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The Technological Sniffing Out of Constitutional Rights: Assessing the Constitutionality of the Passive Alcohol Sensor III

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THE TECHNOLOGICAL SNIFFING OUT OF CONSTITUTIONAL RIGHTS: ASSESSING THE CONSTITUTIONALITY OF THE PASSIVE ALCOHOL SENSOR III

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INTRODUCTION

The Fourth Amendment of the United States Constitution guarantees to each person, in the United States, the right to be free from unreasonable searches and seizures.[1] In determining what constitutes a "search" under the Fourth Amendment, the Supreme Court has developed a two-prong analysis based on reasonable subjective expectations of privacy.[2] The recent advent of sense enhancing technology has increasingly enabled law enforcement officials to conduct "searches" that have been held to be constitutional because they did not constitute "searches" under the Fourth Amendment.[3] One of the current tools being used in the war

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[1] *See* U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

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

[3] *See, e.g.*, United States v. Knotts, 460 U.S. 276 (1983) (holding that the monitoring of beeper signals from a radio transmitter placed on the defendant's vehicle did not constitute a search or seizure under the Fourth Amendment); Smith v. Maryland, 442 U.S. 735 (1979) (holding that the use of a pen register by a telephone company did not constitute a "search" under the Fourth

against drunk driving is an instrument known as the Passive Alcohol Sensor III ("P.A.S. III") or the "Sniffer."[4] This tool acts as a breathalyzer and is used without the driver's knowledge or consent.[5] Presently, there is no case law addressing the constitutionality of the use of the P.A.S. III.[6]

This Note analyzes the constitutionality of the use of the P.A.S. III and argues that the use of this tool should constitute a "search" under the Fourth Amendment. It further argues that the use of the Sniffer is an unreasonable search that implicates the Fifth Amendment right against self-incrimination.[7] Since the use of the Sniffer has implications for both Fourth and Fifth Amendment rights, there should be specific protocols followed in conjunction with its use.

Part I of this Note provides background on the seminal and applicable search and seizure cases, the primary cases on the Fifth Amendment right against self-incrimination, as well as the P.A.S. III. Part II of this Note analyzes the constitutionality of the use of the Sniffer and argues that the use of the Sniffer should be ruled unconstitutional. The Sniffer invades the privacy of the interior of the car in an attempt to detect something that is otherwise undetectable. As such, it should be considered an unreasonable invasion of privacy. However, under the current stream of case law, it is unlikely that the use of the Sniffer will be considered unconstitu-

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Amendment); United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999), *cert. granted,* 121 S. Ct. 29 (2000) (No. 99-8508) (holding that a thermal image scan did not constitute a search under the Fourth Amendment). The Supreme Court is set to decide the *Kyllo* case this term. For a detailed discussion, see *infra* Part I.A.1.b.

[4] The P.A.S. III appears to be an ordinary flashlight but is actually equipped with a sensor that detects alcohol. *PAS Systems International: P.A.S. III Sniffer, at* http://www.sniffalcohol.com/prod01.htm, (last visited Mar. 30, 2001).

[5] *Id.*

[6] However, there does seem to be an unreported ruling in the District of Columbia upholding the Sniffer's reliability. Mary P. Gallagher, *Civil Libertarians Wince at New Device that 'Shines Light' on Drunken Drivers*, N.J. L.J., Aug. 21, 2000.

[7] *See* U.S. CONST. amend. V. The Fifth Amendment, in relevant part, provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Id.*

tional. Part II also provides a policy analysis on the use of the Sniffer. The final part of this Note suggests some guidelines that should be implemented in conjunction with the use of the Sniffer.

I. BACKGROUND

A. *Case Law*

1. Fourth Amendment Freedom from Unreasonable Searches and Seizures

The early interpretations by the Supreme Court of the United States of whether there had been an unreasonable search or seizure under the Fourth Amendment focused on a strict trespass of property approach.[8] Thus, for example, in *Olmstead v. United States*, the Court found that a surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution.[9] In *Olmstead*, the defendants' conversations were intercepted through a wiretap of the defendants' office as well as several of their residences.[10] The intercepted conversations were subsequently used against the defendants in court.[11] The phones were tapped by the insertion of small wires along regular telephone lines and was done without any physical trespass on the defendants' property.[12] Reasoning that the wires were not part of the defendants' houses or office and that the evidence was secured by the use of the sense of hearing, the Court held that there was neither a search nor a seizure.[13] The Court found that since the Fourth Amendment only applied to the search or seizure of material things, there was no Fourth Amendment violation.[14]

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[8] *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928).
[9] 277 U.S. at 464.
[10] *Id.* at 457.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 464.
[14] *Id.* at 464-66.

In its seminal decision of *Katz v. United States*, the Supreme Court redefined and expanded what constitutes a "search" under the Fourth Amendment.[15] In *Katz*, the Court ruled that in order for a search to be considered reasonable under the Fourth Amendment, it must pass muster under a two-pronged analysis.[16] First, there must be a subjective reasonable expectation of privacy on the part of the defendant.[17] Second, this expectation of privacy must be one that society is willing to recognize.[18] Utilizing this two-prong criteria, the Supreme Court has determined that actions such as the use of a beeper by police to monitor the movement of a car,[19] and the use of a dog by police to attempt to sniff out drugs did not amount to violations of the Fourth Amendment because they did not constitute searches.[20]

In determining the reasonableness of a search, one consideration is the location of the search itself.[21] For example, the Supreme Court has recognized an increased expectation of privacy rights where the location being searched is a home.[22] Thus, in *Payton v. New York*, where police officers broke into the defendant's apartment without obtaining a warrant, the Court ruled that the

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[15] 389 U.S. 347 (1967).

[16] *Id.* at 361 (Harlan, J., concurring). This two-prong test was formulated in Justice Harlan's concurrence and not the majority opinion. *Id.* The majority opinion merely defined what was protected under the Fourth Amendment, that "the Fourth Amendment protects people, not places." *Id.* at 351.

[17] *Id.*

[18] *Id.*

[19] United States v. Knotts, 460 U.S. 276. The Court held that the monitoring of a signal did not invade any legitimate expectation of privacy on the defendant's part. The defendant was the owner of the cabin that was the final destination of the car being monitored. *Id.*

[20] *See* United States v. Place, 462 U.S. 696 (1983) (holding that the exposure of luggage to a trained narcotics dog does not constitute a search under the Fourth Amendment).

[21] *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 331-34 (1998) (discussing the hierarchy of privacy interests created by the Supreme Court).

[22] *See e.g.*, Payton v. New York, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.").

entry into the home, absent a warrant or exigent circumstances violated the defendant's Fourth Amendment rights.[23] Similarly, in *Welsh v. Wisconsin*, where the police entered the defendant's house and arrested him for driving while intoxicated, the Court held that the warrantless entry was in violation of the Fourth Amendment.[24] Therefore, at least with respect to homes, the Court has found that there needs to be either a warrant or an exigent circumstance before the privacy of an individual's home can be invaded.

a. Automobiles and Decreasing Expectations of Privacy

Unlike the expectation of privacy in a home, individuals have diminished Fourth Amendment rights in their automobiles.[25] Starting with its decision in *Carroll v. United States*,[26] where the Supreme Court upheld a conviction for transporting alcohol based on an amendment to the Prohibition Act,[27] the Court began to recognize a diminished expectation of privacy with respect to automobiles. Although the alcohol was searched and seized from

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[23] *Id.* at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971) ("It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . 'exigent circumstances.'").

[24] 466 U.S. 740 (1984).

[25] *See* Cardwell v. Lewis, 417 U.S. 583, 589 (1974) ("At least since *Carroll v. United States*, the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other."); *see also* James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 841-45 (1999); Clancy, *supra* note 21, at 332.

[26] 267 U.S. 132 (1924).

[27] National Prohibition Act, ch. 85, 41 Stat. 305 (repealed 1933). The Prohibition Act was passed to enforce the Eighteenth Amendment, which prohibited the manufacture, sale, or transportation of alcohol within the United States. U.S. CONST. amend. XVIII (repealed 1933). The Eighteenth Amendment was subsequently repealed by the Twenty-First Amendment. U.S. CONST. amend. XXI. The Twenty-First Amendment provides: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." *Id.*

the defendant's automobile without a warrant, the Court noted that there was a distinction between searching a private dwelling and searching an automobile or other vehicle.[28] Moreover, the Court held that this distinction was consistent with the Fourth Amendment.[29] The Court's reasoning for this distinction between a vehicle and a dwelling was based on the idea that there may be exigent circumstances involved with a movable vehicle since anything concealed in a movable vehicle may be readily moved out of the reach of a search warrant.[30]

Expanding on this line of reasoning, the Court in *Cardwell v. Lewis*, found yet another distinction between automobiles and homes.[31] In *Cardwell*, the defendant had parked his car at a public parking lot while he was meeting with police officers inside the stationhouse.[32] While the defendant was inside the stationhouse, several officers removed paint samples from the defendant's car.[33] The defendant claimed that the removal of the paint samples from

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[28] *Caroll*, 267 U.S. at 147.

[29] *Id.*

[30] *Id.* at 151. The *Carroll* court opined as follows:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153; *see also* Chambers v. Maroney, 399 U.S. 42 (1970). In *Chambers*, the Court ruled the following:

> [T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable . . . . Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.

Id. at 50-51.

[31] 417 U.S. 583, 590 (1974).

[32] *Id.* at 587.

[33] *Id.* at 591.

his car was unconstitutional.[34] However, the Court upheld as reasonable searches the removal of paint samples from the automobile, as well as the police examination of the car tires.[35] The Court reasoned that "[t]he search of an automobile [was] far less intrusive . . . than the search of one's person or of a building."[36] Furthermore, the Court noted that there was a lesser expectation of privacy in an automobile, since its function was as a means of transportation and not as a home or as "the repository for personal effects."[37]

Following its *Cardwell* decision, the Court, in *United States v. Knotts*, was confronted with the issue of whether the "monitoring [of] beeper signals . . . invaded any legitimate expectation of privacy."[38] In *Knotts*, law enforcement officers arranged to install, inside a chloroform container, a beeper device that emitted periodic signals that could be picked up by a radio receiver.[39] This container was then sold to the co-defendant in the case.[40] Using the signals, the police followed the car to the defendant's cabin.[41] After several days of surveillance, a search warrant was executed that led to the discovery of the chloroform container containing the beeper as well as a drug laboratory within the cabin.[42] Finding that the use of a beeper to monitor signals and the movement of a car did not invade any legitimate expectation of privacy on the part

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[34] *Id.* at 588.

[35] *Id.* at 591-92.

[36] *Id.* at 590 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring)).

[37] *Id.* However, even where the vehicle is used as a home, the Court has still found a diminished expectation of privacy. *See* California v. Carney, 471 U.S. 386 (1985) (recognizing that the mobile home possessed many of the attributes of a home but refusing to distinguish and recognize a greater expectation of privacy). "To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments." *Id.* at 393.

[38] 460 U.S. 276, 285 (1983).

[39] *Id.* at 277.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 279.

of the defendant,[43] the Court held that there was neither a search nor a seizure, and, therefore, no constitutional issue.[44] Reinforcing its plurality opinion in *Cardwell v. Lewis*,[45] the Court also reasoned that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[46]

With its decisions in *Cardwell* and *Knotts*, the Supreme Court further eroded the expectation of privacy an individual enjoys in his or her automobile. Continuing along this tenuous path, the Court ruled, in *United States v. Ross*, that the police could conduct a warrantless search of a vehicle that was believed to contain narcotics.[47] Finding that "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container,"[48] such as luggage, the Court nevertheless held that "an individual's expectation of privacy in a vehicle and its contents may not survive if [there is] probable cause . . . to believe that the vehicle is transporting contraband."[49]

In the recent case of *Wyoming v. Houghton*, the Court scaled back the already diminished expectation of privacy even further by holding that police officers who have probable cause to search a car may inspect a passenger's belongings contained in the car if those belongings are capable of concealing the object of the search.[50] In *Houghton*, the Court assessed the reasonableness of

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[43] *Id.* at 285. While the beeper in the car led the police to the defendant's cabin, the defendant was not the driver of the car. *Id.* at 278.

[44] *Id.* at 285.

[45] 417 U.S. at 590 (holding that the search of an automobile was "far less intrusive" than the search of one's home).

[46] *Knotts*, 460 U.S. at 281.

[47] 456 U.S. 798, 800 (1982).

[48] *Id.* at 823.

[49] *Id.*

[50] 526 U.S. 295, 307 (1999). In *Houghton*, the police had stopped a car for several traffic infractions. *Id.* at 297. Upon questioning the driver, the officer noticed a hypodermic syringe in the driver's shirt pocket. *Id.* at 298. The driver admitted to using drugs which, in turn, led to a search of the car for contraband. *Id.* Among the objects searched was defendant's purse, which was located on the back seat of the car. *Id.*

the search of the passenger's effects by applying a balancing test.[51] Weighing "the degree to which [the search] intrude[d] on an individual's privacy" with "the degree to which [the search was] needed for the promotion of legitimate governmental interests,"[52] the Court found that the passenger's privacy expectations were "considerably diminished" whereas the governmental interests were substantial.[53] Writing for the dissent, Justice Stevens, however, noted that the majority was fashioning a new rule by allowing a search of the passenger's container where the information prompting the search implicated only the driver.[54] Arguing that the majority's rights restrictive approach was not dictated by precedent, Justice Stevens found that the privacy concerns at issue in this case were not outweighed by the State's interest in effective law enforcement.[55] Finding unpersuasive the argument that the spatial association between the passenger and driver was sufficient to either presume that they were partners in crime or ignore privacy interests in a purse, Justice Stevens further argued that at the very least, probable cause to believe that the purse contained contraband was required prior to the search.[56]

The Court's abrogation of Fourth Amendment rights in automobiles is not limited to searches alone – it applies to seizures as well.[57] Unlike a search, a seizure does not rely on expectations of privacy. Instead, a Fourth Amendment seizure occurs only "when there is a governmental termination of freedom of movement through means intentionally applied."[58]

The Court's diminution of the Fourth Amendment right against unreasonable seizures can be seen in the line of cases in which the

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[51] *Id.* at 300.

[52] *Id.*

[53] *Id.* at 304.

[54] *Id.* at 309-10 (Stevens, J., dissenting).

[55] *Id.* at 310-11.

[56] *Id.*

[57] *See* Michigan v. Sitz, 496 U.S. 444 (1990) (holding sobriety checkpoints constitutional); *see also* Lisa K. Coleman, California v. Acevedo: *The Erosion of the Fourth Amendment Right to Be Free from Unreasonable Searches*, 22 MEMPHIS ST. UNIV. L. REV. 831 (1992) (suggesting that the Court's automobile cases have resulted in an erosion of Fourth Amendment rights).

[58] Brower v. County of Inyo, 489 U.S. 593, 597 (1989).

Court had to rule on the constitutionality of checkpoints.[59] For example, in *Michigan v. Sitz*,[60] the Court held that sobriety checkpoints were constitutional by applying a balancing test that it had previously used only in determining the constitutionality of stops with respect to border checkpoints.[61] Agreeing that a seizure occurs when a vehicle is stopped at a checkpoint, the Court reasoned that the issue was whether the search was reasonable under the Fourth Amendment.[62] Balancing the state's interest in public safety against the intrusion into an individual's privacy, the Court found that the state's interest outweighed the slight intrusion on a motorist stopped briefly at a sobriety checkpoint.[63]

In a dissenting opinion, however, Justices Brennan and Marshall, noted that the majority had incorrectly applied the balancing test by "undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving."[64] In addition, they noted that the balancing test should only be applied where "a seizure is substantially less intrusive than a typical arrest."[65] Thus, according to the dissent, the majority's holding subjected the general public to the possibility of "arbitrary or harassing conduct by the police."[66]

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[59] *See, e.g.*, *Sitz*, 496 U.S. 444 (ruling on the constitutionality of sobriety checkpoints); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (ruling on the constitutionality of illegal alien checkpoints).

[60] 496 U.S. 444 (1990).

[61] *See Martinez-Fuerte*, 428 U.S. 543 (1976) (holding that vehicle stops at a fixed checkpoint for brief questioning of its occupants, even without reason to believe that the vehicle contained illegal aliens did not violate the Fourth Amendment).

[62] *Sitz*, 496 U.S. at 450.

[63] *Id.* at 455. "[T]he balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program." *Id.*

[64] *Id.* at 456 (Brennan, J., dissenting).

[65] *Id.* at 457.

[66] *Id.* at 458; *see also* Indianapolis v. Edmond, 121 S. Ct. 447 (2000) (Thomas, J., dissenting) (questioning the reasonableness of checkpoints). Justice Thomas writes:

> Taken together, our decisions in *Michigan Dept. of State Police v. Sitz*, and *United States v. Martinez-Fuerte*, stand for the proposition that

In the recent case of *Indianapolis v. Edmond*, the Supreme Court was again faced with the issue of the constitutionality of checkpoints.[67] This time, however, the Court had to decide on the constitutionality of setting up narcotics interdiction checkpoints.[68] Although reaffirming the test utilized in *Sitz*, which balanced the competing interests at stake and the effectiveness of the program, the Court held that where the primary purpose of the checkpoint was to detect evidence of "ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."[69] As such, these stops could "only be justified by some quantum of individualized suspicion."[70] The Court distinguished sobriety checkpoints from these drug interdiction checkpoints by reasoning that the sobriety checkpoints were constitutional because they were based on a concern for highway safety.[71] By contrast, the primary purpose of the Indianapolis drug interdiction checkpoints was indistinguishable from that of the general interest in crime control.[72]

> suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing.

Id. at 462.

[67] 121 S. Ct. 447 (2000).

[68] These checkpoints are roadblocks used by the police to detect drug traffickers. *See* Sandra Guerra, *Criminal Law: Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1132 (1992). At a fixed location, drivers are stopped and asked for their license and registration. *Id.* at 1133. These stops provide officers with an opportunity to look inside the vehicles and to detect signs of impairment from the driver. *Id.* At the drug interdiction points at issue in *Edmond*, a narcotics detection dog was also walked around the outside of each stopped vehicle to sniff for narcotics. *See Edmond*, 121 S. Ct. at 451.

[69] *Edmond*, 121 S. Ct. at 454.

[70] *Id.* at 457.

[71] *Id.* at 455. "Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate." *Id.*

[72] *Id.* This distinction, however, appears flawed. Like sobriety checkpoints, where the purpose is to identify, arrest, and prosecute drunk drivers, the purpose

The sum and substance of the Court's decisions reveals that the Court has made a clear distinction between privacy interests in the home and privacy interests in an automobile. The mobility of an automobile and its function of traveling on public thoroughfares means that an individual in a vehicle will only be afforded a diminished expectation of privacy. The mere fact that an individual is in an automobile, therefore, serves to subject the individual to a greater likelihood of being searched without any Fourth Amendment implications.

b. Sense Enhanced "Searches"

Sense enhancing devices allow law enforcement officials to conduct non-physical invasions into zones of privacy.[73] These sense enhanced "searches" allow the police to obtain evidence that can not otherwise be obtained either at all or without some physical intrusion.[74] As a result, the superficial distinction as to whether there has been some actual physical intrusion is what distinguishes a search from a sense-enhanced "search."

In terms of expectations of privacy, the Supreme Court has also begun to decrease the sphere of privacy an individual has in general.[75] The same year that the Supreme Court decided in

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of the drug interdiction checkpoints were to identify, arrest, and prosecute drug traffickers.

[73] *See e.g.*, Peter Joseph Bober, Note, *The "Chemical Signature" of the Fourth Amendment: Gas Chromotography/Mass Spectrometry and the War on Drugs*, 8 SETON HALL CONST. L.J. 75, 79-82 (1997) (discussing a device used to detect the presence of drugs); Laura B. Riley, Comment, *Concealed Weapon Detectors and the Fourth Amendment: The Constitutionality of Remote Sense-Enhanced Searches*, 45 UCLA L. REV. 281 (1997) (discussing the use of concealed weapon detectors).

[74] For example: concealed weapons detectors are used to detect weapons without a physical frisk; thermal imaging devices allow detection of the possible locations of heat lamps without a physical search; and gas chromotograph devices that detects drugs by testing the air around suspects.

[75] *See e.g.*, United States v. Place, 462 U.S. 696 (1983) (holding that a dog sniff of luggage did not violate any Fourth Amendment rights); *see also* David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563,

Knotts, that the use of a beeper to monitor the movement of a car did not constitute a search, the Court was also faced with the issue of whether the exposure of luggage to a trained narcotics detection dog constituted a search.[76] Holding that the dog sniff did not constitute a search, the Court, in *United States v. Place*, reasoned that the sniff test was much less intrusive than a typical search.[77] The Court found that the limited scope of the search made by a dog sniff for the presence or absence of narcotics "ensure[d] that the owner of the property [was] not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[78] As such, it did not constitute a search under the Fourth Amendment.[79]

Concurring in the result only, Justices Brennan and Marshall recognized that the dog sniff "add[ed] a new and previously unobtainable dimension to human perception . . . [which] represent[ed] a greater intrusion into an individual's privacy."[80] They noted that the Court unnecessarily addressed the issue of whether the dog sniff constituted a search under the Fourth Amendment.[81]

568-83 (1990) (discussing the Fourth Amendment concerns raised by sense-enhanced searches and arguing that these types of searches encourages improper police practices).

[76] *See Place*, 462 U.S. 696.

[77] *Id.* at 707. According to the Court, the difference between a dog sniff and a typical search was that the dog sniff does not require the opening of the luggage. *Id.* In contrast, a typical search, such as the rummaging through of luggage contents by an officer, would expose "noncontraband items that otherwise would remain hidden from public view." *Id.*

[78] *Id.*

[79] This reasoning was again applied in *Edmond*, where the procedure during the checkpoint involved an officer walking a narcotics-detection dog around a car at checkpoints to try to detect narcotics in the automobile. *Edmond*, 121 S. Ct. at 451. Reaffirming *Place*, the Court noted that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search." *Id.* at 453. "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" *Id.*

[80] *Place*, 462 U.S. at 719 (Brennan, J., concurring).

[81] *Id.* "In any event, I would leave the determination of whether dog sniffs

Reasoning that "[t]he use of dogs represented a greater intrusion into an individual's privacy[,]" Justices Brennan and Marshall argued that "[s]uch use implicate[d] concerns that [were] at least as sensitive as those implicated by the use of certain electronic detection devices."[82]

One of the latest types of sense enhancing searches being conducted by law enforcement officials is the use of thermal imaging devices to scan for marijuana growth. These infrared detection devices provide a visual image of heat radiating from an object being analyzed.[83] While the thermal imaging device does not emit any beams or rays, it collects thermal energy and converts that energy into a color on a predetermined color scale.[84] In effect, these devices allow police officers to enhance their detection capabilities so as to see behind walls and determine whether an individual is using heat lamps to grow marijuana.[85] The Supreme Court has recently heard arguments in *Kyllo v. United States*[86] and is set to resolve the split among the lower courts[87] by deciding on the constitutionality of the use of thermal imagers. In *Kyllo*, the defendant was convicted for manufacturing marijuana based on

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of luggage amount to searches, and the subsidiary question of what standards should govern such intrusions, to a future case providing an appropriate, and more informed, basis for deciding these questions." *Id.* at 720.

[82] *Id.* at 719-20.

[83] *See* T. Wade Mcknight, Comment, *Passive, Sensory-Enhanced Searches: Shifting the Fourth Amendment "Reasonableness" Burden*, 59 LA. L. REV. 1243, 1249-50 (1999); Michael D. O'Mara, Comment, *Thermal Surveillance and the Fourth Amendment: Heating Up the War on Drugs*, 100 DICK. L. REV. 415, 417-18 (1996); Tracy M. White, Note, *The Heat Is On: The Warrantless Use of Infrared Surveillance to Detect Indoor Marijuana Cultivation*, 27 ARIZ. ST. L.J. 295, 296 (1995).

[84] *See* O'Mara, *supra* note 83, at 417.

[85] *See* McKnight, *supra* note 83, at 1249.

[86] 190 F.3d 1041 (9th Cir. 1999), *cert. granted,* 121 S. Ct. 29 (2000) (No. 99-8508).

[87] *See id.* (upholding thermal image scans); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995) (upholding that the use of a thermal imager as non-intrusive); United States v. Field, 855 F. Supp. 1518 (W.D. Wisc. 1994) (holding the warrantless use of a thermal imager improper); United States v. Penny-Feeney, 773 F. Supp. 220 (D. Hawaii 1991) (holding that use of thermal imagers was not a search under the Fourth Amendment).

evidence that was seized during a search of his home pursuant to the execution of a search warrant.[88] The search warrant had been issued based, in part, on information from a thermal image scan of defendant's house that showed high levels of heat emanating from the roof of defendant's garage.[89] In deciding the issue, the Ninth Circuit Court of Appeals found that the thermal image scan was not a search within the meaning of the Fourth Amendment because it was not intrusive.[90] Reasoning that the defendant had not exhibited a subjective expectation of privacy by attempting to conceal the heat emitted from his home, the Ninth Circuit court held that the heat waste emanating from the defendant's home did not constitute an expectation of privacy that society would be willing to recognize as reasonable.[91]

Another line of reasoning that is open for adoption by the Supreme Court is the approach taken by the Western District Court of Wisconsin in *United States v. Field*.[92] In *Field*, the District Court rejected the argument that the thermal imaging device was non-intrusive because it collected heat passively.[93] Analogizing the device to high-powered telescopes and wiretaps which are similarly passive,[94] the District Court reasoned that the whole point of using the device was to detect activity within the home.[95] The District Court further noted that there was no conscious decision by the homeowner to release heat and therefore it could not be analogized to trash that is intentionally thrown out.[96] If the Supreme Court chooses to follow the *Field* line of reasoning, the Court may narrow its finding to the fact that the thermal imaging device is being used to detect activity inside a home.[97] The

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[88] *Kyllo*, 190 F.3d at 1044.

[89] *Id.*

[90] *Id.* at 1046.

[91] *Id.*

[92] 855 F. Supp. 1518 (W.D. Wisc. 1994).

[93] *Id.* at 1530.

[94] *Id.*

[95] *Id.* at 1532.

[96] *Id.*

[97] The Supreme Court has traditionally recognized a greater expectation of privacy in relation to the home than anywhere else. *See supra* note 22 and accompanying text.

Supreme Court may similarly find that there is a sufficient intrusion as to require the police to obtain a warrant prior to using the thermal imaging device.

Given its prior rulings in *Place* and *Knotts*, the Supreme Court, is likely to affirm the ruling by the Ninth Circuit in *Kyllo*. Thus, the Court is likely to continue allowing law enforcement officials to conduct non-intrusive searches with sense enhancing devices without any Fourth Amendment implications.

c. The Plain View Doctrine

The Court created another exception to Fourth Amendment searches with the plain view doctrine. Similar to the Fourth Amendment search analysis, the plain view doctrine utilizes a two-prong test.[98] First, the evidence must not only be in plain view, but its incriminating character must also be immediately apparent.[99] Second, the officer must be lawfully on the premises as well as have a lawful right of access to the object.[100] Thus, if an officer is lawfully on the premises, and observes something in plain view, that item is seizable even in the absence of a warrant.[101]

For example, in *Coolidge v. New Hampshire*, the police seized and searched the defendant's car without a valid warrant.[102] The

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[98] Horton v. California, 496 U.S. 128 (1990) (holding that the discovery and seizure of weapons in plain view during the execution of a search warrant, which only authorized a search for the proceeds of the bank robbery, was not prohibited by the Fourth Amendment).

[99] *Id.* at 136.

[100] *Id.* at 137.

[101] *See* Arizona v. Hicks, 480 U.S. 321, 323 (1987); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court in *Hicks*, reasoned that "[t]he theory of [the plain view doctrine] consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Hicks*, 480 U.S. at 326-27. *See also Horton*, 496 U.S. at 128 (holding that the seizure of items discovered in plain view during a lawful search authorized by a valid warrant did not violate).

[102] 403 U.S. at 447. The Court found that the warrant "authorizing the seizure and subsequent search of [the] automobile was invalid because [it] was not issued by a 'neutral and detached magistrate,'" but rather by the Attorney

police had questioned the defendant in connection with a murder investigation.[103] The government argued that although the warrant was invalid, the search should still fall under one of the exceptions to the warrant requirement. The Court rejected the argument that the search fell within the ambit of the plain view doctrine and held that the doctrine does not apply where the police know in advance, the location of the evidence and intend to seize it but did not obtain a warrant.[104] In contrast, however, the Court reasoned that had the object been inadvertently discovered, it would fall under the plain view doctrine.[105]

Applying this analysis, the Court has ruled, for example, that the moving of an instrument to determine the serial numbers constituted a search.[106] In *Arizona v. Hicks*, police officers responded to the defendant's apartment to search for a shooter that had fired a shot into the apartment below.[107] Upon entering the apartment, they found and seized, inter alia, several weapons.[108] One of the officers also noticed two sets of expensive stereo equipment that seemed out of place in the defendant's apartment.[109] Believing them to have been stolen, the officer lifted the stereo to record their serial numbers.[110] The Supreme Court reasoned that while a mere inspection of the radio equipment that came into view would have produced no additional invasion of privacy interest, the movement of the equipment exposed concealed portions of the apartment.[111] Although, this new search "uncovered nothing of any great personal value," the Court held that a

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General in charge of investigating and later prosecuting the case. *Id.* at 449-50.

[103] *Id.* at 445-46.

[104] *Id.* at 470. "The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property." *Id.* at 472.

[105] *Id.* at 465-67.

[106] *Hicks*, 480 U.S. 321.

[107] *Id.* at 323.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 325.

"search [was] a search, even if it happen[ed] to disclose nothing but the bottom of a turntable."[112]

In sum, the plain view doctrine provides a clear cut, bright line guideline for police officers. The doctrine allows the police to seize incriminating material inadvertently discovered in a legitimate search, while at the same time protecting an individual from any material discovered during unreasonable, unlawful searches.

d. State Interpretation of Privacy and Dog Sniffs

Finding that the Supreme Court's decision in *Place*, was overly narrow, several states have interpreted dog sniffs as qualifying as searches under their state constitutions.[113] For example, agreeing with Justice Blackmun's dissent in *Place*, the Court of Appeals of Alaska, in *Pooley v. Alaska*, found that a dog sniff of luggage did constitute a search, albeit a minimally intrusive one.[114] The Court reasoned that the Alaska Constitution provides the individual with more privacy rights than the federal Constitution.[115] Upholding the lower court's refusal to suppress the drugs found in the defendant's luggage, the Court found that reasonable suspicion was sufficient to justify the search.[116] The Court further stated that "the reasonableness of the dog's use in the particular circumstances should be determined by balancing the state's interests in using the

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[112] *Id.*

[113] *See, e.g.*, State v. Pellicci, 580 A.2d 710 (N.H. 1990); People v. Dunn, 563 N.Y.S.2d 388 (1990); Pooley v. Alaska, 705 P.2d 1293 (Alas. Ct. App. 1985). The United States Constitution sets forth the proposition that federal courts have jurisdiction over federal constitutional issues. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . . In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact."). If there is a conflict over a state court interpretation and a federal court interpretation on a federal constitutional issue, the state interpretation must yield to the federal court interpretation. *See id.*; *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). However, in interpreting state constitutions, the state court is the final arbiter.

[114] 705 P.2d at 1311.

[115] *Id.*

[116] *Id.*

dog against the individual's interest in freedom from unreasonable government intrusions."[117]

Similarly, the Supreme Court of New Hampshire, in *State v. Pellicci*, held that the use of a dog to sniff the exterior of an automobile constituted a search under the New Hampshire Constitution.[118] Distinguishing the state analysis of searches from the Supreme Court's analysis of searches, the New Hampshire Court reasoned that under the New Hampshire Constitution, a search was implied by a "quest by an officer of law, a prying into hidden places for that which is concealed."[119] Since the use of the dog was for the detection of any contraband within the vehicle, the dog sniff constituted a search.[120] However, the Court found that the search was justified since the officers had a reasonable or founded suspicion for the search.[121]

Likewise, the New York Court of Appeals also declared that a dog sniff constituted a search under the New York Constitution.[122] Unlike the *Pellicci* court, however, the court, in *People v. Dunn*, used a similar analysis for the determination of searches as the United States Supreme Court.[123] While acknowledging that a dog only sniffs the outside area, the Court analogized the odors emanating from an apartment to the sound waves that were "harnessed" in *Katz*.[124] The Court reasoned that both of these emanations originated from an area that was unexposed to all except supersensitive detection devices.[125] The defendant's conviction, however, was upheld because the police had a reasonable suspicion that the residence contained illicit contraband.[126] The Court found that since the drug detection dog was "uniquely discriminate and nonintrusive" as well as of "significant utility to

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[117] *Id.*
[118] 580 A.2d 710, 716 (N.H. 1990).
[119] *Id.*
[120] *Id.*
[121] *Id.* at 717.
[122] *Dunn*, 563 N.Y.S.2d at 392.
[123] *Id.* at 392.
[124] *Id.*
[125] *Id.*
[126] *Id.*

law enforcement authorities," probable cause was not necessary for its use, as long as there was reasonable suspicion.[127]

The courts are in disagreement over whether to follow the Supreme Court's restricted interpretation with respect to sense enhanced searches. The Supreme Court's line of reasoning has resulted in state courts attempting to find other rationales for finding intrusions of privacy with respect to dog sniffs.

2. *The Fifth Amendment and the Freedom from Self-Incrimination*

The Fifth Amendment of the United States Constitution protects people from compelled self-incrimination.[128] Although the Constitution protects defendants from being compelled to provide testimonial or communicative evidence, it does not extend to protect defendants from providing evidence that identifies some physical characteristic of the defendant.[129] Beginning in *Holt v. United States*, the Supreme Court made this distinction clear in its analysis of what constituted a violation of the Fifth Amendment right against self-incrimination.[130] In *Holt*, the Court held that compelling a defendant to try on and exhibit for the jury, a blouse that was in evidence, did not violate his right against self-incrimination.[131] The Court reasoned that the "prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort

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[127] *Id.*

[128] *See* U.S. CONST. amend. V. The Fifth Amendment provides: "nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Id.*

[129] *See* Gilbert v. California, 388 U.S. 263 (1967) (holding that the taking of defendant's handwriting exemplars did not violate the Fifth Amendment); United States v. Wade, 388 U.S. 218 (1967) (holding that compelling the defendant to speak within hearing distance of witnesses, for identification purposes, did not violate Fifth Amendment rights).

[130] 218 U.S. 245 (1910).

[131] *Id.* at 253. There was a question as to whether a blouse belonged to the defendant. A witness had testified that the defendant had put on the blouse and that it had fit him. *Id.* at 252.

communications from him, not an exclusion of his body as evidence when it may be material."[132] The Court analogized the prohibition of compelling a defendant to try on and exhibit himself with the blouse on to "forbid[ding] a jury to look at a prisoner and compare his features with a photograph in proof."[133]

Reaffirming the holding of *Holt*, the Court in *Schmerber v. California*, held that the Fifth Amendment privilege against self incrimination only "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[134] Thus, the Court reasoned that the withdrawal and analysis of blood from the defendant did not violate the Fifth Amendment.[135] The Court's analysis of this issue turned, not on whether the administration of the blood test over the defendant's objection constituted compulsion, but whether the defendant was "compelled to be a witness against himself."[136] Noting that the Fifth Amendment right offers "no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture[,]" the Court distinguished tests such as lie detector tests that obtain physical evidence but are "directed to eliciting responses which are essentially testimonial."[137] The Court appeared to find that the "spirit and history" of the Fifth Amendment was evoked only where a person was compelled to submit to testing by which an effort was made to determine his guilt or innocence on the basis of physiological responses.[138]

With similar reasoning, the Court, in *Gilbert v. California*, extended the inapplicability of the Fifth Amendment right to handwriting exemplars.[139] While noting that a person's voice and

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[132] *Id.* at 252-53.

[133] *Id.* at 253.

[134] 384 U.S. 757, 761 (1966).

[135] *Id.*

[136] *Id.*

[137] *Id.* at 764

[138] *Id.*

[139] 388 U.S. 263 (1967). The defendant, who was arrested for a robbery, answered questions regarding several robberies in which the robber had used a

handwriting are means of communication, the Court nevertheless held that the defendant's right against self-incrimination was not violated.[140] The Court reasoned that despite being a means of communication, not every compulsion of voice or handwriting was a communication in violation of the Fifth Amendment privilege.[141] According to the Court, "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment] protection."[142] The Court further reasoned that there was no claim that the content of the exemplars was "testimonial or communicative."[143]

The Supreme Court applied similar reasoning in *United States v. Wade*,[144] a case decided on the same day as *Gilbert*. In *Wade*, the Supreme Court ruled that the compulsion of the defendant to speak at a lineup conducted for identification purposes was also not testimonial in nature.[145] Therefore, it did not violate any privilege against self-incrimination.[146] Again the Court relied on the distinction between a physical characteristic and the more abstract communication purpose.[147]

In contrast, however, where the defendant is asked to provide information such as the date of his sixth birthday, the Supreme Court has held that the privilege against self-incrimination is

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handwritten note. It was during this interrogation that the defendant gave the agent handwriting exemplars. *Id.* at 266.

[140] *Id.* at 266.

[141] *Id.*

[142] *Id.* at 266-67.

[143] *Id.* at 267.

[144] 388 U.S. 218 (1967).

[145] *Id.*; *see also* United States v. Dionisio, 410 U.S. 1 (1972) (reaffirming that there is no Fifth Amendment violation in requiring the defendant to provide voice exemplars where the exemplars were to be used only to measure the physical properties of the witnesses' voices and not for its testimonial or communicative content).

[146] 388 U.S. 218.

[147] *Wade*, 388 U.S. at 222. "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance." *Id.*

invoked.[148] In *Pennsylvania v. Muniz*, the Court stated that the basis for the privilege was the "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . ."[149] Thus, the Court reasoned that whenever a suspect is asked for a response that "requir[es] him to communicate an express or implied assertion of fact or belief," the trilemma of "truth, falsity, or silence" is confronted.[150] Since the sixth birthday question requested information from the defendant that, for whatever reason, he may not remember or be able to calculate, the Court found that the question required a testimonial response.[151] As such, it violated the Fifth Amendment right against self-incrimination.[152]

In sum, the Supreme Court has drawn a narrow distinction between physical characteristics and communicative information in determining Fifth Amendment self-incrimination violation. Unless there is some kind of factual content-based response requested from the defendant that forces the defendant into a trilemma of remaining silent, self-incrimination, or lying, there is no privilege against self-incrimination.

B. Technology

The latest invention in fighting crime is the P.A.S. III. Developed under the direction of various insurance and highway safety organizations[153] and touted as non-intrusive,[154] this innocuous looking flashlight with a built-in breathalyzer is being used to analyze a driver's breath without their participation or con-

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[148] *See* Pennsylvania v. Muniz, 496 U.S. 582 (1990).

[149] *Id.* at 596 (citing Doe v. United States, 487 U.S. 201, 212 (1988)).

[150] *Id.* at 597.

[151] *Id.* at 599.

[152] *Id.* at 600.

[153] Rick Lockridge, *CNN - Flashlight Has a Nose for Drunken Drivers*, (June 16, 1999), *at* http://www.cnn.com/TECH/computing/9906/16/driving.while.illuminated.tt.

[154] *PAS Systems International: P.A.S. III Sniffer*, *at* http://www.sniff-alcohol.com/prod01.htm (last visited Mar. 30, 2001).

sent.[155] The sensor that is attached to the flashlight is an electrochemical fuel cell that detects the presence of alcohol in the air of the car.[156]

In order to analyze a driver's breath, the tool needs to be held within ten inches from the driver as the driver is exhaling.[157] In order to obtain a sample of exhaled air, the Sniffer's manufacturer, PAS Systems International, suggests that the officer request the driver to give their name, address, and date of birth.[158] A pump within the sensor draws in a sample of the exhaled breath as well as the air in the car and the fuel cell analyzes the amount of alcohol in the sample.[159] A bar display on the flashlight indicates the possible blood alcohol content detected.[160] The display ranges from green to red, which corresponds to an approximate blood alcohol content range of .01 to .12.[161] For daytime use, an innocuous looking clipboard with an attached breathalyzer serves the same function.[162]

The tool is currently being used in an increasing number of states.[163] Among the states that are testing the device are Massachusetts, Rhode Island, California, Florida, Georgia, Louisiana, Minnesota, Tennessee, and Texas.[164] In addition, other states

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[155] *Id.* ("The P.A.S. III helps operator formulate probable cause without subject's active involvement.").

[156] *Id.*

[157] *PAS Systems International: Law Enforcement, at* http://www.sniffalcohol.com/law.htm (last visited Mar. 30, 2001). However, the closer the P.A.S. III is held, the more likely it will yield a more accurate result. *Id.*

[158] *PAS Systems International: P.A.S. III Sniffer, at* http://www.sniffalcohol.com/prod01.htm (last visited Mar. 30, 2001).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Brook A. Masters & Tom Jackman, *Sniffer Routs Out Drunk Drivers: Rights Advocates Decry Use of Device*, WASH. POST, Aug. 16, 2000, at B01.

[163] *All Things Considered: Interview: Todd Cubberly, Richardson Police Department, Texas, Discusses New Passive Alcohol Sensors Used in Flashlights* (NPR radio broadcast, Jan. 19, 2000).

[164] *Police Flashlight that Sniffs Alcohol Seen as Tool Against Underage Drinking*, PROVIDENCE JOURNAL - BULLETIN, Feb. 2, 2001, at 8C.

currently using the device include Ohio,[165] Michigan,[166] New Mexico,[167] North Carolina,[168] South Carolina,[169] Wisconsin,[170] Oregon as well as Indiana.[171] The use of the P.A.S. III is being advocated by insurance companies,[172] as well as groups such as Mothers Against Drunk Driving, who buy and donate P.A.S. III units to the police.[173]

Given the nature of the P.A.S. III system and the instructions for its use, the device unnecessarily intrudes upon the privacy of an individual. To ensure some level of accuracy, the device necessarily needs to be held as close to the driver's mouth as possible, which may necessarily lead to an intrusion into the interior of the car. Furthermore, the practical application of the P.A.S. III system, in effect, renders the device to be an ad hoc lie detector test. As such, the use of the P.A.S. III also unconstitutionally infringes on an individual's right to be free from self-incrimination.

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[165] Bruce Cadwallader, *Flashlight Helps Police Spot Drunken Drivers Sensor Can Detect Alcohol on Breath*, COLUMBUS DISPATCH, May 26, 2000, at 1E.

[166] *New Police Flashlights Can 'Smell' Alcohol*, GRAND RAPIDS PRESS, Dec. 25, 2000, at D6.

[167] Gallagher, *supra* note 6.

[168] *Sheriff's Department Gets Alcohol Sensors*, NEWS & OBSERVER, Mar. 4, 1999, at B3.

[169] Gene Crider, *Officers' New Tool to Shine Light on Drunk Drivers*, THE HERALD, June 27, 2000, at 2B.

[170] Anne Bothwell, *Just a Little Breath Will Do You in Flashlight Device Detects Alcohol on Drivers' Breath*, MILWAUKEE JOURNAL, Sept. 2, 1994, at 1B.

[171] Eric Peters, *Sniffer Promises a Secret Way to Deflate People's Liberties*, DETROIT NEWS, Sept. 7, 2000, at 14.

[172] Greg Rickabaugh, *Crime Watch: Tool Combats Drunken Driving; Officers Use New Device to Detect Alcohol Levels Covertly, Sparking Debate on Privacy*, AUGUSTA CHRON., Sept. 9, 2000, at A1.

[173] Pete Williams, *New Device Sniffs Out Drunk Drivers*, (Aug. 28, 2000), *at* http://www.msnbc.com/news/452360.asp. "Just this summer, [M.A.D.D.] bought 38 of the units and donated them to police." *Id.*

II. ANALYSIS OF THE PASSIVE ALCOHOL SENSOR

A. Federal Constitutional Analysis

1. Fourth Amendment Analysis and Argument Against Constitutionality

The latest advances in information technology and the Internet has led to an increased concern over individual privacy rights in identity.[174] In fact, the trend is towards protecting the privacy an individual has in their identity.[175] Ironically, however, there does not seem to be a similar concern over protecting privacy rights in terms of individual liberty. In fact, there seems to be a willingness to sacrifice those privacy rights in exchange for supposed personal safety. The resounding theme in recent cases suggests that if it makes it easier for the police to catch a criminal, then minor intrusions into privacy are acceptable.[176]

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[174] *See* Leslie Miller, *In the Internet We Trust Fears Aside, Americans Regularly Reveal Private Information*, USA TODAY, Aug. 21, 2000, at 3D; Robert O'Harrow Jr., *Wired Economy: States Jump into Privacy Battle*, WASH. POST, Sept. 20, 2000, at G11; Richard Raysman & Peter Brown, *International Privacy: Safe Harbor Protection for Personal Data*, N.Y. L.J., Oct. 10, 2000, at 3; *UCLA Internet Report Refutes Many Preconceived Notions about Online Guidelines*, ASCRIBE NEWS, Oct. 25, 2000; *see also* Consumer Privacy Protection Act, S. 2606, 106th Cong. (2000) ("To protect the privacy of American consumers."); Health Information Privacy Act, H.R. 1941, 106th Cong. (1999) ("To protect the privacy of personally identifiable health information."); Chief Information Officer of the United States of America, H.R. 4670, 106th Cong. (2000) ("To establish an Office of Information Technology in the Executive Office of the President."); Privacy Commission Act, H.R. 4049, 106th Cong. (2000) ("To establish the Commission for the Comprehensive Study of Privacy Protection.").

[175] *See* Miller, *supra* note 174; O'Harrow, Jr., *supra* note 174; Raysman & Brown, *supra*, note 174; *UCLA Internet Report Refutes Many Preconceived Notions about Online Guidelines*, *supra* note 174; S. 2606; H.R. 1941; H.R. 4670; F.R. 4049.

[176] This is a resounding theme of Justice Rehnquist's and Justice White's dissents in cases that hold against warrantless arrests and searches. *See, e.g.*,

The cost of this tradeoff is the diminution of an individual's expectation of privacy in his day to day affairs.[177] Starting with *Dow Chemical Co. v. United States*, the Supreme Court has ruled in favor of a gradual decrease in an individual's expectation of privacy.[178] In *Dow*, the Court held that the aerial surveillance, by which a private corporation hired by a government agency to fly overhead and take photographs of the facility, constituted neither a search nor a seizure – even where a security system had been installed to keep people out.[179] The Court continued its course in *Florida v. Riley* where it held that an aerial surveillance of the defendant's greenhouse did not violate the defendant's Fourth Amendment rights, despite the fact that the defendant had covered all but a small portion of the greenhouse in his backyard.[180] The *Riley* Court reasoned that the use of a helicopter circling at around four hundred feet above the property did not constitute a search under the Fourth Amendment since the garden was observable by

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Payton v. New York, 445 U.S. 573, 618 (1980) (White, J., dissenting in which Rehnquist, J., joined) ("[W]hile exaggerating the invasion of personal privacy involved in home arrests, the [majority] fails to account for the danger that its rule will 'severely hamper effective law enforcement.'"); Welsh v. Wisconsin, 466 U.S. 740, 760 (1984) (White, J., dissenting in which Rehnquist, J., joined) ("A test under which the existence of exigent circumstances turns on a perceived gravity of the crime would significantly hamper law enforcement."); *see also* Hon. Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 2 (1999) ("More recently, the Court's decisions have favored state interests by specifically assisting the police in the performance of official duties and providing bright-line rules that expanded police authority to search a detainee during a traffic stop.")

[177] *See, e.g.*, United States v. Place, 462 U.S. 696, 707 (1983) (holding that the use of a dog to sniff for drugs did not constitute a search under the Fourth Amendment); United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that the use of a beeper to track the movement of a car did not invade any legitimate expectation of privacy); Smith v. Maryland, 442 U.S. 735, 742 (1979) (finding no legitimate expectation of privacy in the numbers dialed on a telephone); Cardwell v. Louis, 417 U.S. 583, 591-92 (1974) (holding that neither the examination of the defendant's tires nor the collecting of pain samples from the defendant's car violated any expectation of privacy).

[178] 476 U.S. 227 (1986).

[179] *Id.* at 239.

[180] 488 U.S. 445 (1989).

the naked eye.[181] Because the police, "like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed[,] [t]hey were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was."[182] Disregarding the fact that the greenhouse was obscured from view by surrounding property, trees, shrubs, and a mobile home, as well as the fact that approximately ninety percent of the greenhouse roof was covered by corrugated roofing panels,[183] the Court concluded that the defendant did not have a reasonable expectation of privacy.[184]

In light of current case law, the Sniffer is likely to pass any Fourth Amendment challenge on its use. A finding of its constitutionality will likely be based on its use and purpose of stopping drunk drivers and its non-intrusiveness. Since an individual has a diminished expectation of privacy in a car and because police may legitimately stop cars at sobriety checkpoints,[185] a determination of constitutionality will turn on whether there is a reasonable expectation of privacy to the air in the car.[186] Although it can be argued that an officer may physically intrude into the interior of a car to accept a driver's license and registration, the use of the Sniffer adds an additional aspect to any physical intrusion. As such, the use of the Sniffer includes, not just a possible physical intrusion into the car, but an attempt to search out the existence of alcohol in the air.

Proponents of the device are likely to argue that the use of the device is similar to the dog sniff upheld in *Place* and that, therefore, it does not constitute a search. Both the device and a dog sniff attempt to detect an odor of a specific contraband. Both are limited to detection of that type of contraband only. Moreover, an analogy is likely to be drawn between an individual's expelled air as the body's waste and the waste that is left on the street for

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[181] *Id.* at 451.

[182] *Id.* at 449-50.

[183] *Id.* at 448.

[184] *Id.* at 450-51.

[185] *See* Michigan v. Sitz, 496 U.S. 444, 455 (1990).

[186] *See supra* Part I.A.1.a for a detailed discussion on expectations of privacy as applied to automobiles.

collection.[187] Similar to the garbage that is left on the street, there is no reasonable expectation of privacy in exhaled air.[188]

Depending on how the Supreme Court rules regarding the use of thermal imaging devices, proponents of the P.A.S. III may also draw an analogy between the P.A.S. III and the thermal imager. Both devices are non-intrusive means of detecting criminality. Furthermore, if there is no reasonable expectation of privacy in heat waste, an argument can be made that there is similarly no reasonable expectation of privacy in exhaled air. On the other hand, if the Supreme Court rules that the use of the thermal imaging device violates the Fourth Amendment, proponents of the P.A.S. III are likely to distinguish the use of the thermal imager by arguing that the thermal imager is being used on a home whereas the Sniffer is being used on an individual in an automobile – an area that the Supreme Court has already recognized a diminished expectation of privacy.

An argument can also be made that the state's interest in catching any and all drivers who are driving while intoxicated or under the influence outweighs any minimal intrusion to drivers stopped at sobriety checkpoints. In fact, since the Sniffer is non-intrusive, it can be argued that its use is far outweighed by the state's interest in public health and safety by preventing drunk drivers. These arguments, however, must fail. The mild intrusive-

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[187] *See* Aaron Larks-Stanford, Comment, *The Warrantless Use of Thermal Imaging and "Intimate Details": Why Growing Pot Indoors and Washing Dishes Are Similar Activities Under the Fourth Amendment*, 49 CATH. U.L. REV. 575, 587 (2000) (discussing the Supreme Court's release and emanation rationale in finding no reasonable expectation of privacy in garbage); Kathleen A. Lomas, Note, *Bad Physics and Bad Law: A Review of the Constitutionality of Thermal Imagery Surveillance after* United States v. Elkins, 34 U.S.F. L. REV. 799, 808 (2000) (discussing the heat waste rationale for finding that the use of thermal imaging devices are not searches); Jennifer Murphy, Comment, *Trash, Thermal Imagers, and the Fourth Amendment: The New Search and Seizure*, 53 SMU L. REV. 1645, 1667 (2000) ("This 'waste heat' that the [thermal imager] detected was analogized to the warrantless search and seizure of garbage left on the curb outside of a residence.").

[188] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626 (1989) ("In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns.")

ness of a procedure should not be determinative of the outcome.[189] The focus should be on the guarantee of the Fourth Amendment against invasions of privacy and not on the amount of intrusiveness.[190] As such, the silent intrusion into the interior of the car in an attempt to search out criminality constitutes an unreasonable invasion of privacy protected by the Fourth Amendment.[191]

The manufacturers of the Sniffer argue that the device is a legitimate tool because there is no "question of a 'trespass' or 'intrusion' into the privacy of an individual."[192] They base their argument on the idea that the Sniffer is protected under the plain view doctrine[193] and on the grounds that it is not an "evidential

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[189] Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (citing Boyd v. United States, 116 U.S. 616, 635 (1886)).

> 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 in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id. at 453-54. *See also* Gregory L. Kelley, Comment, *The Warrantless Use of Thermal Imagery*, 12 T.M. COOLEY L. REV. 597, 642 (1995) (arguing that the classification of the thermal image device as passive "sheds no light on the true issues involved in assessing the constitutionality of a search").

[190] *See* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549 (1990). Professor Katz argues that the *Katz* decision was supposed to provide a framework for ensuring freedom by protecting personal security and that it was supposed to "restore the equilibrium between the individual and his government." *Id.* Professor Katz notes, however, that *Katz* has not resulted in the expansion of constitutional guarantees of individual privacy. *Id*; *see also* Kelley, *supra* note 191, at 642.

[191] *See* Riley, *supra* note 73, at 309-12. "The fact that no touching or probing is involved does not reduce the 'intrusiveness' of devices that can reveal the most intimate information about one's body or activities conducted within one's home." Riley, *supra* note 73, at 310.

[192] *PAS Systems International: P.A.S. III Sniffer*, *at* http://www.sniff-alcohol.com/prod01.htm (last visited Mar. 30, 2001).

[193] *PAS Systems International: Law Enforcement*, *at* http://www.sniffalcohol.-com/law.htm (last visited Mar. 30, 2001). The manufacturers refer to the doctrine

test."[194] The manufacturers contend that since the plain view doctrine covers "sensory impressions gained by an officer who is legally present in the position from where he gains them,"[195] the use of the Sniffer is constitutional because it is "nothing more than an extension of the officer's nose."[196] Furthermore, it is argued that since an officer who is speaking to a driver as part of his investigation of drunk driving has both the right and the responsibility to observe the driver,[197] and since the breath an individual exhales is being put out into the public airspace, the use of the Sniffer falls under the plain view doctrine.[198]

This argument, however, must fail as well. In order to fall within the ambit of the plain view doctrine, the police must legitimately be in the location and the item seized or searched must be readily or immediately apparent.[199] While the police have a right to be present and operate sobriety checkpoints,[200] the alcohol on a driver's breath is not always readily apparent.[201] Where

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as the plain sight doctrine. The plain sight or plain view doctrine allows police officers to seize evidence that is in "plain view" when the officers are conducting a legitimate stop or search. *Id.*

[194] *PAS Systems International: P.A.S. III Sniffer, at* http://www.sniffalcohol.-com/prod01.htm (last visited Mar. 30, 2001). The manufacturers argue that the breath test performed by the Sniffer is not being used as evidence. However, while it is not specific evidence, it is evidence that can be referred to or relied on as establishing probable cause to request further sobriety testing.

[195] *PAS III Flashlight, at* http://www.alcotech.co.za/pasiii1.htm (last visited Mar. 30, 2001).

[196] Pete Williams, *New Device Sniffs Out Drunk Drivers*, Aug. 28, 2000, *at* http://www.msnbc.com/news/452360.asp.

[197] *PAS Flashlight III, at* http://www.alcotech.co.za/pasiii1.htm (last visited Mar. 30, 2001).

[198] *Id.*

[199] *See* Horton v. California, 496 U.S. 128, 131-32 (1990) (holding that the Fourth Amendment does not prohibit the warrantless seizure of evidence of crime in plain view even though the police officer, who only had a warrant to search for stolen rings, was also interested in finding other evidence connected with the crime and, therefore, did not discover the evidence inadvertently).

[200] *See, e.g., Sitz*, 496 U.S. at 455.

[201] The driver may not have drank enough alcohol as to be detectable, the alcohol consumed may have been an alcohol such as vodka that has little odor, or the driver may have used breath mints. *PAS Flashlight III, at* http://www.alcotech.co.za/pasiii1.htm (last visited Mar. 30, 2001).

it is not, the use of the Sniffer does not fall under the plain view doctrine.[202] As such, the Supreme Court, in *Arizona v. Hicks*, held that the slight search of lifting up a stereo to check the serial number was unconstitutional.[203] The Court reasoned that the serial number could not have been in plain view since the officer had to move the stereo to look at it.[204]

The current Fourth Amendment search and seizure line of case law suggests that the Sniffer will likely be determined constitutional.[205] The diminished expectation of privacy with respect to automobiles, the legitimacy of sobriety checkpoints, and the minimal intrusiveness are all factors that will be the basis for the ruling on its constitutionality. However, the arguments that the use of the P.A.S. III is constitutional under the plain view doctrine must be rejected.

The use of the Sniffer should be deemed to constitute a search. Unlike garbage that is intentionally left on the street, there is no similar intentional release of breath into the air. In addition, the main purpose of the Sniffer is to attempt to detect criminality in the air where it is not readily detectable. Furthermore, under the plain view doctrine, the use of the P.A.S. III is not necessary. If the drunkenness is readily apparent, then the plain view doctrine applies regardless, and the use of the Sniffer would be superfluous.[206] However, if it is not readily apparent whether someone

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[202] In addition, this argument contradicts itself. The argument begins with the premise that the use of the Sniffer does not constitute a search but it then turns into an argument that the use of the Sniffer falls under the plain view doctrine. The plain view exception, however, does not apply unless there has already been a search. *See Coolidge*, 403 U.S. at 467. "[P]lain view does not occur until a search is in progress." *Id.*

[203] 480 U.S. 321 (1987).

[204] *Id.* at 325.

[205] Furthermore, "the overall tendency of the Court has been to contract the protected individual interest as a consequence of modern technological advances and their utilization by the government." Clancy, *supra* note 21, at 335. According to Professor Clancy, "[o]ne technique has been to find that the effect of modern life, with its technological and other advances, serves to eliminate or reduce a person's justified expectation of privacy." Clancy, *supra* note 21, at 335.

[206] The driver's state of drunkenness would already be in plain view.

has consumed alcohol, then the use of the P.A.S. III could not be legitimized under the plain view doctrine.

At the very least, the use of the Sniffer is a violation of the spirit of the Fourth Amendment protections.[207] The framers of the Constitution could not have possibly conceived the advances in technology just as it is not possible to conceive of the technology that will be invented within the next century. However, an inference can be drawn from the language of the Fourth Amendment that the framers attempted to create a sphere of privacy upon which law enforcement officials could not arbitrarily intrude in order to obtain information about an individual and use that information against that individual without some form of consent or exigency.[208]

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[207] *See* Clancy, *supra* note 21, at 345-49 (arguing that the Fourth Amendment protection protects a right to be secure which is the right to exclude the government).

[208] *See generally* JOHN H.F. SHATTUCK, RIGHTS OF PRIVACY (1977) (discussing the history of and the zones of privacy created by the Fourth Amendment right against unreasonable searches and seizures). According to Shattuck:

> A major point in [James Madison's] argument for the adoption of enforceable individual rights was that, unless restricted, the government might reasonably consider general warrants and other abusive practices to be necessary for the enforcement of the laws. Accordingly, Madison introduced a proposal to restrict searches, which was subsequently adopted with only a few minor charges as the Fourth Amendment.

Id. at 5; *see also Coolidge*, 403 U.S. at 443.

> [T]here must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.

Coolidge, 403 U.S. at 455. "[A]ny intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity." *Id.* at 467.

2. *Fifth Amendment Analysis*

Assuming that the Sniffer passes Fourth Amendment analysis, there is also a possible Fifth Amendment issue to consider. As Justice Douglas suggested, in a concurring opinion in *Berger v. New York*, "the Fourth Amendment and the Fifth come into play when the accused is 'the unwilling source of the evidence.'"[209] Similarly, in *Schmerber v. California*, the Court noted that tests such as lie detector tests that seem to be directed at obtaining physical evidence may, in fact, be "directed to eliciting responses which are essentially testimonial."[210] The Court reasoned that "[t]o compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."[211] The use of the Sniffer subjects the driver to testing without his knowledge or consent. While the driver is speaking, the officer is testing the breath that is coming from the driver to determine his guilt or innocence. The use of the Sniffer also may compel the driver to provide self-incriminating testimonial evidence without his or her knowledge or consent. Although the compulsion of the individual to provide a breath exemplar is not considered testimonial under the current stream of Fifth Amendment case law, the questioning by the officer may lead to the compulsion of testimonial evidence such as whether the driver has been drinking and the amount of alcohol the driver has consumed. While the Sniffer's results can not be used in Court as direct evidence, there is no way to avoid its use as indirect evidence.[212] The officer, who has not observed the driver exhibit any other signs of consuming alcohol, bases his

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[209] 388 U.S. 41, 67 (1967) (Douglas, J., concurring).

[210] 384 U.S. 757, 764 (1966).

[211] *Id.* at 764.

[212] Although the results of the Sniffer are not admissible as direct evidence of intoxication, its use will be admitted as evidence to support the further detention of the driver for additional testing.

probable cause for administering other sobriety tests solely on the Sniffer.[213]

Given the implications for both the Fourth Amendment right to be free from unreasonable searches and the Fifth Amendment right against compelled self-incrimination, the use of the Passive Alcohol Sensor III should be ruled unconstitutional. The P.A.S. III is more than just a mere enhancement of the olfactory senses, it is a replacement of those senses through the use of a tool. This new tool allows intrusions into zones of privacy protected by the Fourth Amendment.

B. State Constitutional Analysis

The states that have ruled that canine sniffs do constitute searches under their respective state constitutions[214] may, in the end, offer more individual privacy protection. Thus, in a state such as Alaska, where the Court of Appeals applies a balancing approach to the use of canine sniffs,[215] the use of the P.A.S. III may be ruled an unreasonable intrusion on an individual's interest in freedom when weighed against the government's interest in using the device.[216] Similarly, in a state like New Hampshire, where the Supreme Court of New Hampshire recognizes an implied search by the use of the dogs because the sniff pried inside to

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[213] If the Sniffer registers a false positive for alcohol, the officer may request that the driver conduct other sobriety tests. As such, even though the officer has not noticed any other signs of intoxication, the request for further testing is based on the Sniffer.

[214] *See, e.g.*, State v. Pellicci, 580 A.2d 710 (N.H. 1990); People v. Dunn, 563 N.Y.S.2d 388 (1990); Pooley v. Alaska, 705 P.2d 1293 (Alas. Ct. App. 1985). In all of these states, the constitutionality of the dog sniff search was upheld. *See Pellicci*, 580 A.2d at 716; *Dunn*, 563 N.Y.S.2d at 392; *Pooley*, 705 P.2d 1293. However, the initial inquiry was not aborted by a determination of the lack of a search. Rather, these dog sniffs were determined to constitute searches and were upheld because the searches were founded on reasonable suspicion. *See Pellicci*, 580 A.2d at 716; *Dunn*, 563 N.Y.S.2d at 392; *Pooley*, 705 P.2d 1293. *See also supra* Part I.A.1.d. for a detailed discussion of these cases.

[215] *See, e.g.*, *Pooley*, 705 P.2d at 1311.

[216] *Id.*

detect contraband,[217] the use of the P.A.S. III may constitute a violation of state constitutional rights.[218] Likewise, in a state like New York, where the Court of Appeals compares emanating odors to sound waves,[219] the use of the P.A.S. III may be ruled unconstitutional.[220] At the very least, New York may require a finding of reasonable suspicion prior to the use of the P.A.S. III.

In addition, even states that have ruled that the use of thermal imaging technology constitutes a search may rule that the use of the P.A.S. III is an unreasonable invasion of individual privacy rights.[221] For example, in *Young*, where the Washington Supreme Court noted that the "infrared device invaded the home in the sense [that] the device was able to gather information about the interior of the defendant's home that could not be obtained by naked eye observations,"[222] the use of the P.A.S. III may similarly be considered a search and in violation of the state's constitutional protections.[223] Similar to the thermal imaging device, the P.A.S. III also gathers information about the body that could not otherwise be obtained by observations that are not enhanced by the device. As such, just because there may not be a physical intrusion as there

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[217] *See, e.g.*, *Pellicci*, 580 A.2d at 716.

[218] *Id.*

[219] *See, e.g.*, *Dunn*, 563 N.Y.S.2d at 392.

[220] *Id.*

[221] *See, e.g.*, State v. Siegal, 934 P.2d 176 (Mont. 1997) (holding that the warrantless use of thermal imaging violated the defendants' right to privacy guaranteed under the Montana Constitution because there was an actual expectation of privacy in the heat signatures of activities pursued within the home that are not exposed to the public and that such an expectation was reasonable under the heightened standards of the Montana Constitution), *overruled on other grounds by* State v. Kuneff, 970 P.2d 556 (Mont. 1998); State v. Young, 867 P.2d 593 (Wash. 1994) (holding that use of thermal imagers violated both State and Federal Constitutional protections); Commonwealth v. Gindlesperger, 706 A.2d 1216 (Pa. Super. Ct. 1997) (holding that use of the thermal imaging device violated Pennsylvania Constitution because the state constitution provides individuals with even greater protections against unreasonable searches and seizures than the federal Constitution).

[222] *Young*, 867 P.2d at 599.

[223] *Id.*

is with a regular breathalyzer, that does not mean that there is no invasion of privacy.[224]

It appears that an individual may need to resort to state constitutions to obtain protection from unreasonable government intrusions with the P.A.S. III. The problem, however, with leaving it to the states to offer more protection in this case is the lack of consensus among the states in the approach taken. This will lead to incongruous results, with some individuals having more rights to privacy than others depending on which state they live in.

C. Argument for Change

Unlike the thermal imaging cases and the dog sniff cases, reliance on the states to provide a more expansive notion of a search in terms of the Sniffer will likely fail. The statistics are staggering in the amount of alcohol-related deaths and accidents.[225] Since the use of the Sniffer is claimed to detect over fifteen to twenty-five percent more legally intoxicated people than would be detected without its use,[226] it is unlikely that any state legislature will attempt to make sure individual rights are protected vis a vis the use of the Sniffer. In fact, the trend on the federal level has been for stricter drunk driving laws.[227] This has led to the introduction of legislation setting the national level of intoxication at a blood alcohol content of .08 or higher.[228] The statistics,

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[224] *See id.* "Just because technology now allows this information to be gained without stepping inside the physical structure, it does not mean the home has not been invaded for the purposes of [the state constitution]." *Id.*

[225] In both 1997 and 1998, there were approximately 16,000 alcohol related deaths. Kenny Morse, *Drinking and Driving*, *at* http://www.mrtraffic.com/dui.htm (last visited Mar. 30, 2001).

[226] *PAS Systems International: Law Enforcement*, *at* http://www.sniffalcohol.-com/law.htm (last visited Mar. 30, 2001).

[227] *See, e.g.*, Safe and Sober Streets Act of 1999, H.R. 1595, 106th Cong. (1999) ("A bill to amend title 23, United States Code, to provide for a national standard to prohibit the operation of motor vehicles by individuals under the influence of alcohol."); Safe and Sober Streets Act of 1999, S. 222, 106th Cong. (1999) ("A bill to amend title 23, United States Code, to provide for a national standard to prohibit the operation of motor vehicles by intoxicated individuals.").

[228] *Id.* The current level of *per se* intoxication is a blood alcohol content of

however, fail to take into account other factors. If the use of this system is found to be constitutional, the Supreme Court will have a hard time justifying and distinguishing any future technological advances in law enforcement.[229] It is time for the Supreme Court to draw the line. Although the automobile exception began as merely another exception to a warrantless search or seizure, the trend in the case law has all but removed any Fourth Amendment protections an individual enjoys in his or her vehicle.[230] To allow the interpretation of the search and seizure clause to deteriorate any further is to allow the Fourth Amendment to become nothing more than fifty-four empty words.

Dissenting in *United States v. Jacobsen*, Justice Brennan presciently recognized that the majority had "paved the way for technology to override the limits of law in the area of criminal investigation."[231] In *Jacobsen*, the Court held that federal agents did not infringe upon any constitutional rights when they reopened and tested a white powdery substance that was contained within a tube that was secreted within a damaged box.[232] Finding that the

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.10 in Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming. *See Insurance Institute for Highway Safety - Highway Loss Data Institute, DUI/DWI Laws, at* http://www.highwaysafety.org/-safety_facts/state_laws/dui.htm (last visited Mar. 30, 2001). In Alabama, California, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Texas, Utah, Vermont, Virginia, and Washington, the *per se* level of intoxication is a blood alcohol content of .08. *Id.* Massachusetts does not have a per se law, but a blood alcohol content of .08 is considered evidence of alcohol impairment. *Id.*

[229] Among the technology that is now being used by the law enforcement officials are thermal imaging devices to detect marijuana growth inside a home, passive millimeter wave imaging devices to detect concealed weapons, a gas chromotograph device known as the Sentor to detect drugs, and face-mapping computer technology to check for terrorists.

[230] *See supra* Part I.A.1.a. for a detailed discussion on the diminution of Fourth Amendment protections an individual enjoys in their automobile.

[231] 466 U.S. 109, 137 (1984) (Brennan, J., dissenting).

[232] *Id.* at 120.

search did not impede any legitimate expectation of privacy, the Court held that opening the package and the subsequent testing of the white substance did not constitute a "search" under the Fourth Amendment.[233] The Court further reasoned that, although there was a warrantless seizure, the seizure was reasonable.[234] Disagreeing with the majority, Justice Brennan argued that the determination of whether a reasonable expectation of privacy was violated turns on the context in which an item is concealed and not on the identity of the concealed item.[235] He further suggested that, under the majority's approach, there would be no bar to the use of a device that could detect from afar whether an individual was carrying contraband.[236] Optimistically, however, he suggested that the Court "stands ready to prevent this Orwellian world from coming to pass."[237] Unfortunately, this does not appear to be likely.[238] As such, the Supreme Court needs to step in and rule that the use of the Sniffer is unconstitutional.

III. POLICY GUIDELINE PROPOSALS – A DIFFERENT APPROACH

Assuming, *arguendo*, and given the likelihood that the use of the Sniffer will be considered constitutional, there should be procedures guiding officers in using this tool at sobriety checkpoints. Primarily, the P.A.S. III should not be used on every driver that is stopped. Prior to its use, the officer should have an independent basis for believing that the driver is intoxicated. This will ensure against arbitrariness in application.

In addition, the driver should be informed by the officer that he is about to be tested, and be given an opportunity to consent to its

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[233] *Id.* at 120, 123.

[234] *Id.* at 120-21.

[235] *Id.* at 139.

[236] *Id.* at 138.

[237] *Id.* ("Fortunately, we know from precedents such as *Katz v. United States*, overruling the 'trespass' doctrine of *Goldman v. United States*, and *Olmstead v. United States*, that this Court ultimately stands ready to prevent this Orwellian world from coming to pass.").

[238] However, the Supreme Court is set to rule on the constitutionality of the use of thermal imaging devices. *See* United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999) *cert. granted,* 121 S. Ct. 29 (2000) (No. 99-8508).

use. If the Sniffer is used, police officers should be careful in not requesting testimonial information from the driver. As such, the usual questions that are asked at a sobriety checkpoint[239] should not be asked because they will in effect put the driver in a trilemma[240] even if the driver does not know it at the time.[241]

There are also several other approaches that can be taken in dealing with the use of the P.A.S. III. One approach is for the Supreme Court to reconsider its analysis of the constitutionality of dog sniffs. It has been suggested that the Supreme Court could acknowledge that a dog sniff constitutes a search and utilize a different type of analysis.[242] In *Sniffing Out the Fourth Amendment: United States v. Place – Dog Sniffs – Ten Years Later*, Hope Walker Hall suggests that "[t]he point is not to exclude the use of dogs, but rather to regulate their use by acknowledging the relative interests of the individual and government."[243] This balancing test, which the Court has already applied to the constitutionality of operating roadblocks, could also be used to determine the constitutionality of the use of dogs to sniff for drugs in various situations. Hall suggests that the expectation of privacy in the area searched should be balanced against the legitimate need for the intrusion.[244] This, in turn, would result in different levels of justification being required for different levels of intrusion.[245] Thus, the expectation of privacy in the interior of an automobile, when balanced against the need to use the P.A.S. III to determine intoxication, could lead to a requirement of an articulable suspicion of intoxication prior to the use of the P.A.S. III on a driver.[246]

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[239] Questions such as "How much have you had to drink tonight?" or "Have you been drinking?"

[240] *See supra* note 150 and accompanying text.

[241] Since the Sniffer is hidden, the driver may often not know that the Sniffer has been used and detected alcohol.

[242] *See* Hope Walker Hall, Comment, *Sniffing Out the Fourth Amendment:* United States v. Place – *Dog Sniffs – Ten Years Later*, 46 ME. L. REV. 151, 185 (1994).

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

Since the Court did not have to decide the issue of canine sniffs in *Place*,[247] the Court's discussion of canine sniffs could be considered dicta. As such, the Court could arguably still revisit the issue. However, the Court's latest decision in *Indianapolis v. Edmond*, while not decided based on the use of drug detection dogs, suggests that the Court will not reconsider the issue and rule that the use of the dog constitutes a search.[248]

Another approach, suggested by Professor Thomas Clancy, is to reassess the protections of the Fourth Amendment.[249] According to Professor Clancy, the Fourth Amendment was intended to, and should be read to, protect security, which, in turn is defined as the right to exclude government agents from unreasonable intrusion.[250] This Fourth Amendment right to exclude is not limited in application to "persons, houses, papers and effects,"[251] but, instead, also applies to protecting non-physical, intangible interests.[252]

Professor Clancy further argues that "[a] normative liberal approach is particularly necessary in today's world, where technology threatens to make all the details of one's life detectable."[253] Noting that "[p]ermitting the use of sensory enhancing devices encourages extraordinary efforts and technological innovation to defeat the ability to exclude the government."[254] Clancy argues that "[r]ather than making arbitrary decisions to differentiate among efforts made to keep secrets or among the effects of various technological devices, the inquiry [should focus on] the essence of what the amendment seeks to protect – the right to exclude others from prying."[255] This inquiry would lead to a determination of whether "the precautions taken by the person

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[247] 462 U.S. 696 (1983).

[248] 121 S. Ct. 447, 453 (2000). "The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search." *Id.*

[249] *See* Clancy, *supra* note 21.

[250] *See* Clancy, *supra* note 21, at 350-52.

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

[252] Clancy, *supra* note 21, at 355.

[253] Clancy, *supra* note 21, at 364.

[254] Clancy, *supra* note 21, at 365.

[255] Clancy, *supra* note 21, at 365.

objectively evidence an intent to exclude the human senses"; whether "the particular surveillance technique utilized by the government defeat the individual's right to exclude"; and whether "the 'spirit motivating the framers' of the amendment 'abhor these new devices no less' than the 'direct and obvious methods of oppression' that inspired the Fourth Amendment."[256]

Utilizing Professor Clancy's inquiry, the use of the P.A.S. III would likely intrude on an individual's right to be secure.[257] Arguably, where the car windows are rolled up, there is an intent to exclude human senses. Furthermore, the use of the checkpoint requiring an individual to stop and to roll down the car windows to talk to the police defeats the individual's right to exclude. Finally, the use of the Sniffer to detect the undetectable invades a person's privacy to determine guilt in a manner that is no less abhorrent than a "direct and obvious method of oppression." As such, Professor Clancy's inquiry suggests that the use of the P.A.S. III would be unconstitutional.[258]

CONCLUSION

The Supreme Court's decisions in the Fourth Amendment line of search and seizure cases unfortunately suggest that there is an increasingly smaller sphere of privacy to which an individual is entitled. In fact, there appears to be only a small, ever decreasing expectation of privacy rights in automobiles that the Supreme Court is willing to recognize as existing. While it is necessary for the court to balance the competing interests of law enforcement and individual privacy, such a balance should not consistently be struck in favor of law enforcement at the expense of individual privacy. Without a doubt, in this day and age of using technology in the commission of crimes, effective law enforcement necessitates allowing the police similar access to devices created by the advances in technology. However, considerations of increased invasions into individual privacy should not be considered lightly.

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[256] Clancy, *supra* note 21, at 366.
[257] Clancy, *supra* note 21, at 362.
[258] Clancy, *supra* note 21, at 365.

Technological advances are threatening the individual right to be free from governmental intrusions. Furthermore, technological advances and the increasing use of devices such as the Sniffer appear to be leading the Supreme Court back to a diminished notion of privacy under the Fourth Amendment. With the exception of certain eavesdropping devices, the Court has managed to evade the Fourth and Fifth Amendment's proscriptions and allow a continuing infringement on an individual's privacy. The time has come for the Supreme Court to draw the line and stop chipping away further at individual rights. If it does not, the Fourth Amendment protection against unreasonable searches and seizures will cease to have any real practical meaning.