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STATE V. RABB: DOG SNIFFS CLOSE TO HOME

TIMOTHY C. STONE†

INTRODUCTION

Sensory perception is an inextricable part of Fourth Amendment¹ jurisprudence.² A policeman's sense of smell, for example, can create probable cause³ for a lawful search or seizure.⁴ A canine's sense of smell operates much like our own, except that its sensory instrument—the snout—is exponentially

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

U.S. CONST. amend. IV.

² Probable cause can result from that which an officer sees, *see Horton v. California*, 496 U.S. 128, 136–37 (1990) (explaining plain view doctrine), *hears, see Hoffa v. United States*, 385 U.S. 293, 303 (1966) (“The risk of being overheard by an eavesdropper . . . is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.” (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting))), or even feels, *see Minnesota v. Dickerson*, 508 U.S. 366, 377 (1993) (reasoning that a “suspect’s privacy interests are not advanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch”).

³ Probable cause to search exists when, “given all the circumstances set forth in the affidavit before [the issuing magistrate], . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁴ *See Taylor v. United States*, 286 U.S. 1, 6 (1932) (finding a search unconstitutional in light of the prohibition officers’ failure to procure a warrant, but stating that “[law enforcement] may rely on a distinctive odor as a physical fact indicative of a possible crime”); *Fitzgerald v. State*, 837 A.2d 989, 1038 (Md. Ct. Spec. App. 2003) (describing sense of smell as the third most “productive of incriminating data,” behind sight and sound, and discussing *Johnson v. United States*, 333 U.S. 10, 13 (1948), in which the smell of burning opium from inside a room generated probable cause for a search), *aff’d*, 864 A.2d 1006 (Md. 2004).

stronger than the human nose.⁵ This potency explains the dog sniff's long history as a law enforcement tool.⁶

As a legal matter, it is undisputed that the "alert"⁷ of a trained dog to contraband generates probable cause for a search or seizure.⁸ However, a discrete and more contested issue is whether the sniff *itself* constitutes a Fourth Amendment "search."⁹ Beginning with its 1983 decision in *United States v. Place*,¹⁰ the Supreme Court has held—at least under some circumstances—that it does not.¹¹ The Court reasoned that two

⁵ See Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 408–10 (1997) (examining the "science behind the sniff"); Shannon R. Hurley-Deal, Comment, *State v. Fisher: Canine Sniffs – Who Let the Dogs Out?*, 26 N.C. CENT. L.J. 47, 51 (2003) ("If laid out, the surface area of a dog's olfactory cells would cover a space equivalent to the skin area of the dog's body. In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.") (footnotes omitted).

⁶ The use of the dog sniff is "deeply ingrained in our general culture." *Fitzgerald*, 837 A.2d at 1037.

We know that a canine "non-alert" may be as probative as an "alert," as, in *Silver Blaze*, Sherlock Holmes explained the significance of "the dog that did not bark in the night." In *The Odyssey*, Homer recounts how Ulysses's incognito return to Ithaca, after an absence of twenty years, was almost compromised when his faithful dog, Argos, alerted to the smell of his long missing master.

Id. at 1037–38.

⁷ "An alert is an indication from a trained dog that the odor of an illegal drug is present." Bird, *supra* note 5, at 406 n.3.

⁸ See, e.g., *Florida v. Royer*, 460 U.S. 491, 506 (1983) (stating that a positive result from a dog's sniff "would have resulted in [the defendant's] justifiable arrest on probable cause"); JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:9 n.67 (3d ed. 1996 & Supp. 2005) (listing cases).

⁹ The ramifications of that initial determination—whether a government activity is a search and, therefore, a Fourth Amendment "event" that triggers constitutional protections—are extremely important. See, e.g., David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 150 (2002) ("[I]nvestigative tactics that are not deemed 'searches' or 'seizures' escape judicial review altogether under the Fourth Amendment.")

¹⁰ 462 U.S. 696 (1983).

¹¹ See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) ("[T]he use of a well-trained narcotics-detection dog . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests."); *City of Indianapolis v. Edmond*, 531 U.S. 32, 52–53 (2000) (Rehnquist, J., dissenting) ("We have already held, however, that a 'sniff test' by a trained narcotics dog is not a 'search' within the meaning of the Fourth Amendment because it does not require physical intrusion of the object being sniffed and it does not expose anything other than the contraband items."); *Place*, 462 U.S. at 707 ("[E]xposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment.")

of the sniff's principal characteristics—non-intrusiveness¹² and limited information-capture¹³—exempt it from Fourth Amendment scrutiny as a *sui generis* law enforcement technique.¹⁴ That is to say, the information that a sniff generates—a very blunt “‘yea’ or ‘nay’” as to whether contraband exists¹⁵—implicates a privacy expectation in the contraband's owner that society does not accept as objectively reasonable under the famed *Katz* test.¹⁶ The Court, however,

¹² See *Place*, 462 U.S. at 707 (emphasizing the “limited . . . manner in which the information is obtained”). The facts of *Place* and its progeny involved dogs sniffing property. See *Caballes*, 543 U.S. at 407 (involving a car); *Edmond*, 531 U.S. at 35 (pertaining to automobiles); *United States v. Jacobsen*, 466 U.S. 109, 111 (1984) (regarding a Federal Express package); *Place*, 462 U.S. at 697–98 (focusing on personal luggage). Undoubtedly, a sniff directed at one's person is much more intrusive. Cf. *Caballes*, 543 U.S. at 421 (“A drug-detection dog is an intimidating animal.”) (Ginsburg, J., dissenting); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (lamenting the “extraordinary atmosphere” during a school-wide drug search in which “[e]very single student was sniffed, inspected, and examined at least once by a dog”) (Swygert, J., dissenting); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246–47 (1983) (“[T]he very act of being subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst to the innocent sniffer.”); Jon S. Vernick et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J. AM. SOC'Y L. MED. & ETHICS 567, 571 (2003) (“[T]he body and its odors are highly personal’ and ‘dogs often engender irrational fear.’”) (quoting *B.C. v. Plumus Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999)).

¹³ *Place*, 462 U.S. at 707 (pointing to the “limited . . . content of the information revealed” by a dog sniff); see also *Edmond*, 531 U.S. at 40 (“[A]n exterior sniff of an automobile . . . is not designed to disclose any information other than the presence or absence of narcotics.”). This idea has been referred to as a “limited disclosure theory.” Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 707–08 (1988).

¹⁴ See *Place*, 462 U.S. at 707 (“[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”).

¹⁵ *Fitzgerald v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004). This idea has also been referred to as “the binary search doctrine.” The Supreme Court, *2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 186–87 (2005).

¹⁶ Most jurists and scholars view *Katz* as a profound turning point in Fourth Amendment jurisprudence. The *Katz* Court (arguably) departed from the long-accepted idea—derived from common law notions of property—that violation of the Fourth Amendment presupposes the occurrence of a physical trespass. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001) (discussing the previous role of common-law trespass in Fourth Amendment jurisprudence and stating that the Court has “since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property”); Sklansky, *supra* note 9, at 152 (writing that *Katz* “appeared to revolutionize the test for determining . . . whether [an activity] is

muddied the waters¹⁷ in *Kyllo v. United States*,¹⁸ when it found that thermal imagers used for surveillance implicate Fourth Amendment protections.¹⁹ In *Kyllo*, a federal agent aimed a thermal imager at a residential apartment and detected heat discrepancies around its walls; based on this information, the agent correctly inferred that the apartment's occupant was employing heat-generating lamps in order to grow marijuana.²⁰ Surprisingly, the *Kyllo* Court found the defendant's interest in the heat—a byproduct of activity inside the home—to comprise a privacy expectation that society was prepared to recognize as reasonable.²¹ A factor contributing to the Court's decision was

a 'search' or 'seizure'"). *But see* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004) (claiming that the *Katz* test "has proven more a revolution on paper than in practice"); Sklansky, *supra* note 9, at 163 (calling Justice Scalia's criticism of the *Katz* test, among other things, "self-indulgent" (quoting *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring))). Justice Harlan expounded upon the test in his famous *Katz* concurrence, in which he proffered a two-pronged inquiry to determine whether government activity comprises a "search," and, thus, whether it implicates either the Fourth Amendment's warrant or reasonableness requirements. The first prong asks whether an individual has a subjective expectation of privacy in his own activity or property. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), *superseded on other grounds by statute*, Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2000), and Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (2000). The second, more dispositive component, requires that the privacy expectation be one that society is prepared to recognize as reasonable. *Id.*; *see also* *California v. Ciraolo*, 476 U.S. 207, 219 (1986) (Powell, J., dissenting) (reviewing the methodology of Fourth Amendment decisions grounded in the dual-prong framework); Sklansky, *supra* note 9, at 157 (explaining that the subjective prong has the "odd consequence that people who suspect the government are spying on them may lose, for that very reason, much of their protection against what they fear," and that, consequently, the Court relies more on the objective component).

¹⁷ *See, e.g.*, *State v. Rabb*, No. 4D02-5139, 2006 WL 349493, at *6 (Fla. Dist. Ct. App. Feb. 15, 2006) (viewing *Kyllo* as controlling the Fourth Amendment treatment of a sniff conducted outside a house); *infra* notes 25–68 and accompanying text (discussing *Rabb*). "Muddied" should not imply a negative connotation. *See* Kerr, *supra* note 16, at 837 & n.215 (writing that *Kyllo* has been "hailed as a 'landmark'" among scholars, and referencing numerous sources with similar language).

¹⁸ 533 U.S. 27 (2001).

¹⁹ *Id.* at 40 ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

²⁰ *Id.* at 29–30.

²¹ *Id.* at 34–35 (discussing the *Katz* test and holding that "the information obtained by the thermal imager in this case was the product of a search"); *see also* Sklansky, *supra* note 9, at 144 (noting the "ideological oddity" of the *Kyllo* Court's voter composition).

that the case dealt with surveillance of a home, a place traditionally afforded heightened constitutional protection.²²

Kyllo is arguably a departure from the *sui generis* model—whereby a sniff is not a search due to its non-intrusiveness and limited information-capture²³—in the context of the home.²⁴ If this reading of *Kyllo* is correct, then a dog sniff outside a private residence is a Fourth Amendment search—a conclusion that at least one court has reached. In *State v. Rabb*,²⁵ police received an anonymous tip that James Rabb²⁶ was growing cannabis in his house.²⁷ After partly corroborating the tip, officers placed the suspect's residence under surveillance.²⁸ When Rabb left his house by car, officers followed him and eventually pulled him over for commission of a traffic infraction.²⁹ The police observed

²² *Kyllo*, 533 U.S. at 37 (“[A]ny physical invasion of the structure of the home, ‘by even a fraction of an inch,’ [is] too much . . .” (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961))); see also *Payton v. New York*, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.”); *Silverman*, 365 U.S. at 511–12 n.4 (“A man can still control a small part of his environment, his house That is still a sizable hunk of liberty—worth protecting from encroachment.” (quoting *United States v. On Lee*, 193 F.2d 306, 315 (2d Cir. 1951) (Frank, J., dissenting), *aff’d*, 343 U.S. 747 (1952))).

²³ See *supra* notes 9–14 and accompanying text (discussing the sniff as a non-intrusive method of obtaining only a limited amount of information).

²⁴ Cf. David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1090 (2004) (“[T]he decisions in *Kyllo* and *Place* seem completely inconsistent.”); Jeffrey A. Bekiaries, Comment, *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 FLA. L. REV. 963, 973–74 & n.103 (2005) (“Will the Court apply the analysis in *Kyllo* to a suspicionless canine sniff of the home in the future, or will it adopt the view . . . that a canine sniff is not a search in any context?”). But see *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (stating that a thermal imager’s capacity to reveal intimate, non-incriminating details in a home underpinned *Kyllo*’s holding); *Fitzgerald v. State*, 837 A.2d 989, 1036 (Md. Ct. Spec. App. 2003) (reconciling *Kyllo* and *Place* by distinguishing a thermal imager from a dog sniff in that the former detects only “circumstantial evidence of crime” while the latter identifies “the very gravamen of crime itself”), *aff’d*, 864 A.2d 1006 (Md. 2004); *Morgan v. State*, 95 P.3d 802, 807 (Wyo. 2004) (stressing that a thermal imager, unlike a dog sniff, captures innocuous information about its target); Vernick et al., *supra* note 12, at 573 (arguing that the *Place* line of cases were not relevant to *Kyllo*); *infra* notes 46–59 and accompanying text.

²⁵ 920 So.2d 1175 (Fla. Dist. Ct. App. 2006).

²⁶ *Id.* at 1178 & n.1. The tip, however, identified Rabb as “John Brown.” *Id.*

²⁷ *Id.* at 1178.

²⁸ *Id.*

²⁹ *Id.* A pretextual traffic stop is constitutional so long as it is based on probable cause. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (reviewing precedent and concluding that it “foreclose[s] any argument that the constitutional

that Rabb appeared visibly nervous, and for good reason: an assortment of cannabis cultivation literature was in plain view.³⁰ A drug-detection dog was then led around the vehicle and alerted to its exterior;³¹ a search of the car revealed one marijuana cigarette.³² At this point, the officers brought the dog to the defendant's home and led it up the public roadway to the front door, where it again alerted to the presence of marijuana.³³ Based on the preceding events, a magistrate issued a warrant for police to search Rabb's house.³⁴ The search yielded, among other things, sixty-four cannabis plants.³⁵

The trial court found the dog sniff of Rabb's house to constitute a warrantless search.³⁶ Without the canine's positive alert, the warrant application was deemed insufficient to create probable cause and the evidence seized from the home was consequently suppressed.³⁷ The Florida Fourth District Court of Appeals affirmed,³⁸ and the United States Supreme Court granted certiorari,³⁹ vacated the judgment,⁴⁰ and instructed the Fourth District to reconsider the case in light of *Illinois v.*

reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

³⁰ *Rabb*, 920 So.2d at 1178.

³¹ *Id.* at 1179.

³² *Id.* Rabb also voluntarily relinquished marijuana hidden in his sock. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Police also recovered two MDMA tablets, Alprazolam tablets, and three additional marijuana joints. *Id.*

³⁶ *Id.* at 1180.

³⁷ *Id.* The exclusionary rule makes evidence seized in violation of the Fourth Amendment inadmissible in the prosecution's case-in-chief. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending federal exclusionary rule to states).

³⁸ *State v. Rabb*, 881 So.2d 587, 595 (Fla. Dist. Ct. App. 2004), *vacated*, 544 U.S. 1028 (2005) ("Based on the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of the dog sniff without a warrant constituted a search that was not permitted by the Fourth Amendment.").

³⁹ *Rabb*, 544 U.S. at 1028.

⁴⁰ *Id.*

Caballes.⁴¹ On remand, the Florida court reaffirmed the evidence-suppression order as consistent with *Caballes*.⁴²

I. THE MAJORITY AND DISSENTING VIEWS

As previously stated, the *Rabb* court found *Kyllo* dispositive,⁴³ stressing that the context of a sniff is determinative.⁴⁴ It analogized a thermal imager to a dog sniff,

⁴¹ 543 U.S. 405 (2005). In *Caballes*, the defendant was pulled over by a state trooper for speeding. *Id.* at 406. A second trooper overheard the radio dispatch reporting the stop and traveled to the scene with his drug-detection dog. *Id.* The canine was led around the defendant's car and alerted at the trunk, the search of which yielded marijuana. *Id.* The defendant was consequently convicted of a narcotics offense. *Id.* at 407. The Supreme Court held that the seized evidence was admissible, *id.* at 409–10, thereby reaffirming the “limited disclosure theory,” Gutterman, *supra* note 13, at 707–08, under which government activity that reveals only the presence of contraband “compromise[s] [no] legitimate interest in privacy.” *Caballes*, 543 U.S. at 408 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). The Court distinguished two ideas: an individual's bare and unprotected expectation that certain facts remain hidden from authorities, and an objectively reasonable privacy interest that satisfies the second prong of the *Katz* test. *Id.* at 408–09; see *supra* note 16 (explaining the two-part *Katz* test). The Court viewed the defendant's marijuana-concealment expectation as fitting squarely into the former category. See *Caballes*, 543 U.S. at 409. Note that a privacy expectation in per se unlawful property (or activities) is *always* unreasonable, because reasonableness implies lawfulness under at least some circumstances. For example, while it is reasonable for an adult to drink five beers, it is normally unreasonable for that same adult to drink five beers and then immediately drive an automobile. Narcotics possession, on the other hand, is uniformly unreasonable despite the context in which it occurs. This explains the Court's choice of words in describing the privacy expectation at issue in limited disclosure cases: instead of “reasonable[ness]” as in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), the Court speaks of whether the defendant has a “legitimate” privacy interest. *Jacobsen*, 466 U.S. at 123; see also *Fitzgerald v. State*, 837 A.2d 989, 1027 (Md. Ct. Spec. App. 2003) (noting the change in language), *aff'd*, 864 A.2d 1006 (Md. 2004). The logic underpinning this switch is consistent with the Court's position that “[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.” *Jacobsen*, 466 U.S. at 122. This idea also informs the bifurcated structure of the *Katz* test: simply because an individual has a privacy expectation under the first prong does not presuppose society's acceptance of that same expectation as objectively reasonable under the second prong. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁴² See *State v. Rabb*, 920 So.2d 1175, 1178 (Fla. Dist. Ct. App. 2006). The Florida Constitution contains a provision nearly identical to the Fourth Amendment, and provides that the right which it bears “shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” FLA. CONST. art. 1 § 12.

⁴³ *Rabb*, 920 So.2d at 1182.

⁴⁴ See *id.* at 1186 (“Put simply, we view the reasonable expectation of privacy afforded to locations along a hierarchy from public to private.”).

and distinguished prior sniff jurisprudence by positing that *location*—the place of the alleged search—underpins the *sui generis* model.⁴⁵ The court cited *Kyllo* for the proposition that the “quality or quantity” of the captured information is not the “Fourth Amendment concern.”⁴⁶ Instead, the decision focused on the heightened protection afforded the home under Fourth Amendment caselaw,⁴⁷ reasoning that all details inside the home are “intimate,” and therefore warrant constitutional protection.⁴⁸ Hence, that a dog sniff “provides limited information regarding only the presence or absence of contraband” is irrelevant.⁴⁹ The critical issue is rather that the government “endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house.”⁵⁰ The court also emphasized that *Caballes* dealt with a vehicle stopped on a public interstate highway,⁵¹ while the *Rabb* sniff transpired outside a private home, a place that stands “strong and alone, shrouded in a cloak of Fourth Amendment protection.”⁵² Moreover, it distinguished both *Caballes* and *Place* from the facts at hand, stating that “[v]ehicles

⁴⁵ See *id.* at 1184. The court cited *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), to support its position that “place” underpins the limited disclosure inquiry. *Rabb*, 920 So.2d at 1184. *Thomas* construed *United States v. Place*, 462 U.S. 696 (1983) narrowly to cover only the site of the alleged search—a public airport—and concluded that “a practice that is not intrusive in a public airport may be intrusive when employed at a person’s home.” *Rabb*, 920 So.2d at 1184 (*Thomas*, 757 F.2d at 1366). The *Rabb* court also distinguished *Nelson v. State*, 867 So.2d 534 (Fla. Dist. Ct. App. 2004), in which no search was found when law enforcement led a narcotics detection canine through a public hotel corridor in order to perform sniffs at each door. See *Rabb*, 920 So.2d at 1185. Once again, the *Rabb* court emphasized the role of location, stating that a hotel room is “neither as private nor as sacrosanct” as a house and that the *Nelson* sniffs occurred in a hallway, a “public area” that warrants even less Fourth Amendment protection. *Id.* at 1186.

⁴⁶ *Rabb*, 920 So.2d at 1190 (quoting *Kyllo v. United States*, 533 U.S. 27, 37 (2001)).

⁴⁷ *Id.* at 1183 (discussing *Silverman v. United States*, 365 U.S. 505 (1961), and *Kyllo*); see also *infra* notes 58, 64 and accompanying text.

⁴⁸ *Rabb*, 920 So.2d at 183; see also *infra* note 112.

⁴⁹ *Rabb*, 920 So.2d at 1184.

⁵⁰ *Id.* at 1190.

⁵¹ *Id.* at 1189. The majority pointed to the lesser degree of Fourth Amendment scrutiny historically afforded vehicles on public roads. *Id.* (citing *California v. Carney*, 471 U.S. 386, 390–92 (1985)).

⁵² *Id.*; see *Payton v. New York*, 445 U.S. 573, 590 (1980) (stating that the “Fourth Amendment has drawn a firm line at the entrance to the house” and affirming the warrant requirement for in-home arrests). *But see id.* at 615 (White, J., dissenting) (“[T]he Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere.”).

on public roadways and luggage in airports are simply different [than a house] because the privacy to be invaded . . . is necessarily limited by the size of the vehicle or bag”⁵³

The dissent argued that context is irrelevant: a sniff is a non-search due to its extremely limited information-capture.⁵⁴ As such, to change the location of the sniff is not to destroy its *sui generis* character, so long as its locus is open to the public.⁵⁵ Furthermore, the dissent stressed that by remanding the case for further consideration in light of *Caballes*, the Supreme Court endorsed the idea that a sniff—provided it occurs on constitutionally unprotected ground—detects only the presence of contraband, “in which there is no legitimate privacy interest.”⁵⁶ The fact that the marijuana scent originated inside a home was therefore constitutionally irrelevant.⁵⁷ As long as the site from which the dog sniff occurred was not *itself* protected⁵⁸—and in this case the dissent argued that it was not⁵⁹—there could be no search. Finally, the dissent distinguished *Kyllo* on two grounds. First, a thermal imager is unlike a dog sniff because it can capture lawful, intimate details about its target.⁶⁰ Second, *Kyllo* sought to protect individual privacy from the “advance of technology.”⁶¹ Since law enforcement’s use of the dog sniff

⁵³ *Rabb*, 920 So.2d at 1190.

⁵⁴ *See id.* at 1197 (Gross, J., dissenting) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

⁵⁵ *See id.* (“There is no legal distinction between officers in an airport with the suspect’s luggage, as in *Place*, and the officers and dog at the front door of *Rabb*’s residence in this case.”) Wherever the sniff may occur, the result is always the same: *there is or there isn’t* contraband present.

⁵⁶ *Id.* at 1198.

⁵⁷ That the focus of the sniff is a home lacks significance because “[t]he higher level of justification required to satisfy the Fourth Amendment when it applies . . . is not to be confused with the very different issue of whether the amendment applies. . . . [The amendment does not protect against] non-searches and non-seizures, reasonable or unreasonable.” *Id.* at 1199 (quoting *Fitzgerald v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *aff’d*, 864 A.2d 1006 (Md. 2004)).

⁵⁸ *See id.* at 1193.

⁵⁹ *Id.* (utilizing *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986), as support for the proposition that “the space in front of the door enjoyed no constitutional protection”).

⁶⁰ *Id.* at 1201 (“[Thermal imagers] might disclose . . . at what hour each night the lady of the house takes her daily sauna and bath”) (quoting *Kyllo v. United States*, 533 U.S. 27, 38 (2001)).

⁶¹ *Id.* at 1201 (quoting *Kyllo*, 533 U.S. at 34); *Kyllo*, 533 U.S. at 36 n.3 (discussing “scientifically feasible” technology that would allow police to see through walls); *see also id.* at 40 (declaring that the Court “must take the long view” towards the Fourth Amendment as preparation for the onslaught of new, more intrusive

predates American colonialism,⁶² the Court could not have intended that sniff jurisprudence fall within the ambit of its holding.⁶³

The majority responded to the dissent by drawing a philosophical line in the sand between its own approach that Fourth Amendment search inquiries should depend upon "whether the place at which the search occurred was subject to a legitimate expectation of privacy," and the dissent's focus on "whether the item searched for was subject to a legitimate expectation of privacy."⁶⁴ It reasoned that adherence to the dissent's model, whereby search status is "solely a function of whether the item searched for is illegal," would theoretically allow police to "march[] a dog up to the doors of every house on a street hoping the dog sniffs drugs inside."⁶⁵

The disagreement in *Rabb* stems from an apparent Fourth Amendment inconsistency: *Place*'s *sui generis* principle,⁶⁶ and *Kyllo*'s so-called "protection-of-intimate-details" rule.⁶⁷ As one commentator put it: "Both cases involved the use of a sense-enhancing device that was not in general public use, that did not require a physical trespass into a constitutionally protected area, and that revealed only limited information. And yet the cases reached opposite results."⁶⁸ To reconcile the two would answer the question: is a dog sniff outside of a home a Fourth Amendment search?

This Comment submits that the correct answer is no: so long as the dog stands on constitutionally unprotected ground, its sniff is a non-search. As such, this Comment argues that both the holding and the rationale of *Rabb* are incorrect. Whether a

surveillance technology).

⁶² See *Rabb*, 920 So.2d at 1202 (Gross, J., dissenting) ("Bloodhounds have been chasing escaping prisoners and other fugitives through the swamps for hundreds of years . . ." (quoting *Fitzgerald v. State*, 837 A.2d 989, 1037 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004)).

⁶³ See *id.*

⁶⁴ *Id.* at 1190 (majority opinion).

⁶⁵ *Id.* "Such an 'ends justifies the means' approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment." *Id.* at 1190-91.

⁶⁶ See *supra* note 14 & accompanying text.

⁶⁷ See *supra* note 19. See generally *Rabb*, 920 So.2d at 1192 ("The United States Supreme Court has yet to address the intersection of the logic of *Caballes* and *Place* with the historical protection of the home and *Kyllo*.").

⁶⁸ Steinberg, *supra* note 24, at 1090.

dog sniff triggers Fourth Amendment protections is an issue generally unaffected by location. Part II.A of this Comment asserts that *Kyllo* was not meant to alter the Supreme Court's dog sniff jurisprudence, and therefore *Rabb's* reliance on that case is misguided. Part II.B suggests that *Kyllo* would have been decided in the same fashion had the focus of the disputed surveillance not been a home, which refutes *Rabb's* premise that *Kyllo* principally sought to strengthen the home's Fourth Amendment protection. Part II.C points out the absence of Supreme Court precedent indicating any intent to abandon the *sui generis* treatment of the dog sniff. Part II.D emphasizes that the Fourth Amendment does not protect wrongdoers from the government detecting evidence of their crimes, particularly when such detection is the product of a sense-enhancing instrument that captures exclusively unlawful information and that is employed from constitutionally unprotected ground. Finally, Part II.E discusses the Fourth Amendment significance of the physically non-invasive quality of a dog sniff.

II. AN ANALYSIS OF THE CASE

A. *The Court's Misinterpretation of Kyllo*

The *Rabb* court incorrectly read *Kyllo* as evidence that *Place* and its progeny concern location. It is undisputed that the home—one context in which government searches and seizures can occur—merits special treatment under Fourth Amendment jurisprudence,⁶⁹ and that this was *one* important factor in *Kyllo*.⁷⁰ Yet the preference afforded the home is not absolute,⁷¹ as proven

⁶⁹ The home has long received a higher level of Fourth Amendment protection than other locations. See *supra* note 52 and accompanying text. See generally *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At 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.”).

⁷⁰ See *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (positing that, within the home, all details are intimate and worthy of protection).

⁷¹ Under a literal reading of *Katz*, the Fourth Amendment should not afford the home greater protection than anywhere else. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”), *superseded on other grounds by statute*, Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2000), and Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (2000). These two ideas—the Fourth Amendment affords the home special treatment, and the Fourth Amendment protects people, not places—have been called “mutually inconsistent.” Sklansky, *supra* note 9, at 190.

by the numerous post-*Katz* decisions holding police surveillance directed at homes to be non-searches.⁷² This suggests that *Kyllo* did not mark an abrupt philosophical shift by the Court toward expanded Fourth Amendment protections for the home. Rather, its focus was less the Fourth Amendment security afforded any one place, and more a broader fear that *future* technology—akin to thermal imaging but significantly more invasive—would profoundly diminish individual privacy. In fact, Justice Scalia clearly identified this concern when he warned that “advancing technology” would soon allow the government to “discern all human activity in the home.”⁷³

⁷² See *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986). The Court reasoned that any citizen flying in the public airspace above the defendant’s home could have looked down and observed his marijuana plants. *Id.* Similarly, any dog-owning member of the public could have walked their German Shepherd to the front door of Rabb’s home and—if the canine was properly trained—detected the presence of marijuana inside. Granted, *Ciraolo* (as well as *Kyllo*) considered the extent to which the disputed technology was “in general public use.” See *Kyllo*, 533 U.S. at 39 n.6, 40; *Ciraolo*, 476 U.S. at 215 (“In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.”). The analogy is therefore simply meant to stress the availability of both drug-detection canines and airplanes to the public. See *California v. Greenwood*, 486 U.S. 35, 37–38, 40 (1988) (holding that garbage generated *inside a home* and disposed of at a curb was not protected by the Fourth Amendment); *Oliver v. United States*, 466 U.S. 170, 178–180 (1984) (reaffirming the “open fields doctrine” whereby private land *adjacent to a home* does not merit Fourth Amendment scrutiny); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (finding that the government’s use of a pen register to determine numbers dialed *on a private home phone* did not comprise a Fourth Amendment search), *superseded on other grounds by statute*, Electronic Communications Privacy Act of 1988, 18 U.S.C. §§ 2510, 3121 (2000).

⁷³ *Kyllo*, 533 U.S. at 35–36; see also *id.* at 36 n.3 (discussing surveillance technology permitting law enforcement officers to see through walls); *id.* at 40 (proclaiming that the Court “must take the long view”); *id.* at 51 (Stevens, J., dissenting) (criticizing the majority for seeking to “craft an all-encompassing rule for the future”); *United States v. Cusumano*, 83 F.3d 1247, 1261 (10th Cir. 1996) (McKay, J., dissenting) (expressing concern that the government’s use of technology and the “march of science” threaten privacy). The dissent in *Cusumano*—which opposed the court’s decision to treat thermal imaging of a home as a non-search—argued many of the same points that Justice Scalia later adopted in *Kyllo*. Compare, e.g., *Kyllo*, 533 U.S. at 34 with *Cusumano*, 83 F.3d at 1258–61 (applying *Katz* test and reaching same result); 533 U.S. at 35–36 with 83 F.3d at 1259–60 (stressing that advancing technology threatens privacy); 533 U.S. at 37–38 with 83 F.3d at 1260 (reasoning that all details inside the home are intimate and worthy of Fourth Amendment protection). It is therefore informative to note that the *Cusumano* dissent specifically distinguished a sniff from an imager, reasoning that the latter “lacks the [sniff’s] precision” because “it empowers the government to detect a vast array of innocent conduct.” *Id.* at 1264–65. See generally *State v. Rabb*, 920 So.2d

The *Rabb* court, however, misunderstood the nature of Justice Scalia's fear, as evidenced by its comment that *Kyllo* was "concerned with the use of *advanced* technology by law enforcement."⁷⁴ The court correctly pointed out that a dog sniff can be viewed as a type of advanced technology, given that the snout, in comparison to the human nose, is a "far superior[] sensory instrument."⁷⁵ Yet this was never in dispute. The issue is not whether a dog sniff constitutes advanced technology in some comparative sense, but whether, like a thermal imager, it comprises a kind of "*advancing* technology."⁷⁶ The answer to this latter question is a resounding no.⁷⁷ Use of the canine sense of smell for hunting and law enforcement is a practice that antedates even American history.⁷⁸ The *Kyllo* majority was surely aware of this fact, which probably explains its failure to mention *Place* or dog sniffs even once.⁷⁹ More likely than not, the Court presumed—given that *Kyllo* involved sophisticated thermal imaging equipment,⁸⁰ and given its own stated concern for more invasive future surveillance technology⁸¹—that lower courts would recognize its holding as wholly unrelated to its dog sniff jurisprudence.⁸²

B. *The Structure of Kyllo*

The same result would have been reached in *Kyllo* even if the target of the thermal imager was *not* a private residence,⁸³

1175, 1201 (Gross, J., dissenting) (Fla. Dist. Ct. App. 2006) ("The thermal imaging device was not limited to discovering the presence or absence of contraband drugs.").

⁷⁴ *Rabb*, 920 So.2d at 1184 (emphasis added).

⁷⁵ *Id.* (quoting *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985)).

⁷⁶ *See id.* at 1183 (citing *Kyllo*, 533 U.S. at 35–36).

⁷⁷ *See id.* at 1202 (Gross, J., dissenting) (quoting *Fitzgerald v. State*, 837 A.2d 989, 1037 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004) for its discussion of the use of dog sniffs in law enforcement dating back to the twelfth century).

⁷⁸ *See Fitzgerald*, 837 A.2d at 1037 ("[The dog sniff] is hardly a new or unfamiliar investigative modality.").

⁷⁹ *See id.* at 1036.

⁸⁰ Thermal imagers are technologically sophisticated in comparison to dog sniffs.

⁸¹ *See supra* note 73 and accompanying text.

⁸² *See Kyllo v. United States*, 533 U.S. 27, 47–48 (2001) (Stevens, J., dissenting) (warning that the majority's logic was potentially applicable to "mechanical substitutes for dogs").

⁸³ *See Amanda S. Froh, Note, Rethinking Canine Sniffs: The Impact of Kyllo v. United States*, 26 SEATTLE U. L. REV. 337, 349–50 (2002) (supplying reasons why *Kyllo's* result would be the same even if the thermal device was not pointed at a

which disproves *Rabb's* claim that creation of a Fourth Amendment search hinges on the government "endeavor[ing] at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house."⁸⁴ Post-*Katz* caselaw considers four principal factors to decide whether a privacy expectation from government interference is objectively reasonable.⁸⁵ As stated, a positive finding in this regard converts the interference into a Fourth Amendment search.⁸⁶ The four-part inquiry asks whether: (1) the government surveillance technique is sense-enhancing;⁸⁷ (2) the area infiltrated is traditionally associated with personal privacy; (3) the technique is widely available to the public; and (4) the information could not be captured without physical trespass if not for the assistance of the surveillance device.⁸⁸

Although *Kyllo* did not explicitly adopt this four-part test, it underpins the decision's reasoning and holding.⁸⁹ More importantly, application of thermal imaging to each prong yields a result consistent with the existence of a Fourth Amendment search: thermal imaging allows recognition of heat normally invisible to the human eye;⁹⁰ the target of the scan was a private residence;⁹¹ the technology was not in general public use;⁹² and without the thermal imager the police could not have discerned the heat level generated by the home's interior without unlawful

home).

⁸⁴ *State v. Rabb*, 920 So.2d 1175, 1190 (Fla. Dist. Ct. App. 2006).

⁸⁵ *See Froh, supra* note 83, at 342–43.

⁸⁶ Although this is the general rule, there are various warrant exceptions. *See, e.g., Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (finding that the potential destruction of evidence created exigent circumstances that allowed for the circumvention of the warrant requirement), *superseded on other grounds by statute*, 625 ILL. COMP. STAT. ANN. 5/11-501.2, ILL. VEH. CODE § 11-501.2(c)(2) (West 2002).

⁸⁷ "A sense-enhanced search involves 'any police examination of a person or his property through the use of some method that provides information not available to unaided sensory perceptions.'" Steinberg, *supra* note 24, at 1087 (quoting David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 563 n.1 (1990)).

⁸⁸ *See Froh, supra* note 83, at 342–43.

⁸⁹ *See id.* at 349 n.103 ("[T]his test is not laid out explicitly in the case, but rather is gleaned from reading the decision as a whole.").

⁹⁰ *See Kyllo v. United States*, 533 U.S. 27, 29 (2001) (observing that thermal imagers detect radiation "not visible to the naked eye").

⁹¹ *See id.*

⁹² *See id.* at 39 n.6 ("[W]e can quite confidently say that thermal imaging is not 'routine' . . .").

entrance.⁹³ That the target of the surveillance was a home therefore constituted only one of four factors, *each of which* supported the Court's holding that use of thermal imaging technology triggered a Fourth Amendment event.⁹⁴ It is therefore likely that the *Kyllo* Court would have reached the same result even if the thermal imager had *not* been directed at a home.⁹⁵ Consequently, *Rabb's* reliance on *Kyllo* for the proposition that context underlies the Fourth Amendment principle of limited disclosure—i.e., that *Place* and its progeny are inapplicable in the context of the home—is misplaced.

C. *The Sui Generis Model and Supreme Court Precedent*

Aside from *Rabb's* misapplication of *Kyllo*, there is no additional Supreme Court caselaw that supports a departure from the treatment of dog sniffs as *sui generis*. Some jurists and scholars criticize the *sui generis* idea as unsound in light of empirical evidence suggesting that canine sniffs generate high rates of “false positives” when used in law enforcement situations.⁹⁶ The *Rabb* court neither adopted nor even addressed this criticism. The fact remains that literature positing the inaccuracy of dog sniffs has existed for years,⁹⁷ and yet the Supreme Court has chosen time and again to retain the sniff's non-search status.⁹⁸

⁹³ See *id.* at 35 n.2 (“[On the night of the scan] no outside observer could have discerned the relative heat of *Kyllo's* home without thermal imaging.”).

⁹⁴ Furthermore, in *Kyllo* there was no physical invasion, the presence of which previously justified the Court's heightened standard of Fourth Amendment protection for the home. See *Froh*, *supra* note 83, at 350.

⁹⁵ See, e.g., *Payton v. New York*, 445 U.S. 573, 615 (1980) (White, J., dissenting) (“[T]he Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere.”).

⁹⁶ See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting) (“The infallible dog, however, is a creature of legal fiction.”).

⁹⁷ At a minimum, critics can point to cases as far back as 1979 in support of this claim of inaccuracy. See *Doe v. Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979) (discussing the strip-search of a junior high school student upon a canine alert to the presence of drugs in which narcotics were not found and the sniffer was later discovered to have been playing with a pet dog in heat on the morning prior to the incident).

⁹⁸ One year prior to *Kyllo*, the Court briefly reaffirmed the *sui generis* model in *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (holding that a dog sniff around the exterior of a car did not convert a Fourth Amendment seizure into a search). Four years after *Kyllo*, the Court again upheld this dual-prong rationale—limited disclosure and non-intrusiveness—for dog sniffs directed at automobiles. See

Moreover, those who argue that recognition of the sniff's fallibility "ends the justification claimed in *Place* for treating the sniff as *sui generis*"⁹⁹ overlook an important idea expounded upon in *United States v. Jacobsen*: "[T]he likelihood that [dog sniffs or drug tests] will actually compromise any legitimate interest in privacy seems *much too remote* to characterize the testing as a search subject to the Fourth Amendment."¹⁰⁰ The Court thus conceded that sniffs sometimes generate false positives and, as a result, expose otherwise constitutionally protected items to public view. A marginal error rate is presumably not thought to justify the burden on law enforcement¹⁰¹—particularly for enforcement of drug laws—of even a limited probable cause requirement for dog sniffs.¹⁰²

D. *The Divining Rod Theory and the Launching Pad Idea*

Rabb ignores that a privacy expectation in the secretion¹⁰³ of evidence of a crime is per se unreasonable,¹⁰⁴ and that, standing alone, it can never merit Fourth Amendment protection. Arnold Loewy discussed this idea in *The Fourth Amendment as a Device for Protecting the Innocent*.¹⁰⁵ He began with the premise that there is no Fourth Amendment right to be secure from the government finding evidence of a crime because no privacy interest exists in the possession of, or the participation in, per se unlawful items or activities.¹⁰⁶ Loewy posited that if science could invent an "evidence-detecting divining rod" that, for example, "accurately detected weapons and did not disrupt the

Caballes, 543 U.S. at 408 (finding that a dog sniff outside a car does not impinge constitutionally protected privacy interests); *supra* note 41 (examining *Caballes*).

⁹⁹ *Caballes*, 543 U.S. at 412 (Souter, J., dissenting).

¹⁰⁰ *United States v. Jacobsen*, 466 U.S. 109, 124 (1984) (emphasis added).

¹⁰¹ See Loewy, *supra* note 12, at 1234 ("The importance of solving crime cannot be gainsaid. It is one of the most critical functions that a government can perform.").

¹⁰² Especially given that most erroneous canine alerts result from "inadequate handler training." Bird, *supra* note 5, at 423–25 (1997) (emphasis added) (addressing cases such as *Renfrow* in which handlers were unpaid volunteers); see *supra* note 97 (discussing *Renfrow*).

¹⁰³ See Loewy, *supra* note 12, at 1229 ("[T]here is no [F]ourth [A]mendment right to secrete [evidence of a crime;] . . . the right of the people to be secure in their persons, houses, papers, and effects does not include the right to be secure from the government's finding evidence of a crime.").

¹⁰⁴ See generally *supra* note 41.

¹⁰⁵ Loewy, *supra* note 12, at 1245–46.

¹⁰⁶ See *id.* (protecting marijuana scent from police detection is hardly a "powerful" Fourth Amendment claim).

normal movement of people, there could be no [F]ourth [A]mendment objection to its use.”¹⁰⁷ This “divining rod theory” is simply an illustrative restatement of the *sui generis* concept born in *Place*.¹⁰⁸ Not only is a sniff (of property) extremely unintrusive,¹⁰⁹ but the inquiry that it implicates is binary¹¹⁰—a simple “contraband ‘yea’ or ‘nay.’”¹¹¹ Thus, if one assumes that contraband possession is unlawful wherever it occurs,¹¹² narrow information-capture prevents the sniff from infringing any legitimate privacy interest.¹¹³

¹⁰⁷ *Id.* at 1244–47. Interestingly, Loewy theorized that a divining rod would separate the innocent from the guilty. *See id.* at 1246. Its use would thereby free innocent persons from the government’s “unwarranted suspicion” that they participated in criminal activity. *Id.* at 1247. In response to the claim that Americans have a constitutional right to be free from unwarranted governmental suspicion anyway, Loewy argued that if such were true, there would exist a “catch-22 in which police could not search because they did not have probable cause [or reasonable suspicion] and could not investigate in order to establish probable cause [or reasonable suspicion] because suspicion would thereby be cast on the individual unjustly.” *Id.* at 1247 n.85. The absence of such a constitutional right reinforces the idea that a dog sniff—to the extent it operates like a divining rod—actually has a salutary effect by liberating the sniffer from law enforcement’s otherwise “unjustifiable suspicion.” *Id.* at 1247–48. One objection to the divining rod theory is that certain criminal laws—such as those for marijuana possession—exist in order to satisfy society’s moral obligations, yet remain largely “unenforced because we want to continue our conduct,” i.e., using marijuana. *Id.* at 1248 n.86 (quoting Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 14 (1932)). To that, Loewy counters: “If the employment of crime-detecting devices such as marijuana-sniffing dogs causes us to rethink that which we outlaw, it is an argument in favor of, and not against, such a use.” *Id.*

¹⁰⁸ *See United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any *legitimate* interest in privacy.”) (emphasis added).

¹⁰⁹ *But see supra* note 12 (commenting that a sniff directed at one’s person instead of property may indeed be intrusive).

¹¹⁰ *Fitzgerald v. Maryland*, 837 A.2d 989, 1031 (Md. Ct. Spec. App. 2003) (citing *United States v. Colyer*, 878 F.2d 469, 474 (D.C. Cir. 1989)).

¹¹¹ *Id.* at 1030.

¹¹² Surprisingly, the *Rabb* court was unwilling to make this very logical assumption, instead reasoning that because the marijuana scent originated inside the defendant’s home, it was an “intimate detail” of that house, no less so than the ambient temperature inside *Kyllo*’s house. *State v. Rabb*, 920 So.2d 1175, 1183 (Fla. Dist. Ct. App. 2006). One wonders whether the court would have reached this conclusion had the scent emanating from *Rabb*’s home been that of a chemical weapon, such as sarin or cyanide.

¹¹³ *Cf. Fitzgerald*, 837 A.2d at 1030 (“The rationale of *Place* and of *Jacobsen* . . . had absolutely nothing to do with the locus either 1) of where the dog sniffing took place or 2) of where the subjective expectation of privacy was being entertained.”).

Some object that the limited information-capture rationale violates a basic Fourth Amendment principle: information yielded from an unlawful search cannot then inform the justifiability of that same search.¹¹⁴ For example, the phone conversation at issue in *Katz* was held constitutionally protected, and yet application of *Place*'s limited disclosure principle to the facts of that case—where the defendant's words were themselves per se unlawful¹¹⁵—would seem to produce an opposite result. However, *Caballes*' reasoning—a thermal imager is unlike a dog sniff because the former can reveal innocent details about its target¹¹⁶—helps invalidate this argument. This dichotomy—i.e., surveillance that can only detect unlawful information, and that which can capture lawful, intimate details—resolves the contradiction implicit in the idea that while a speaker never has a legitimate privacy interest in criminal speech,¹¹⁷ government wiretapping of that same unlawful speech is nevertheless a Fourth Amendment search. This is because just as a thermal imager senses all heat lost,¹¹⁸ a wiretap intercepts all language

¹¹⁴ Froh, *supra* note 83, at 356 & n.144 (reading *United States v. Jacobsen*, 466 U.S. 109 (1984) as holding that “persons engaging in private illegal activity have relinquished their expectation of privacy with respect to the illegal product . . . [because the] result of a search cannot play a part in determining whether the search was justified” (citing *Byars v. United States*, 273 U.S. 28, 29 (1927))); see also Gutterman, *supra* note 13, at 709 & n.341 (“A search prosecuted in violation of the Constitution is not made lawful by what it brings to light.” (quoting *Byars v. United States*, 273 U.S. 28, 29 (1927))).

¹¹⁵ See Hope Walker Hall, Comment, *Sniffing Out the Fourth Amendment: United States v. Place—Dog Sniffs—Ten Years Later*, 46 ME. L. REV. 151, 182 (1994) (“*Katz* [had] a legitimate expectation of privacy in his telephone conversation, regardless of the *illegality* of the *content* of that conversation. *Place*, on the other hand, was afforded no legitimate expectation of privacy . . . Here is a classic case of . . . ‘doublethink.’” (citing John M. Burkoff, *When is a Search Not a “Search?” Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515 (1984))).

¹¹⁶ See *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (quoting *Kyllo v. United States*, 533 U.S. 27, 38 (2001), for the idea that an imager can detect what time of day the “lady of the house” takes her daily bath). *Kyllo* stood for the proposition that inside the home “all details are intimate details,” no matter how trivial they might seem. *Kyllo*, 533 U.S. at 37 (emphasis in original). It is not up to judges, nor police, to distinguish between what is, and what is not, an intimate detail. See *id.* at 38–39.

¹¹⁷ See *infra* notes 119–21 and accompanying text. See generally Loewy, *supra* note 12, at 1244–46 (arguing that the Fourth Amendment is only implicated when the search can detect not just evidence of a crime, but also intimate, innocent details).

¹¹⁸ The detection of heat loss permits discernment of “distinguishable heat signatures inside the structure,” in that it is “indicative of the amount of energy expended by the occupants of [the] building.” *United States v. Cusumano*, 83 F.3d 1247, 1257 & n.13 (10th Cir. 1996).

spoken—both lawful¹¹⁹ and unlawful.¹²⁰ Viewed in this light, what protected Katz's conversation from government surveillance was the *prospect* of innocent speech.¹²¹

A dog sniff, on the other hand, is distinguishable from both a wiretap and a thermal imager in its capacity to reveal only evidence of a crime.¹²² Context would therefore inform its search/non-search status in one situation only: when the site of the sniff—the so-called “launching pad”¹²³—is *itself* constitutionally protected.¹²⁴ The issue is whether the launching pad is a “place covered by the Fourth Amendment,”¹²⁵ and the determinative factor¹²⁶—be it inside an airport terminal, as in *Place*,¹²⁷ or outside a private home, as in *Rabb*¹²⁸—is the legality

¹¹⁹ “I will pay you \$25 to pick up my wife at the theater.”

¹²⁰ “I will pay you \$25,000 to kill my wife at the theater.”

¹²¹ This reasoning is consistent with the divining rod theory and the idea that there is no right to secrete evidence of a crime. See Loewy, *supra* note 12, at 1229. If the government somehow invented a divining rod that could monitor all human speech and recognize only those statements evincing evidence of a crime—*without* processing and understanding non-criminal speech—there could be no Fourth Amendment objection to its use. See *id.* at 1246. The device would essentially function like a dog sniff for human speech. This idea, however, should at once seem counterintuitive. Words are not understood in isolation; we interpret them based upon the context and structure of the sentences in which they appear. This is why human speech is so fundamentally unlike a sniff in its capacity to reveal evidence of a crime. On the one hand, the smell of contraband triggers a distinct and unmistakable reaction in the sniffer, as if a pattern of the target substance is imprinted in the mind. On the other hand, speech requires interpretation of words based upon their context and structure, without which words are meaningless. Accordingly, the Fourth Amendment must protect *all* speech—even that which is *per se* unlawful—because it is not the government's job to distinguish between “intimate” and “non-intimate” speech. Cf. *Kyllo*, 533 U.S. at 38–39.

¹²² See *supra* note 13.

¹²³ *Fitzgerald v. State*, 837 A.2d 989, 1024–26 (Md. Ct. Spec. App. 2003), *aff'd*, 864 A.2d 1006 (Md. 2004).

¹²⁴ See *supra* notes 55–57 and accompanying text.

¹²⁵ *Fitzgerald*, 837 A.2d at 1026 (reasoning that so long as the launching pad is constitutionally unprotected “the police could have been on the most baseless or random of fishing expeditions and it would be beyond [the court's] area of concern”).

¹²⁶

The higher level of justification required to satisfy the Fourth Amendment when it applies . . . is not to be confused with the very different issue of whether the amendment applies. Even the enhanced protection of the home is still limited to being a protection against “unreasonable searches and seizures.” It is not a protection against non-searches and non-seizures, reasonable or unreasonable.

Id. at 1030.

¹²⁷ See *United States v. Place*, 462 U.S. 696, 698 (1983).

¹²⁸ See *supra* note 33–34 and accompanying text.

of the police presence at the site of the sniff.¹²⁹ And as the *Rabb* dissent pointed out, the drug-detection dog in that case clearly stood on constitutionally unprotected ground.¹³⁰

E. "Passive" and "Active" Technology

A sniff is a form of "passive," as opposed to "active," surveillance/investigative technology.¹³¹ A device that uses active technology generates its own feedback in order to provide

¹²⁹ See *Fitzgerald*, 837 A.2d at 1029 ("As long as the observing person or the sniffing canine are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence, a search within the meaning of the Fourth Amendment has not occurred." (quoting *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998))). See generally *Kyllo v. United States*, 533 U.S. 27, 42 (2001) (explaining that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" and citing various caselaw); *State v. Rabb*, 920 So.2d 1175, 1193 (Fla. Dist. Ct. App. 2006) (Gross, J., dissenting) ("The Fourth Amendment does not necessarily protect areas of a home which are 'open and exposed to public view.'" (quoting *State v. Duhart*, 810 So.2d 972, 973 (Fla. Dist. Ct. App. 2002))). One could argue that the launching pad idea embodies a return to pre-*Katz* jurisprudence, in that it relies on the property-based notion of trespass. See *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."); Sklansky, *supra* note 9, at 155 (commenting that *Katz* embodied a "new, ahistorical approach" to the Fourth Amendment in its departure from the antiquated focus on common law trespass); *supra* note 16 (discussing the significance of *Katz*). At least one scholar contends, however, that the focus on property rights under the Fourth Amendment has remained practically unabated since *Katz*. See Kerr, *supra* note 16, at 820. Kerr posits that the post-*Katz* Supreme Court has continued to adhere to the property-based common law in deciding Fourth Amendment issues. *Id.* ("*Katz* did not revolutionize Fourth Amendment law, but merely reemphasized the loose property-based approach announced in [an earlier case]."). For example, an expectation of privacy is normally found objectively "reasonable" under the second prong of the *Katz* test only when it is supported by a real property-based right to exclude. See *id.* at 809–10. The author also interpreted the facts of *Katz* itself as consistent with the idea that in paying for a phone call, *Katz* leased a temporary privacy right within the phone booth. See *id.* at 822–23. This notion of "'momentary' property rights," *id.* at 823, helps explain such cases as *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (involving police flight over private land), in which an arguably intrusive governmental surveillance technique—yet one that infringed no traditional property right—was held a non-search under the Fourth Amendment. Cf. *Dow Chem. Co. v. United States*, 476 U.S. 227, 228 (concluding that aerial *photography* of an industrial complex was not a Fourth Amendment search).

¹³⁰ *Rabb*, 920 So.2d at 1193 (Gross, J., dissenting); see also *supra* notes 123–25. See generally *Rabb*, 920 So.2d at 1194 (Gross, J., dissenting) ("Here, the front door of the residence was on a direct path from the public street, about twenty or thirty feet in. As the dog and the detectives stood at the front door, prior to inhaling, there was no constitutional violation.").

¹³¹ See generally Vernick et al., *supra* note 11.

sensory-enhancement.¹³² In contrast, one that relies on passive technology detects energy already emitted by its target.¹³³ Passive technology is therefore physically non-invasive¹³⁴ and, as a result, is less likely to implicate Fourth Amendment privacy interests. This is especially true when a passive device is used on a living thing, in that to find a Fourth Amendment search, a court would “have to rely on a less tangible conception of bodily integrity”—i.e., a “metaphysical privacy interest” of sorts.¹³⁵

It is not submitted that the use of passive technology is categorically exempt from Fourth Amendment scrutiny. *Kyllo* itself disproves this proposition, since the Court even found a search when federal agents aimed a thermal imager, a prototypical passive device,¹³⁶ at an *inanimate* object.¹³⁷ Yet recall that both *Kyllo* and *Caballes* stressed the imager’s ability to detect innocent, intimate details.¹³⁸ This suggests that only after courts first distinguish the sniff on the basis of its exceptionally narrow information-capture¹³⁹ does the extent of its invasiveness, or lack thereof, become a factor in deciding whether a search exists. Under this view, the passive/active dichotomy played no role in *Kyllo* because the Court focused exclusively on what it considered the imager’s most glaring constitutional flaw: its ability to expose legitimately private information to public

¹³² *Id.* at 569.

¹³³ *Id.*

¹³⁴ See *id.* at 571 (“[Active devices] emit[] energy directed at the target . . . and therefore pose[] health or other risks . . . [while passive technology] pose[s] no greater health threat than other electronic devices.”).

¹³⁵ *Id.* (noting that scanners based on passive technology “are not physically intrusive, and that courts have not recognized a metaphysical privacy interest with respect to [many] electronic devices used by police”); cf. *Kyllo v. United States*, 533 U.S. 27, 43–44 (2001) (Stevens, J., dissenting).

[T]he notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment . . . is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building.

Id.

¹³⁶ See *Kyllo*, 533 U.S. at 29–30 (“Thermal imagers detect infrared radiation . . . operat[ing] somewhat like a video camera showing heat images.”).

¹³⁷ *Id.* at 40 (holding that use of a thermal imager is a Fourth Amendment “search”).

¹³⁸ See *supra* notes 41, 116 and accompanying text. See generally *Kyllo*, 533 U.S. at 37–38 (stating that details inside the home are intimate).

¹³⁹ The heat escaping from *Kyllo*’s home could have been caused by virtually anything capable of generating heat.

view.¹⁴⁰ Yet upon inquiring into the constitutional status of a surveillance/investigative technique that already meets the limited information-capture standard—such as a dog sniff when performed outside of a home—the passive/active distinction would be of renewed importance, because a sniff's reliance on passive technology¹⁴¹ defeats the claim that a drug-detection dog seeks to, and in fact succeeds at, “cross[ing] the ‘firm line’ of Fourth Amendment protection at the door of [a] house.”¹⁴² In fact, as Judge Gross wrote in his *Rabb* dissent, the exact opposite was true: “[I]t was the constitutionally unprotected odor of contraband that crossed the threshold of the home to the dog’s nose”¹⁴³

CONCLUSION

State v. Rabb was decided incorrectly: a dog sniff is a non-search so long as it is performed from a constitutionally unprotected launching pad. First, the court's focus on *Kyllo* is misplaced. *Kyllo* addressed the threat of futuristic, ultra-invasive technology, a category inapplicable to the sniff. Moreover, it misread *Kyllo* as signifying that the target of government surveillance informs its search/non-search status. Context was only one among many factors that contributed to the *Kyllo* holding, and the Court would have reached the same result had the focus of the scan not been a house. Second, there is no Supreme Court precedent that suggests an intent to abandon the *sui generis* model, flawed as it may be. This is especially true when the focus of a sniff is an inanimate object like a house. Third, provided that the sniff is performed from constitutionally unprotected ground, it infringes no legitimate privacy interest. This is consistent with the idea that the Fourth Amendment does not validate privacy expectations in per se unlawful property or activity. Finally, because the sniff comprises a type of passive technology, the argument that its use somehow breaches the “firm line at the entrance to the house” is patently untrue. The

¹⁴⁰ See *supra* note 41 (discussing the difference between “legitimacy” and “reasonableness”).

¹⁴¹ Recall that passive devices interpret energy already emitted by their targets. See *supra* notes 133–35 and accompanying text.

¹⁴² *State v. Rabb*, 920 So.2d 1175, 1184 (Fla. Dist. Ct. App. 2006); see also *supra* note 73 & accompanying text.

¹⁴³ *Rabb*, 920 So.2d at 1199 (Gross, J., dissenting).

dog sniff is a unique and vital law enforcement technique, and its Fourth Amendment character is generally unaffected by the location in which it occurs.

