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Caballes, Place, and Economic Rin-tin-tincentives: The Effect of Canine Sniff Jurisprudence on Demand for and Development of Search Technology

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Caballes, *Place*, and Economic Rin-tin-tincentives

THE EFFECT OF CANINE SNIFF JURISPRUDENCE ON THE DEMAND FOR AND DEVELOPMENT OF SEARCH TECHNOLOGY

I. INTRODUCTION

The "legal fiction"[1] of the canine sniff test's infallibility jeopardizes the development and application of surveillance technologies that will allow law enforcement officers to better provide for public safety without running afoul of the Fourth Amendment's proscription of unreasonable searches and seizures.[2] In an era characterized by a continuing war on narcotics trafficking and overshadowed by a continuing fear of domestic terrorist attack, the importance of balancing privacy interests against realistic assessments of the intrusiveness of surveillance technologies is readily apparent. Law enforcement initiatives designed to curb the narcotics trade and reduce the risk of terrorist incidents have made the drug

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[1] Illinois v. Caballes, 534 U.S. 405, 411 (2005) (Souter, J., dissenting).

[2] To date, only one commentator has noted that legal rules providing stringent protection for privacy rights create a corresponding demand on the part of law enforcement officers for technologies that identify only the presence or absence of illegal activity. Lee C. Milstein, *Fortress of Solitude or Lair of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home*, 78 N.Y.U. L. REV. 1789, 1816 (2003). While Milstein does not specifically address the effect that applying Fourth Amendment scrutiny to canine sniffs will visit on law-enforcement demand, another commentator has observed that "law enforcement agencies have too much invested in their dog-training programs to placidly accept" court rulings subjecting canine sniffs to Fourth Amendment scrutiny. Max A. Hansen, *United States v. Solis: Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 411 (1976). Hansen's claim provides strong support for the inference that the laxity with which federal courts approached the canine sniff prior to and after the Supreme Court's ruling in *Caballes* provided strong incentives for law enforcement agencies to invest in canine sniff programs. Scholarship in the realms of economics and political science further supports this inference, noting that "a strong Fourth Amendment and strict police accountability are jointly sufficient for ongoing progress in search technology." Hugo M. Mialon & Sue H. Mialon, *The Economics of the Fourth Amendment: Crime, Search, and Anti-Utopia*, ECONPAPERS, Sept. 2004, *available at* http://econpapers.repec.org/paper/emowp2003/0411.htm.

and bomb-sniffing dog a regular feature of American life.[3] Such canines appear in our schools, at our major transportation hubs, at our major landmarks, and at our border patrol checkpoints.[4] Following the Supreme Court's ruling in *Illinois v. Caballes*,[5] which unequivocally insulated the canine sniff test from Fourth Amendment scrutiny, there is a strong likelihood that the police dog will become an even more pervasive investigative device.[6] By authorizing police officers to use the canine as an unrestricted tool capable of generating the probable cause necessary to conduct full-blown searches of random objects and individuals,[7] the Court has decreased the likelihood that law enforcement agencies will demand the development of more accurate and less intrusive technologies.[8]

The canine sniff was the first of only two investigative techniques that the Supreme Court recognized as revealing only the presence or absence of illegal activity.[9] Insisting in *United States v. Place* that it knew of "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," the Court classed the canine sniff as *sui generis* and resolved, albeit in dictum, that canine sniffs were not "searches" and were therefore not subject to Fourth Amendment scrutiny.[10] A year later, the Court discovered another investigative procedure that was similarly limited, holding in *United States v. Jacobsen*[11] that "a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"

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[3] *See generally* Tom O'Connell, *Drug Sniffing Dogs Introduced into L.A. Schools*, http://www.november.org/razorwire/rzold/09/0909.html (last visited Oct. 4, 2006); Brian Handwerk, *"Detector Dogs" Sniff Out Smugglers for U.S. Customs*, NATIONAL GEOGRAPHIC NEWS, July 12, 2002, http://news.nationalgeographic.com/news/2002/07/0712_020712_drugdogs.html; Marsha Walton, *Bomb-Sniffing Dogs Head to Airports*, CNN SCI-TECH, Jan. 18, 2002, http://cnnstudentnews.cnn.com/2002/TECH/science/01/18/rec.bomb.sniffing.dogs.02/.

[4] *See supra* note 3.

[5] *Caballes*, 543 U.S. at 409.

[6] *See id*. at 410 (Souter, J., dissenting).

[7] *See id*. at 417.

[8] *See infra* note 30 and accompanying text for authority illustrating that police alter their search and seizure behavior (including investigatory techniques) in response to judicial decrees.

[9] United States v. Place, 462 U.S. 696, 707 (1983).

[10] *Id.*

[11] 466 U.S. 109 (1984).

and is therefore not a search within the meaning of the Fourth Amendment.[12]

The Court reconsidered the Fourth Amendment implications of the canine sniff test in *Illinois v. Caballes*,[13] where it decided that a defendant's right against unreasonable searches and seizures had not been violated as a result of a canine sniff test conducted during a traffic stop for speeding.[14] The *Caballes* Court reiterated the *Place* Court's observation that a canine sniff reveals only the presence or absence of contraband and emphasized that investigative techniques bearing this characteristic do not constitute "searches" under the Fourth Amendment.[15] In a strong dissent, Justice Souter noted that the court's holding was based on the untenable premise that canines do not err.[16] After offering considerable empirical support for the proposition that drug sniffing canines are in fact fallible, Justice Souter observed that the risk of false positives justified treating the canine sniff as "the search that it amounts to in practice."[17] Because canines alert falsely, Justice Souter reasoned, they run the risk of revealing more than the mere presence or absence of illegal activity.[18] As Justice Souter observed:

> An affirmative reaction . . . does not identify a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on. The police will then open the container and discover whatever lies within, be it marijuana or the owner's private papers.[19]

Justice Souter's dissent thus recognized, in substance, that because false canine alerts present the risk of unjustified governmental intrusions into the citizenry's "persons, houses, papers, and effects,"[20] they run the risk of compromising legitimate interests protected by the Fourth Amendment.[21] Justice Souter therefore observed that, rather than giving law

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12 *Id.* at 123.
13 543 U.S. 405, 407 (2005).
14 *Id.* at 408.
15 *Id.* at 409.
16 *Id.* at 410 (Souter, J., dissenting).
17 *Id.* at 414.
18 *Id.* at 410-13.
19 *Caballes*, 543 U.S. at 416.
20 U.S. CONST. amend. IV.
21 *Caballes*, 543 U.S. at 415-17 (Souter, J., dissenting).

enforcement agencies license to utilize the canine sniff indiscriminately, the Court should have required the search to be justified by at least a minimal level of reasonable suspicion.[22]

Building upon Justice Souter's implication that the risk of false positives justifies treating the canine sniff and the police conduct ensuing from it as a single investigatory process constituting a search, this Note will explore the merits and market implications of requiring heightened levels of suspicion for the use of canines as an investigatory tool. By challenging the Supreme Court's rulings in *United States v. Place*, *Illinois v. Caballes*, and *Kyllo v. United States*,[23] this Note will argue that a jurisprudence recognizing the fallibility of the canine sniff and requiring a heightened showing of suspicion on the part of law enforcement officers will secure privacy interests while incentivizing the development of surveillance technologies that do not intrude upon legitimate privacy interests. Part II of this Note will offer essential background information and analysis concerning the economic and social incentives that the Court's Fourth Amendment jurisprudence creates for law enforcement agencies. Part III will examine and critique the development and current state of the law pertaining to canine sniffs in an effort to illustrate that 1) evidence coinciding with and post-dating *Place* indicates that canine sniffs are not infallible; 2) canine sniffs are therefore legible as the first step in a broader process enabling police officers to inspect personal property that implicates legitimate privacy interests; and 3) the use of drug sniffing canines as an investigatory tool should therefore require, at a bare minimum, reasonable articulable suspicion on the part of law enforcement officers. Part IV will explore the implications of requiring law enforcement officers to have reasonable articulable suspicion prior to the application of a canine sniff test and suggest that 1) the requirement of a showing of reasonable articulable suspicion is too subjective to provide sufficient protection for privacy interests; 2) a reasonable articulable suspicion standard will incentivize overreaching by street level law enforcement officers; and 3) the requirement of such a showing will therefore encourage the perpetuation of status quo investigatory techniques. Part V will argue that a requirement

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[22] *Id.* at 417.

[23] 533 U.S. 27, 40 (2001).

of probable cause prior to the application of a canine sniff will best protect privacy and public safety interests by illustrating that 1) a probable cause regime places the greatest possible burden upon law enforcement agencies when they rely on the drug sniffing canine as an investigatory tool; 2) the rigors of complying with probable cause's burdensome guidelines will render status quo investigatory techniques unattractive to law enforcement officers; and 3) a requirement of probable cause will therefore incentivize the development and application of less invasive investigative techniques.

II. OVERVIEW OF INCENTIVES FOR LAW ENFORCEMENT AGENCIES CREATED BY THE FOURTH AMENDMENT'S EXCLUSIONARY RULE

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[24] Over the course of its Fourth Amendment jurisprudence, the Supreme Court has sought to strike a balance between the individual right to privacy and the public interest in enabling law enforcement officials to investigate crimes, make arrests, and obtain convictions.[25] The desire to balance these interests has led to the adoption of an evidentiary rule of exclusion (the "exclusionary rule"), which provides that all evidence obtained in violation of the Fourth Amendment will be inadmissible in a court of law.[26] The Court has traditionally recognized that the exclusionary rule serves to "compel respect for the [Fourth Amendment] in the only effectively available way—by removing the incentive to disregard it."[27] As interpreted by the Courts of the United States, the Fourth Amendment is designed to create a structure of legal incentives to protect individuals against unwarranted police intrusion.[28] It follows intuitively that this

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

[25] *See* Boyd v. United States, 116 U.S. 616, 630, 635 (1886) (noting that the Fourth Amendment addresses "all invasions on the part of the government and its employ[ee]s of the sanctity of a man's home and the privacies of life" and that Constitutional protections of privacy against government intrusion "should be liberally construed," because "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon").

[26] The exclusionary rule was adopted at the federal level and made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1966).

[27] *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 247 (1960)).

[28] *See id.*; Kaufman v. United States, 394 U.S. 217, 229 (1969).

incentive structure affects law enforcement agencies' market demand for technologies[29]—such as thermal imaging devices, x-ray scanners, stationary radar detectors, and drug sniffing canines—that enhance police officers' abilities to detect unlawful activity, make arrests, or issue citations.[30]

Faced with the possibility that such technologies may enable police officers to invade the "privacies of life"[31] that have traditionally been subject to the strong protection provided by the Fourth Amendment's exclusionary rule, courts examining the Fourth Amendment implications of such technologies have embarked upon two related inquiries. Courts seek to determine, first, whether the use of an investigatory technology implicates the Fourth Amendment at all.[32] In the course of this inquiry, courts will examine the privacy interests that the use of a particular technology may compromise.[33] In the event that

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[29] This Note will use the term "technology" in its broad, etymological sense to mean "the practical application of knowledge especially in a particular area," "a capability given by the practical application of knowledge," or "a manner of accomplishing a task especially using technical processes, methods, or knowledge." Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/technology (last visited Oct. 4, 2006). While popular usage of the term "technology" might be limited to inanimate objects possessing circuitry, this Note will consider thermal imaging devices, x-ray scanners, stationary radar detectors, and drug sniffing canines under the rubric of "technology" as defined above. The Supreme Court lent legal credence to this view of "technology" when it recognized in *United States v. Jacobsen* that precedents it forged with respect to canine sniffs were applicable in cases involving other investigative techniques and technologies that revealed nothing other than the presence or absence of illegal activity. United States v. Jacobsen, 466 U.S. 109, 123-24 (1984). Moreover, numerous scholars have observed the similarities between drug sniffing canines and other forms of sense-enhancing technology, and have persuasively argued that legal precedents created in the context of canine sniffs have implications for cases pertaining to other search technologies. *See, e.g.*, Leading Cases, *Fourth Amendment—Canine Sniff*, 119 HARV. L. REV. 179, 184 (2005); David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 29-32 (1996).

[30] Empirical studies of the effect of the exclusionary rule on the conduct of police officers and the procedures of law enforcement agencies further reinforces this proposition. *See*, Bradley C. Canon, *Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 710 (1974) (noting that immediately following the Court's recognition of the exclusionary rule in *Mapp*, police officers began to seek judicial search warrants more frequently than they had prior to *Mapp*). Canon's statistical analysis suggests that police behavior in the context of search and seizure is responsive in the long term to judicial decrees heightening law enforcement agencies' burden to demonstrate compliance with the Fourth Amendment. *Id. See also* Myron W. Orfield Jr., Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (noting that "[o]n an institutional level, the [exclusionary rule] has changed police, prosecutorial, and judicial procedures").

[31] Boyd v. United States, 116 U.S. 616, 630 (1886).

[32] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 476 (5th Cir. 1982).

[33] *Id.*

the use of an investigative technology has the propensity to compromise legitimate privacy interests, courts will hold that use of the technology constitutes a "search" and that the Fourth Amendment therefore applies.[34] Upon reaching this threshold conclusion, courts will then seek to determine the circumstances under which the Fourth Amendment will permit the use of an investigatory technique that compromises legitimate interests in privacy.[35] These determinations, in turn, affect the extent to which law enforcement agencies will demand search technologies.[36] If a court should conclude that the use of a particular investigative technology constitutes a "search" for Fourth Amendment purposes, police will be less likely to invest in it, either out of fear that its use will give rise to the application of the exclusionary rule or out of certainty that using the technology in a manner compliant with the Fourth Amendment would be cost-prohibitive.[37] If, on the other hand, a court rules that the use of a particular investigative technology *does not* constitute a search for Fourth Amendment purposes, police will be more likely to invest in it because it can be applied without fear that courts will suppress the evidence that it uncovers on Fourth Amendment grounds.[38]

A. Incentives for Law Enforcement Agencies Under a Non-Search Regime

It is settled law that "the Fourth Amendment protects people, not places,"[39] and that searches and seizures are to be struck down as contrary to the provisions of the Fourth

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[34] *See id*. (noting that "[t]he decision to characterize an action as a search is in essence a conclusion about whether the Fourth Amendment applies at all").

[35] *See* United States v. Ventresca, 380 U.S. 102, 106 (1965).

[36] *See* Canon, *supra* note 30, at 710 (noting that Supreme Court rulings are effective in altering police behavior, including search and seizure conduct). *See also* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (noting that "[w]hen the Fourth Amendment limits the use of a police tactic like house searches, it does two things: it raises the cost of using that tactic, and it lowers the relative cost of using other tactics that might be substitutes").

[37] *See* Canon, *supra* note 30, at 710 (noting that immediately following the Court's recognition of the exclusionary rule in *Mapp*, police officers began to seek judicial search warrants more frequently than they had prior to *Mapp*). Canon's statistical analysis suggests that police behavior in the context of search and seizure is responsive in the long term to judicial decrees heightening law enforcement agencies' burden to demonstrate compliance with the Fourth Amendment. *Id. See also* Orfield, *supra* note 30, at 1017 (noting that "[o]n an institutional level, the [exclusionary rule] has changed police, prosecutorial, and judicial procedures").

[38] *See* Stuntz, *supra* note 36.

[39] Katz v. United States, 389 U.S. 347, 351 (1967).

Amendment whenever they unreasonably intrude upon an individual's reasonable "expectation[s] of privacy."[40] Building on the rule initially articulated in *Katz v. United States*,[41] the Supreme Court resolved in *United States v. Jacobsen*[42] that individuals can have no reasonable expectations of privacy pertaining to contraband or illegal activity.[43] The *Jacobsen* court concluded that no invasion of privacy had taken place when federal agents conducted a chemical field test to determine whether a white, powdery substance seeping from a damaged air-freight parcel was in fact cocaine.[44] As the court observed:

> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.[45]

Relying on the observation that the chemical field test at issue revealed only the presence or absence of criminal activity, the *Jacobsen* court drew a comparison between the chemical field test and the canine sniff test—an investigative technique that it had classed as *sui generis* in *United States v. Place*.[46] The *Place* court concluded that the canine sniff was in a class unto itself because it revealed nothing more than the presence or absence of illegal activity and therefore ensured that the "owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[47] Because the Court did not view the canine sniff as compromising any legitimate interest

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[40] *Id.* at 361.

[41] *Katz*, 389 U.S. 347.

[42] United States v. Jacobsen, 466 U.S. 109 (1984).

[43] *Id.* at 123.

[44] *Id.* at 125.

[45] *Id.* at 123.

[46] 462 U.S. 696, 707 (1983).

[47] *Id.*

in privacy, it concluded that canine sniffs were not searches within the meaning of the Fourth Amendment.[48]

The Court's ruling in *Jacobsen* went a step further and lent credence to the view that *any* investigative technique revealing only the presence or absence of illegal activity would not give rise to Fourth Amendment scrutiny.[49] Because such techniques do not constitute "searches" within the meaning of the Fourth Amendment, they do not give rise to Fourth Amendment inquiries pertaining to reasonableness or probable cause.[50] Because courts have held that investigative techniques such as canine sniffs and chemical field tests do not implicate Fourth Amendment concerns, numerous commentators have noted that courts treat them as "non-searches."[51] As the Fifth Circuit aptly put it, "the decision to characterize an action as a search is in essence a conclusion about whether the fourth amendment applies at all."[52] As such, courts have traditionally dispensed with reasonableness and probable cause inquiries in cases involving so-called "binary searches"—that is, investigative techniques revealing only the presence or absence of illegal activity.[53]

Binary search technologies are therefore attractive investments to law enforcement agencies. A number of studies have shown that the Court's Fourth Amendment rulings—in

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[48] *Id.*

[49] *Jacobsen*, 466 U.S. at 124.

[50] *See also* Illinois v. Caballes, 543 U.S. 405, 407 (2005) (canine sniff revealing only presence or absence of narcotics did not give rise to Fourth Amendment inquiry); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (vehicle checkpoints with narcotics-detection dogs did not require reasonable suspicion or probable cause because they revealed only the presence or absence of contraband); *Place*, 462 U.S. at 707 (canine sniff held *sui generis* because it was deemed "less intrusive" than other investigative techniques and revealed only the presence or absence of illegal activity).

[51] *See* Jeffrey A. Bekiares, Case Comment: *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 FLA. L. REV. 963, 971 (2005); Theresa A. O'Loughlin, Note: *Guerrillas in the Midst: The Dangers of Unchecked Police Powers Through the Use of Law Enforcement Checkpoints*, 6 SUFFOLK J. TRIAL & APP. ADV. 59, 76 (2001).

[52] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 476 (5th Cir. 1982).

[53] *See supra* note 50. The phrase "binary search" provides a useful shorthand for "investigative techniques revealing merely the presence or absence of illegal activity." The phrase is scholarly in origin, and appears to have been coined by Ric Simmons in *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1306 (2002). At the time of Simmons' writing, the Supreme Court had decided only two "binary search" cases: *Place*, 462 U.S. 696 (involving canine sniff tests) and *Jacobsen*, 466 U.S. 109 (involving chemical field tests purported to reveal only the presence or absence of narcotics). The Court's binary search jurisprudence has since been supplemented by *Caballes* and, arguably, *Kyllo*.

particular, the advent of the exclusionary rule in *Mapp*—cause law enforcement institutions and individual police officers to alter their search and seizure behavior.[54] Moreover, scholars have noted that the exclusionary rule encourages law enforcement agencies that fear the deterrent remedies of suppression and dismissal to "find a legal way to obtain . . . evidence" rather than "waste their time in activities made unproductive by the exclusionary rule."[55] As such, binary search technologies present police agencies with compelling alternatives to more intrusive technologies. Furthermore, because binary search technologies do not require law enforcement institutions to incur the social, institutional, and economic costs associated with proving that an investigatory activity was supported by probable cause or reasonable articulable suspicion, law enforcement agencies are likely to maximize their use of investigative techniques that do not give rise to Fourth Amendment scrutiny.[56] As one commentator has noted, court-imposed search and seizure obligations operate as a kind of "tax" on law enforcement agencies' search and seizure behavior.[57] Because the rigors of complying with the Fourth Amendment impose considerable institutional costs on police, it follows that they will seek to minimize this "tax" burden by using investigatory techniques that do not trigger Fourth Amendment scrutiny.[58]

B. Incentives for Law Enforcement Agencies Under Reasonable Articulable Suspicion and Probable Cause Regimes

1. Reasonable Articulable Suspicion

A court will "tax" investigative techniques by applying Fourth Amendment scrutiny when those techniques risk allowing police officers to detect more than the mere presence

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[54] *See supra* note 37.

[55] Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials*, 88 COLUM. L. REV. 247 n.98 (1988).

[56] *See* Stuntz, *supra* note 36 (noting that "[w]hen the Fourth Amendment limits the use of a police tactic like house searches, it does two things: it raises the cost of using that tactic, and it lowers the relative cost of using other tactics that might be substitutes").

[57] *Id.* at 1275.

[58] *Id.* (noting that "here as elsewhere, if you tax a given kind of behavior, you will probably see less of it").

or absence of illegal activity.[59] When applying Fourth Amendment scrutiny, courts will determine whether a search was supported by one of two possible investigatory prerequisites: reasonable articulable suspicion or probable cause.[60] The Fourth Amendment requires, at a minimum, that officers be able to justify a search or seizure by pointing to specific articulable facts that generated suspicion.[61] This investigatory prerequisite, which courts refer to as either "reasonable suspicion" or "reasonable articulable suspicion," has been held to require police officers to show something more than an arbitrary justification for a search or seizure, but something less than full-blown probable cause.[62] Because the quantum of evidence required under a reasonable articulable suspicion regime is considerably less[63] than that required by probable cause, courts usually apply the reasonable suspicion standard where searches involve only minimal intrusions that are limited in scope to the situation that gave rise to the search in the first place.[64] Because the nature of the intrusion is minimal in such cases, the "tax" that law enforcement agencies incur in the course of justifying the intrusion is likewise minimal, requiring only that police officers form impressions on the basis of articulable facts and be able to recount and justify those impressions in a court of law.[65]

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[59] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (subjecting technologies revealing intimate details to a requirement of probable cause).

[60] *See generally* United States v. Sokolow, 490 U.S. 1 (1989).

[61] *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that a limited search in the context of a traffic stop may be justified when a "police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). To date, only the Ninth Circuit has held that the application of a sense-enhancing technology requires reasonable articulable suspicion, holding in *United States v. Beale*, 731 F.2d 590 (9th Cir. 1983), that canine sniffs required "some articulable reason" as a prerequisite to their use. This holding was later overruled by an *en banc* rehearing. *See* United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) (en banc). In all other cases involving sense enhancing technologies, courts have either ruled that the technologies at issue were of a binary character, and therefore not subject to Fourth Amendment scrutiny or that such technologies were intrusive, and therefore required probable cause. *See supra* notes 50, 59 and accompanying text.

[62] *See Sokolow*, 490 U.S. at 7 (noting that the standard required for validating searches under a reasonable articulable suspicion regime is "obviously less demanding than that [required] for probable cause").

[63] *Id.*

[64] *See Terry*, 392 U.S. at 21.

[65] *See* Erica Flores, Case Comment, *"People, Not Places": The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. PA. J. CONST. L. 1071, 1091 (2006) (noting that the reasonable articulable suspicion standard is flawed because of

The Supreme Court first articulated the contours of the reasonable suspicion standard in *Terry v. Ohio*.[66] In *Terry*, a police officer stopped and frisked three individuals who he suspected were planning a robbery.[67] The officer witnessed two of the individuals pacing back and forth between a street corner and a store window.[68] The third individual approached them and, after conferring with them briefly, left the scene.[69] After this occurred, the two individuals lingered for a while before walking off in the same direction as the third man.[70] The officer followed the two individuals who had lingered on the street corner and approached them when they caught up to the third individual.[71] Fearing that at least one of the individuals was armed, the officer frisked all three of them and recovered firearms from two of the individuals.[72] The officer admitted that he had no prior information regarding the three individuals and that his suspicion that they were "casing a job, a stick up" proceeded solely from what he had observed.[73] The officer justified the frisks on the ground that he feared for his own safety.[74] After refusing to suppress the weapons on Fourth Amendment grounds, the trial court convicted the two individuals from whom the officer recovered firearms on charges of carrying concealed weapons.[75]

Throughout all stages of *Terry*'s procedural history, courts conceded that the searches were not supported by probable cause, but nevertheless affirmed the trial court's refusal to suppress the weapons that the officer recovered from the suspects.[76] Hearing the case after grant of certiorari, the Supreme Court held that even where a search is not supported by probable cause, it may nevertheless be reasonable when a police officer's action is "justified at its inception" and is "reasonably related in scope to the circumstances which

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"the judiciary's almost unwavering deference to police determinations of whether it has been satisfied").

66 Terry v. Ohio, 392 U.S. 1 (1968).

67 *Id.* at 6-7.

68 *Id.* at 6.

69 *Id.*

70 *Id.*

71 *Id.* at 6-7.

72 *Terry*, 392 U.S. at 6.

73 *Id.* at 6-7.

74 *Id.* at 30.

75 *Id.* at 7-8.

76 *Id.* at 8.

justified the interference in the first place."[77] The Court observed that the officer's actions were justified at their inception because he had witnessed the defendants "go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation."[78] Moreover, the Court noted that the search was reasonably related in scope to the circumstances that gave rise to the intrusion because the officer's fear that the individuals were contemplating a daytime robbery lent reasonable support to his suspicion that they were armed.[79] However, the Court emphasized that the reasonableness of the search turned rather significantly on the manner in which it was conducted.[80] Because the officer only patted down the surface of the suspects' clothing and did not intrude further until he felt the guns underneath the surface, the Court held that the search was "limited" and that it therefore complied with the Fourth Amendment even in the absence of full-blown probable cause.[81]

The *Terry* Court thus announced that a search may be constitutionally permissible even in the absence of probable cause in cases where an officer can point to specific articulable facts to justify the intrusion and tailors the intrusion to both the scope of those facts and the inferences that he draws from them.[82] To the extent that this reasonable articulable suspicion standard may be said to "tax" law enforcement agencies by imposing Fourth Amendment obligations, it appears to impose only a minimal burden. Because the impressions that a single police officer forms over a brief period of time are sufficient to generate reasonable articulable suspicion, law enforcement agencies are not required to conduct the lengthy investigative processes necessary to justify searches under a probable cause regime.[83] Moreover, because courts rely on the interpretations of individual police officers in the course of determining whether a limited search was supported by reasonable articulable suspicion, the sole institutional obligation that a

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[77] *Id.* at 20.

[78] *Terry*, 392 U.S. at 22.

[79] *Id.* at 28.

[80] *Id.*

[81] *Id.* at 28-30.

[82] *Id.* at 20-21.

[83] *See* United States v. Sokolow, 490 U.S. 1, 7 (1985) (noting that the proof required to justify a search under a reasonable articulable suspicion regime is "considerably less" than that required under a preponderance of the evidence standard).

reasonable suspicion regime imposes upon law enforcement agencies is the duty of individual officers to testify as to specific, articulable facts that warranted the intrusion.[84] Finally, as explained at greater length below, courts typically defer to such testimony, which means that evidence is rarely suppressed in situations where a "limited" search requires only reasonable articulable suspicion.[85] As such, while the institutional costs imposed by a reasonable articulable suspicion regime appear to be minimally higher than those associated with investigative techniques to which the Fourth Amendment does not apply, they are nevertheless far lower than the institutional costs associated with a requirement of probable cause. It follows from these observations that an investigative technology would remain at least somewhat attractive to law enforcement agencies if a court was to rule that its use constituted only a minimal intrusion that must be supported by specific, articulable facts.

2. Probable Cause

Courts impose the maximum "tax" of probable cause in situations where police officers seek to intrude more significantly upon an individual's private affairs.[86] The "tax" imposed on law enforcement agencies and individual police officers is greater in such instances, because probable cause requires a quantum of evidence sufficient to merit the issuance of a warrant.[87] While searches conducted under the auspices of probable cause are generally supported by a judicial warrant, even warrantless searches conducted in the field must be supported by probable cause when they involve more than "limited" intrusions into the public's "person, houses, papers,

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[84] *See* Flores, *supra* note 65, at 1091 (noting that the reasonable articulable suspicion standard is flawed because of "the judiciary's almost unwavering deference to police determinations of whether it has been satisfied").

[85] *See id*.

[86] Both reasonable articulable suspicion and probable cause are determined according to reasonableness under the totality of the circumstances. *See Sokolow*, 490 U.S. at 7-8. Nevertheless, the Supreme Court has endorsed the view that probable cause requires considerably more proof of wrongdoing than reasonable articulable suspicion. *See id.* at 7. As the Court held in *Terry v. Ohio*, reasonable suspicion may justify a search pursuant to a lesser quantum of evidence than that required for probable cause only when the nature of the intrusion is limited. 392 U.S. at 28-30. As such, it follows that probable cause is required where the nature of the intrusion is greater. *See infra* notes 98-103 and accompanying text.

[87] *See* United States v. Ventresca, 380 U.S. 102, 109 (1965).

and effects."[88] Indeed, fear of incurring the judicial penalties of suppression or dismissal has led police officers to seek warrants with greater frequency in the years following the establishment of the exclusionary rule.[89] In cases where police seek warrants, the cost of engaging in investigative activity naturally increases due to the exigencies of gathering evidence, presenting it to a magistrate, filing a sworn affidavit affirming the existence of probable cause, and persuading the magistrate that probable cause exists.[90]

Even in cases where police conduct searches without judicially granted warrants, a court will conduct a *de novo* review of the facts to determine whether the quantum of evidence available to the officer was sufficient to merit the issuance of a warrant on the ground of probable cause.[91] In order for suspicion to rise to a level sufficient to merit a judicial warrant, a court must find that the information justifying the warrant request is sufficiently trustworthy to be considered and that the amount of evidence offered is sufficient to constitute probable cause.[92] A court will require a greater showing as to the "trustworthiness" of evidence under a probable cause regime than it will under a reasonable articulable suspicion regime,[93] and the quantum of evidence that is required for a search to be supported by probable cause is likewise much greater.[94] As such, a probable cause regime "taxes" law enforcement agencies more than a reasonable articulable suspicion regime, requiring them to produce a quantum of evidence far exceeding the subjective impressions required by reasonable suspicion.[95] Because producing such

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[88] U.S. Const. amend. IV.

[89] *See* Orfield, *supra* note 30, at 1017-18.

[90] *See* John E. Theuman, Annotation, *Validity of, and Admissibility of Evidence Discovered in, Search Authorized by Judge over Telephone*, 38 A.L.R. 4th 1145 (2004) (outlining the standard procedure for the issuance of a warrant).

[91] *See* Ornelas v. United States, 517 U.S. 690, 690 (1996) (holding that appellate courts should conduct *de novo* review of warrantless searches to determine whether probable cause actually existed).

[92] *See* Aguilar v. Texas, 378 U.S. 108, 112-14 (1964) (affirming that the trustworthiness of information must be evaluated according to its basis and veracity), *overruled on other grounds by* Illinois v. Gates, 462 U.S. 213 (1983).

[93] *See Ornelas*, 517 U.S. at 695 (treating probable cause and reasonable suspicion as similarly fluid inquiries involving inquiry into the totality of the circumstances).

[94] *See Sokolow*, 490 U.S. at 7 (noting that the quantum of evidence required under a reasonable articulable suspicion regime is less than that required by probable cause).

[95] *Id.*

evidence imposes pervasive procedural and institutional costs on law enforcement agencies, it follows that police officers are least likely to prefer investigative techniques that require a showing of probable cause to justify their use.[96]

In cases involving investigatory technologies, courts are particularly likely to require probable cause when law enforcement agencies employ technologies not in public use.[97] In *Kyllo v. United States*, the Court considered the use of thermal imaging devices to detect the growth of marijuana inside homes.[98] The technology at issue in *Kyllo* enabled police officers to determine whether the levels of heat emanating from a home were consistent with the use of high intensity lamps typically used in the process of indoor marijuana growth.[99] The thermal imaging device used by the police officers converted radiation into images on the basis of relative warmth, producing only a "crude visual image" of infrared radiation emanating from the home.[100] The *Kyllo* court held that the use of the thermal imaging device was subject to Fourth Amendment scrutiny because the device was not in public use and enabled law enforcement officers to obtain "information regarding the interior of the home" that could not otherwise have been obtained without physical intrusion.[101] Although the Court offered sparse justification for hinging the probable cause requirement on whether or not a technology is in general public use, the requirement is in all likelihood based on the notion that an individual cannot have reasonable expectations of privacy pertaining to activities that a member of the general public could become privy to by use of widely available technology.[102] As such, the Court ultimately concluded that the use of thermal imaging devices to obtain information regarding the interior of the home was presumptively unreasonable

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[96] *See* Stuntz, *supra* note 36, at 1284.

[97] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001). Read side by side with the Court's holdings in *Caballes* and *Place*, the *Kyllo* Court's conclusion that the use of search technologies not in general public use must be supported by probable cause begs the obvious question of whether the drug sniffing canine may be deemed to be "in general public use." *See id*.

[98] *Id.*

[99] *Id.* at 29.

[100] *Id.* at 30.

[101] *Id.* at 34.

[102] *Id.* (presumably referring to reasonable expectations of privacy when justifying the "general public use" requirement by stating that the rule "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted").

unless conducted under the auspices of probable cause, pursuant to a judicially granted warrant.[103]

The *Kyllo* rule is likely to place a strong burden on law enforcement agencies seeking to use surveillance technologies that courts deem to compromise legitimate privacy interests. Although the *Kyllo* decision turned rather significantly on the fact that a new technology was used to glean information regarding the home, dictum concerning the thermal imaging device's ability to reveal purely innocent behavior—such as the time of day that the "lady of the house takes her daily sauna"—at least suggests that the decision turned, in part, on the ability of the emergent surveillance technology to disclose more than the presence or absence of illegal activity.[104] When analyzed in conjunction with the holdings of *Place*, *Caballes*, and *Jacobsen*, this dictum lends credence to the view that surveillance technologies will trigger at least a minimal level of Fourth Amendment scrutiny whenever they reveal more than the presence or absence of illegal activity. Although the Court has yet to examine devices such as the thermal imager outside the context of home surveillance, *Kyllo*'s observation that thermal imaging devices reveal "intimate" details suggests that such devices would implicate Fourth Amendment concerns regardless of the context in which they are used.[105]

Since the Court held that the application of technologies not in general public use requires probable cause in the context of home surveillance, it created a disincentive for law enforcement agencies to invest in emerging search technologies that might be used to scrutinize the home.[106] Since such technologies, by virtue of the mere fact that they are "new," generally tend not to be in public use, it follows that the *Kyllo* rule provides a strong incentive for law enforcement agencies to maintain status quo investigatory techniques. As a result of *Kyllo*, it appears likely that law enforcement agencies will continue to invest in canine detection[107] and forgo investment

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[103] *Kyllo*, 533 U.S. at 40.

[104] *Id.* at 38.

[105] *Id.*

[106] *See* Stuntz, *supra* note 36.

[107] *See* Max A. Hansen, United States v. Solis: *Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 411 (1976) (observing that "[l]aw enforcement agencies have too much invested in their dog training programs to placidly accept" court rulings subjecting canine sniffs to Fourth Amendment scrutiny).

in emerging technologies regardless of whether those technologies are more accurate and less invasive.[108]

III. ANALYSIS AND CRITICISM OF CANINE SNIFFS UNDER THE CURRENT NON-SEARCH REGIME

As noted above, investigative techniques that do not interfere with an individual's reasonable expectations of privacy are considered "non-searches" for the purpose of Fourth Amendment inquiry and do not require courts to apply either reasonable suspicion or probable cause standards.[109] Because so-called binary searches are thought to reveal only the presence or absence of illegal activity, these investigative techniques fall outside the scope of the Fourth Amendment.[110] Of the two investigative technologies that the Court has exempted from Fourth Amendment scrutiny, the canine sniff test was reconsidered most recently in *Illinois v. Caballes*.[111] In *Caballes*, the Court reiterated its decades-old position that canine sniff tests are not subject to the Fourth Amendment because they are limited intrusions that reveal only the presence or absence of contraband.[112] *Caballes* involved a drug conviction resulting from a canine sniff conducted during a routine traffic stop.[113] An Illinois state trooper stopped Roy I. Caballes for speeding on the highway and radioed his police dispatcher to report the stop.[114] Overhearing this transmission, a second trooper drove to the location of the stop with a drug-detecting canine.[115] While the first trooper was writing out a citation for Caballes' speeding, the second trooper walked his dog around the car.[116] The dog alerted to Caballes' trunk, and a subsequent search revealed marijuana.[117]

In a brief opinion that insulated the canine sniff test from Fourth Amendment scrutiny, the *Caballes* majority was careful to cite *United States v. Jacobsen*, where the Court observed that chemical field tests for the presence of narcotics

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[108] *See supra* note 36.
[109] *See supra* note 53 and accompanying text.
[110] *See supra* notes 49-53 and accompanying text.
[111] 543 U.S. 405 (2005).
[112] *Id.* at 408.
[113] *Id.* at 406.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 406.
[117] *Caballes*, 543 U.S. at 408.

were not searches because, like the canine sniff test, they reveal only the presence or absence of illegal activity.[118] The fact that the Supreme Court grouped the canine sniff and the chemical field test together under the "binary search" rubric illustrates not only the fictitious quality of the Court's canine sniff jurisprudence, but also the specious reasoning underlying the formation of the category itself.[119] The reliability of the chemical field test has been called into question.[120] Likewise, federal case law and private research have shown that canine sniffs are not as reliable as the Court would like to believe.[121] While the inherent unreliability of both investigative procedures raises the specter of unwarranted intrusions upon innocent individuals' reasonable expectations of privacy, the fact that chemical field tests are invariably performed upon substances lawfully within police custody establishes that the intrusion of the chemical field test does not rise to the same level of invasiveness as the intrusion enabled by a false canine alert.[122] Unlike the chemical field test, which is immune from Fourth Amendment scrutiny when performed upon substances lying in plain view, the canine sniff test is applied for the purpose of locating concealed substances.[123] Moreover, chemical field tests arguably do not involve the same level of intrusion and intimidation that may arise in the context of a canine-wielding police officer approaching an individual or that individual's property.[124]

Despite the obvious disparities between canine sniffs and chemical field tests, the *Caballes* Court nevertheless observed that both investigative techniques are not searches because they reveal only the presence or absence of contraband.[125] In so holding, the Court at long last gave precedential force to decades-old dictum from *United States v. Place*, in which the Court observed that canine sniffs "[do] not

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[118] *Id.* at 408.

[119] *Id.*; United States v. Jacobson, 466 U.S. 109, 124 (1984).

[120] *See* Blanchard & Chin, *Identifying the Enemy in the War on Drugs*, 47 AM. U. L. REV. 557, 583 n.160 (1998) (noting that "typically, field tests used by officers are merely indicative and not conclusive of the presence of a narcotic substance").

[121] *See Caballes*, 543 U.S. at 412 (Souter, J., dissenting) (citing K. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* (Apr. 2001) (prepared under Federal Aviation Administration grant by the Institute for Biological Detection Systems of Auburn University)).

[122] *See id*. at 415.

[123] *Id.* at 416.

[124] *Id.* at 417-25 (Ginsburg, J., dissenting).

[125] *Id.* at 409-10.

constitute [searches] within the meaning of the Fourth Amendment" because the limited disclosures afforded by dog sniffs "ensure[] that the owner of . . . property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[126] The *Place* Court offered no empirical justification for its dictum that canine sniffs reveal only the presence or absence of contraband, and the fact that the observation was inessential to the Court's holding is underscored by the Court's failure to ask the parties to brief the issue.[127] Nevertheless, the *Caballes* Court seized upon the *Place* Court's dictum in concluding that because canine sniffs are not searches, they do not implicate the Fourth Amendment and, therefore, do not require a showing of probable cause or reasonable articulable suspicion prior to their application.[128]

The dubious validity of the *Place* Court's dictum notwithstanding, the *Caballes* Court used this analysis to distinguish its ruling from *Kyllo v. United States*,[129] where a divided Court held that the warrantless use of a thermal imaging device to detect the growth of marijuana in a home was impermissible under the Fourth Amendment because the device was not in public use and had the potential to reveal more information than the presence or absence of criminal activity.[130] The *Caballes* Court's insistence that a canine sniff "*only* reveals the presence of contraband" and therefore "compromises no legitimate privacy interest" is specious, however, insofar as it fails to adequately address petitioner's argument that "error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband."[131] Noting that "the record contains no evidence or findings that support [petitioner's] argument," the Court went on to suggest that since "an erroneous alert, in and of itself, reveals . . . [no] legitimate private information" it may be found "sufficiently reliable to establish probable cause to conduct a full-blown search."[132]

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[126] 462 U.S. 696, 707 (1983).

[127] *See* H. Paul Honsinger, *Katz and Dogs: Canine Sniff Inspections and the Fourth Amendment*, 44 LA. L. REV. 1093, 1100 (1984).

[128] *Place*, 462 U.S. at 707.

[129] 533 U.S. 27 (2001).

[130] *Id.* at 40.

[131] *Caballes*, 543 U.S. at 405.

[132] *Id.* at 409.

In so holding, the Court failed to acknowledge the reality, observed by Justice Souter in his dissent, that a "dog who alerts hundreds of times will be wrong dozens of times."[133] Justice Souter's observation narrows the alleged gulf between *Kyllo* and *Caballes*, suggesting that a canine sniff test may amount, in some cases, to the functional equivalent of other investigatory techniques that are subject to Fourth Amendment scrutiny due to the fact that they disclose more than the presence or absence of contraband. While it is true that an erroneous canine sniff "in and of itself"[134] discloses no concrete facts about the contents of the object or individual being subjected to the investigation, such a procedure, when combined with the ensuing police inspection that it authorizes, carries with it the same potential for embarrassment and invasion at stake in the case of a thermal imaging device.[135] In fact, the possibility of false positives may implicate stronger privacy interests than those compromised by a thermal imaging device.[136] Whereas the thermal imaging device at issue in *Kyllo* was capable only of exposing "a crude image" of heat emanating from a home and did not enable police officers to discern persons or objects inside the domicile, a false canine alert enables a police officer to conduct a full-blown physical search of the contents of a container.[137] As such, Justice Souter was correct to observe that "it makes sense . . . to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases, including *Kyllo*, in deciding whether such a search is reasonable."[138]

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[133] *Id.* at 412 (Souter, J., dissenting).

[134] *Id.* at 409 (majority opinion).

[135] *Id.* at 412 (Souter, J., dissenting).

[136] This claim assumes that "intimate details" disclosed as the outcome of a search carry with them stronger privacy interests than so-called "insignificant" details. While the *Kyllo* decision hinged, in part, on the proposition that all details disclosed during surveillance of the home are "intimate," nothing in the *Caballes* decision indicates that a dog sniff would be an impermissible search if performed outside the door of a home or apartment. As such, it may be the case that the rulings of *Kyllo* and *Caballes* are on a collision course with one another.

[137] *Caballes*, 543 U.S. at 413 (Souter, J., dissenting).

[138] *Id.* at 413. The failure to harmonize *Kyllo* is not the sole problem with the *Caballes* Court's reasoning. As Justice Ginsburg persuasively observed in her own *Caballes* dissent, the canine sniff at issue was also contrary to the Court's ruling in *Terry v. Ohio*, where it held that the investigative techniques employed by police officers must be "reasonably related in scope to the circumstances which justified the interference in the first place." *See id*. at 418 (Ginsburg, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). While the Court's failure to consider *Terry* may be indicative of a broad desire to uphold canine sniffs in all circumstances, for the purposes of this Note it is sufficient to observe that error rates provide sufficient

The history of federal canine sniff jurisprudence is replete with evidence of the method's unreliability.[139] While the lion's share of cases casting doubt on the technique's infallibility predate the Supreme Court's controlling rulings in *Place* and *Caballes*, their unique facts nevertheless indicate that dogs are far from one hundred percent accurate. In *United States v. Sullivan*,[140] the Fourth Circuit concluded that a canine sniff was not a search despite the fact that law enforcement officers relied on less than a "full alert" to generate the probable cause necessary to conduct a full-blown search of the defendant's luggage.[141] As the Court put it, the dog did not "give signs of sensing drugs by pawing at the luggage excitedly, but he did show *an interest* in one blue bag."[142] The Court's anthropomorphic treatment of the canine may strike some as humorous, but the very notion that a well-trained canine engaged in a police investigation can show less than "full alert" also casts significant doubt on the binary character of the sniff test. The facts in *Sullivan* illustrate that, rather than alerting to the presence of contraband, canines may also indicate the mere possibility of such a presence.[143] While it is true that the investigation in *Sullivan* resulted in a seizure of narcotics, this seizure was the outcome of a less than reliable application of the dog sniff technique.[144] Although the *Sullivan* ruling predates *Caballes*, nothing in the controlling case indicated that the course of action undertaken by police officers in *Sullivan* ran afoul of the Fourth Amendment. Because the *Caballes* majority failed to analyze the sniff test as a single investigatory process comprised of the activities of a canine and his police handlers, it provided no mechanism for distinguishing between an alert and a mere indication of interest.[145] In essence, the *Caballes* rule permits dogs to sniff

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ground to hold that canine sniffs are searches under the rule articulated in *Katz* and extended in *Kyllo*.

[139] *See generally* Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).

[140] 625 F.2d 9 (4th Cir. 1980).

[141] *Id.* at 12-13.

[142] *Id.* at 12 (emphasis added).

[143] This possibility also arose in *United States v. Guzman*, 75 F.3d 1090, 1091-92 (6th Cir. 1996), where a handler also distinguished between a dog's "interest" and full alert.

[144] *See id*. at 1096 (acknowledging prior to *Caballes* that a dog's "interest" in a bag alone would not constitute probable cause).

[145] *See* Illinois v. Caballes, 543 U.S. 405, 416 (2005) (Souter, J., dissenting).

persons and objects indiscriminately[146] and allows law enforcement officers to interpret a dog's behavior in whatever manner they wish.[147] This concern is all the more prevalent insofar as the conclusiveness of canine sniffs is so often predicated on the subjective impressions of dog handlers.[148] As one commentator has noted, "[c]anines often have their own particular pattern for communicating an alert. If a handler is not aware of a dog's particular behavior, she may mistake an indication of narcotics for a reaction to food, another animal, or other distraction."[149]

To the extent that *Caballes* can be read as authorizing the investigative process at issue in *Sullivan*, it is clear that current law permits a less than full canine alert to justify a full-blown search, particularly when a canine's "interest" is accompanied by individualized suspicion.[150] This observation once again suggests a closer parallel between canine sniffs and the surveillance technology at issue in *Kyllo* than the *Caballes* majority was willing to admit. As one commentator has noted, a canine "interest" in an object or person may proceed from nothing other than innocent factors such as the scent of food, perfume, or another animal.[151] Similarly, in *Kyllo*, the thermal imaging device at issue had the ability to detect heat signatures that might have been owing to any number of innocent factors.[152] As such, *Sullivan*'s fact pattern supports the revision of the *Caballes* rule to reflect the fact that canines may alert to the possibility rather than the certainty of the presence of contraband.

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[146] *See id*. at 422-23 (Ginsburg, J., dissenting).

[147] *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detecting Dog*, 85 KY. L. J. 405, 424-35 (1997) (noting that false positives typically result from subjective error on the part of canine handlers). The analysis above presumes that misinterpretations may also be willful.

[148] *Id.*

[149] *Id.* at 423 (citation omitted).

[150] *See* United States v. Guzman, 75 F.3d 1090, 1091-92 (6th Cir. 1996); United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993). It is worth noting that neither of these cases requires individualized suspicion as a precondition for the application of a canine sniff. They merely note that a canine "interest" in a person or receptacle is only sufficient to generate probable cause when accompanied by independent observations tending to arouse articulable suspicion. *Guzman*, 75 F.3d at 1096; *Jacobs*, 986 F.2d at 1235.

[151] Bird, *supra* note 147, at 423.

[152] Kyllo v. United States, 533 U.S. 27, 38 (2001) (observing that heat signatures might be generated by "the lady of the house tak[ing] her daily sauna and bath").

Where *Sullivan* suggests that canine behavior may be less than certain in a given investigatory situation, the notorious case of *Doe v. Renfrow*[153] illustrates that canines are downright incorrect in many cases.[154] In *Doe*, a dog alerted when it sniffed a thirteen-year-old girl during the course of a warrantless dragnet inspection at an Indiana junior high school.[155] When a superficial search of the student's person failed to uncover contraband, she was subjected to an equally fruitless strip search.[156] It was later discovered that the student had been playing with her own dog, which was in heat, on the morning of the search.[157] The false alerts at issue in *Doe* were not limited to this one individual. Although police dogs alerted to more than fifty students during the course of the dragnet inspection,[158] contraband was recovered from only seventeen students.[159] As such, *Doe* strongly subverts the judicial myth that canine sniffs are one hundred percent accurate and supports a more realistic classification of the canine sniff as a search subject to Fourth Amendment scrutiny. While it is perhaps the case that the mere application of canine sniffs did not impinge upon the students' reasonable expectations of privacy, the Court did not hesitate to conclude that the subsequent strip search prompted by a false alert deprived the student of her Fourth Amendment rights. As the above analysis has shown, there is no rational basis for distinguishing between the sniff and the conduct of a police officer, because handlers may erroneously interpret canine behavior as an alert.[160] As such, it makes sense to treat the canine sniff as the first step in an investigatory procedure implicating the Fourth Amendment.

The Supreme Court's broad ruling in *Place* that canine sniffs reveal only the presence or absence of criminal activity placed the Court's canine sniff jurisprudence on a collision course with the factual scenario that the Eleventh Circuit considered in *Merrett v. Moore*.[161] In *Merrett*, the Eleventh Circuit ruled on the constitutionality of a dragnet procedure in

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153 475 F. Supp. 1012 (N.D. Ind. 1979).

154 *Id.* at 1017.

155 *Id.* at 1016-17, 1019.

156 *Id.* at 1017.

157 *Id.*

158 *Id.* at 1028.

159 *Doe*, 475 F. Supp. at 1017.

160 *See supra* notes 147-49 and accompanying text.

161 58 F.3d 1547, 1553 (11th Cir. 1995).

which police officers conducted a series of canine sniff tests on automobiles stopped at a highway roadblock.[162] Although the procedure generated twenty-eight canine alerts, only one person was arrested for possession of narcotics.[163] Despite recounting evidence of false positives in its own recitation of the facts, the Court nevertheless relied on *Place* in holding that canine sniffs are not searches under the Fourth Amendment.[164] As if aware of the inherent inconsistency between the facts before it and the Supreme Court's classification of the canine sniff as a binary search, the Court declined to quote the *Place* rationale that canine sniffs disclose only the presence or absence of illegal activity.[165] Considered in this light, *Merrett* provides what is perhaps the best rationale for revising the rule articulated in *Caballes* and *Place*. By forging a rule based on the proposition that canines do not err, the Supreme Court has doomed district and circuit courts considering cases involving false positives to contradict themselves in the sheer act of adhering to controlling authority. As such, the interest of judicial consistency mandates that the rule be altered to require either reasonable suspicion or probable cause.

The circuit courts' rulings in each of the cases discussed above are consistent with the rule articulated by the Supreme Court in *Caballes*. Before *Caballes*, only a minority of circuit courts were willing to subject canine sniffs to Fourth Amendment scrutiny, and then only in special cases.[166] These limitations on the canine sniff have been swept away in favor of an authoritative ruling that enables law enforcement officers to conduct canine sniffs at random without need for probable cause or reasonable suspicion.[167] In an era when law enforcement agencies increasingly seek to maximize the use of surveillance technologies in the service of public safety, it is a matter of common sense that legal rules insulating police canine usage from Fourth Amendment scrutiny will incentivize continued police reliance on the canine as an investigatory tool. It follows from this observation that the use of canines will increase, perhaps even to the point of constituting random,

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[162] *Id.*

[163] *Id.* at 1549.

[164] *Id.* at 1553.

[165] United States v. Place, 462 U.S. 696, 707 (1983).

[166] *See generally* United States v. Beale, 674 F.2d 1327 (9th Cir. 1982); United States v. Klein, 626 F.2d 22 (7th Cir. 1980).

[167] *See* Illinois v. Caballes, 543 U.S. 405, 422 (Ginsburg, J., dissenting).

dragnet-type searching.[168] Ironically, the incentive for police officers to increase their usage of canine detection may ultimately decrease the net effectiveness of canine sniffs due to the fact that "dog sniffs are most effective when implemented in tandem with law enforcement expertise and least effective when conducting random searches."[169]

This final observation suggests that the incentives created for law enforcement officers under a non-search regime endanger not only individual rights to privacy, but also public safety. Because canines err, a false alert may enable law enforcement officers to intrude upon the "privacies of life"[170] that should be protected by the Fourth Amendment's exclusionary rule.[171] Moreover, the "legal fiction" that canine sniffs are one hundred percent accurate authorizes police officers to use canines indiscriminately and thereby reduces the net effectiveness of the canine as an investigatory tool.[172] Finally, because the Court's ruling in *Kyllo* would subject possible alternatives to the canine sniff test to a higher Fourth Amendment burden by requiring a showing of probable cause,[173] it follows that law enforcement agencies have little incentive to seek more accurate and less intrusive investigatory technologies. The current non-search regime thus creates a situation in which police officers would rather maintain the status quo than embrace technologies that require showings of reasonable suspicion or probable cause.

IV. ANALYSIS AND CRITICISM OF CANINE SNIFFS UNDER A REASONABLE ARTICULABLE SUSPICION REGIME

The insufficiencies of the Supreme Court's empirical assumptions highlighted in the above analysis of *Caballes* and *Place* suggest that the canine sniff's unreliability requires some level of Fourth Amendment scrutiny. Numerous scholars have suggested that the low-level intrusiveness of canine sniffs merits the requirement of a level of suspicion rising above arbitrariness but falling short of full-blown probable cause.[174]

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168 *Id.*

169 Bird, *supra* note 147, at 426-27.

170 Boyd v. United States, 116 U.S. 616, 630 (1886).

171 Mapp v. Ohio, 367 U.S. 643, 655 (1966).

172 Bird, *supra* note 147.

173 Kyllo v. United States, 533 U.S. 27, 40 (2001).

174 *See*, *e.g.*, Honsinger, *supra* note 127, at 1106-07.

While the assumption that canine sniffs are relatively unintrusive when compared with other investigative techniques will be subject to interrogation in the portion of this Note dealing with the implications of a probable cause regime, the analysis that follows will examine the policy implications of requiring only a showing of reasonable articulable suspicion rather than the full-blown probable cause required by more intrusive investigative methods. Viewing reasonable articulable suspicion from the standpoint of economic incentive, this analysis will show not only that the deference with which courts have treated the reasonable articulable suspicion test is likely to result in the perpetuation of status quo investigatory techniques, but also that deference to the judgment of police officers under a reasonable suspicion regime will result in a standard that differs from arbitrariness in name alone.

The Supreme Court has held that reasonable articulable suspicion "is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."[175] In *Terry v. Ohio*, the Supreme Court held that a "limited" search can be justified on the basis of reasonable suspicion when a "police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[176] In order to determine whether a search is reasonable, courts should balance the "nature and extent of the governmental interests involved" against the searched individual's expectations of freedom from interference by law enforcement officers.[177] When considering the quantum of evidence necessary to generate reasonable suspicion, the Supreme Court has never provided a hard and fast rule, holding instead that the standard is "obviously less demanding than that required for probable cause"[178] and requires "considerably less"[179] proof of wrongdoing than a preponderance of the evidence standard would necessitate. The nebulosity of

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[175] Alabama v. White, 496 U.S. 325, 330 (1990).

[176] Terry v. Ohio, 392 U.S. 1, 21, 30-31 (1968).

[177] *Id.* at 22.

[178] United Sates v. Sokolow, 490 U.S. 1, 7 (1989).

[179] *Id.*

these principles has resulted in a standard that is so deferential to the judgment of police officers that practically any articulated justification is sufficient to withstand Fourth Amendment scrutiny.[180]

To determine whether a search or seizure is supported by "reasonable suspicion," a court will evaluate the totality of the circumstances of each case to ascertain whether a law enforcement officer had a "particularized and objective basis" for suspecting that criminal activity was afoot.[181] While nominally "objective," the reasonable suspicion test nevertheless permits police officers to rely on "their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[182] The standard for evaluating the propriety of investigatory conduct supported by reasonable suspicion is therefore not that of a reasonable individual, but rather an individual "versed in the field of law enforcement."[183] While the Supreme Court has gone to great lengths to characterize the reasonable articulable suspicion test as objective,[184] the emphasis that the Court has placed upon police officers' particularized experience and training nevertheless reveals that the test is applied with deference to the subjective judgments of individual law enforcement officers.[185]

As one commentator has noted, the deference with which courts approach the reasonable suspicion test is in fact so expansive as to swallow up the requirement that a police officer be able to point to particularized facts to justify an intrusion.[186] Because the Supreme Court has explicitly authorized courts to determine the reasonableness of an investigatory procedure with reference to the experience and

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[180] *See*, *e.g.*, United States v. Givan, 320 F.3d 452, 458-59 (3d Cir. 2003) (finding that police had reasonable suspicion for expanding the scope of a routine traffic stop when the driver of a car rented a day before the stop appeared "nervous and fidgety").

[181] United States v. Arvizu, 534 U.S. 266, 273 (2002).

[182] *Id.* (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

[183] *Cortez*, 449 U.S. at 418.

[184] *See Sokolow*, 490 U.S. at 7 (noting that the reasonable suspicion test requires police to proffer "some minimal level of *objective* justification for the stop" (emphasis added) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984))).

[185] *See* Flores, *supra* note 65, at 1091 (noting that the reasonable articulable suspicion standard is flawed because of "the judiciary's almost unwavering deference to police determinations of whether it has been satisfied").

[186] *Id.*

training of a particular officer, the Court has introduced a large element of subjectivity into a test that it alleges to be "objective."[187] Even if the Court's rulings fall short of endorsing searches made pursuant to full-blown, individualized subjectivity, the standard nevertheless embraces the subjective wiles of law enforcement as an institution by constraining its analysis to reasonable inferences drawn by an individual "versed in the field of law enforcement."[188] In light of law enforcement institutions' profoundly self-interested concern with making arrests and obtaining convictions, Erica Flores had noted that such a rule is tantamount to "trusting the pope to uphold the Free Exercise Clause of the Constitution."[189]

The legal mechanics of applying a reasonable suspicion regime to canine sniff tests are inferable from Federal case law predating *Place*. While circuit court cases decided before *Place* almost uniformly concluded that canine sniffs, whether conducted in schools, at airports, or during traffic stops, did not constitute searches for the purposes of Fourth Amendment inquiry, the lion's share of these decisions nevertheless addressed the question of "cause" in dictum.[190] Even where the circuit courts did not address the question of cause overtly, many nevertheless recounted narratives of events that generated police suspicion.

In *United States v. Fulero*, the court held that a canine sniff was not an unreasonable search when a police dog alerted at footlockers owned by "three hippies," one of whom the arresting officer recognized as "probably involved in the narcotics traffic."[191] Although the court dismissed the petitioner's assertion that the canine sniff was a search as "frivolous," the Court's decision to recount the factors that gave rise to the officer's suspicion prior to the application of the sniff tacitly implicated the Fourth Amendment.[192] Likewise, in *United States v. Bronstein*, the Second Circuit held that a canine sniff was not a search, but nevertheless observed that tips received from airline personnel had provided law enforcement officers with "ample cause" to investigate the

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[187] *Arvizu*, 534 U.S. at 273; *Cortez*, 449 U.S. at 417-18.

[188] *Cortez*, 449 U.S. at 418.

[189] Flores, *supra* note 65, at 294.

[190] *See, e.g.*, United States v. Klein, 626 F.2d 22, 24-25 (7th Cir. 1980); United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975); United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974).

[191] 498 F.2d at 748.

[192] *Id.* at 748-49.

petitioners.[193] Finally, in *United States v. Klein*, the Seventh Circuit held that canine sniffs were not searches, but noted that "authorities already had reasonable suspicion to believe that the luggage contained contraband and used a dog as a further investigatory device."[194] In reaching this decision, the Court declined to decide whether the use of canine sniffs would be constitutional in sweeping, "dragnet-type sniffing expedition[s]."[195] The *Klein* court's final observation is in clear tension with its ruling that canine sniffs do not implicate the Fourth Amendment insofar as "the scope of an activity is [only] relevant . . . as to its reasonableness once it has been characterized as a search."[196]

One commentator has noted, more generally, that the tendency of the *Fulero*, *Bronstein*, and *Klein* courts to recount narratives of "cause" leading up to the application of canine sniffs is in tension with their underlying conclusion that canine sniffs, when considered alone, are not subject to Fourth Amendment scrutiny.[197] Writing shortly after the Supreme Court's decision in *Place*, Professor Honsinger observed that "if a sniff is not a search, it should be subject to no restrictions as to reasonableness, and there is no valid constitutional basis for subjecting it to a suspicion requirement."[198] Endorsing the Ninth Circuit's view of the issue in *United States v. Beale*,[199] Honsinger went on to suggest that a canine sniff should be considered a "subsearch" requiring a showing of at least some level of suspicion rising above arbitrariness but falling short of probable cause.[200]

The Ninth Circuit's treatment of the canine sniff issue provides a compelling lens through which to view the implications of a reasonable articulable suspicion regime. In *Beale I*, a police officer observed two male Caucasians exit a taxi cab in front of an airport.[201] After checking three pieces of luggage, one of which bore an identification tag indicating a New Jersey address, the two individuals parted company and

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193 521 F.2d at 461.

194 626 F.2d 22, 27 (7th Cir. 1980).

195 *Id.*

196 *See* Honsinger, *supra* note 127, at 1095.

197 *Id.* at 1096.

198 *Id.*

199 United States v. Beale (*Beale I*), 674 F.2d 1327 (9th Cir. 1982), *vacated*, 463 U.S. 1202 (1983).

200 *See* Honsinger, *supra* note 127, at 1097.

201 *Beale I*, 674 F.2d at 1328.

obtained their airplane seating assignments from the ticket counter.[202] The men shared the same flight itinerary, having purchased first class tickets to San Diego with a stopover in Houston.[203] After leaving the ticket counter separately, the two men rejoined when they entered the boarding area.[204] Observing that their behavior was consistent with a general drug courier profile, the officer approached the two gentlemen and identified himself.[205] The officer asked the men for identification and whether they had ever been arrested.[206] One of the men, who appeared nervous, answered that he had been arrested on a narcotics charge six years ago.[207] The officer subsequently ordered that the bags that the two men checked be subjected to a canine sniff test.[208] Upon sniffing the men's bags, the dog alerted, and the officer found narcotics.[209]

The Court expressed no opinion as to whether these facts were sufficient to generate reasonable articulable suspicion, but nevertheless observed that the trial court had erred in failing to conduct a Fourth Amendment inquiry.[210] Because the Ninth Circuit found that a canine sniff test was "a Fourth Amendment intrusion, albeit a limited one," it vacated the trial court's ruling and remanded the case for further proceedings.[211] The Supreme Court subsequently vacated and remanded the Ninth Circuit's holding for reconsideration in light of the Supreme Court's classification of canine sniffs as *sui generis* in *United States v. Place*.[212] Rehearing the case, the *Beale II*[213] Court resolved somewhat defiantly that a requirement of reasonable articulable suspicion was consistent with the Supreme Court's holding in *Place*.[214] Although this holding was subsequently reversed following an *en banc* rehearing,[215] the *Beale II* court nevertheless observed that the

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[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 1328 n.1.

[206] *Id.* at 1328-29.

[207] *Beale I*, 674 F.2d at 1329.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 1335-36.

[211] *Id.*

[212] United States v. Beale, 463 U.S. 1202 (1983).

[213] United States v. Beale (*Beale II*), 731 F.2d 590 (9th Cir. 1983), *rehearing granted*, 736 F.2d 1289 (9th Cir. 1983).

[214] *Id.* at 593-94.

[215] United States v. Beale (*Beale III*), 736 F.2d 1289 (1984).

history of federal canine sniff jurisprudence in sister circuits tacitly suggested that canine sniffs should be subjected to a reasonable articulable suspicion standard:

> Despite the general proffer of arguments tending to exclude canine investigations from Fourth Amendment control, no federal court has yet upheld a canine investigation in the face of a record demonstrating a *lack* of prior individualized suspicion. Several courts have expressly noted the existence of prior suspicion in affirming the validity of the sniff, and some have stressed that the court was not confronted with an indiscriminate "dragnet" type of investigation.[216]

In the course of reaching this conclusion, the *Beale II* Court cited the aforementioned cases of *Klein* and *Bronstein*, suggesting that a reasonable articulable suspicion regime would validate canine sniffs conducted under conditions resembling the facts of those cases. Moreover, although the *Beale II* Court failed to cite *United States v. Fulero*, its recognition that "no federal court has yet upheld a canine investigation in the face of a record demonstrating a *lack* of prior individualized suspicion" tacitly suggests the Court's approval of the result in *Fulero*.[217]

Viewed through the lens of the Ninth Circuit's holding in *Beale II*, the impact of a reasonable articulable suspicion regime on the surveillance technology market becomes clear. Such a regime would authorize canine sniff tests under circumstances falling far short of the requirements of probable cause. As in *Fulero*, such a regime would permit canine sniffs in instances where police suspicion is predicated on little more than amorphous social impressions (such as one or more suspects being a "hippy") and uncorroborated personal recollections (such as one or more suspects being recognized as "involved in the drug trade"). The Ninth Circuit's observation thus gives rise to the conclusion that imposing a reasonable articulable suspicion regime for canine sniffs would result in nothing more than a perpetuation of the post-*Place* status quo. The history of "reasonable suspicion" as a prerequisite for investigatory procedures is rife with evidence of the potential for police overreaching. Outside of the canine sniff context, the reasonableness regime has permitted police to expand the scope of investigations for reasons amounting to little more

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[216] 731 F.2d at 595.

[217] *Id.* at 594.

than the fact that an individual appeared "nervous and fidgety."[218] Because of the considerable deference accorded to police officers in the adjudication of whether or not a search was conducted pursuant to reasonable articulable suspicion, it appears that such a regime would provide law enforcement agencies with little incentive to invest in more accurate and less intrusive alternatives to the canine sniff test.

V. ANALYSIS OF CANINE SNIFFS UNDER A PROBABLE CAUSE REGIME

The preceding analysis illustrates that imposing a reasonable suspicion regime on the canine sniff test would give police officers incentives to maintain status quo procedures. Absent some meaningful reconfiguration of the reasonable articulable suspicion standard,[219] self-interest will lead law enforcement officers to proffer minimal justifications for disproportionately invasive searches and seizures.[220] Judicial deference to police justifications will in turn create a situation in which law enforcement agencies do not experience the costs of the exclusionary rule.[221] As such, it appears unlikely that a reasonable suspicion regime would lead law enforcement officers to divert resources to less intrusive and more effective technologies.[222] Imposing a probable cause regime may therefore be the best way to maximize market incentives for the development of investigatory alternatives that more closely resemble binary technologies. The remainder of this Note will set forth the legal principles by which a court might subject the canine sniff test to probable cause requirements and examine the effects of such a regime upon the surveillance technology market.

As noted above, the *Place* court based its classification of canine sniffs as "non-searches," in part, on the observation that canine sniffs are non-intrusive.[223] As Justice Ginsburg noted in her *Caballes* dissent, however, the imposition of a drug sniffing canine onto an individual's person or property can

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[218] United States v. Givan, 320 F.3d 452, 458-59 (3d Cir. 2003).

[219] Erica Flores persuasively demonstrates that a judicial presumption of unreasonability in all cases involving police search and seizure behavior would remedy the potential for overreaching. *See*, Flores, *supra* note 65.

[220] *Id.*

[221] *Id.*

[222] *See* Stuntz, *supra* note 36, at 1275.

[223] United States v. Place, 462 U.S. 696, 707 (1983).

be quite intimidating.[224] As a dissenting Tenth Circuit judge noted in *United States v. Williams*, "These drug dogs are not lap dogs."[225] Coupled with the fact that canines and their handlers are error prone,[226] the Justices' observations suggest that the nature of the canine sniff intrusion merits some heightened degree of Fourth Amendment scrutiny. Although Justices Souter and Ginsburg ultimately conclude that reasonable articulable suspicion would be the most appropriate standard,[227] their analysis does not account for the fact, elaborated upon at length above, that reasonable articulable suspicion requirements have a minimal effect, if any at all, on police conduct.[228] Because a reasonable articulable suspicion regime would not accomplish the deterrent objectives of the exclusionary rule, Justice Ginsburg's suggestion that canine sniffs should be controlled by *Terry* appears to run afoul of the Supreme Court's avowed objective "to compel respect for the [Fourth Amendment] in the only effectively available way—by removing the incentive to disregard it."[229]

A probable cause regime would accomplish this objective most effectively. While the notion that a reasonable articulable suspicion regime fails to deter unconstitutional police conduct would be sufficient, in and of itself, to justify a requirement of probable cause under the deterrence rule articulated in *Mapp*, such a conclusion is equally supported by the Court's holding in *Kyllo v. United States*. Insofar as the *Kyllo* ruling proscribes the warrantless application of technologies not in general public use,[230] the Court's holding appears to endorse the notion that drug sniffing canines should be subjected to a probable cause regime. Like thermal imaging devices, drug sniffing canines are not readily available to individual consumers.[231] Since drug sniffing canines are not in general public use, their use implicates legitimate privacy interests that should be

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[224] Illinois v. Caballes 543 U.S. 405, 421 (Ginsburg, J., dissenting).

[225] 356 F.3d 1268, 1276 (10th Cir. 2004).

[226] *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting).

[227] *Id.* at 420 (Ginsburg, J., dissenting).

[228] *See supra* notes 186-190 and accompanying text.

[229] Mapp v. Ohio, 367 U.S. 643, 656 (1966) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[230] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[231] An overwhelming majority of companies selling drug sniffing canines gear their sales efforts toward law enforcement agencies and large corporations. *See generally* Rolling Meadow Kennels and Canine Training, http://www.rmkct.com (last visited Oct. 4, 2006); Southern Hills Kennels, http://www.drugdogs.net (last visited Oct. 4, 2006); K-9 Center, http://www.k9-center.com (last visited Oct. 4, 2006).

subject to the strong protection of the Court's exclusionary rule.[232] Indeed, as noted above, canine sniffs may implicate even stronger privacy interests than thermal imaging devices.[233] Whereas thermal imaging devices enable police to detect only a "crude visual, or . . . image" of heat radiating from a house,[234] canine alerts permit intimate inspection of an individual's "persons, houses, papers, and effects."[235]

Although *Kyllo*'s "general public use" test arguably provides the strongest existing judicial justification for subjecting canine sniffs to a probable cause regime, it is nevertheless an undesirable rationale for imposing a probable cause requirement. As noted above, the *Kyllo* rule imposes a Fourth Amendment stigma upon emerging technologies, requiring that they be subject to probable cause requirements until they come into general public use. If this rule is allowed a broad application, law enforcement agencies will have no incentive to forgo the demonstrably inaccurate and invasive canine sniff test in favor of more reliable and less intrusive technologies. As such, the court's ruling in *Kyllo* has a chilling effect on the development of technologies such as the nascent "Dog-on-a-Chip"—a handheld sensing device designed to mimic (and even improve upon) the capabilities of a drug sniffing canine.[236] Under the *Kyllo* rule, this technology would be subject to Fourth Amendment scrutiny even though its compactness and accuracy assures that it is less invasive than the canine sniff test.[237] Moreover, since the device promises to greatly reduce law enforcement agencies' expenditures in the course of providing food and general care for their canine detection units, applying the *Kyllo* rule would detract from the significant savings that this device promises for law enforcement agencies.[238] Therefore, the *Kyllo* rule would result in a net loss in the realm of public safety by requiring that resources that would otherwise be freed for other law

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[232] *See generally Mapp*, 367 U.S. at 646-57.

[233] *See supra* note 135 and accompanying text.

[234] *Kyllo*, 533 U.S. at 30.

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

[236] Scott Buhrmaster, *Dog vs. Device; Are Drug-Sniffing K-9s Getting Snuffed Out of Law Enforcement?*, PoliceOne.com, Nov. 26, 2003, http://www.policeone.com/writers/columnists/ScottBuhrmaster/articles/72998.

[237] *Drug Sniffing Dogs Could be Replaced by an Electronic Chip*, AZoNano.com, Nov. 7, 2003, http://www.azonano.com/details.asp?ArticleID=157.

[238] *Id.*

enforcement activities continue to be expended in the service of an antiquated canine program.

It follows from this analysis that a probable cause regime is most likely to encourage law enforcement agencies to divert resources from canine detection programs to technologies that are more accurate and less invasive. In order for such a regime to be effective, a court subjecting the canine sniff test to a probable cause requirement would need to carefully distinguish *Kyllo* on the ground that *Kyllo* involved a bright line protection of the home—an environment in which the court concluded that all details are "intimate."[239] Such a ruling would have the twin virtues of remedying the negative consequences of the *Caballes* Court's holding that canine sniffs are not searches for the purposes of the Fourth Amendment and freeing police officers to pursue new search technologies for purposes other than home surveillance.

VI. CONCLUSION

This Note has shown that the *Caballes* Court's classification of the canine sniff as a non-search provides incentives for law enforcement agencies to maintain their use of canines as an investigatory device. This consequence is undesirable from a policy perspective in light of pervasive evidence indicating that canines, contrary to the prevailing legal wisdom, are not one hundred percent accurate. Because canines err, false alerts enable police officers to conduct full-blown searches of people and objects that implicate legitimate privacy interests. This empirical fact lends support to the argument that canine sniffs should be subject to some level of Fourth Amendment scrutiny. Reasonable articulable suspicion will not suffice, however, to accomplish the deterrent objective of the exclusionary rule. Because courts determine whether or not a search was supported by reasonable articulable suspicion with undue deference to the subjective impressions of police officers, incentive remains for law enforcement agencies to maintain their investments in the inaccurate and invasive drug sniffing canine.

By requiring that police officers conduct investigations and uncover facts sufficient to merit the issuance of a judicial warrant, a requirement of probable cause will provide the

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[239] *Kyllo*, 533 U.S. at 301.

greatest incentive for law enforcement agencies to seek more accurate and less invasive technologies. Law enforcement demand will, in turn, foster development of such technologies in the market, provided that courts considering such technologies are careful to distinguish the use of these technologies in the field from the facts at issue in *Kyllo v. United States*. Because *Kyllo*'s holding can be limited to the use of emerging technologies for the purpose of home surveillance, requiring police officers to have probable cause prior to the use of a drug sniffing canine will enable law enforcement agencies to better provide for public safety without running afoul of the Fourth Amendment's proscription of unreasonable searches and seizures.

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