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Who Let the Dogs Out—and While We're at It, Who Said They Could Sniff Me?: How the Unregulated Street Sniff Threatens Pedestrians' Privacy Rights

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Who Let the Dogs Out—and While We're at It, Who Said They Could Sniff Me?

HOW THE UNREGULATED STREET SNIFF THREATENS PEDESTRIANS' PRIVACY RIGHTS

INTRODUCTION

Jane Doe left her office at the same time as usual. She walked three blocks south, turned right at the deli, and walked four blocks west. She was happy to be walking home—earlier it was raining and she was forced to take the crowded bus. The streets were busy, even for rush hour, and she was too distracted to see who was around her. As she waited on the corner for the "don't walk" sign to change, she suddenly felt something press against her leg. Turning quickly, she saw the snout of a police dog and a human officer standing right behind it. Before she realized what was happening, the dog stopped sniffing and sat down, and the officer asked her to step aside. Having never committed a crime in her life, she was scared. She followed the officer a few feet away, where he conducted a search of her body, clothes, and purse. After several minutes, the officer apologized, turned, and walked away—his pup trailing behind him.

What Jane Doe did not realize is that she had just been sniffed and searched for drugs. The dog's sitting down indicated to its human partner that it had detected an illegal substance, and the human officer's search followed. However, Jane Doe was not carrying drugs at all. Perhaps the dog alerted because during her bus trip earlier in the day, she had been sitting beside someone who had recently used marijuana. Perhaps the smell lingered. Perhaps the human officer simply picked her at random and wanted to see what he could find. Perhaps the dog did not smell anything, and instead, provided its human partner with a false alert. Should any of these explanations afford Jane Doe any less of a right to privacy on her person? Should her expectation to this privacy be reduced merely because a dog was involved?

These questions—which inquire into the degree of protection afforded via privacy rights—have been posed for years as the Fourth Amendment case law has developed. The Fourth Amendment affords people privacy rights in their "persons, houses, papers, and effects" against searches and seizures that are not supported by probable cause.[1] Throughout the twentieth and twenty-first centuries, the Supreme Court has worked to develop a comprehensive understanding of the vague terms "search" and "seizure."[2] The Court has struggled to adopt definitions that both maintain the tradition of privacy and also respond to the changing times and availability of technology. In doing so, it has engaged in a long history of changing its interpretation of the amendment in both scope and meaning.[3]

The change in scope and meaning has similarly affected the scope of the constitutional search as compared to other stops, such as a pat down. A public pat down requires an officer's reasonable suspicion as to criminal activity that he has developed through his observations of particular events.[4] A pat down is limited to only the exterior of the body and only to looking for specific, dangerous contraband that the officer is reasonably suspicious is present.[5] "Reasonable suspicion" is defined as: "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity."[6] If the pat down, supported by reasonable suspicion, creates probable cause that the individual has committed a crime, an officer is permitted to seize[7] that individual, and thereby conduct a full search.[8] A street seizure and search, in

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

[2] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, *in* THE FOURTH AMENDMENT: SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 32–37 (Cynthia Lee ed., 2011). One scholar has noted that the Framers intended for the Fourth Amendment to create a proactive cease of unreasonable and unjustified stops and arrests, as opposed to just an "after-the-fact remedy for unjustified intrusions." *Id.* at 34.

[3] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, *in* THE FOURTH AMENDMENT: SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE, *supra* note 2, at 27, 27–31 (satirically commenting on the ever-changing approach by the Court, and stating: "[w]arrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so.").

[4] Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

[5] *Id.* at 24–26, 29–30.

[6] *Reasonable Suspicion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[7] In one case, the Supreme Court explained that a "seizure" can be understood to mean any situation where "a police officer accosts an individual and restrains his freedom to walk away." *Terry*, 392 U.S. at 16.

[8] *Id.* at 30–31 (holding that when an officer limited his pat down of a pedestrian to trying to find dangerous weapons that may harm individuals nearby, and he found these weapons during the pat down, he was permitted to arrest and conduct a search of the pedestrian).

turn, requires probable cause, defined as: "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."[9] Determining whether an officer has probable cause rests on a more stringent standard, as a seizure and search is more invasive for an individual than is a stop and a pat down. The Court, however, has held that a dog sniff does not require either reasonable suspicion or probable cause for the sniff to be constitutional; instead *the sniff itself* is what creates the probable cause required for the officer to conduct a constitutional seizure and search.[10]

The Court, however, has reduced this seemingly limitless power of the sniff in situations where the individual is protected by some other doctrine of Fourth Amendment privacy rights, such as privacy within a vehicle or home.[11] While the Court has acknowledged that a pedestrian carries *some* level of an expectation of privacy,[12] the current unregulated street sniff regime invades a pedestrian's right to such a degree that it virtually deprives her of *all* privacy expectations to her very person.[13]

Because the Supreme Court has not yet articulated precisely what the pedestrian's reasonable expectation of privacy is in relation to dog sniffs, it has permitted street sniffs to go unregulated—meaning that a dog's alert, by itself, can create probable cause that criminal activity is occurring, without requiring that there be any check on the sniff before a subsequent search is constitutional. This has left American citizens like Jane Doe prone to fall victim to what are often

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[9] *Probable Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] Illinois v. Caballes, 543 U.S. 405, 408–10 (2005). Justice Ginsburg commented in her dissent that she believed that this was a dangerous outcome—as the holding "clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots." *Id.* at 422 (Ginsburg, J., dissenting).

[11] *See*, *e.g.*, Rodriguez v. United States, 135 S. Ct. 1609, 1616–17 (2015) (holding that it is unconstitutional for an officer to extend a traffic stop once the purpose for its inception is completed, so to perform a dog sniff for drugs that is not supported by separate reasonable suspicion); *see* Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013) (holding that a dog sniff on one's front lawn is unconstitutional if conducted without first gaining the homeowner's permission to do so or subsequent to the officer's obtaining of a warrant); Delaware v. Prouse, 440 U.S. 648, 662–63 (1979) (holding that to stop an individual, whether or not the stop is triggered by a dog sniff, an officer must have a reasonable suspicion that criminal activity is occurring prior to performing the traffic stop). For a complete analysis about the decisions that protect individuals from dog sniffs in other locations, see *infra* Sections II.A, II.B.

[12] *See*, *e.g.*, *Terry*, 392 U.S. at 9 (stating that pedestrian Terry held privacy rights that protected him against unreasonable searches and seizures while walking on a street in Cleveland).

[13] *See infra* Part III (describing the way in which a dog sniff invades one's reasonable expectation of privacy).

inaccurate sniffs and false alerts.[14] The sniff may be appropriate in some cases; however, in other cases, particularly where the sniff leads to a false alert, pedestrians' rights may be infringed. A dog that does not pick up the scent of drugs, yet alerts anyway, is dangerous for an individual's rights. Similarly, a dog that alerts because it *has* detected the scent of drugs may not be reliable, as it may be registering merely a lingering odor due to the pedestrian's contact with the scent at some point in the day, as opposed to her actual possession or use of a drug. These types of false alerts pose threats to an individual's expectation of privacy in public places. False alerts are often due to training issues, mistakes, or handler cues.[15] The problem at issue is that these false alerts create probable cause and thus allow the human officer to search individuals based upon probable cause that should never have been formulated in the first place. If, on the other hand, canine sniffs could be relied upon as accurate, the fact that officers may search after an alert would not, in itself, be problematic, as this would ensure that the probable cause created through a canine's alert to drugs was reliable. Without this guarantee, however, there is no way to tell whether or not searches stemming from a police dog's alert are based on more than the human partner's mere hunch or whim—a possibility which the Supreme Court has worked diligently to avoid in other contexts within the Fourth Amendment.[16]

In order to remedy this issue, the Court or the government must first determine the level of expectation of privacy that pedestrians hold in relation to police dog sniffs. The policy considerations that afford a moderate expectation of privacy to vehicles[17] should also apply to pedestrians, and therefore, an equivalent expectation in privacy should be extended to these more vulnerable citizens.

Once this expectation of privacy has been established, the government should place heightened requirements on all K9 units[18]—specifically, through the implementation of standardized

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[14] *See infra* Part IV (describing the high levels of inaccuracy in police dog alerts).

[15] *See infra* Part IV.

[16] *See, e.g.*, *Terry*, 392 U.S. at 9 (stating that pedestrian Terry held privacy rights that protected him against unreasonable searches and seizures while walking on a street in Cleveland, and that reasonable suspicion by an officer must be supported by specific facts that cause the officer to believe that there is criminal activity occurring).

[17] See *infra* Section II.C for a complete discussion on these policy considerations. These considerations include: the impracticability in obtaining a warrant for a vehicle, the government's ability to regulate vehicles, and public safety. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990); South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Carroll v. United States, 267 U.S. 132, 153 (1925).

[18] "K-9 dog" is defined as "[a] dog trained specif[cally] to work with law-enforcement officers." *K-9 Dog*, BLACK'S LAW DICTIONARY (10th ed. 2014).

training and the creation of threshold accuracy requirements for handler-canine pairs. This will establish the continuance of accuracy for future sniff searches. Through the promise of more accurate alerts, pedestrians would be guaranteed constitutional searches that respect their rights. Until these heightened requirements and standardization methods are in place to improve accuracy, however, the government must implement a temporary presumption against the constitutionality of these sniffs. This would temporarily avoid the possibility that inaccurate alerts result in searches based on unreliable probable cause.[19]

Part I of this note addresses the history of the dog sniff and the policy rationales supporting the allowance of canine sniffs. Part II discusses what the Supreme Court means when it refers to a "reasonable expectation of privacy"[20] in different settings, while Part III explains why pedestrians are entitled to a heightened reasonable expectation of privacy when it comes to these street sniffs. Part IV offers insight into the problem and highlights the consequences of unregulated street sniffs of pedestrians, who should be granted heightened privacy rights. Finally, Part V offers a solution which includes four crucial steps the government must take: (1) acknowledge the pedestrians' heightened expectation of privacy; (2) implement a temporary presumption against street sniffs that are not supported by prior human reasonable suspicion of illegal activity; (3) standardize training requirements for all handler-canine pairs, which targets the problems that cause false alerts; and (4) implement a threshold accuracy requirement for all handler-canine pairs. Employing this solution will guarantee that individuals are afforded their constitutionally protected rights.

I. THE DRUG-SNIFFING POLICE DOG AND ITS SNIFF

Canines have become an extremely integral part of the government and police force. The use of "man's best friend"[21] to assist in locating and tracking down particular scents has been

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[19] The requirements placed on the human officer are demonstrated in *Terry*, which required that an officer reasonably suspect that someone is carrying a weapon—or in this case, an illegal substance—and that this belief be based on the officer's knowledge and familiarity in the field. *Terry*, 392 U.S. at 27–29. In the event that these factors are satisfied, the officer will be permitted to conduct a pat down of, and possibly search, the individual only for the purposes of protecting himself or others from dangerous use of that weapon. *Id.*

[20] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[21] Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 385, 385 (1955) (commenting on the development of the close relationship between dogs and humans).

prevalent for the past two centuries.[22] For example, the novel *Uncle Tom's Cabin* "gives a dramatic portrayal of the use of bloodhounds in recapturing runaway slaves."[23] Even the children's cartoon, "Scooby Doo, Where Are You!" features Scooby Doo, a canine detective, who helps his human friends solve mysteries.[24] The image of the investigative dog has been incorporated in this way because of its long-standing and important history as a member of the police force.

A. Training the Canines

Training dogs to specialize in police investigations has an important history of its own. The first serious attempt to train dogs for police use began in France in 1895 and was adopted and duplicated almost immediately by Germany in 1896.[25] Germany built upon the envisioned potential of the dog training programs by testing various breeds of dogs to determine which were prime for the position[26] as well as by creating a police training school for canines in Grunheide.[27] After the program's success, training began to spread to the countries of Britain, Belgium, Switzerland, Holland, Sweden, Spain, Italy, Canada, and the United States.[28] The increased prevalence of training programs offered the promise of more dogs entering into the "K9 force."

At present, police academies in the United States[29] invest time, money, and energy in enlisting and training puppies to become canine officers because of the incredible differences between humans and dogs. A canine has a stronger sense of smell than a human, possessing "more than 220 million olfactory receptors[30] in its nose, while humans have only 5 million."[31] This difference explains the fact that some dogs can identify the

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[22] *Id.* at 385–86.

[23] *Id.* at 388.

[24] SCOOBY DOO, WHERE ARE YOU! (CBS Network 1969–1970).

[25] Sloane, *supra* note 21, at 391.

[26] *Id.* The German Shepherd was selected as the prime choice for police work and is still the breed that is predominantly used today. *Id.*

[27] *Id.*

[28] *Id.* at 392–94.

[29] *See*, *e.g.*, *Canine Unit*, N.Y. STATE POLICE, https://www.troopers.ny.gov/Specialized_Services/Canine_Unit/ [https://perma.cc/M52F-VSRU] (describing the creation and growth of K9 units within the New York State Police Department).

[30] Olfactory receptors are defined as: "protein[s] capable of binding [odor] molecules that play[ ] a central role in the sense of smell." Elizabeth Bernays & Reginald Chapman, *Olfactory Receptor*, ENCYC. BRITANNICA, http://www.britannica.com/science/olfactory-receptor [https://perma.cc/Z68W-QMP7].

[31] Julio E. Correa, *The Dog's Sense of Smell*, ALA. COOP. EXTENSION SYS., http://www.aces.edu/pubs/docs/U/UNP-0066/UNP-0066.pdf [https://perma.cc/8Y8L-YNA4] (last updated Feb. 2016).

scent of drugs that have been "dissolved inside another liquid," that are located in the sweat on a human hand, or that have already been deposited inside the body.[32] Moreover, experiments have shown that dogs can smell even the residue left when a bag of drugs is rubbed against a cement wall.[33] The physiological makeup of a dog's brain and nose, as well as its development, allow it not only to recognize a scent but also to follow a trail,[34] thereby making it a prime investigator.

While a dog's chemical makeup suggests that it is perfect for a life of police investigation,[35] a K9 unit will nonetheless subject the dog to intensive training procedures prior to allowing it to join the force. Depending on what unit the canine is placed in,[36] it will be trained to detect only a few particular substances.[37] Generally speaking, in the narcotics unit, training begins with puppy toys scented with drugs.[38] The dogs are trained to identify "target odors"[39]—the scents of the substance that the dogs will eventually detect—by physically pressing their noses into the person or item to be sniffed.[40] When the dog recognizes a target odor, it is trained to "alert" to its owner of this detection by

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[32] These incredible traits have been attributed to Megan—a canine claimed to be the "most successful drugs dog ever." Jack Doyle, *A Sniff Away from Retirement, Megan the Most Successful Drugs Dog Ever Who's Detected £30 Million of Cocaine in Seven-Year Career*, DAILY MAIL ONLINE (Jan. 18, 2014), http://www.dailymail.co.uk/news/article-2541587/A-sniff-away-retirement-Megan-successful-drugs-dog-detected-30million-cocaine-seven-year-career.html.

[33] Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

[34] Correa, *supra* note 31, at 2.

[35] Unfortunately for the police departments, not all dogs are born with ideal traits for becoming a member of the K9 unit. For example, if a dog is unmotivated, sensitive to loud noises, or not sociable, it may not be qualified for police training. Melanie Basich, *K-9 Training Challenges*, POLICE (Oct. 16, 2012), http://www.policemag.com/channel/patrol/articles/2012/10/k-9-training-challenges.aspx [https://perma.cc/Q2KH-7AY3].

[36] There are several smells that dogs can be trained to identify. *Detection Dogs*, K9 GLOB. TRAINING ACAD. WORKING DOGS, k9gta.com/detection-dogs/ [https://perma.cc/CFT5-6EYY]. Some training academies offer a wide range of areas of training. *Id.* For example, the K9 Global Training Academy offers programs that train dogs to become experts at sniffing out mines, drugs, bombs, arson, or individuals based on their trails. *Id.*

[37] Alexandra Horowitz, *The Limits of Detection*, NEW YORKER (Apr. 24, 2013), http://www.newyorker.com/news/news-desk/the-limits-of-detection [https://perma.cc/7V3F-3AT9]. During the training period, "each [dog] is trained specifically on particular molecules or compounds, and pays other odors no mind at all." *Id.*

[38] Jane J. Lee, *Detection Dogs: Learning to Pass the Sniff Test*, NAT'L GEOGRAPHIC (Apr. 8, 2013), http://news.nationalgeographic.com/news/2013/04/130407/detection-dogs-learning-to-pass-the-sniff-test/ [https://perma.cc/N6UN-NNQU].

[39] *Id.* Some examples of "target odors" are "marijuana, cocaine, methamphetamines, and heroin." *Id.*

[40] Because dogs cannot simply smell contraband items from across a room, they are trained to physically press their noses into the person or personal items to be sniffed. Horowitz, *supra* note 37.

either sitting down or digging.[41] This portion of the training continues for six weeks, after which the dog meets its new handler, the individual who will study the dog's behavior, learn to interact and understand the dog, train the dog, and who will eventually become the dog's partner in the field.[42] Subsequent to meeting and becoming familiar with one another, the pair typically undergoes six additional weeks of training together.[43] The training programs involve various different concentrations, often placing handlers and the dogs in realistic scenarios where the pair must learn how to work together and react to one another.[44] Notably, these training programs are not standardized within or among the states—each program within each state is free to utilize and implement its own qualification standards for membership to the K9 force.[45] For example, K9 Global Training Academy, a training center that offers various programs for training dogs to detect different odors, maintains that a canine and handler pair is fit to work in the field only after the completion of a certification process, three real world performance evaluations, and a written examination.[46] Alternatively, many states do not require certification at all.[47] However, though not required by law, some trainers choose to go above and beyond to maintain the skills that the dogs and handlers have developed. For example, Alex Rothacker, a canine trainer, explained that even after the initial training process he recommends that the dog-handler teams attend training sessions twice a week to assure that the pairs remain well trained.[48] Once the handlers and their canines have formed a partnership, the dogs become an important part of the force and are given the credence and respect of a four-legged officer.[49] The

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[41] Hinkel & Mahr, *supra* note 33.

[42] Lee, *supra* note 38.

[43] *Id.*

[44] Training programs often list this realistic-scenario training as part of the program. *See, e.g.*, *Drug Dog Training*, K9 GLOB. TRAINING ACAD. WORKING DOGS, http://k9gta.com/k9-services/k9-training/drug-dog-training/ [https://perma.cc/CMB7-XMKE].

[45] Hinkel & Mahr, *supra* note 33. Notably, even when training centers concentrate on training handlers, there are no standards for training when it comes to interpreting a dog's signals. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 422–23 (1996–1997). See *supra* note 44, for a description of one training center's handler training procedures. For a discussion about the problems that result from the lack of a standardized training system throughout the states, see *infra* Section V.C.

[46] *Drug Dog Training*, *supra* note 44.

[47] Hinkel & Mahr, *supra* note 33.

[48] *Id.*

[49] *See, e.g.*, S.P. Sullivan, *Photos: Four-Legged Veterans Get Salute at 'K9 Veteran's Day' Event*, NJ.COM (Mar. 14, 2013), http://www.nj.com/bergen/index.ssf/2013/03/four-legged_veterans_get_salute_at_k9_veterans_day_event.html [https://perma.cc/4VS5-79KG] (posting photographs from New Jersey's 'K9 Veteran's Day' in 2013—an event

Supreme Court has offered various rationales for why this system is constitutional, as discussed in more detail below.

B. Policy Rationales for Allowing the Sniffs

The Supreme Court has presented policy rationales to support the viewpoint that the canine sniff is itself constitutional, particularly because it does not qualify as a "search" under the Fourth Amendment. In two of its foundational "dog sniff" cases, the Court drew a distinction between a dog sniff and a search under the Fourth Amendment, often relying on the misconception that detection dogs are always accurate.[50] This differentiation means that a dog sniff does not need to comply with certain requirements that would be otherwise necessary if the officer were to conduct a search—namely, obtaining a warrant or holding probable cause of criminal activity.[51] In crafting this distinction, the Court focuses on three main points: (1) that the government has a strong interest in finding illegal substances, (2) that individuals do not have a privacy interest in illegal substances, and (3) that detection dogs are capable of identifying only illegal substances.

The Court first began to develop this line of reasoning in 1983 when it decided *United States v. Place.* In this case, the Court declared that a sniff is not a search.[52] After determining that a "strong governmental interest" exists in stopping the movement of illegal substances, the Court balanced this interest against any privacy violations that occurred through the means of a dog sniff.[53] The Court explained that a sniff is "sui generis"[54] because it does not require the same invasive techniques as an ordinary search, nor can it detect the presence of *legal* substances—only *illegal* substances that the dogs have been trained to identify.[55] Notably, the Court's analysis rested on what it referred to as a "well-trained narcotics detection

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celebrating the veteran canines who worked in the police force). When speaking about the K9 unit, Sergeant Kenneth Keenan stated: "[n]obody remembers my name, but they always remember the dog's name." *Id.*

[50] *See infra* Part IV (describing the high levels of inaccuracy in police dog alerts).

[51] *See* Terry v. Ohio, 392 U.S. 1, 20, 25–26 (1968) (stating that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances," and further stating that a "'full' search" cannot be completed in the absence of probable cause).

[52] United States v. Place, 462 U.S. 696, 707 (1983). For an analysis on this case, see *infra* Section II.B.2.

[53] *Place*, 462 U.S. at 704–05.

[54] "Sui generis" is defined as: "Of its own kind or class; unique or peculiar." *Sui Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

dog," presumably meaning one that *could not* or *would not* alert to a legal substance by mistake.[56] Over twenty years later in *Illinois v. Caballes*, the Court reiterated this distinction, adding that one cannot hold a valid or reasonable interest in possessing illegal substances, and because a dog will alert *only* after it detects an illegal substance, a dog sniff can *establish* the probable cause necessary for a full search and does not violate the Fourth Amendment.[57] By relying on the fiction that each drug dog is properly trained and reliable, the Court did not address the possibility that unreliable dogs are often working in the field.[58]

Notably, the Court's reasoning in these cases relied on the belief that detection dogs can detect *only* illegal substances. However, as will be discussed in Part IV, these sniffs are often inaccurate, leading to violations of privacy rights that outweigh the government interest in having sniffs in the first place.[59] The Court's misconception on this point has allowed the government to continue to use detection dogs in ways that should not be available when the dogs are not properly trained or reliable.

II. THE REASONABLE EXPECTATION OF PRIVACY IN DIFFERENT SETTINGS

The term "reasonable expectation of privacy" was first coined in *Katz v. United States*.[60] Justice Harlan, concurring with the majority decision, explained that an individual holds a reasonable expectation of privacy when two conditions are met: "first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[61] However, over time, the "subjective" aspect of this test has become less important.[62]

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[56] *See id.*

[57] Illinois v. Caballes, 543 U.S. 405, 408–09 (2005).

[58] Notably, in *Caballes*, the Respondent argued that these detection dogs are not always accurate. *Id.* at 409. However, the Court brushed this argument aside, and worked under the assumption that this is not the case. *Id.* For an analysis on how the court treats reliability in detection dogs, see *infra* Part IV.

[59] *See infra* Part IV.

[60] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[61] *Id.* at 361. This principle was reaffirmed by the Court the following year. Terry v. Ohio, 392 U.S. 1, 9 (1968).

[62] *See generally* California v. Greenwood, 486 U.S. 35, 39–41 (1988) (An individual has no reasonable expectation of privacy to garbage exposed to the public, even if he does not subjectively believe that anyone will go through it.); Cardwell v. Lewis, 417 U.S. 583, 588–92 (1974) (officers taking a paint chip from the exterior of a vehicle in a parking lot was not a Fourth Amendment intrusion, even if the individual would not subjectively believe that an officer would do such a thing).

The Supreme Court has stated that "the Fourth Amendment protects people, not places,"[63] yet at the same time seems to determine "reasonableness" based on the location of a search.[64] In doing so, the Court has created a sliding scale analysis to determine the reasonableness of a search, and likewise determine the reasonableness of a sniff based on where the sniff occurred.[65] This scale refers to the different levels of reasonableness of one's potential expectation of privacy, which is determined by balancing the government interest of the search against the resulting invasion of privacy of that person.[66] A home or dwelling carries the highest expectation of privacy and therefore offers the most protection for citizens.[67] Airports, on the contrary, provide citizens with the lowest reasonable expectation of privacy.[68] Finally, somewhere in the middle is the automobile—where a citizen's expectation of privacy is reduced but not eliminated.[69] While the Court has articulated that the pedestrian is entitled to some protections on the street,[70] it has not acknowledged any privacy rights for the individual against the street sniff—and, therefore, it permits the street sniff to

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[63] *Katz*, 389 U.S. at 351. This quote originated from the *Katz* decision, but has since been reiterated in various Supreme Court cases. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 49 (2001); United States v. Dionisio, 410 U.S. 1, 8 (1973); *Terry*, 392 U.S. at 9.

[64] The Court appears to determine whether an individual's expectation of privacy is reasonable by evaluating the location where the search occurred—particularly concentrating on the importance of the location and any potential government interests that induced the search. *See*, *e.g.*, *Kyllo*, 533 U.S. at 31 (stating that because of the home's value in society—as evaluated under the common-law—there are only a few exceptional circumstances which would permit an officer's warrantless entry into a home); *see also* South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (explaining that because the government has a high ability to consistently regulate vehicles, one in a vehicle holds a reduced expectation of privacy—thereby granting the government a greater right to search a vehicle than it would a home); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that the home is an important part of history, and therefore, certain intrusions are not permissible); Carroll v. United States, 267 U.S. 132, 153 (1925) (explaining that there are different expectations of privacy for one in a vehicle and one in a home because it is less practicable to obtain a warrant for a vehicle than it is for a home).

[65] Angela S. Overgaard, Comment, *People, Places, and Fourth Amendment Protection: The Application of* Ybarra v. Illinois *to Searches of People Present During the Execution of Search Warrants on Private Premises*, 25 LOY. U. CHI. L.J. 243, 245–46 (1994) (describing the Court's test to determine the reasonableness of an expectation of privacy).

[66] *See What Does the Fourth Amendment Mean?*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0 [https://perma.cc/6FMA-ZJVC] (describing the Fourth Amendment balancing test by stating: "[w]hether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing . . . the intrusion on an individual's Fourth Amendment rights . . . [against] legitimate government interests, such as public safety").

[67] *See infra* Section II.A.

[68] *See infra* Section II.B.

[69] *See infra* Section II.C.

[70] *See infra* Section II.D.

continue, absent safeguards[71] to protect the pedestrian's right to privacy.[72] However, in examining the Court's rationales, which support heightened expectations of privacy in other locations, it is clear that pedestrians are entitled to heightened rights as well, particularly those that are equivalent to the reasonable expectation of privacy afforded to those in a vehicle. The Court's rationales in each of the other categories for Fourth Amendment protection demonstrate the appropriateness of a heightened expectation of privacy for pedestrians.

A. The Highest Expectation of Privacy: The "Home Cases"

The "home cases" present rationales supporting the highest level of privacy when in one's home—rationales that are not found where an individual is situated elsewhere. The Court has held, "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion."[73] To protect the home against invasion, the Court has required that, absent exigent circumstances, an officer have a warrant to either enter or search the home.[74] As per the explicit language in the Fourth Amendment, a warrant can be obtained only after the showing of probable cause of criminal activity.[75] The Court has upheld an individual's high right to privacy in the home even in the context of the dog sniff.

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[71] These safeguards refer to limitations that the Court has placed on officers who are conducting sniffs in those locations that offer a moderate to high expectation of privacy. *See* cases cited *supra* note 11.

[72] See Terry v. Ohio, 392 U.S. 1, 9 (1968), for the Court's determination that pedestrians hold a reasonable expectation of privacy against unreasonable searches and seizures while walking on a street.

[73] Silverman v. United States, 365 U.S. 505, 511 (1961); *see also* Payton v. New York, 445 U.S. 573, 583–590 (1980) (describing the high expectation of privacy that individuals hold in their homes).

[74] *Payton*, 445 U.S. at 590 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). The Court has described "exigent circumstances" as "emergency or dangerous situation[s]." *Id.* at 583.

[75] "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Court has consistently upheld the probable cause requirement. *See, e.g.*, Franks v. Delaware, 438 U.S. 154 (1978) (discussing the importance of a warrant that is based on truthful probable cause); Whiteley v. Warden, 401 U.S. 560, 568–69 (1971) (upholding and re-emphasizing the rule that a warrant is invalid if not based on accurate probable cause).

1. Privacy in the Home

As technological advancements expanded in the United States, so too did novel manners of searching homes. In *Kyllo v. United States*,[76] the Supreme Court inquired into the protection of privacy in the home against thermal-imaging devices.[77] An agent of the United States Department of the Interior suspected that Danny Kyllo was growing marijuana but did not hold enough evidence to obtain a warrant to search his home.[78] For this reason, the officer sat across the street from Kyllo's house, and scanned the home with a thermal-imager based on his knowledge that growing marijuana requires specific lamps that radiate high levels of heat.[79] Thermal-imagers sit outside of the home and detect and record these heat levels, and therefore can indicate whether it is likely that marijuana is being grown inside.[80] The Court began the *Kyllo* decision with a short and sweet prelude of what was to come: "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."[81] Backed by established common law that one is entitled to a reasonable expectation of privacy in the home, the Court defended this right against ever-enhancing technology and held that even though the agent did not physically enter the home, his use of technology to obtain the same evidence that could otherwise be gained through a physical invasion violated the Fourth Amendment.[82] *Kyllo* demonstrated the Court's understanding that the home is inherently valuable to society and carries with it a high expectation of privacy.

2. Privacy in the Home When Canines Are Present

While the Court valued privacy in the home against technology,[83] it had yet to consider the canine sniff in conjunction with the home. In *Florida v. Jardines*,[84] upon

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

[77] The thermal-imaging device utilized in *Kyllo* was the Agema Thermovision 210 thermal imager. *Id.* at 29. The Court explained that "[t]hermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences." *Id* at 29–30.

[78] *Id.*

[79] *Id.* at 29.

[80] *Id.*

[81] *Id.* at 31.

[82] *Id.* at 34.

[83] *Id.*

[84] Florida v. Jardines, 133 S. Ct. 1409 (2013).

suspecting that Joelis Jardines was growing marijuana inside of his home, a human detective and his K9 partner traveled onto the premises and conducted a canine sniff on Jardines's front porch.[85] Once the dog detected the scent of marijuana, it alerted its handler—who then left, obtained a search warrant based on this information, and searched the home pursuant to the warrant.[86] Though the Court's decision rested on property rationales—stating that because the sniff occurred within the constitutionally protected area of Jardines's home where the officers did not have permission to be, this manner of investigation was unconstitutional[87]—Justice Kagan's concurrence argued instead that this case could have been viewed through an evaluation of the privacy rights.[88] Kagan compared a drug-sniffing dog to *Kyllo*'s thermal-imager,[89] specifying that the established value of the home required a warrant for this type of dog sniff.[90] While not the majority decision, Kagan's evaluation of privacy rights demonstrated the heightened value placed on the home and that which occurs within it.

Precedent cases that evaluate the standard of privacy in the home stand for the proposition that a high expectation of privacy based on common-law tradition and history will protect against invasion, whether accomplished through human or nonhuman means. In both contexts, the Court requires that an officer have a warrant based on probable cause prior to entering the home or conducting a search of the premises. In assessing both privacy and property doctrines, the Court affords a high expectation of privacy to the home, as well as the individuals within it, and thus places the home on the far end of the sliding scale of Fourth Amendment rights.

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[85] *Id.* at 1413.

[86] *Id.*

[87] *Id.* at 1415–17. The Court explained that the reasonable expectation of privacy doctrine was simply *added* to the traditional property ideals and did not replace them altogether—and, therefore, this case could be evaluated under the principles of property law. *Id* at 1417 (quoting United States v. Jones, 132 S. Ct. 945, 951–52 (2012)). Further, the Court explained that there is an implicit license for one to walk to the front door, knock, wait to be answered, and then leave—but that this license does not extend to a dog entering onto the premises to sniff for drugs. *Id.* at 1415–16.

[88] *Id.* at 1418 (Kagan, J., concurring). Justice Kagan explained that property concepts and privacy concepts will likely follow the same pattern, as the law of property will influence what society will understand to be a reasonable expectation of privacy. *Id.*

[89] *See id.* at 1419 (arguing that the canine sniff and the thermal-imager are similar because neither was used by the general public and both were used to explore what were otherwise unknowable events occurring inside the home).

[90] *See id.* at 1419–20.

B. The Lowest Expectation of Privacy: The "Airport Cases"

At the opposite end of the spectrum from the "home cases" are the "airport cases." Though federal courts have looked at far fewer cases involving privacy rights in airports, the cases that they *have* looked at have demonstrated that, distinct from both the home and vehicle cases, privacy rights of those in an airport are at their lowest. The Court bases this low expectation of privacy on two rationales: the inherent nature of an airport and the safety interests held by the government.[91] The government has a strong interest in stopping drug trafficking and airports often serve an integral role in this activity.[92] Unlike in the vehicle, which implicates these safety interests to a lesser extent,[93] one holds a low expectation of privacy in the airport setting because she will necessarily fall subject to full searches and seizures, absent prior probable cause or reasonable suspicion, as part of routine security screening.[94] Indeed, while the Court has held in the past that people in airports are entitled to privacy rights,[95] this is true only *after* the individual has consented to and completed a full security check. Airport security procedures indicate that one's right to privacy in an airport—if existent—is extremely minimal. In a sense, the individual trades her right to privacy for access to the airport and plane.

1. Privacy in the Airport

The Supreme Court has indicated that, although a very low bar, individuals continue to hold some privacy rights even when in an airport. In *Florida v. Royer,* the Court found that police officers violated an individual's rights when their stop

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[91] *See* United States v. Place, 462 U.S. 696, 704 (1983) (stating that, "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports . . . substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels").

[92] *Id.* at 704–05.

[93] The World Drug Report indicates that throughout the past several years, planes were one of the "most common mode[s] of transportation used by drug traffickers globally," with high numbers of seizures. U.N. OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 39–40 (2015), https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf [https://perma.cc/JZ82-A84B]. In comparison, eight percent of drug traffickers chose to transport drugs via boats and the remaining forty-six percent was split between traffickers transporting drugs by trains and by vehicles. *Id.* at 39.

[94] *See TSA: Despite Objections, All Passengers Must Be Screened*, CNN (Nov. 16, 2010), http://www.cnn.com/2010/TRAVEL/11/15/california.airport.security/ [https://perma.cc/93FT-4WEV] (stating that officers applying safety procedures in airports require that *everyone* be subjected to a search).

[95] *See Place*, 462 U.S. at 706–07.

became too intrusive.[96] In this case, two detectives noticed the defendant walking through an airport and displaying the telltale signs of someone involved in drug trafficking.[97] After the defendant consented to having a conversation with the officers, he became noticeably nervous and the officers told him that they suspected that he was involved with drug trafficking and that he should accompany them to another room.[98] Once in the room, the officers found marijuana in his suitcases, which they opened with his consent.[99] The Court held that the entire procedure was constitutional until the moment that the officers had the defendant accompany them into the back room. "The predicate," the Court explained, for "permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect."[100]

Although the Supreme Court has furthered the individual's right to privacy in the context of the airport, it is clear that an individual holds a low expectation of privacy here, as compared to that held in other locations such as the home or the vehicle. The robust link between the airplane and "drug courier activity"[101] creates a specific need for the government to implement safety protections, which outweighs one's interest in privacy rights. Individuals' privacy rights in an airport are, in a sense, dependent on their consenting to the intrusive security measures of the airport. The government's interest in maintaining public safety[102] is visible in the wide array of safety procedures that airport-goers are subject to.[103] The notion that upon entering an airport, everyone must comply with baggage checks, screenings, pat downs, and possibly body searches has become commonplace.[104] Here, government agents are not

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[96] Florida v. Royer, 460 U.S. 491, 504, 507 (1983).

[97] *Id.* at 493.

[98] *Id.* at 493–94.

[99] *Id.* at 494–95.

[100] *Id.* at 500–01.

[101] United States v. Place, 462 U.S. 696, 704 (1983).

[102] The issue of drug trafficking is not the only safety concern that is protected through airport security regulations—terrorist activity is also highly linked with airport travel. *See* Corey Flintoff, *Why Do Terrorists So Often Go for Planes?*, NPR (May 15, 2012), http://www.npr.org/2012/05/15/152750767/why-do-terrorists-so-often-go-for-plane [https://perma.cc/4DLF-TJNT]. An interview with terrorism analyst Jessica Stern indicates that "[t]errorists like to do what they know how to do," explaining why they continue to blow up planes. *Id.*

[103] The government uses various methods to ensure safety before people are permitted to board a flight. *Security Screening*, TRANSP. SEC. ADMIN., https://www.tsa.gov/travel/security-screening [https://perma.cc/8NMX-B8JR].

[104] *See id.*; *see also TSA: Despite Objections, All Passengers Must Be Screened*, *supra* note 94.

merely observing individuals and their actions, but rather are touching, screening, and scanning people's bodies and luggage—thereby eliminating any expectation that one may hold against a search or seizure elsewhere. Moreover, the substantial reduction in the privacy rights that one can expect to hold in an airport is justified by the personal choice that one commits to in choosing to enter an airport, thereby trading her right to object to a search.[105] The Court has explicitly commented on these government interests in the context of the dog sniff in an airport.

2. Privacy in the Airport When Canines Are Present

In *United States v. Place*, the Court evaluated its holding in *Florida v. Royer* in the context of the dog sniff, and emphasized the government's interest in searches in an airport.[106] The Court clarified that the government's interest in halting the spread of deadly drugs is particularly applicable in the airport setting because airports have an "inherently transient nature of drug courier activity."[107] Notably, and unlike in *Royer,* this case involved a drug-detection dog, which appeared to play a role in the Court's decision-making process. The Court explained that an individual person holds a privacy interest in her luggage, and while she must comply with bag check procedures, she is nonetheless protected from an officer approaching her randomly and "expos[ing] noncontraband items that otherwise would remain hidden from public view . . . [by] rummaging through the contents of the luggage."[108] According to the Court, there is no danger of invasion by use of a detection dog as these dogs can detect only illegal substances, and therefore, any search resulting from a dog's alert would be based on the confirmed presence of contraband items.[109] The Court relied on its belief that dog sniffs are generally accurate to support its holding that an individual's limited expectation of privacy would not be violated through a dog sniff in the way that it would be if this individual were subject to procedures that were not so targeted.

In considering the holdings of *Place* and *Royer,* it seems likely that had the Court not believed that detection dogs are

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[105] *See TSA: Despite Objections, All Passengers Must Be Screened*, *supra* note 94.

[106] *Place*, 462 U.S. at 703 (citing United States v. Mendenhall, 446 U.S. 544, 561 (1980)).

[107] *Id.* at 704; *see also* U.N. OFFICE ON DRUGS & CRIME, *supra* note 93, at xii, 39 (indicating that in 2015 drug traffickers transported drugs via planes, boats, trains, and vehicles).

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

[109] *Id.*

often accurate, it may have led to a different outcome. It might have held that the dog sniff has the potential to be as invasive as a search or pat down and, therefore, must be supported by probable cause or reasonable suspicion.[110] The Court's reliance on its notion of the completely accurate dog means that a search could *never* result from a dog's alert unless there is contraband present. However, this fails to acknowledge the fact that a false alert, which creates probable cause, leads to the unsupported search that the Court has aimed to disallow. As will be explained in Part IV, the Court's misconception on this point causes the individual to be prone to more invasive procedures than should be permitted under the Fourth Amendment.

C. The Moderate Expectation of Privacy: The "Vehicle Cases"

The "vehicle cases" rest at the center of the reasonable expectation of privacy sliding scale. The Supreme Court has found that, while in a vehicle, citizens can expect a moderate level of privacy—somewhere between the expectation of those in their homes and those in the airport.[111] Unlike the "home cases"—which rely on the inherent value of the home, as well as the crucial role that it has played throughout common-law tradition and history[112]—and unlike the "airport cases"—which concentrate on the government interest in ending drug-trafficking—the "vehicle cases" focus upon three distinct rationales: practicability, an ability to regulate, and safety interests that relate to a vehicle on the road.[113] With these

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[110] Florida v. Royer, 460 U.S. 491, 497–500 (1983).

[111] *See Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, 70 J. CRIM. L. & CRIMINOLOGY 498, 498 (1979) (explaining that the vehicle is "one of the few exceptions to the rule that 'warrantless searches are per se unreasonable.'" (footnote omitted)).

[112] *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) ("[I]n the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"). See *supra* Section II.A for a complete analysis of the Court's understanding of the value of the home.

[113] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990) (explaining that a general sobriety checkpoint absent prior reasonable suspicion would not be unconstitutional because of the "magnitude of the drunken driving problem [and] the States' interest in eradicating it"); South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976) (stating that people in automobiles hold a lower expectation of privacy than those in the home because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls"); Carroll v. United States, 267 U.S. 132, 153 (1924) (stating that unlike for a home, securing a warrant for a vehicle is not practicable "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

particular policy considerations in play, vehicles remain at the center of the sliding scale for privacy rights.[114]

1. Privacy in Vehicles

Generally, the law affords the home greater privacy protections than a vehicle because of the impracticability in obtaining a warrant and conducting a search in a timely manner in most vehicle cases.[115] In *Carroll v. United States,*[116] the Supreme Court distinguished the two situations and created a lower standard for searches of a vehicle than of a home. During prohibition,[117] at which time it was unlawful to possess, use, or travel with liquor,[118] agents who patrolled a public road became suspicious that a group of passengers traveling in a particular car were carrying liquor.[119] The officers pulled over the vehicle, conducted a search, and found alcohol located inside.[120] The Court explained that this stop and search was constitutional, as the officers held a reasonable suspicion that there was criminal activity occurring in the vehicle.[121] This, now known as "the *Carroll* doctrine," established that an officer need only have reasonable suspicion of criminal activity prior to stopping the vehicle in order to ask the driver questions and establish the probable cause needed to constitutionally search it.[122] This doctrine created a lesser requirement on an officer to stop and search a vehicle than would be required for one to search a home[123] because, the Court explained, the warrant requirement is not practicable in the context of a traffic stop. While an officer may readily obtain a warrant for a dwelling, the officer seeking a warrant for a vehicle risks the vehicle leaving the jurisdiction on a whim.[124] Nonetheless, the Court clarified that when a

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[114] *See Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, *supra* note 111 (describing the vehicle as offering fewer privacy protections than the home).

[115] *See Carroll*, 267 U.S. at 153.

[116] *Id.* at 132.

[117] Prohibition made illegal the manufacture, sale, or transportation of intoxicating liquors. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 1.

[118] *Carroll*, 267 U.S. at 143–44.

[119] *Id.* at 160. The officers became suspicious because they had observed the group of men traveling in the same vehicle multiple times throughout the patrol, each time they passed, they were coming from the direction of an area that was known to supply alcohol, and the individuals in the car were known to be the "bootleggers" of the area. *Id.*

[120] *Id.* at 135–36, 162.

[121] *Id.* at 162.

[122] California v. Acevedo, 500 U.S. 565, 570 (1991).

[123] Distinguishable from the vehicle, the Court has held that entering into or using devices to explore the inside of a home "is a 'search' and is presumptively unreasonable without a warrant." Kyllo v. United States, 533 U.S. 27, 40 (2001).

[124] *Carroll*, 267 U.S. at 153.

warrant *could* be readily secured for a vehicle with "reasonabl[e] practicab[ility]," it must be.[125] In this balance, the Court did not eliminate one's right to privacy in a vehicle, but rather balanced this right against other issues facing the law-enforcing officer.

Practicability is not the sole consideration of the Court in distinguishing between privacy rights maintained in the home and those maintained in a vehicle. In *South Dakota v. Opperman*, the Court considered the government's ability to regulate vehicles as a compelling rationale for a moderate expectation of privacy.[126] The Court held constitutional an officer's warrantless search of a vehicle after it had been towed and taken to a city impound lot[127] because of the government's ability to continually regulate vehicles.[128] In particular, the Court mentioned that the government regulates periodic inspections, license checks, and examination of license plates, inspection stickers, exhaust fumes, excessive noise, headlights, and the overall functioning of a vehicle.[129] The government's ability to regulate vehicles gives the individual a lower expectation that she has complete control over or privacy in a vehicle.

Aside from a vehicle's ability to leave the jurisdiction and its subjection to continuous government regulations, the Court has also concentrated on the increased public safety risks inherent in illegal behavior that takes place in a vehicle.[130] For example, in *Delaware v. Prouse,*[131] an officer conducted a random traffic stop to check the driver's license and registration.[132] Indeed, it was only after the officer had pulled over the driver that he began to suspect that there were drugs inside the car.[133] The Court held that this particular type of stop was overly intrusive, as the officer did not hold reasonable suspicion of criminal activity occurring prior to his conducting the stop.[134] According to the Court, there were less-intrusive types of stops that could promote safety without violating the

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[125] *Id.* at 156.

[126] South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

[127] *Id.* at 366. The Court also mentioned that the warrantless search was constitutional because of the officer's particular need to protect others and also protect the property inside the vehicle. *Id.* at 369.

[128] *Id.* at 367.

[129] *Id.* at 368.

[130] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451–52 (1990) (explaining that there is a high risk of drunk-driving and the government therefore has an interest in stopping vehicles to ensure that the drivers are not intoxicated).

[131] Delaware v. Prouse, 440 U.S. 648 (1979).

[132] *Id.* at 650.

[133] *Id.*

[134] *Id.* at 655–59.

Fourth Amendment and, therefore, the government's interest in maintaining public safety on the road would not outweigh a driver's Fourth Amendment rights.[135] Eleven years later, the Court identified one such less-intrusive alternative in *Michigan Department of State Police v. Sitz*, where it upheld a general sobriety checkpoint that stopped *all* vehicles so that officers could check drivers for signs of intoxication.[136] The *Prouse-Sitz* doctrine stands for the proposition that although the government holds a strong interest in promoting public safety, this interest must nonetheless be balanced against a driver's heightened reasonable expectation of privacy.

2. Privacy in Vehicles When Canines Are Present

The reasonable suspicion requirement for traffic stops[137] soon implicated questions regarding what an officer could do once he stops a vehicle. *Illinois v. Caballes*[138] and *Rodriguez v. United States*[139] are the two leading cases that limit an officer's use of a canine during a traffic stop.[140] In *Caballes,* a State Trooper pulled over a man for speeding.[141] During the stop, the officer permitted his dog to circle and sniff the outside of the vehicle, which led to an alert revealing marijuana stored in the trunk.[142] In evaluating the constitutionality of the sniff, the Court clarified that a dog sniff is not a search for Fourth Amendment purposes, and therefore does not require prior reasonable suspicion.[143] While the Court held the stop and sniff in this case to be constitutional, it nonetheless placed specific

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[135] *Id.* at 655, 659. The Court maintained that those in a vehicle hold a strong reasonable expectation of privacy against reasonless stops by stating that, "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Id.* at 662.

[136] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990). The Court balanced the government's interest in societal safety against the intrusion of privacy rights. *Id.* at 455. The Court concentrated on media reports of drunk-driving accidents and annual death statistics in finding that the state had an important interest in stopping drunk driving. *Id.* at 451. On the other hand, the Court found there to be only a slight intrusion into the rights of motorists who were stopped at these checkpoints because the law-abiding citizen would be able to see that others had been stopped. *Id.* at 452–53 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)). The Court also emphasized the checkpoint's likely effectiveness in achieving safety. *Id.* at 454 (distinguishing a general sobriety checkpoint from the random *Prouse* stop by explaining the *Prouse* stops offered a "complete absence of empirical data" demonstrating the potential effectiveness of the program, and that general sobriety stops are effective).

[137] *See* Delaware v. Prouse, 440 U.S. 648, 662–63 (1979).

[138] Illinois v. Caballes, 543 U.S. 405 (2005).

[139] Rodriguez v. United States, 135 S. Ct. 1609 (2015).

[140] *See id.* at 1614; *Caballes*, 543 U.S. at 407.

[141] *Caballes*, 543 U.S. at 406.

[142] *Id.*

[143] *Id.* at 408–10.

emphasis on the requirement that the initial stop be constitutional in itself. It explained that a driver's expectation of privacy in a vehicle will neither affect nor limit a sniff that occurs once a vehicle has been pulled over as long as the stop was constitutional at its commencement.[144] The Court's emphasis on this point seemed to indicate that there are at least *some* limitations on an officer's ability to allow a canine sniff. These restrictions were later specified in *Rodriguez*.

In *Rodriguez,* the Court clarified the limitations that it had begun to articulate in *Caballes*, to restrict what would otherwise be a limitless power for police. In this case, an officer stopped a vehicle because it had been swerving on the road.[145] After writing a ticket for the driver, the officer allowed his dog to sniff the vehicle even though the officer had no reasonable suspicion of any further illegal activity.[146] Distinguishable from *Caballes,* the Court here found that the traffic stop had been completed once the officer finished writing the ticket.[147] Therefore, the sniff became a separate event that required its own reasonable suspicion for the officer to hold the vehicle beyond the scope of the original stop and purely for the purpose of allowing a canine to sniff it.[148] Both the initial stop and the extension of the traffic stop must be supported by their own reasonable suspicion of criminal activity.[149]

Although the vehicle cases do not limit a dog sniff in itself, they nonetheless place restrictions on when and where a dog sniff may take place. The sniff will be constitutional if the reason that an officer stopped the vehicle is constitutional and the sniff occurred concurrently with the investigation of the action that gave rise to the reasonable suspicion for the officer to pull over the car. Similarly, it can be assumed that if the car was stopped on its own accord, a dog sniff of an already stopped vehicle would be constitutional as well. It is instead the limitation on the extension of the stop, for the purposes of conducting a separate dog sniff, that is restricted if not supported by reasonable suspicion.[150] The Court's reasoning in these cases maintains the idea that although an individual in a vehicle is

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[144] *Id.*

[145] *Rodriguez*, 135 S. Ct. at 1612–13.

[146] *See id.* at 1613 (explaining that "[t]he District Court adopted the Magistrate Judge's factual findings and legal conclusions" that the officer did not hold a reasonable suspicion that criminal activity was occurring when he extended the stop).

[147] *Id.* at 1612.

[148] *See id.* at 1614 ("Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.").

[149] *Id.* at 1616.

[150] *See id.* at 1614–15.

afforded a lower reasonable expectation of privacy as compared to an individual in her home, she nonetheless is deserving of protection against limitless stops, and potentially, sniffs.

D. The Unmeasured Expectation of Privacy: The "Pedestrian Cases"

As demonstrated in precedent case law applicable to the home, airport, and vehicle, a reasonable expectation of privacy depends on a person's location due to varying government interests pertaining to each place.[151] Indeed, it seems that the Court's "people, not places"[152] doctrine is based, in fact, on *where* the individual is at the time of the possible invasion—as an individual's reasonable expectation of privacy will change depending on her location. Moreover, there are various times when it is, in fact, the *place* that is being protected. For example, the warrant requirement protects the home itself from invasion. Similarly, it is *the car itself* that is protected from random traffic stops and extensions of stops. However, the individual herself can still be said to be afforded heightened protections when in these locations, as she is protected by her personal rights as well as the second layer of protections granted to her home or car. Because a pedestrian is not shielded by the enclosure of a vehicle or a home, and therefore cannot hide behind double layer of protection, she is left vulnerable to the minimal protections for pedestrians, which overlook the problems that inaccurate dog sniffs implicate. While the Supreme Court has not yet explicitly indicated where the pedestrian's reasonable expectation of privacy falls on the sliding scale in relation to dog sniffs, it *has* acknowledged at least some existing privacy rights for pedestrians against

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[151] The Court appears to determine whether an individual's expectation of privacy is reasonable by evaluating the location where the search occurred—particularly concentrating on the importance of the location and any potential government interests which induced the search. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31, 34 (2001) (stating that because of the home's value in society—as evaluated under the common-law—there are only a few exceptional circumstances that would permit an officer's warrantless entry into a home); South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976) (explaining that because the government has a high ability to consistently regulate vehicles, one in a vehicle holds a reduced expectation of privacy—thereby granting the government a greater right to search a vehicle than a home); Silverman v. United States, 365 U.S. 505, 511 (1961) (stating that the home is an important part of history and, therefore, certain intrusions are not permissible); Carroll v. United States, 267 U.S. 132, 153 (1925) (explaining that there are different expectations of privacy for one in a vehicle and one in a home because it is less practicable to obtain a warrant for a vehicle than it is for a home).

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

searches by human officers.[153] The Court's acknowledgment of these rights has developed through its interpretation of the protections traditionally recognized under the common law.[154]

In *Terry v. Ohio,* the Supreme Court both identified a privacy right for pedestrians as well as placed further limitations on street-patrolling officers.[155] The conflict presented in this case began when an officer, who was standing on the street, noted Terry and another man acting suspiciously.[156] Specifically, the officer observed them walking up and down the sidewalk in front of a shop, pausing to peer through the shop's window each time that they passed;[157] this behavior occurred roughly a dozen times.[158] Based on the officer's belief that Terry was carrying a weapon and intended to rob the store, the officer approached Terry, stopped him, and conducted a pat down over his clothes.[159] While acknowledging that a pedestrian holds at least some expectation of privacy,[160] the Court nonetheless found that based on the particular circumstances of the instant case, the officer's actions did not violate these rights.[161]

The Court's decision rested upon an evaluation similar to the one it used in *Prouse* and *Sitz,* namely, a balancing between the government's interest in permitting this type of search and seizure—including effective crime prevention, detection of crimes, and assurance that Terry did not pose a danger to the officer or others—against the level of intrusion of privacy rights held by the individual.[162] Moreover, the Court explained that the officer's stop and pat down of Terry was constitutional because he held a reasonable suspicion—based on more than a mere hunch—of danger and criminal activity

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[153] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) (stating that pedestrian Terry held privacy rights that protected him against unreasonable searches and seizures while walking on a street in Cleveland).

[154] *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

[155] *Terry*, 392 U.S. at 9, 28–29.

[156] *Id.* at 5–6.

[157] *Id.* at 6.

[158] *Id.*

[159] *Id.* at 6–7. The officer later clarified that he conducted the pat down purely due to his suspicion that Terry posed an imminent danger and further stated that he did not, at any point, look or feel inside of Terry's clothing. *Id.* at 7.

[160] *See id.* at 8–9 (stating that the Fourth Amendment's "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs").

[161] *Id.* at 30.

[162] *Id.* at 21–23.

prior to approaching Terry.[163] Indeed, the Court clarified that the officer must base his reasonable suspicion on specific inferences that the officer is capable of drawing from prior experience in the field.[164] Notably, the Court implemented this reasonable suspicion requirement—thereby limiting the officer's ability to pat down this individual—even when Terry was in public and on public property. An officer needs some reason to pat down the individual before the pat down is constitutional. The safeguard requiring that an officer hold a reasonable suspicion of criminal activity prior to stopping or patting down an individual[165] supports the argument that the pedestrian holds a privacy right that fits somewhere on the sliding scale.

Based on the *Terry* case, as well as case law precedent and considerations of government interests, the pedestrian should be granted the same expectation of privacy as that which she holds when in a vehicle—thereby also entitling the pedestrian to similar safeguards against invasion by a dog sniff.

III. WHY PEDESTRIANS ARE ENTITLED TO A HEIGHTENED REASONABLE EXPECTATION OF PRIVACY

The current law does not require that a police officer have reasonable suspicion of criminal activity prior to permitting a street sniff. However, when sniffs are utilized in the context of vehicles and homes, they are limited in their application, as they are only possible subsequent to other requirements having been met—namely, reasonable suspicion, probable cause, or a warrant.[166] These requirements protect either the home or the vehicle itself, and thereby shield the citizens inside from any danger that may result from less-than-reliable canine alerts.[167] On the contrary, in the context of the airport, individuals are required to consent to various types of searches, and potentially dog sniffs.[168] A declaration as to

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[163] *Id.* at 27–29. The Court clarified that this search would not have been constitutional had the officer not limited his search to checking for weapons for his own protection, or had the officer not held reasonable suspicion that he was dealing with a "dangerous individual." *Id.* at 27.

[164] *Id.*

[165] *See id.*

[166] *See* cases cited *supra* note 11. Although not addressed in this note, there *are* specific instances where officers may search a home, even without a warrant—specifically, when there are "exigent circumstances." *See, e.g.*, Kentucky v. King, 563 U.S. 452, 460 (2011).

[167] *See infra* Part IV (describing the high levels of inaccuracy in police dog alerts).

[168] *See* Andrea Sachs, *Don't Mind the Wet Nose: TSA Enlists More Dogs to Screen Passengers*, WASH. POST (Jan. 21, 2016), https://www.washingtonpost.com/lifestyle/travel/dont-mind-the-wet-nose-tsa-enlists-more-dogs-to-screen-passengers-for-explosives/2016/01/20/26e11d98-b983-11e5-829c-26ffb874a18d_story.html?utm_term=.fba343d9

where the pedestrian's expectation of privacy stands is imperative to maintain specifications as to what police are and are not permitted to do on the street. By applying the balancing test that the Court consistently uses to determine one's expectation of privacy,[169] it is apparent that pedestrians are entitled to the same expectation of privacy as one in a vehicle.

A. Policy Considerations and Government Interests Support a Moderate Expectation of Privacy for the Pedestrian

Similarities between a pedestrian and vehicle, as well as differences between a pedestrian and an individual in her home or an airport, indicate that the pedestrian should hold a moderate expectation of privacy equivalent to that held by an individual in a vehicle. The three main rationales that the Court has used to support a moderate expectation of privacy in vehicles are: impracticability in obtaining a warrant, ability to regulate a vehicle, and public safety,[170] all which support a moderate expectation of privacy for the pedestrian as well.

Although the policy rationales supporting the highest reasonable expectation of privacy in the home do, in fact, lend some support for a high reasonable expectation of privacy for the pedestrian, the unique aspects of being a pedestrian create a distinction between these two contexts. The Court depends on two rationales for a high privacy right in the home: common-law tradition and history.[171] In examining the way in which the common-law and history value the pedestrian, the Court has offered a rather literal reading of the text of the Fourth Amendment.[172] It has stated that "[n]o right is held more

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c5eb [https://perma.cc/4CD9-TZVS] (discussing the use of detection dogs in airports); *see also Security Screening*, *supra* note 103; *TSA: Despite Objections, All Passengers Must Be Screened*, *supra* note 94.

[169] *See What Does the Fourth Amendment Mean?*, *supra* note 66 (describing the Court's balancing test, by stating: "Whether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing . . . the intrusion on an individual's Fourth Amendment rights . . . [against] legitimate government interests, such as public safety").

[170] See *supra* Section II.C for a complete discussion on policy rationales behind a moderate expectation of privacy for individuals in vehicles.

[171] *See supra* Section II.A.

[172] In examining the protections that the Fourth Amendment provides to the citizen, the Court has looked at the language of the Fourth Amendment and how it can practicably be interpreted, stating:

> [I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body . . . is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It

sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[173] This serves to demonstrate that there is an inherent connection between the Fourth Amendment and the individual—the *person*—and her personal privacy.

At the same time, however, there are inherent differences between a home and a pedestrian. For example, an officer who intends to obtain a warrant to search a home will not face the same difficulties as he may in obtaining a warrant for the search of a pedestrian. As supported by the *Carroll* doctrine, some locations extend a lower expectation of privacy to the individual because of her ability to move out of the jurisdiction before the officer has returned to execute a warrant.[174] Likewise, an officer's reasonable suspicion that there is criminal activity will not be enough to grant him access into the home in the same way that it will permit the officer to conduct a pat down of a pedestrian.[175] Moreover, as indicated in *Opperman,* when a location is subject to various government regulations, it will generally offer a lower expectation of privacy for the individual.[176] While the individual is subject to regulations about what she can or cannot do on the street, there are few regulations supporting what one can do once in her home.[177] For these reasons, it is clear that the rationales supporting the highest expectation of privacy in the home do not appropriately support such a strong expectation for the pedestrian.

On the opposite end of the scale, the rationales supporting a lower expectation of privacy at an airport do not align with the pedestrian's expectation on the street. At the airport, an officer may conduct a search without a reasonable suspicion of criminal activity. In fact, one can gain access to a plane or airport only if she consents to relinquish all privacy

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> is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Terry v. Ohio, 392 U.S. 1, 16–17 (1968) (footnote omitted).

[173] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[174] *See* Carroll v. United States, 267 U.S. 132, 153 (1925).

[175] *Compare* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."), *with Terry*, 392 U.S. at 27 (holding that an officer needs only reasonable suspicion to conduct a pat down of a pedestrian).

[176] South Dakota v. Opperman, 428 U.S. 364, 367–69 (1976) (distinguishing vehicles from homes because vehicles are under constant regulation by the government).

[177] *See supra* Section II.A.

rights and comply with both a bag and body search.[178] Although the Court appears to believe that an individual's privacy rights are in a sense reacquired after the search, it is *only* after giving consent to an invasive search that this is allowed.[179] This is distinct from the pedestrian, who has not consented to comply with a pat down or bag screening just because she is walking on the street.

Unlike in the context of the home or the airport, the pedestrian fits appropriately in the center of the sliding scale along with the vehicle. First, an officer's ability to obtain a warrant so that he can conduct a search of a pedestrian is greatly inhibited by the fact that an individual can move with ease in and out of the jurisdiction. Indeed, in both the context of a vehicle and a pedestrian, an officer is subject to potential difficulty in maintaining knowledge about the whereabouts of his suspect.[180] Moreover, a pedestrian has the ease of getting into a vehicle and driving away. While it is true that a vehicle has a greater ability to travel farther distances than a pedestrian, individuals are nonetheless harder to trace than vehicles, causing the two to be very similar in this regard. For example, vehicles are traceable via license plate and also cannot hide from police in the same way that a single individual could. The ease of fleeing from a location, in both the context of the vehicle and an individual, produces problems for the officer attempting to relocate either after taking the time to obtain a warrant. Therefore, obtaining a warrant for either a vehicle or pedestrian is less practical than obtaining a warrant to enter and search a stationary dwelling, such as a home.[181]

Second, the government's ability to regulate both vehicles and individuals warrants granting both the same expectation of privacy. As mentioned above, the government regulates motor vehicle aspects such as periodic inspections, valid licenses, proper license plates, inspection stickers, exhaust fumes, excessive noise, headlights, and overall functioning of the vehicle.[182] These regulations—which contribute to a reduction of public danger and nuisance[183]—exist in distinct, yet similar

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[178] The government utilizes various methods to ensure safety before people are permitted to board a flight. *See Security Screening*, *supra* note 103; *See also TSA: Despite Objections, All Passengers Must Be Screened*, *supra* note 94.

[179] See *supra* Section II.B for a complete discussion on airport security and individuals' privacy rights in an airport.

[180] *See* Carroll v. United States, 267 U.S. 132, 153 (1925).

[181] *See id.*

[182] South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

[183] *See id.* at 368–69 (explaining that maintaining regular checks on vehicles will avoid "impeding traffic or threat[s to] public safety and convenience").

applications for the pedestrian. For example, the government manages what an individual can or cannot do on public property such as prohibitions against jaywalking[184] and public nudity.[185] Moreover, nearly every state has implemented disorderly conduct laws, which regulate acts such as public drunkenness, loitering, and general disruption of the peace.[186] Pedestrians—being highly regulated by the government—therefore fit the *Opperman* doctrine that when so regulated, hold a lower expectation than they would in their homes.[187]

Third, the issue of public safety is a crucial aspect for privacy rights in the context of vehicles and pedestrians. A heavy analysis is unnecessary here, as the Court has already acknowledged that there are similar needs for public safety, both on the public roadway and on the street. Finding the government's interest in supervising public safety to be important, yet in need of limitations,[188] the Court applied parallel reasoning in both *Prouse,* in the context of a vehicle stop, and *Terry*, in the context of a pedestrian stop and pat down.[189] As the Court stated in both instances, one's privacy interests in these situations are held too close to the Fourth Amendment to allow a government interest in public safety to invade it without limitations.[190] Both cases guarantee the individual—whether in a car or on the street—a safeguard that upholds her right to privacy, by requiring that an officer have reasonable suspicion of criminal activity prior to conducting a stop or search.[191]

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[184] In attempting to combat the high number of pedestrian fatalities, state legislatures have placed specific regulations on what pedestrians can and cannot do when entering a crosswalk or street. See *Pedestrian Crossing: 50 State Summary*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 20, 2015), http://www.ncsl.org/research/transportation/pedestrian-crossing-50-state-summary.aspx [https://perma.cc/4UC4-ZME6] for a list of these laws in each state. For example, a pedestrian may not "suddenly leave the curb and enter a crosswalk into the path of a moving commercial vehicle that is so close to constitute an immediate hazard" (Alaska), and "[p]edestrians must yield the right-of-way to vehicles when crossing outside of a marked crosswalk or an unmarked crosswalk at an intersection" (Arkansas). *Id.*

[185] Every state code contains laws regulating public exposure, or what is sometimes called "public lewdness." For a complete list of these laws in each state, see *Nudity and Public Decency Laws in America*, HG.ORG., https://www.hg.org/article.asp?id=31193 [https://perma.cc/GD3E-YGJL].

[186] *Conduct: Disorderly Conduct*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Behavior that tends to disturb the public peace, offend public morals, or undermine public safety."); *Disorderly Conduct*, FINDLAW, http://criminal.findlaw.com/criminal-charges/disorderly-conduct.html [https://perma.cc/5T9K-KQ32] (offering a brief description of disorderly conduct laws that have been implemented in most states).

[187] *See Opperman*, 428 U.S. at 368.

[188] *See* Delaware v. Prouse, 440 U.S. 648, 662–63 (1979).

[189] *See id.*; Terry v. Ohio, 392 U.S. 1, 9, 30 (1968).

[190] *See Prouse*, 440 U.S. at 662–63; *Terry*, 392 U.S. at 9, 30.

[191] *See Prouse*, 440 U.S. at 662–63; *Terry*, 392 U.S. at 9, 30.

The government interests providing for a moderate right to privacy for one in a vehicle align perfectly with those interests applicable to a pedestrian on the street. At the same time, distinct government interests inducing either a higher or lower expectation of privacy for those citizens in the home or airport do not apply to the pedestrian in the same way. Therefore, unless the pedestrian's privacy interests are in contrast with those privacy rights held by an individual in a vehicle, the expectations of privacy in both contexts should be equal, in all aspects.

B. The Individual's Interests Support a Moderate Expectation of Privacy for the Pedestrian

The individual's interest in privacy rights on the street are equivalent to her interest in privacy rights when in a vehicle. The Court has consistently applied a balancing test to all of its Fourth Amendment cases, evaluating the interests on both sides—namely, the interests of the government, as well as the interests of the individual.[192] As discussed in Section III.A, the government's interest in the context of the vehicle and the pedestrian are equivalent. Therefore, to determine where the pedestrian falls on the sliding scale, the next step is to look on the other side of the balancing test—at the individual's privacy interests when on the street and when in a vehicle.

The pedestrian's interests in privacy rights are not equivalent to those in the contexts of the home or the airport. The home offers a barrier from the world and often has alarm systems, blinds, or the like to assure that this barrier remains intact. To be sure, the individual is more exposed when *not* enclosed in the home and, therefore, could not possibly expect the same level of privacy rights. Indeed, at the other end of the scale, pedestrians have an interest in much higher privacy protections than those individuals in an airport. The pedestrian has not voluntarily consented to an intrusive search, nor is he required to do so in order to gain access to the street or sidewalk.[193]

On the other hand, the interests that those in a vehicle hold are identical to the interests of a pedestrian. The vehicle—playing a crucial role in society, along with its unique ability to move quickly in and out of jurisdictions—allows and induces

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[192] "Whether a particular type of search is considered reasonable in the eyes of the law is determined by balancing . . . the intrusion on an individual's Fourth Amendment rights . . . [against] legitimate government interests, such as public safety." *What Does the Fourth Amendment Mean?*, *supra* note 66.

[193] See *supra* Section II.B for a complete discussion on airport security and individuals' privacy rights in an airport.

people to expect that they are entitled to privacy in this area.[194] As described by the Court, a vehicle is a location where individuals tend to feel a "sense of security and privacy."[195] This, the Court held, was enough to warrant privacy protections as eliminating these protections would undercut the purpose of the Fourth Amendment.[196] Similarly, *Terry* offered the notion that a person always has an expectation against unwarranted searches and seizures of his person—even when not shielded by either a vehicle or home.[197] Moreover, it is a logical assumption that one on the street holds an expectation of privacy to her person, as people find a sense of security in areas such as their pockets, purses, or wallets and likely will not expect to have someone look inside.[198] Generally, individuals keep their valuables on their person because there is a sense of security in having an item closeby—it gives the individual a stronger sense of control over whatever the item may be. When someone holds something on her person, the item is with her wherever she goes. Conversely, if an individual leaves an item in a vehicle, she cannot possibly exert the same control over it. The individual experiences an expectation that the items in her pockets are safe from inspection from the world unless she intentionally makes the item viewable.

Finally, and perhaps most importantly, the Court has stated, and restated, that "the Fourth Amendment protects people, not places."[199] Yet, people appear to be protected only when they are in a particular location. If the Court and the government are not willing to offer privacy rights for an individual when she is not enclosed in a particular area, then the entire Fourth Amendment doctrine is relying on a false ideal. Clearly, the Court has intended to protect the *individual,* and therefore, the *individual* should be protected—regardless of whether she is enclosed in a structure.

The robust similarities in the government interests and the individual interests between the pedestrian and one in a vehicle create identical balancing factors—and therefore should

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194 *See Prouse*, 440 U.S. at 662–63.

195 *Id.*

196 *Id.*

197 *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) ("[W]herever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion." (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (internal citations omitted))).

198 *See What Does Your Purse Say About You*, ABC NEWS (Jan. 25, 2006), http://abcnews.go.com/GMA/story?id=1539488 [https://perma.cc/TW45-BNK5] (evaluating the personal connection that one feels with the items kept in a purse or bag).

199 *Katz*, 389 U.S. at 351.

produce the same result. Thus, the pedestrian should be entitled to an expectation of privacy that falls in the middle of the sliding scale—namely, a moderate expectation of privacy.

IV. THE PROBLEM: WHY SNIFFS ARE PARTICULARLY DANGEROUS TO ONE'S PRIVACY RIGHTS

The question that follows is: Why are these sniffs so dangerous? If all they can do is determine whether or not someone is carrying contraband, why are they so harmful to an individual's rights? The Court has held that police dog sniffs are "*sui generis*," as they are capable of identifying only contraband.[200] However, the Court's blind faith in the canine sniff[201] disregards both reports of handler cues, which induce dogs to alert falsely to the presence of drugs,[202] and the prevalence of poor training mechanisms leading to false alerts. Because of these false alerts, searches may no longer be truly limited to contraband.

It is not the fact that the dog has such different capabilities from the human itself[203] but rather the way in which the law permits the police force to *use* the dog's capabilities that threatens individuals' privacy rights. While a human officer may have reason to search someone who carries the scent of an illegal substance, the threshold for a dog's smell is much lower, thereby allowing it to recognize a new world of smells that a human alone could not have detected.[204] Moreover, while a human officer must study the actions or behavior of the suspect—perhaps by asking questions—prior to touching or

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[200] See *supra* note 54 for the definition of "sui generis." The Court has held that the dog sniff is "sui generis" because it believes that a sniff is limited to exposing only contraband, and nothing else. United States v. Place, 462 U.S. 696, 707 (1983).

[201] *See* Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 28 (1990) ("The myth [of the dog sniff] so completely has dominated the judicial psyche in those cases that the courts either assume the reliability of the sniff or address the question curiously; the dog is the clear and consistent winner.").

[202] Bird, *supra* note 45, at 424. "Handler cues are [described as] conscious or unconscious signals given from the handler that can lead a detection dog to where the handler thinks drugs are located." *Id.* A human officer's approaching or suspecting someone of carrying drugs may "cue" to the dog that it should alert to drugs to please its handler—regardless of whether it has actually detected an illegal substance. *Id.*; *see also* Lee, *supra* note 38 (describing some of the problems with handler communication).

[203] See *supra* Section I.A for a discussion about what makes dogs so useful in the K9 force.

[204] Correa, *supra* note 31 (describing the anatomy of a dog's nose and why it is capable of detecting and identifying odors); *see also* Doyle, *supra* note 32 (describing the abilities of one particular dog, named the "most successful drugs dog ever").

intruding the personal space of the pedestrian,[205] dogs do not communicate with a potential suspect in the same way. This, coupled with the fact that no laws stop the human officer from allowing the dog—that lacks its own discretion to choose who or what to smell—to sniff random passersby without reasonable suspicion or probable cause, opens the door to invasions that, without the dog, would be clearly unconstitutional.[206]

The prevalence of handler cues, coupled with poor training methods, has led to low accuracy rates for dog alerts to illegal substances. For example, a three-year study conducted by the Chicago Tribune indicated that only 44% of alerts by detection dogs in Illinois led to officers finding the illegal substances that the dogs were trained to find.[207] Notably, when looking at only the dog sniffs of Hispanic individuals, the successful alert rate was much lower—at only 27%.[208] The study further looked into specific counties in Illinois, showing that the highest percentage of accurate alerts in any individual county was in Naperville, at 47% accuracy, but at only 8% accuracy when involving Hispanic individuals being sniffed.[209] Indeed, studies examining the accuracy of dogs that are trained to identify substances other than drugs have demonstrated that dogs range greatly in accuracy. For example, dogs trained to identify the smell of a particular breed of tortoise varied in reliability from 27%–73%.[210] Notably, and although various other sources have reported statistics of low accuracy, one source in particular has acknowledged an inherent difficulty in gathering precise statistics of false alerts—due to the fact that this information may be used against handlers by revealing the high prevalence of handler cues, and also because there are no standardized requirements that these handlers publicize their results.[211]

Handlers often give off "handler cues" to the canines, triggering them to alert that they have sniffed contraband—even when they have not.[212] "Handler cues" are described as: "conscious or unconscious signals given from the handler that can lead a detection dog to where the handler thinks drugs are

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[205] See Terry v. United States, 392 U.S. 1, 27–29 (1968), for a demonstration of an officer's attempt to gather more information prior to conducting a street search.

[206] Horowitz, *supra* note 37.

[207] Hinkel & Mahr, *supra* note 33.

[208] *Id.*

[209] *Id.*

[210] Lee, *supra* note 38.

[211] *Id.*; *see, e.g.*, Hinkel & Mahr, *supra* note 33. For a discussion about the lack of standardized training across states, see also *infra* Section V.C.

[212] *See* Bird, *supra* note 45, at 424.

located."[213] A 2010 study led by Lisa Lit, a researcher at the University of California, Davis, demonstrated that alerts by drug-sniffing dogs are, in fact, affected by handler beliefs.[214] Handler cues are dangerous because they induce the dog to alert that it has identified a target substance in order to please its human partner—regardless of whether the dog has actually identified the scent at all.[215] This sidesteps the requirement that officers have reasonable suspicion or probable cause of criminal activity, which serves as a method to make sure that stops, pat downs, and possible searches are based on more than just an officer's hunch about or personal bias against a pedestrian.[216] Indeed, internal bias by handlers may be the reason that the Chicago Tribune's study yielded such low accuracy rates for alerts of Hispanic drivers as compared to other drivers across the board.[217] Notably, however, although a false alert during a traffic stop may be due to handler cues,[218] safeguards that protect the individual inside the vehicle are nonetheless present, as an officer is required to have reasonable suspicion or probable cause before he can pull over a vehicle.

Handler cues continue to occur due to poor techniques used in training both the handlers and the dogs. Trainers themselves have commented on the fact that often dogs are not properly trained and, in most states, no statutory standards of performance exist.[219] For the most part, this means that there is no body of government ensuring that the handler-dog duos are performing at a high level of accuracy, indicating that they are qualified to continue working with the force. Training,

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[213] *Id.*

[214] *See generally* Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 387 (2011). In this study, Lit set up four different rooms, each with different tests, though none of the rooms contained a target scent for the dogs to identify. *Id.* at 389–90. Each team was told that there may be up to three target scents in each room. *Id.* Some rooms had indicators—red construction paper that would indicate to the human handler that there might be a target scent present. Some rooms also had decoy scents. *Id.* The first room contained no indicators or decoys, the second room contained an indicator but no decoys, the third room contained a decoy scent with no indicators, and the fourth room contained both a decoy scent and an indicator. *Id.* The rooms were double-blind, in the sense that neither the handler nor the dog were previously aware of whether there was an illegal substance in the room. *Id.* However, the handlers would likely believe that a substance *was* present in the rooms with the construction paper markings. *Id.* at 392. Though the dogs should not have alerted to a scent in any of the rooms, there were alerts in all of the rooms, with the most alerts occurring in the rooms with the red construction paper. *Id.* at 389–90, 392.

[215] Bird, *supra* note 45, at 424.

[216] *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

[217] Hinkel & Mahr, *supra* note 33.

[218] For example, a dog may be cued to alert by its handler when the handler walks too slowly or too many times around a vehicle. *Id.*

[219] *Id.*

however, is absolutely crucial for both the dog and the handler.[220] Without implementing more stringent requirements on training techniques both before and after the handlers and dogs are allowed to enter the force, there is no way to reinforce techniques that have the ability to curb the prevalence of handler cues.

Unfortunately, the Supreme Court appears to blindly rely on training techniques without thoroughly evaluating whether they work or not. The Court has stated that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert,"[221] and further that "law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources."[222] Indeed, the entire drug sniff doctrine is based on the Court's belief that the detection dogs are well trained and reliable.[223] Yet, even when presented with evidence that this assumption is incorrect—and that quite often, the human officer's cues trigger the dog's alert—neither the Court nor the government has taken the steps necessary to protect the privacy rights that pedestrians deserve.[224] Moreover, while some lower courts have acknowledged that canine sniffs can be unreliable and have held that they will not rely on a dog's sniff if that dog is often inaccurate, other courts have disregarded these facts altogether, opting instead to rely on the alerts of inaccurate dogs.[225] The Seventh Circuit, for example, stated on the one hand that, "[t]his should not become a race to the bottom . . . . We hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use, and we caution that a failure to do so can lead to suppression of evidence."[226] However, the Court nonetheless found that a mere 59.5% accuracy rate by a dog was "good enough."[227] Other lower courts

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[220] Alex Rothacker, a detection dog trainer, explained: "If you don't train, you can't be confident in your dog . . . . A lot of dogs don't train. A lot of dogs aren't good." *Id.* He further explained that most trainers are simply "very lazy" when it comes to training their dogs—but "[t]he dogs [can be] only as good as the handlers" are. *Id.*

[221] Florida v. Harris, 133 S. Ct. 1050, 1057 (2013).

[222] *Id.*

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

[224] *See*, *e.g.*, Illinois v. Caballes, 543 U.S. 405, 411–12 (2005) (Souter, J., dissenting) (listing and citing cases that presented showings of evidence of the "less than perfect accuracy" of drug-sniffing dogs).

[225] *See, e.g.*, United States v. Bentley, 795 F.3d 630, 636 (7th Cir. 2015).

[226] *Id.*

[227] *Id.*

have stressed the importance of training and accuracy for the dogs.[228] The Court's misguided view of the reliability of canine officers attributes to resulting privacy invasions for the victims of inaccurate alerts.

Handler cues threaten the guarantees of privacy provided by the Fourth Amendment because they create an easy route to manipulate established law and circumvent rights that pedestrians deserve. A human officer is required to provide "specific and articulable" reasons[229] for believing criminal activity to be occurring before he can stop an individual and attempt to alleviate his suspicions.[230] However, rather than providing these reasons, an officer might simply cue his dog to alert to a scent, which would in turn permit an officer's search—all while technically not violating any current privacy laws for the individual. Any officer accompanied by a dog has the ability—intentionally or unintentionally[231]—to gain the probable cause required to conduct a full search, thereby creating a system where the pedestrian is subject to searches at the whim of the officer—a notion explicitly held to be unconstitutional under *Terry*.[232] Absent government acknowledgment of pedestrians' reasonable expectation of privacy and implementation of heightened training and accuracy requirements for dogs and handlers, government encroachment into pedestrians' expectation of privacy will have the freedom to continue to grow.

V. A FOUR-PART TEST TO REGULATE THE STREET SNIFF AND PROTECT PEDESTRIANS

To support the rights guaranteed to individuals under the Fourth Amendment,[233] the government must assure that those who are entitled to equal expectations of privacy are afforded equal protections and safeguards under the law. Specifically, the government should maintain privacy protections

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[228] *See, e.g.*, United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462, 478 (N.D. Tex. 1991) (stating that "[r]eliability problems [with detection dogs] arise when the dog receives poor training, has an inconsistent record, searches for narcotics in conditions without reliability controls, or receives cues from its handler").

[229] *Reasonable Suspicion*, *supra* note 6.

[230] *See* Terry v. Ohio, 392 U.S. 1, 27–29 (1968).

[231] *See* Bird, *supra* note 45, at 424 (describing "handler cues" as "conscious or unconscious signals given from the handler that can lead a detection dog to where the handler thinks drugs are located").

[232] The Court in *Terry* stated, "in determining whether [an] officer acted reasonably in . . . [conducting a search,] due weight must be given, not to his . . . 'hunch,' but to . . . specific reasonable inferences." *Terry*, 392 U.S. at 27.

[233] The purpose of the Fourth Amendment is to "protect[] people from unreasonable searches and seizures by the government." *What Does the Fourth Amendment Mean?*, *supra* note 66.

for the pedestrian that are equivalent to those afforded to the individual when in a vehicle. While the most *effective* way for the government to assure the protection of pedestrians' privacy rights may be to eliminate the use of the canine sniff altogether, this is not the *best* way to handle such a powerful and important procedure. Not only is it unrealistic for the government to abolish these constitutional sniffs because of their promise and functionality but it is also true that not all sniffs lead to inaccurate results.[234] For these reasons, a better solution to the problem at hand is to improve the accuracy of, rather than eliminate, canine sniffs. In order to accomplish this, the government should (1) acknowledge that a pedestrian's reasonable expectation of privacy is equivalent to that of a passenger in a vehicle; (2) execute a temporary presumption against the constitutionality of street sniffs not backed by human reasonable suspicion; (3) implement standardized training for canines and handlers, which targets the use of handler cues; and (4) create and apply a threshold accuracy requirement for handler-canine pairs.

A. Government Acknowledgment of a Pedestrian's Heightened Reasonable Expectation of Privacy

Government acknowledgement of the equivalent expectation of privacy held by both individuals in vehicles and on the street is crucial because—in its absence—the government has the ability to work around the requisite "reasonable suspicion" standard. This is particularly visible under the current street sniff system. The most problematic part of the street sniff is that dog sniffs, as they exist now, do not fit the mold that the Court has assumed they do—in other words, they are not truly limited to the "disclos[ure] [of] only the presence or absence of narcotics,"[235] as they often lead to more intrusive

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[234] *See*, *e.g.*, Illinois v. Caballes, 543 U.S. 405, 408–10 (2005); United States v. Place, 462 U.S. 696, 707 (1983); United States v. Bentley, 795 F.3d 630, 636 (7th Cir. 2015). For a discussion about the way that the courts handle the idea that detection dogs may not be completely reliable, see *supra* Part IV. As indicated by the Chicago Tribune's studies, at least some sniffs are accurate. Hinkel & Mahr, *supra* note 33 (In discussing the low accuracy of dog alerts, Hinkel and Mahr specifically reference the results of the *Chicago Tribune*'s three-year study on detection dogs. This study yielded results indicating that only 44% of alerts by detection dogs in Illinois led to officers' finding illegal substances or paraphernalia.).

[235] *Place*, 462 U.S. at 707. For a discussion about the policy rationales that the Court has relied on in determining that the dog sniff is constitutional, see *supra* Section I.B.

searches, premised on faulty evidence to begin with.[236] Since dogs are not reliable, there must be other safeguards to protect the individual. In other locations (i.e., the home), other protections mitigate the harm of the sniffs,[237] but the individual on the street is fully exposed to harmful sniffs that, based on the Court's own reasoning, are not constitutional.

It is not that the government must *raise* the pedestrian's expectation of privacy standard, but rather, that it must *acknowledge* where it falls on the sliding scale. Individuals after *Terry* were promised the right against being stopped or patted down absent a human officer's reasonable suspicion. This is the equivalent protection offered to those in a vehicle; after *Prouse* and *Sitz*, an officer must have a reasonable suspicion to conduct a traffic stop unless *everyone* is being stopped. With that in mind, it is important to ensure that these standards are being maintained across the board, as individuals are already entitled to an expectation of privacy when on the street because the *Terry* decision has promised them that their rights will not be violated without certain evidence. However, these rights are not being maintained across the board when it comes to dog sniffs. Dog sniffs in the vehicle context are regulated in some way—there are requirements about what an officer can or cannot allow his dog to do in relation to a vehicle. The Court outlined these guidelines by reaching different holdings in *Caballes* and *Rodriguez*. Moreover, a moving vehicle cannot be sniffed unless the officer requires it to stop.[238] Distinct from a vehicle, a pedestrian is *always* exposed to an officer who is approaching with a dog. Whether the individual stops on her own accord or continues to walk, the police officer can direct his dog to follow and sniff, even if the officer does not require the individual to stop. For this reason, the government must implement boundaries for these officers, so that the exposed pedestrian's rights are maintained.

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[236] See *supra* Part IV for a discussion about the way that the courts handle the notion that detection dogs may not be completely reliable.

[237] See *supra* Part II for a complete discussion about the safeguards that the Court has put in place to protect individuals' privacy rights in other contexts.

[238] Notably, the exception to this statement is where an officer approaches an already-parked vehicle. However, there is still a distinction between a parked vehicle and Jane Doe, who is standing in place on the street on her own accord. *See supra* Introduction. Although neither instance requires that the officer physically stop his suspect to conduct a sniff, a parked car invokes less of a sense of security and privacy than does a pedestrian's own body and person. An individual who leaves her vehicle behind is generally less likely to feel a sense of privacy there, as opposed to her pockets or purse. See *supra* Section III.B for a discussion about a pedestrian's expectation of privacy over items kept on her person, as opposed to those items that she leaves in a vehicle.

Acknowledging the heightened expectation of privacy and implementing guidelines and regulations to protect it is both possible and realistic. If the government were to acknowledge a pedestrian's right to a higher expectation of privacy, it would essentially require that the government implement a standardized rule for police handlers who conduct these sniffs, which would set the stage for heightened accuracy requirements. A governmental acknowledgement that pedestrians are entitled to a higher expectation of privacy will serve to mold future laws and requirements, as well as to ensure that future decisions by the Court—even if based on blind reliance on the accuracy of a dog—feature dog sniffs that are *actually* reliable. If, on the other hand, the government does not improve training, it would at the very least need to acknowledge that pedestrians are entitled to a heightened expectation of privacy, because the level of privacy currently afforded to pedestrians violates the Fourth Amendment.

It is important to note that inaccurate alerts that lead to a finding of no illegal substances are generally not brought to court. However, with a standard that implements actual privacy rights for the pedestrian against these types of invasions, pedestrians will have less of a burden in proving that, when an illegal substance is found, their rights have been violated. As the Court brushes away any attempts by defendants to argue that dogs should not be relied on unless there is proof that they have high rates of accuracy,[239] the pedestrian faces an uphill battle, requiring a defendant to prove that (1) the Court should not rely on the dog in the first place, and (2) if the dog was not trusted, because it is known to be unreliable, then the illegal substance in question would never have been found. Government acknowledgment of pedestrians' expectation of privacy would provide higher safeguards and alleviate some of the burden that the pedestrian holds—for it would guard pedestrians from being violated by inaccurate dogs in the first place and would force the hand of the government to improve these procedures.

The fact that the government has not acknowledged the equality between the expectation of privacy for the pedestrian and the passenger in a vehicle is especially troublesome because when a pedestrian is approached by an officer who requests permission to conduct a dog sniff, this pedestrian is effectively forced to either stop and comply with the sniff, or

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[239] *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 409 (2005) (where the Court disregarded the respondent's argument that it should not rely on these sniffs because dogs have proven to be unreliable).

refuse—thereby inducing reasonable suspicion in the mind of the officer to conduct a pat down of her anyway. For example, in *Illinois v. Wardlow,* the Court explained that although merely standing in an area of high criminal activity would not be enough to create reasonable suspicion, "evasive behavior," such as running away or intentionally and obviously avoiding police officers is "a pertinent factor in determining reasonable suspicion."[240] Further, the reasonable suspicion induced by the pedestrian's refusal would comply with that required in *Terry,* and therefore, a pat down stemming from it *would* be constitutional.[241] If the random sniffs by canines assured accuracy, there would be no danger in pat downs or searches of pedestrians based solely on their alerts, as this would create proper probable cause, a standard higher than the reasonable suspicion required under *Terry*. Without *any* guarantee whatsoever that the probable cause created by an alert was based on the scent of drugs, those pedestrians subject to a subsequent search by a human officer have been stripped of their Fourth Amendment protections. Therefore, the government must take the first step to mitigate this issue, by acknowledging that pedestrians are entitled to a moderate expectation of privacy.

B. The Temporary Presumption Against Sniffs Not Supported by Prior Reasonable Suspicion

Because the current system violates privacy protections owed to pedestrians under the Fourth Amendment, it cannot continue unless and until improved. That is why a temporary presumption against canine sniffs as they are currently utilized is necessary, until the training system is standardized and improved, so as to ensure accuracy in alerts. Specifically, the presumption should weigh against the constitutionality of canine sniffs not backed by prior *human* reasonable suspicion. Creation of this temporary presumption would uphold the rights of pedestrians that are afforded through *Terry*—and that should be afforded equally through *Prouse, Caballes,* and *Rodriguez*—by guaranteeing that stops, pat downs, searches, and seizures of people on the street are based on more than mere randomness or an officer's hunch. The risk of a violation of pedestrians' rights through a false alert based on handler cues would be avoided. By defaulting to the *Terry* standard, pedestrians would enjoy strong protection against sniffs, while the government gains time to

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[240] Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

[241] *See* Terry v. Ohio, 392 U.S. 1, 27–29 (1968).

create a more permanent solution. A pedestrian's expectation of privacy, therefore, would be equally protected against both human and canine intrusions.

A temporary presumption against the constitutionality of street sniffs that are not supported by prior human reasonable suspicion functions as a holdover, which would guarantee pedestrians the safeguards that they are entitled to because they hold a moderate expectation of privacy. Though members of the K9 force have been shown to be helpful to the police force, this is not a reason to violate the rights of pedestrians. A permanent solution may take time, but due to the nature of the loss of privacy rights that is taking place, the government must take action now to stop these types of searches that lack probable cause. This presumption would terminate once dog sniffs are more highly regulated and proven to be more accurate. This affords the government the time necessary to create heightened training and accuracy requirements and standards.

C. Curbing Subconscious Cues Through Standardized Training

Because pedestrians should be afforded the same privacy rights as those in a vehicle, it is not necessarily true that sniffs should *never* take place. In a vehicle, sniffs are permissible once an officer has stopped a car based on reasonable suspicion.[242] In contrast, the requirement that an officer have reasonable suspicion to stop an individual is much less effective in a situation involving a pedestrian, because a dog may sniff anyone who walks past it and an officer will not always need to stop an individual *before* he allows the canine to sniff her—as demonstrated by the story about Jane Doe.[243] However, improvements in the accuracy of canine alerts would make the impossibility of this particular safeguard irrelevant, as the dangers associated with handler cues would be eliminated—or at least reduced—and, therefore, subsequent stops, pat downs, seizures, and searches would be based on honest and legitimate reasonable suspicion or probable cause, as appropriate. This would serve to equalize the reasonable expectation of privacy of all pedestrians—whether faced with a member of the police force on two or four legs.[244]

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[242] *See* Illinois v. Caballes, 543 U.S. 405, 408–10 (2005).

[243] *See supra* Introduction.

[244] Recall that in *Terry*, the Court held that human officers must have reasonable suspicion prior to conducting a search of a pedestrian. *Terry*, 392 U.S. at 27.

The government must work to standardize training requirements for canine officers and their human partners. Paul Waggoner, a member of Auburn University's detector-dog research program has explained that "[t]raining is the key to eliminating accidental cues and false alerts."[245] The government must first recognize the problem, so that new training systems may target precisely what leads to inaccurate alerts. Yet, the government fails to acknowledge the danger and prevalence of handler cues, even though reports and lower courts have indicated that this is a growing problem.[246]

Because under the current system training programs across each state are not standardized,[247] each police department and training center develops its own methods to ensure that dogs and handlers can work together.[248] Critics of this inconsistent system have commented that many dogs and handlers leave these programs without the training that is crucial for the position at hand.[249] Many argue that training should focus on the elimination of the influence of handlers over the dogs and their alerts.[250] Other critics argue that more emphasis should be placed on how dogs learn from humans, so that the dogs learn how to properly respond even when the human officer acts improperly.[251] Regardless, in creating standardized training that focuses on conscious and subconscious cues by handlers, the issue of human influence over dogs' alerts will be largely abated.

While various scholars have suggested that training should be standardized,[252] few have offered more than general ideas as to *how* training may be enhanced overall. After completing her 2010 study,[253] Lisa Lit explained that "[p]eople use an array of [training] techniques, and depending on who

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[245] Hinkel & Mahr, *supra* note 33.

[246] *See supra* Part IV (describing the high levels of inaccuracy in police dog alerts).

[247] Hinkel & Mahr, *supra* note 33. Robert C. Bird commented on the fact that even when there are specific requirements in place for the training of dogs, there are no such standards for the human handlers when it comes to interpreting a dog's signals. Bird, *supra* note 45, at 422–25.

[248] Training programs often list this realistic-scenario training as part of the program. *See, e.g.*, Bird, *supra* note 35, at 413–14.

[249] Hinkel & Mahr, *supra* note 33.

[250] *Id.*

[251] *Id.*

[252] *See, e.g.*, Dave Hunter, *Common Scents: Establishing a Presumption of Reliability for Detector Dog Teams Used in Airports in Light of the Current Terrorist Threats*, 28 U. DAYTON L. REV. 89, 98, 108–09 (2002); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 33 (2006); Mark E. Smith, Comment, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 HOUS. L. REV. 103, 137 (2009).

[253] For a full description of this study, see Lit et al., *supra* note 214.

you talk to, their method will be the best method . . . [but] there is not much data to support one training method over another."[254] Regardless, many scholars and critics have offered solutions that they believe will at least target the problem. Some have argued that it would be helpful to implement "double-blind" trials whereby the handler and dog enter a room to see if they detect an illegal substance, while neither of them know whether there is a substance in the room.[255] This it not used by most training centers or organizations; most of them instead conduct "single-blind evaluations," whereby the handler is notified that there is a substance in the room that the dog should alert to.[256] Utilizing double-blind trials will help the handlers become aware of the possibility that he is cueing his dog by accident.

Videotaping may be an effective addition to the double-blind tests. After concluding her study, Lit explained that she did not implement videotaping of the experiment though this would have allowed her to better study the way that humans were cueing to their dogs.[257] She also stated that she hopes to recreate the experiment *with* the implementation of videotaping to study precisely what cues humans are giving the dogs.[258] Taping and rewatching handler-canine pairs in action, Lit argues, will permit those watching to understand the prevalent issues.[259] Because handler cues are often "subtle human cues . . . including pointing, nodding, head-turning and gazing,"[260] these actions can easily be watched and rewatched on tape, allowing individuals to study their actions and learn from their mistakes. Notably, not all training centers and organizations require that handlers be videotaped during their training sessions. Though some scholars have played with the idea of requiring that officers videotape every sniff conducted,[261] videotaping in *training sessions* is a more functional alternative to this, as it is a proactive method in which the government can determine which handlers and canines from the K9 force have low accuracy rates *before* allowing them to conduct sniffs outside of the training center. This higher emphasis on how handlers

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[254] Lee, *supra* note 38.

[255] *Id.*

[256] *Id.*

[257] *Explosive- and Drug-Sniffing Dogs' Performance Is Affected by Their Handlers' Beliefs*, U.C. DAVIS HEALTH (Feb. 1, 2011), http://www.ucdmc.ucdavis.edu/publish/news/newsroom/4968 [https://perma.cc/4ANX-67JJ].

[258] *Id.*

[259] *Id.* (quoting Lisa Lit as saying, "[t]his study should be replicated and expanded so that we can assess hidden cues handlers might be giving").

[260] *Id.*

[261] *See*, *e.g.*, Myers II, *supra* note 252, at 33–34 & n.178.

and dogs work together, and on what level of influence handlers have on dogs *during* training, will lead to a better understanding of accidental handler cues, and a better grasp on how to avoid them, by allowing handlers who cue to their dogs subconsciously to have the opportunity to observe and study their actions and movements, and thus become conscious of their cues.

To be sure, this system may not curb the prevalence of a handler *consciously* cueing its dog to alert to drugs, for these handlers may ace the trial but choose to act improperly once out in the real world. For this reason, the government would need to invest in not merely proactive measures, but also retroactive measures, such as a threshold accuracy requirement for all handler-dog pairs.

D. Curbing Conscious Cues Through an Accuracy Threshold Requirement

In a perfect world, implementing proactive measures alone would counter the problem at hand. However, standardized training alone cannot account for the inevitable possibility that some officers may choose to take advantage of their power. The government must therefore ensure that the heightened training standards are put to good use.

Some scholars have suggested that recordkeeping requirements be put into place to maintain the accuracy of canine officers.[262] However, more must be done to assure that human officers intentionally cueing their dogs face consequences for violating pedestrians' rights. Although recordkeeping is important, it alone does not offer a solution to the fact that a large percentage of dogs alert inaccurately. There must be a consequence to reinforce the importance of accurate alerts. Therefore, along with the recordkeeping, the government must initiate a standard threshold accuracy requirement that handler-canine pairs must meet. Pairs that do not meet the required accuracy level would need to be either retrained, or removed from the K9 unit altogether.

Previously, in *Florida v. Harris,* the Supreme Court held that a state cannot require that a detection dog meet requirements from a checklist created by the state to be considered accurate enough to create probable cause.[263] The Court held that this type of formulation would violate the "totality of the circumstances" test that is generally used for the probable cause analysis, particularly because it is not a flexible

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[262] *See, e.g.*, Hunter, *supra* note 252, at 96, 108–09.

[263] Florida v. Harris, 133 S. Ct. 1050, 1056 (2013).

standard.[264] However, creating a standard percentage is not the same as creating a checklist with specific requirements.[265] The extreme level of flexibility permitted by the Court is precisely the piece of the puzzle that is allowing handler cues to continue to exist. Further, it is important to note that this particular required percentage is not one that plays a role in the admissibility of evidence—which is what the Court concentrated on in its decision in *Harris*.[266] Instead, this percentage will be used only to determine whether dog-handler pairs are adequate to remain in the K9 force. The "totality of the circumstances" formulation is used for determining probable cause—not for determining whether a dog or human is fit for employment with the police academy.

This requirement would eliminate the possibility that after being trained more thoroughly, officers who are not up to the task might continue to violate Fourth Amendment rights of pedestrians, as it would specifically target those officers who are incapable of learning to control their cues through training, as well as those officers who make the affirmative choice not to do so. There is no valuable reason that handler-canine teams who often alert inaccurately should be kept in the force. Not only does allowing them to stay waste police funding and time, but it continues to subject citizens to privacy violations.

While it is easy to say that the threshold percentage for accuracy should be high, it is not as simple to say exactly what the percentage should be. Officers must be afforded at least some room for mistakes. Just as officers who initiate *Terry* stops may be incorrect in believing that a pedestrian is carrying drugs or a weapon, dogs too make errors. However, regardless of where the threshold begins, it should serve only as a starting point. As the standardization of training for handler-canine pairs continues to improve, the percentage threshold requirement for accuracy should increase with each year. Therefore, even if the government begins with the Seventh Circuit's "good enough" standard at 59.5% accuracy,[267] this would only continue to improve. The point of the threshold is to hold officers to a standard so that they may not take advantage of the system, as well as to define clear consequences for those

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[264] *Id.*

[265] For example, the Court rejected a proposed requirement that instructed: "an alert cannot establish probable cause under the [the state] court's decision unless the State introduces comprehensive documentation of the dog's prior 'hits' and 'misses' in the field." *Id.*

[266] *Id.*

[267] United States v. Bentley, 795 F.3d 630, 636 (7th Cir. 2015).

who do. It is fair to assume that this is the type of regulation that the Seventh Circuit was discussing in *Bentley* when it referred to its hope that officers would "improve the quality of training and the reliability of the[ir] animals,"[268] which has not, as of yet, been implemented.

Through the government's acknowledgment of a pedestrian's reasonable expectation of privacy, the temporary presumption, proactive training standardization, and a retroactive accuracy threshold requirement, pedestrians' privacy rights will be maintained and protected, while still allowing the government to utilize the canine's nose.

CONCLUSION

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."[269] In guaranteeing all citizens the right to certain privacy,[270] the amendment ensures the security and safety of individuals under the Constitution. A citizen's sense of privacy is a crucial piece of human development and interaction.[271] Therefore, government intrusion into privacy rights risks compromising the value of one's everyday life.

The current system—which continues to allow street sniffs of pedestrians to remain wholly unregulated—disregards privacy rights that are in fact held by the individual. The rationales that support the standard of privacy owed to a person in a vehicle are present in the analysis to determine the level of privacy owed to a pedestrian. Therefore, both a pedestrian on foot subject to a search of her person, and a person in a car subject to a search of her vehicle, should be entitled to the same protections. As the Court has indicated, a government interest in safety cannot be achieved through means that utterly violate an

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[268] *Id.*

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

[270] *See What Does the Fourth Amendment Mean?*, *supra* note 66; *see also* Katz v. United States, 389 U.S. 347, 350 (1967) (stating that although the Fourth Amendment should not be understood as a "general constitutional right to privacy," the Amendment nonetheless can be said to stand to "protect[] individual privacy against certain kinds of governmental intrusion," though some of the protections of the Fourth Amendment can be said to go even further beyond the issue of privacy).

[271] *See* Lauren McCormick, *The Internet and Social Media Sites: A Shift in Privacy Norms Resulting in the Exploitation and Abuse of Adolescents and Teens in Dating Relationships*, 7 ALB. GOV'T L. REV. 591, 593 (2014) (arguing that "[t]he importance of privacy extends to every facet of our lives, as it gives us the power to determine what information we allow people to have access to").

individual's expectation of privacy.[272] The current regime, however, persists in doing just that—by permitting sniffs to circumvent established laws. Therefore, the government must improve the level of accuracy of the sniffs that currently have the power to invade individuals' right to privacy, to thereby maintain the purpose, meaning, and importance of the Fourth Amendment.

Jacey Lara Gottlieb[†]

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[272] *See*, *e.g.*, Delaware v. Prouse, 440 U.S. 648, 662–63 (1979) (holding that even when an officer has a reasonable suspicion to stop a vehicle, this does not mean that the individual in the vehicle has lost "all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation," and further commenting on other cases that have limited stops, seizures, and searches, so that individuals are not "shorn of all Fourth Amendment protection" just because they are in a particular location or are acting in a certain manner).

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