974).

91. *See United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1983).

However, unlike the aforementioned instances, the present case differs in that the police officers' senses were not enhanced. A dog's more sensitive nose *replaced*—rather than enhanced—the officers' own senses of smell. It was the dog's action alone that alerted the officers to the marijuana; their own sense of smell played no role in the discovery.⁹² Consequently, the notion that drug-sniffing canines fall within the category of “sense-enhancing” tools should be dismissed.

3. The Marijuana in Caballes' Trunk Does Not Fall Within a “Plain Smell” Exception

For purposes of Fourth Amendment analysis, the Supreme Court has held that a search occurs where the government infringes upon an individual's subjective expectation of privacy that society considers to be reasonable.⁹³ Granted, cars generally invite a lower expectation of privacy because of their public nature.⁹⁴ The public can easily see an automobile's passengers and contents as it travels on roads and highways.⁹⁵ Although cars may deserve less privacy protection due to their use in public, the Court has nevertheless

92. Judge Mansfield makes this very argument in *United States v. Bronstein*, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring). In his concurring opinion, Judge Mansfield compares drug-detecting dog sniffs to the use of hidden microphones in *Katz v. United States*, 389 U.S. 347 (1967). *Bronstein*, 521 F.2d at 464. In *Katz*, the U.S. Supreme Court determined that the Government performed a Fourth Amendment search when it attached microphones to the outside of a public telephone booth in order to hear sounds that would otherwise be inaudible to the human ear. *Katz*, 389 U.S. at 353. Judge Mansfield also refers to *United States v. Albarado*, 495 F.2d 799, 802–03 (2d Cir. 1974), in which the Second Circuit held that the use of an X-ray machine to detect the presence of a knife or pistol inside a closed area constitutes a search. He points out that the X-ray machine and the drug-detecting canine are both “non-human means of detecting the contents of a closed area without physically entering into it” and “without the enhancement of human senses.” *Bronstein*, 521 F.2d at 464.

93. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

94. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1756 (2000).

95. *New York v. Class*, 475 U.S. 106, 112–13 (1986) (citing *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).

accorded some degree of protection to the trunk.⁹⁶ This makes sense given its concealed nature. The trunk is an area of the vehicle set apart from the rest of the car and it contains a separate locking mechanism. Moreover, unlike a vehicle's passenger compartments, the contents of a closed trunk are not readily visible through a window. Arguably, a person may choose to place items in the trunk as opposed to the backseat of a car, reasonably expecting to shield those items from the public eye. When an individual conceals his possessions in this manner, it would be reasonable to conclude that he does so with some expectation of privacy.⁹⁷

96. See, e.g., *New York v. Belton*, 453 U.S. 454, 460–61 n.4 (1981) (exempting the trunk from the Court's discussion of areas within the car that an officer may search as incident to a lawful arrest). *Belton* involved a search of an automobile incident to an arrest. *Id.* at 456. The Court prefaced its opinion by stating that a search of the arrestee incident to a lawful arrest does not require a warrant. *Id.* at 457. The issue, however, was whether such warrantless searches also extended to the interior of the arrestee's automobile. *Id.* at 459. The Court looked to an earlier decision, *Chimel v. California*, 395 U.S. 752 (1969), which stated that the officer must limit the warrantless search to the area within the "immediate control" of the arrestee. *Id.* at 763. Interpreting *Chimel*, the *Belton* Court ultimately held that once a police officer has made a lawful arrest of an automobile's occupant, he or she may search the passenger compartment of the vehicle as well as any containers found therein. *Belton*, 453 U.S. at 460. The Court deemed such a rule necessary since the arrestee may otherwise be able "to grab a weapon or evidentiary item[s]" relating to criminal conduct within the passenger compartment. *Id.* at 460–61. It is possible that this dual rationale of disarming arrestees and preserving evidence justified the Court's decision to exclude the car trunk, since it is unlikely that the arrestee will be able to reach into the trunk without the officer's knowledge. Absent this risk, the Court chose to exclude the car trunk from the areas which officers were at liberty to search. *Belton*, 453 U.S. at 460–61 n.4. *Illinois v. Caballes* does not involve a search incident to a lawful arrest. Nevertheless, the justification the Court provided for including only the automobile's passenger compartment in *Belton* may arguably apply even in the case of a traffic stop.

97. See *Illinois v. Caballes*, 543 U.S. 405, 416 n.6 (Souter, J., dissenting). One could compare this to *California v. Greenwood*, 486 U.S. 35, 41 (1988), in which the Court stated that even assuming that the defendant had a subjective expectation of privacy in garbage he placed for pick up in front of his house, such an expectation was not one that society was prepared to find reasonable. The Court noted that the garbage was easily accessible to animals, scavengers, and other members of the public. *Id.* at 40.

By contrast, when an individual leaves an object out in the open, an officer does not conduct a search of the item when he observes it.⁹⁸ The rationale is that by leaving the object in “plain view,” the owner exhibits “no intention to keep [it] to himself.”⁹⁹ This reasoning also takes form in a “plain smell” doctrine, which states that there is no reasonable expectation of privacy and thus no search where officers detect odors emanating from enclosed spaces.¹⁰⁰

Thus, one may argue that the smell of marijuana coming from Caballes’ trunk falls within the “plain smell” doctrine and thereby escapes scrutiny. Such an argument, however, requires too great a stretch in reasoning to be feasible. In the instant case, the officers did not detect the odors emanating from Caballes’ trunk with their own nostrils. Rather, any detection of smell was done vicariously through the use of a trained drug-detecting canine. In order to apply the “plain smell” doctrine to the instant case, one would have to impute a dog’s sense of smell to a human being.¹⁰¹ The Ninth Circuit addressed the issue of smell in *Hernandez v. United States*,¹⁰² in which police officers detected the odor of marijuana from suitcases only after pressing the suitcases’ sides together and forcing air out from the inside.¹⁰³ The court characterized this action as an “exploratory investigation” and concluded that it constituted a search.¹⁰⁴ The officers in *Hernandez* were not able to detect the smell until they took further action.¹⁰⁵

98. *Illinois v. Caballes*, 543 U.S. at 416 n.6 (Souter, J., dissenting) (citing *Katz*, 389 U.S. at 361).

99. *Id.* (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

100. WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.2, at 454 (West’s Criminal Practice Series 4th ed. 2004) (“[T]here is no ‘reasonable expectation of privacy’ from lawfully positioned agents ‘with inquisitive nostrils.’”).

101. The difference between a human being’s sense of smell and that of a drug-detecting canine cannot be taken lightly. *See, e.g.*, Brief of the Nat’l Ass’n of Criminal Def. Lawyers as Amicus Curiae in Support of Respondent at 13, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923) (“A trained canine’s sense of smell is many orders of magnitude more powerful than that of any police officer.”).

102. 353 F.2d 624 (9th Cir. 1965).

103. *Id.* at 626.

104. *Id.*

105. *Id.*

Likewise, in the instant case, Officers Gillette and Graham were not passive actors who just happened to notice the smell of marijuana wafting out of Caballes' trunk.¹⁰⁶ Had they not utilized the drug-sniffing canine, the officers would not have detected the marijuana.¹⁰⁷ Hence, one can hardly characterize the contents of Caballes' trunk as falling within the "plain smell" doctrine.

Admittedly, a dog sniff of a car is much less intrusive than a typical search.¹⁰⁸ For example, in performing the procedure, Officer Graham did not subject the interior of the car to the canine sniff nor did he rummage through Caballes' belongings. Rather, he simply walked the dog around the exterior of the vehicle. Concededly, when properly conducted, the dog sniff should not reveal information other than the presence or absence of contraband.¹⁰⁹ Moreover, the Court has pointed out that an individual lacks any reasonable expectation of privacy in illegal contraband,¹¹⁰ making the dog sniff seem less intrusive. When police officers utilize canines, however, they do so with the purpose of uncovering something that is not otherwise apparent to them.¹¹¹ They in turn run the risk of overstepping their boundaries, as did the officers in *Hernandez*.¹¹² Thus, while the information that a dog sniff is designed to reveal may be limited, by no means does this warrant complete exclusion from Fourth Amendment scrutiny.¹¹³

106. See *supra* text accompanying notes 21–25.

107. See *id.*

108. See Brief of The Ill. Ass'n of Chiefs of Police and The Major Cities Chiefs Ass'n as Amicus Curiae in Support of Petitioner at 5–6, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923).

109. Brief for the Respondent at 17, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923). This also assumes, however, that the dog sniffs are accurate. As previously discussed, the accuracy of canine drug sniffs has in fact often been called into question. See generally *Illinois v. Caballes*, 543 U.S. at 411–12 (Souter, J., dissenting) (explaining that the canine sniff is not infallible and sometimes reveals false positives); see *supra* text accompanying notes 79–84.

110. See *supra* text accompanying notes 45–50.

111. *United States v. Beale*, 736 F.2d 1289, 1293 (9th Cir. 1984) (Pregerson, J., dissenting) (“When using dogs to ferret out contraband, the police . . . are seeking evidence in hidden places. If this activity does not qualify as a ‘search,’ then I am not sure what does.”).

112. See *supra* text accompanying notes 102–105.

113. See Brief for the Respondent, *supra* note 109, at 17.

*B. The Supreme Court Should Have
Applied Terry v. Ohio's Reasonableness Test*

Since a dog sniff does not entail the same high degree of intrusiveness involved in a typical search, the Supreme Court correctly decided that a dog sniff does not require probable cause.¹¹⁴ The Court's solution to permit dog sniffs even where no suspicion exists, however, seems too extreme. Between these two extremes, perhaps police officers should be permitted to utilize drug-sniffing canines upon a lower quantum of evidence than would ordinarily be required to establish probable cause. In fact, the standard applied in *Terry v. Ohio*¹¹⁵ should be applicable in the instant case.

1. *Terry* Announced a Two-Part Test

In *Terry*, a police officer seized three men after suspecting them of planning a "stick-up."¹¹⁶ Prior to the seizure, he had observed a series of acts that he felt warranted further investigation.¹¹⁷ The officer also feared that the men might be armed and thus patted them down for weapons.¹¹⁸ The Supreme Court found that the pat-down constituted a search within the meaning of the Fourth Amendment.¹¹⁹ In analyzing the reasonableness of the search and seizure, the Court applied a two-part test: first, "whether the officer's action was justified at its inception," and second, "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."¹²⁰

The Court utilized a balancing test to analyze the first prong. In determining whether an officer's actions were justified and therefore reasonable, it explained that "there is 'no ready test for determining reasonableness other than by balancing the [government's] need to

114. Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 101, at 15-16.

115. 392 U.S. 1 (1968).

116. *Id.* at 6-7.

117. *Id.* (stating that the officer observed the men hovering on a particular block for extended periods of time, looking repeatedly into a store window, pacing alternately along one path, and meeting for conferences on the street corner).

118. *Id.* at 7.

119. *Id.* at 19.

120. *Id.* at 19-20.

search [or seize] against the invasion [of the individual's privacy] which the search [or seizure] entails."¹²¹ The Court considered first the "nature and extent" of governmental interests.¹²² It noted that the government had an interest in effective crime prevention, and that consequently, police officers may be able to approach individuals without probable cause where necessary to investigate potential criminal behavior.¹²³ Another governmental interest was the police officer's immediate need to ensure his personal safety.¹²⁴ The Court explained that where an officer justifiably believes that the person he is investigating may be armed and dangerous, it would be unreasonable to deny that officer the ability to take measures as he sees fit to neutralize the threat of physical harm to himself and to those around him.¹²⁵

Noting the government's interests in preventing crime and protecting officers, the Court next considered the "nature and quality of the intrusion on individual rights."¹²⁶ The Court acknowledged that while officers may sometimes be justified in conducting searches without probable cause, one could not ignore the reality that a search—no matter how limited—is usually an "annoying, frightening, and perhaps humiliating experience."¹²⁷

Applying this balancing test, the Court in *Terry* concluded that the government interest outweighed the individual interest, justifying a standard less than probable cause in the context of "stop-and-frisks." In particular, it reasoned that where an officer faces exigent circumstances that call his physical safety into question, the officer should be able to conduct a search for weapons on the basis of reasonable suspicion.¹²⁸ An officer has reasonable suspicion if a reasonably prudent person in the officer's situation would be warranted in believing that his safety or that of those around him was

121. *Id.* at 21 (alteration in original) (quoting *Camara v. S.F. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)).

122. *Id.* at 22.

123. *Id.*

124. *Id.* at 24.

125. *Id.*

126. *Id.*

127. *Id.* at 24–25.

128. *Id.* at 27.

in jeopardy.¹²⁹ In determining whether the officer satisfied this standard given the circumstances, the Court required the officer to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹³⁰

The *Terry* Court applied this standard to the first prong—“whether the officers’ act was justified at its inception”¹³¹—by explaining that the officer observed two men acting as if they were contemplating a robbery.¹³² Even after the officers confronted the suspects, nothing in the suspects’ conduct dispelled the officer’s initial suspicion.¹³³ Based on these observations, the majority ultimately found that the officer was warranted in his belief that the men under investigation were armed, and thus, he justifiably initiated the search.¹³⁴

The Court then examined the second prong, whether the officer’s action was reasonably related in scope to the circumstances justifying the search. There was no problem with scope, the Court explained, when the officer patted down the petitioner’s outer clothing to reveal any weapons that might be hidden therein.¹³⁵ In so doing, the officer limited his search to what was absolutely necessary to dispel his fear that the men might be armed.¹³⁶ What the officer did not do, observed the Court, was “conduct a general exploratory search for whatever evidence of criminal activity he might find.”¹³⁷

2. The canine sniff of Caballes’ trunk is not reasonable under a *Terry* analysis

Although *Terry* involved a “stop and frisk” of a person for weapons, the Supreme Court has applied its principles to traffic stops as well.¹³⁸ Furthermore, as Justice Ginsburg explained in her

129. *Id.*

130. *Id.* at 21. The Court further elaborated that “subjective good faith alone” would be insufficient. *Id.* at 22.

131. *See supra* text accompanying note 120.

132. *Id.* at 28.

133. *Id.*

134. *Id.* at 28.

135. *Id.* at 29.

136. *Id.* at 30.

137. *Id.*

138. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1035 (1983); *Pennsylvania*

dissenting opinion, the Court has viewed routine traffic stops as relatively comparable to *Terry* stops.¹³⁹ Adopting Justice Ginsburg's approach and applying a balancing test to the present case, the dog sniff was not justified at its inception because of the lack of reasonable suspicion and is thus likely to fail the first prong of the *Terry* analysis.¹⁴⁰

In terms of necessity, the officer's interest in protecting himself from imminent physical harm in *Terry* was arguably greater than any immediate interest Officer Gillette may have had in discovering contraband. Considering the level of intrusiveness, on the other hand, one might point out that a physical pat-down as occurred in *Terry* is admittedly much more invasive than a dog sniff. Nonetheless, introducing a drug-detecting canine on a public highway is still invasive and ought to be justified by the same level of suspicion under the balancing test.¹⁴¹ The government certainly has an interest in preventing drug trafficking, but one must take care to weigh that interest against the degree of interference. Put differently, preserving one's Fourth Amendment rights requires that the court balance the government's concern for apprehending drug traffickers against the individual interest in privacy.

Officers Gillette and Graham probably would also be unable to point to "specific and articulable facts" to warrant their belief that the dog sniff was necessary.¹⁴² One might argue that Caballes' nervous

v. *Mimms*, 434 U.S. 106, 109 (1977) (looking to *Terry* in determining that an officer's actions in stopping a motorist with expired license tags and requesting that he exit the car were reasonable).

139. *Illinois v. Caballes*, 543 U.S. 405, 420 (2005) (Ginsburg, J., dissenting) ("I would apply *Terry*'s reasonable-relation test . . . to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes.").

140. This comment focuses on the dog sniff as a limited search for purposes of the *Terry* analysis, since it is undisputed that Officer Gillette justifiably seized Caballes when he initiated the traffic stop. See *supra* text accompanying note 37.

141. See Brief for the Respondent, *supra* note 109, at 17 ("[B]ringing a dog to the scene of a traffic stop singles out the stopped individual, and suggests suspicion of drug activity.").

142. The Illinois Supreme Court refused to find that Officer Gillette's observations about Caballes—his nervous behavior, his travel attire, the lack of luggage, and the smell of air freshener—established a reasonable basis for

behavior and prior arrests for marijuana distribution are grounds for reasonable suspicion. However, it is difficult to give conclusive weight to the previous arrests without considering the context in which they occurred, including the circumstances of the arrests and the time that has since elapsed. As for his uneasy demeanor, courts have found nervous behavior relevant in determining whether reasonable suspicion exists.¹⁴³ Nevertheless, nervousness is not an abnormal response to an unexpected situation and as a consequence, basing reasonable suspicion on anxious behavior is also questionable.¹⁴⁴ Officer Gillette had stopped Caballes for a traffic violation; nothing Caballes otherwise said nor did during that detention period would have given an individual in Gillette's position the belief that a drug sniff was necessary.¹⁴⁵ Consequently, the dog sniff was not justified at its inception and the second prong of the *Terry* analysis need not apply.

While Justice Ginsburg referred to the *Terry* two-prong test in her *Caballes* dissent,¹⁴⁶ she appears to mischaracterize its reach. In *Terry*, the Court first stated that the officer was justified in initiating a pat-down search.¹⁴⁷ The Court then explained that the search was reasonably related in scope to the circumstances that merited the search in the first place.¹⁴⁸ By contrast, in the *Caballes* dissent, Justice Ginsburg begins by observing that Gillette's seizure of Caballes—that is, the traffic stop—was warranted at its inception.¹⁴⁹ When discussing the second prong, however, she states that the dog

conducting a dog sniff. If anything, stated the court, those factors constituted “nothing more than a vague hunch that [Caballes] may have been involved in possible wrongdoing.” *Illinois v. Caballes*, 543 U.S. 405, 419 n.1 (2005) (Ginsburg, J., dissenting.).

143. *See, e.g.*, *United States v. Gilliard*, 847 F.2d 21, 25 (1st Cir. 1988).

144. *See, e.g.*, *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (“Nervousness is a common and entirely natural reaction to police presence . . .”).

145. *Cf. Terry v. Ohio*, 392 U.S. 1, 28 (1968) (“The actions of [the suspects] were consistent with [the officer's] hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons. . .”).

146. *Illinois v. Caballes*, 543 U.S. 405, 418 (2005) (Ginsburg, J., dissenting).

147. *Terry*, 392 U.S. at 28; *see supra* text accompanying notes 132–134.

148. *Terry*, 392 U.S. at 29–30; *see supra* text accompanying notes 135–137.

149. *Illinois v. Caballes*, 543 U.S. at 418 (Ginsburg, J., dissenting).

sniff was not reasonably related in scope to the circumstances that necessitated the *traffic stop*. Justice Ginsburg's dissent thus fails to address whether the dog sniff was even justified in the first place.¹⁵⁰

Should the second prong apply for the sake of argument, one might contend that once Officer Graham brought the canine to sniff Caballes' vehicle, the seizure that was justified at its inception now exceeded its scope.¹⁵¹ Under this theory, one might note that Officer Gillette had seized Caballes for speeding, yet the drug sniff shared no logical relationship to the circumstances that justified that stop. Caballes had no reason to believe, nor could he have reasonably foreseen, that a traffic stop for speeding would also entail a canine sniff. Officer Gillette had also specifically informed him that he would only receive a warning ticket. In other words, the dog sniff was not a "natural extension" of the original traffic stop.¹⁵² In the Court's decision in *Florida v. Royer*,¹⁵³ Justice White stated that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."¹⁵⁴

This argument, however, is unlikely to succeed. In *People v. Cox*,¹⁵⁵ the Illinois Supreme Court held that a dog-sniff of a vehicle was unconstitutional.¹⁵⁶ There, an officer stopped the defendant because the vehicle did not have a rear registration light.¹⁵⁷ Upon first initiating the stop, he called another officer to conduct a canine drug-sniff.¹⁵⁸ The second officer arrived at the scene fifteen minutes

150. See also *Terry*, 392 U.S. at 19 ("The scope of the *search* must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (emphasis added) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).

151. This appears to be the point that Justice Ginsburg was making in her dissent, the difference being that she did not separate "search" from "seizure" in applying the *Terry* analysis. See *Illinois v. Caballes*, 543 U.S. at 417-25 (Ginsburg, J., dissenting).

152. Cf. *United States v. Suarez*, 694 F. Supp. 926, 938 (S.D. Ga. 1988) (additional questions posed by the officer did not constitute a second seizure since they were a "natural extension" of the continuing traffic stop).

153. 460 U.S. 491 (1983).

154. *Id.* at 500.

155. 782 N.E.2d 275 (Ill. 2002).

156. *Id.* at 281.

157. *Id.* at 279.

158. *Id.*

after the initial stop, while the first officer was still writing the traffic citation.¹⁵⁹ In finding the introduction of the drug-detecting dog impermissible, the Court explained that although the first officer was still writing the ticket when the dog arrived, nothing in the record justified the duration of the stop.¹⁶⁰ Moreover, the first officer specifically requested the canine sniff, despite having no reason to suspect the presence of drugs.¹⁶¹

However, the instant case differs in two material respects. First, Officer Gillette did not call the narcotics-sniffing dog to the scene.¹⁶² Second, Officer Gillette was still in the process of writing the traffic ticket when Officer Graham arrived with the dog, and the entire incident—including the sniff—took less than ten minutes.¹⁶³ Thus, unlike *Cox*, it does not appear that the officers' investigation lasted longer than necessary to complete the purpose of the traffic stop. Consequently, the introduction of the drug-detecting canine did not broaden the scope of the traffic stop—at least not in terms of duration. However, as discussed above, the drug-sniff should nevertheless fail to pass constitutional muster under the first prong of the *Terry* analysis.¹⁶⁴

V. IMPLICATIONS

The Supreme Court's holding in *Caballes* places a dangerous degree of power in the hands of law enforcement authorities. The Court concluded that a canine sniff conducted during a traffic stop did not compromise *Caballes*' Fourth Amendment interests.¹⁶⁵ This holding begs the question of where the Court will draw the line.

That dogs have been an important tool in crime prevention efforts certainly cannot be disputed.¹⁶⁶ However, after the Court's

159. *Id.* at 280.

160. *Id.* The Illinois Supreme Court also noted that there is no specific time limit on traffic stops. *Id.* Nevertheless, it held that the duration of this specific traffic stop roused suspicion. *Id.* (citing *United States v. Sharpe*, 470 U.S. 675, 685 (1985)).

161. *Id.* at 280–81.

162. See *Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

163. *Id.*

164. See *supra* text accompanying notes 140–145.

165. *Illinois v. Caballes*, 543 U.S. at 410.

166. See, e.g., Bob Egelko, *Supreme Court Expands Police Search Powers:*

decision, these law enforcement interests may be furthered at the cost of infringing into the private lives of citizens. If searches that are not motivated by reasonable suspicion continue to be validated based on the nature of the information they reveal,¹⁶⁷ there would appear to be no limits to conducting searches until one is able to find contraband.

Moreover, the Court's affirmation of *Place* may clear the way for unfettered police discretion. In *Place*, the Court held that a dog sniff does not constitute a search.¹⁶⁸ Hence, a dog sniff escapes the Fourth Amendment requirement of reasonableness, meaning an officer could conduct a sniff without any suspicion of wrongdoing.

This is a disturbing notion on several levels. For instance, there has been significant debate over the prevalence of racial profiling practices by law enforcement officers.¹⁶⁹ This concern stems from reports of increased numbers of traffic stops and interrogations aimed against drivers of color.¹⁷⁰ Much of the controversy centers around statistics that reveal heightened drug interdiction practices involving African-American and Hispanic drivers in particular.¹⁷¹ It is worthwhile to note that, according to his own attorney, Caballes was of Filipino descent but appeared Hispanic.¹⁷² Though a

Drug-Sniffing Dogs Now Have Access to Any Car Stopped, S.F. CHRON., Jan. 25, 2005, at A4.

167. In *Caballes*, the U.S. Supreme Court did not indicate whether Officer Gillette's actions were supported by reasonable suspicion. For an argument that reasonable suspicion did not exist, see *supra* text accompanying notes 142–145.

168. *United States v. Place*, 462 U.S. 696, 707 (1983).

169. See, e.g., DATA COLLECTION RES. CTR., INST. ON RACE AND JUSTICE, HISTORY OF RACIAL PROFILING ANALYSIS, <http://www.racialprofilinganalysis.neu.edu/background/history.php> (last visited Apr. 2, 2006).

170. *Id.*

171. See *id.* (“In some cases . . . officers began targeting black and Hispanic male drivers by stopping them for technical traffic violations as a pretext for ascertaining whether the drivers were carrying drugs.”). For a more thorough discussion of racial profiling in the context of traffic stops, see Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Michael A. Harris, “*Driving While Black*” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

172. See Timothy P. O’Neill, *5 Reasons Defense Attorneys Should Be Thankful*, CHI. DAILY L. BULL., Dec. 12, 2003, available at http://www.jmls.edu/facultypubs/oneill/oneill_column_1203.shtml.

discussion of racial profiling is outside the scope of this Comment, the ongoing debate proves interesting in light of this fact.

To characterize dog sniffs as non-searches when incident to a lawful traffic stop may also open the door to any number of different investigations. Police officers could potentially pull an individual over for driving five miles over the speed limit and then conduct a canine-assisted drug sniff, brushing it off as a mere extension of the original traffic stop so long as it was conducted within a ten-minute time period. There is also the question of line-drawing. Should lower courts apply the rule that a dog sniff is not a search, it leaves open the issue of whether a dog sniff of a home—the front porch, for example—would also escape constitutional scrutiny. The Court has recognized that the home deserves special protection. However, if a dog sniff is not a search, one can only worry about how much protection the home really has.

It must still be noted that in this post-September 11 era, concerns over terrorism and national security are important factors to consider. Perhaps one might argue that individuals should sacrifice their interests in privacy for a greater good. However, suspicionless drug sniffs implicate the right of citizens to remain free from arbitrary police interference, a right that is central to the Fourth Amendment's protections.¹⁷³ As Justice Ginsburg pointed out in her dissenting opinion, the Court has distinguished between a general interest in crime control and more immediate threats to national security.¹⁷⁴ As such, even if dog sniffs were to be properly considered as limited searches, the Fourth Amendment would undoubtedly permit sniffs for explosives in the face of imminent danger under the special needs doctrine.¹⁷⁵

VI. CONCLUSION

In some sense, the Supreme Court's decision in *Caballes* comes as no surprise. It follows the Court's line of precedent giving deference to law enforcement authorities and government interests in

173. Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 101, at 4.

174. *Illinois v. Caballes*, 543 U.S. 405, 424 (Ginsburg, J., dissenting).

175. *Id.* at 425. The special needs doctrine is an important exception carved out for imminent dangers to national security. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 706 (1989). This subject however lies beyond the scope of this Comment.

crime control. It should, however, shock the conscience of millions of motorists who travel our nation's highways every day. While the government has a legitimate interest in preventing drug-crimes, with this Court's decision, it comes at a high price—peace of mind.

Canine sniffs serve important purposes and are invaluable to proper drug-detection procedures. However, the power to conduct these sniffs must be subject to the Constitution's checks on unreasonable intrusions into an individual's right of privacy. The Fourth Amendment serves as a key deterrent function and has long been recognized as a crucial means of discouraging unlawful police conduct.¹⁷⁶ The Court's decision in *Caballes*, unfortunately, has chipped away at that fundamental protection. Until the Court recognizes the need to limit law enforcement's discretion in conducting potentially intrusive investigations, the rest of us can only wonder what our next commute will have in store.

*Jessica Na**

176. *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

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