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The Need For Judicial Restriction on the Use Of Drug Detecting Canines

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INTRODUCTION

THE USE OF drug sniffing dogs to detect smuggled contraband began in September 1970 as a means of interdicting the flow of illegal drugs "through border ports and at major gateways" of this country.[1] Since then, the use of dogs to detect contraband has been expanded to include such diverse circumstances as schools,[2] domestic airflights,[3] and storage facilities.[4] The sensitive noses of these dogs have been directed at individuals,[5] luggage,[6] packages,[7] and vehicles.[8] This activity has raised constitutional issues implicating the fourth amendment; the resolution of which has divided courts and commentators.

The purpose of this comment is to examine these issues, outline the conflicting positions, and attempt to forecast the direction the courts may take in their effort to bring some harmony to this unsettled (and to some, unsettling) area of law. Few people would attempt to deny law enforcement officials the use of this highly effective and relatively unintrusive law enforcement tool. Yet there are those who fear that the unsettled questions concerning limits on the use of this tool may lead to serious abuse,[9] and who raise the specter of unlimited government intrusion should this type of investigatory activity fall through the

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[1]Comment, *United States v. Solis: Have the Government's Supersniffers Come Down With A Case of Constitutional Nasal Congestion?*, 13 SAN. DIEGO L. REV. 410 (1976).

[2]Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982) *cert. denied*, ____ U.S. ____, 103 S. Ct. 3536 (1983); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd per curiam*, 631 F.2d 91 (7th Cir. 1980) *cert. denied*, 451 U.S. 1012 (1981); Jones V. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

[3]United States v. Place, 660 F.2d 44 (2d Cir. 1981) *aff'd*, ____ U.S. ____, 103 S. Ct. 2637 (1983); United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962 (1981); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975) *cert. denied*, 424 U.S. 918 (1976); People v. Price, 54 N.Y. 2d 557, 446 N.Y.S.2d 906, 431 N.E.2d 267 (1981).

[4]United States v. Venema, 563 F.2d 1003 (10th Cir. 1977).

[5]Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd per curiam*, 631 F.2d 91 (7th Cir. 1980), *cert. d enied*, 451 U.S. 1022 (1981).

[6]United States v. Place, 660 F.2d 44 (2d Cir. 1981), *aff'd* ____ U.S. ____, 103 S. Ct. 2637 (1983); United States v. Saperstein, 723 F.2d 1221 (6th Cir. 1983); United States v. Sentovich, 677 F.2d 834 (11th Cir. 1982); United States v. West, No. 80-1727 (1st Cir. 1983) (available on LEXIS, Genfed library, Cir. file).

[7]United States v. Robinson, 707 F.2d 811 (4th Cir. 1983); State v. Wolohan, 23 Wash. App. 813, 598 P.2d 421 (1979).

[8]United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976); People v. Matthews, 112 Cal. App.3d 11, 169 Cal. Rptr. 263 (1980).

[9]State v. Wolohan, 23 Wash. App. 813, 822, 598 P.2d 421, 426 (1979).

constitutional cracks and therefore be deemed exempt from judicial control.[10]

I. BACKGROUND

Many of the major issues and areas of conflict in this area were introduced and defined in cases that arose during the mid-1970's and early 1980's. A brief overview of these cases will provide a background against which later developments can be measured. The pressure on the police, and the resulting pressure on the courts, to find effective means of combatting the apparently uncontrolled upsurge in the distribution and use of drugs during this period should be kept in mind while reviewing these cases and some of the highly artificial doctrine that resulted.

In *United States v. Fulero,*[11] decided in 1974, a Greyhound Bus Lines employee reported the suspicious activity of "three hippies" who had brought two footlockers to the Yuma terminal for shipment to Washington. The investigating sergeant secured the services of "Chief," a drug-detecting dog, who had been working regularly for two years and who was deemed to be "consistently reliable." Chief alerted to the footlockers, and on the basis of this reaction a warrant was obtained to open and search the lockers. Marijuana was found, and a controlled delivery was made which resulted in the arrest and conviction of the defendant. In affirming that conviction the district court stated:

> The appellant contends that Chief's sniffing of the air around the footlockers was an unconstitutional intrusion into the lockers. We think the argument is frivolous. The appellant also contends that there was no probable cause for the issuance of the search warrant. We think there was ample probable cause and that the conduct of the police was a model of intelligent and responsible procedure.[12]

By characterizing the sniff as focusing on the "air-space" around the footlocker, the court removed the defendant's argument for a reasonable expectation of privacy in the footlocker, which is necessary under *Katz v. United States*[13] to invoke the fourth amendment protection against unreasonable searches and seizures. The *Katz* requirement became a favorite method of later courts in finding that the sniff itself did not constitute a search.[14]

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[10] In the final analysis, whether a governmental intrusion in to a private area constitutes a reasonable search under the Fourth Amendment depends on the kind and degree of intrusion which a free society is willing to tolerate. . . . These [electronic monitoring devices, high power telescopes, and the keen olfactory powers of specially trained dogs] and other extraordinary information gathering devices gravely threaten each person's ability to maintain any semblance of privacy.
United States v. Solis, 393 F. Supp. 325, 328 (C.D. Cal. 1975), *rev'd* 536 F.2d 880 (9th Cir. 1976).

[11] 498 F.2d 748 (D.C. Cir. 1974) (per curiam).

[12] *Id.* at 749.

[13] 389 U.S. 347 (1967).

[14] United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981), *cert. denied,* 452 U.S. 962 (1981); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981); People v. Mayberry, 117 Cal. App. 3d 360, 172 Cal. Rptr. 629 (1981), *superceded,* 31 Cal. 3d 335, 182 Cal. Rptr. 617, 644 P.2d 810 (1982); United States v. Lewis, 708 F.2d 1078 (6th Cir. 1983).

The Court in *United States v. Solis*[15] found that the use of dogs to sniff a semi-trailer constituted a search. Since this search was based upon a tip from an informant of unknown reliability and the marijuana was seized pursuant to a warrant issued *after* the dog sniff had detected the presence of drugs, the evidence was suppressed as being the "fruit" of a prior illegal search.[16] Since the dogs, with a sense of smell eight times more powerful than that of man and a claimed reliability of 100% were likened to the electronic bug in *Katz,* the use of the dogs was held to be an illegal search in violation of the warrant requirement. In focusing on the defendant's reasonable expectation of privacy in the *contents* of his trailer, the district court in it's *Katz* analysis found that the intrusion was indeed a search.[17]

The above decision was overruled by the circuit court a year later[18] in an opinion that built on *Fulero* and an intervening case, *United States v. Bronstein.*[19] In *Bronstein,* the court found that the defendant's diminished expectation of privacy in his suitcase[20] removed the case from the parameters of *Katz,* thus the use of dogs to sniff the luggage did not constitute a search. In a case of judicial overkill, the court also spawned the subsequently much criticized[21] "plain smell doctrine." Under this doctrine, the use of a dog is analogized not to the proscribed bug in *Katz,* but to such permissible sense-enhancing devices

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[15] 393 F. Supp. 325 (C.D. Cal. 1975).

[16] *Id.* at 326.

[17] *Id.* at 328.

[18] United States v. Solis, 536 F.2d 880 (9th Cir. 1976).

[19] 521 F.2d 459 (2d Cir. 1975).

[20] The canine surveillance conducted here occurred in a public airline terminal and the subject was baggage shipped on a public air flight. There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the sky-jacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta.

United States v. Bronstein, 521 F.2d 459, 462 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976).

[21] I am unable to agree with the majority that use of a marijuana-sniffing dog to ascertain the contents of a private bag amounts to some sort of "plain smell," comparable to a "plain view," rather than a search . . . .

There is no legally significant difference between the use of an x-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife, which we have held to be a search, United States v. Albarado, [cite omitted] and the use of a dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entering into it . . . The fact that the canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. The important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.

Id. at 464.

"In practical effect there is no difference between the emanations of odor sniffed by the dog and the sound vibrations sensed by such devices [magnetometer, spike mike]. Both originate from inside a private area and travel beyond its perimeters." People v. Price, 54 N.Y.2d 557, 565, 446 N.Y.S.2d 906, 910, 431 N.E.2d 267, 271 (1981).

Unlike the electronic "beeper" in *Knotts,* however, a dog does more than merely allow police to do more efficiently what they could do using only their own senses. A dog adds new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into the individual's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices.

United States v. Place, 103 S. Ct. 2637, 2651 (1983).

as flashlights and binoculars.[22] The *Bronstein* court further distinguished the use of a dog from that of a magnetometer or bug by noting that: 1) a dog responds *only* to contraband and a mistake favors the suspect; 2) the limited intrusion is directed not at the person, but at his baggage; 3) the dog is not used in a dragnet fashion, but only in response to a reliable tip.[23] On the basis of the reduced expectations of privacy and the plain smell rationale the court concluded, "The police have traditionally employed dogs to detect crime and criminals and the limited but effective use of the animals here creates no constitutional issue of substance."[24]

In reversing the district court, the circuit court in *United States v. Solis*[25] built on *Fulero* and *Bronstein* and found that the use of the dogs was not a search but "rather monitoring of the air in an area open to the public . . . [for the purpose of] determining the possible existence of a criminal enterprise nearby."[26] Noting that there was no physical invasion, indiscriminate use of sophisticated electronics, or search of the person, and that the "target" was physical and not a protected communication, the court held "that the use of the dogs was not unreasonable under the circumstances and therefore was not a prohibited search under the fourth amendment."[27] This unconvincing reasoning would later be attacked by both commentators and courts.[28]

In 1976, the Ohio Court of Appeals for Franklin County decided in *State v. Elkins*[29] that the use of a drug-sniffing dog to detect the presence of marijuana in a crate mailed from San Diego to Cleveland constituted a search. The court engaged in a *Katz* analysis and decided that, "by the use of a sophisticated device, albeit flesh and blood, the user perceived something entirely hidden from human senses, enhanced or unenhanced."[30] In engaging such a realistic *Katz* analysis the Court did not deprive law enforcement officials of the fruits of their search. The court found that such a search was reasonable under the circumstances, since it was based on reasonable suspicion and conducted in a public place.[31] This rejection of the plain smell doctrine and the retention of authority to pass on the reasonableness of the search is in accord with commentators who

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[22]United States v. Bronstein, 521 F.2d 459, 462 (2d Cir. 1975) *cert. denied,* 424 U.S. 918 (1976).

[23]"We fail to understand how the detection of the odiferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constiutionally suspect." *Id.* at 461.

[24]*Id.* at 463.

[25]536 F.2d 880 (9th Cir. 1976).

[26]*Id.* at 881.

[27]*Id.* at 883.

[28]Hansen, *supra* note 1 at 410. *See supra* note 55 and accompanying text.

[29]47 Ohio App. 2d 307, 354 N.E.2d 716 (1976).

[30]*Id.* at 311, 354 N.E.2d at 718.

[31]"[T]he police, who fortunately have also developed more sophisticated techniques to deal with criminals in response to a similar development on the part of criminals, utilized the trained police dog to obtain the further evidence necessary for procurement of a search warrant." *Id.* at 312, 354 N.E.2d at 719.

ask the courts not to abdicate their responsibility in this matter. One commentator wrote:

> To hold that no reasonable expectation of privacy existed and that no search occurred permits the judiciary, in effect, to wash its hands of its normal supervisory role over a given type of governmental investigative activity. Because of the nature of common law precedent, a single such determination by an appellate court amounts to an authorization for the police to continue that particular sort of investigative activity unfettered, with little likelihood of being called to account under the fourth amendment.[32]

In *United States v. Race,*[33] the First Circuit Court of Appeals concluded that an agent conducting a random canine search of an airline cargo warehouse could use the alert of the dog as the foundation for the probable cause needed to arrest the defendant.[34] In this sharp break with previous cases, the court ignored the reasonble suspicion requirement that was implicit in *Fulero,*[35] *Solis,*[36] and *Bronstein,*[37] in which informers' tips served as the catalyst for police activity and as a foundation of those courts' *Katz* analyses. The *Race* court declined to address the basic issue of whether or not the sniff constituted a search and concentrated its analysis on the reliability of the dog as established by the government's evidentiary foundation.[38] As the number of cases dealing with the dog-sniff issue increased without providing clear resolution or guidance, later courts juggled the factors of reasonable, articulable suspicion,[39] probable cause based on the on the dog alert,[40] and the credibility and reliability of the dog[41] in an ever less credible attempt to justify the position that the use of a drug-sniffing dog did not constitute an intrusion of any kind and was thus exempt from fourth amendment control.

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[32]Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs,* 11 GA. L. REV. 75, 86 (1976).

[33]529 F.2d 12 (1st Cir. 1976).

[34]*Id.* at 14. *Contra* People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

[35]498 F.2d 748 (D.C. Cir. 1974) (per curiam).

[36]563 F.2d 880 (9th Cir. 1976).

[37]521 F.2d 459 (2d Cir. 1975) *cert denied,* 424 U.S. 918 (1976).

[38] The dog's strong alert to the two crates, when turned loose in a warehouse containing some 300 crates, was enough to give agent Murphy, who had worked with the dog since 1971, reason to believe the crates held contraband. We do not, of course, suggest that any dog's excited behavior could, by itself, be adequate proof that a controlled substance was present, but here the Government laid a strong foundation of canine reliability and handler expertise.
United States v. Race, 529 F.2d 12, 14 (1st Cir. 1976).

[39]United States v. McCranie, 703 F.2d 1213 (10th Cir. 1983); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981); State v. Wolohan, 23 Wash. App. 813, 598 P.2d 421 (1979).

[40]United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982), *cert. denied* ___ U.S. ___, 103 S. Ct. 3543 (1983); United States v. Traylor, 656 F.2d 1326 (9th Cir. 1981); United States v. Morin, 665 F.2d 765 (5th Cir. 1982); United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982).

[41]Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980); People v. Matthews, 112 Cal. App. 3d 11, 169 Cal. Rptr. 263 (1980); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981); United States v. Traylor, 656 F.2d 1326 (9th Cir. 1981); United States v. Patino, 649 F.2d 724 (9th Cir. 1981); United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982), *cert. denied,* ___ U.S. ___, 103 S. Ct. 3543 (1983).

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In *People v. Williams,*[42] a California court of appeals suppressed evidence discovered during a random sniff of an airline baggage area by a dog of questionable reliability. While the illegal conduct of the officers was a factor in its decision, the court focused on the lack of any reasonable, articulable suspicion as the major reason for affirming the grant of the suppression order:

> Without a search warrant and without notice or knowledge of the possible presence of any narcotics, Perkins and Nash took Bourbon to the baggage staging area of American Airlines, not open to the public, in the back of the terminal, in order that Bourbon might engage in a fishing expedition, or more precisely in this instance in a sniffing expedition, of a general, routine, exploratory nature, for marijuana, cocaine and heroin. They were not looking for weapons or bombs . . . it only included marijuana, cocaine and heroin.[43]

The *Williams* court stopped short of calling the poice activity a search. However, it is evidence from its concern with the reliability of the dog and the need for articulable, reasonable suspicion that the court was uncomfortable with the ever-expanding ramifications of earlier pronouncements that the use of drug-sniffing dogs did not constitute a search.

The court in *Washington v. Wolohan*[44] focused on the reliability of the dog and held that the alert of the dog alone provided sufficient probable cause for the issuance of a warrant in a "random sniff" case.[45] Although it tossed in garbled and unconvincing arguments concerning reasonable expectations of privacy[46] (based in reality on the plain smell fiction), the court failed to find that such a use of a dog constituted a general, exploratory search; therefore, no reasonable suspicion was necessary for the police to engage in such activity.

In a well-reasoned dissent, Judge McInturff departed from the traditional all-or-nothing *Katz* analysis and viewed the dog-sniff issue in light of the analysis used in the case of *Terry v. Ohio.*[47] Under *Terry* and its progeny, an "investigatory stop" is warranted without probable cause if there is a specific articulable fact to support a suspicion that contraband is present. A balance of interests between the individual's expectation of privacy and the state's interest

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[42] People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

[43] *Id.* at 348-49, 124 Cal. Rptr. at 254.

[44] 23 Wash. App. 813, 598 P.2d 421 (1979).

[45] *Id.* at 815, 598 P.2d at 423.

[46] The outside of the package is open to view and the package is subject to dropping or tearing. We hold that although Wolohan may have had a limited expectation of privacy as to the contents and his personal effects in a package in transit, he did not have a reasonable expectation of privacy in the area in which the package itself was located, the parcel area, nor in the air space immediately surrounding the package from which the odor emanated.
Id. at 818, 598 P.2d at 424.

[47] 392 U.S. 1 (1968).

in effective enforcement renders such a stop reasonable.[48] The factors to be considered in achieving this balance include the nature and severity of the intrusion and the type and importance of the government interest that is to be furthered. Judge McInturff found that the wholesale, random use of the dog-sniff would militate against the use of the dog in this situation, and the balance to be in favor of the individual's expectaion of privacy stating:

> The prospect of canine sniffers lying in wait at every corner, conducting what under these facts must be termed an exploratory search, offends my sensibilities and the principles underlying the Fourth Amendment . . . .
>
> While there is disagreement over whether sniffing by the uninvited canine nose constitutes a search, the cases are virtually unanimous in requiring or finding that the police officer entertained a *reasonable suspicion* regarding the presence of contraband in the particular area to be searched prior to employing the canine's drug-sensitive senses . . . .
>
> While a person's expectation of privacy legitimately diminishes when packages or baggage are consigned to a common carrier, I cannot agree that all Fourth Amendment protections are forfeited, thus authorizing wholesale examinations in the hope that a crime might be detected.[49]

As it became apparent to courts[50] and commentators[51] that the resolution of the dog-sniff issue under *Katz* alone led to highly artificial and strained analysis, more attention was given to the investigatory stop allowed under the *Terry* analysis with the presence of specific, articulable facts upon which an officer could base a reasonable suspicion. Even before the *Terry* progeny[52] expanded the *Terry* investigative stop beyond the limited weapons pat-down area, one commentator stated:

> It is submitted . . . that a methodology analogous to that of *Terry* is better suited than *Katz* to deal with the type of intrusions seen in *Bronstein, Fulero,* and *Solis.* A *Terry*-type methodology would recongize that the government engages in activity subject to the fourth amendment's proscriptions when it utilizes dogs to detect contraband, but that this usage does not necessarily constitute a full search. The reasonableness of such

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[48] *Id.* at 24.

[49] State v. Wolohan, 23 Wash. App. 813, 822-23, 598 P.2d 421, 426-27 (1979).

[50] United States v. Place, 660 F.2d 44 (2d Cir. 1981) *aff'd,* ___ U.S. ___, 103 S. Ct. 2637 (1983); United States v. Freymuller, 571 F. Supp. 61 (N.D. Ill. 1983).

[51] As a result of the inherent vagueness of the *Katz* doctrine, three views have emerged to deal with the canine situation: first, that no search occurred; second, that a search occurred but it was reasonable under the circumstances; and third, that a search occurred and it was unreasonable absent a search warrant or exigent circumstances. [Footnotes omitted.]
Schuster, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime,* 44 FORDHAM L. REV. 973, 989 (1976).

[52] Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968); United States v. Mendenhall, 446 U.S. 544 (1980), *reh. denied,* 448 U.S. 908 (1980); Reid v. Georgia, 448 U.S. 438 (1980); Florida v. Royer, 103 S. Ct. 1319 (1983).

a subsearch would be gauged by a balancing process in which the primary considerations would be the individual's expectations of privacy on the one hand and both the degree of the intrusion and the circumstances occasioning that intrusion on the other.[53]

As America entered the 1980's with the dog-sniff issue unresolved and the flow and distribution of illicit drugs continuing unabated, federal and state courts continued to rely on the discredited plain smell doctrine[54] to justify their position that the use of drug-sniffing dogs did not constitute a search under the fourth amendment.

II. The School Cases

In the late 1970's and early 1980's, a series of cases involving random, dragnet type sniff-searches of students while on school premises served to throw the dog-sniff issue into sharp relief. The same issues of reasonable suspicion, probable cause, the reliability of the dogs and even plain smell were transferred to the school setting. While nobody would deny that school officials had a legitimate, even compelling interest in stemming the tide of possession and use of drugs in schools, the degree of intrusiveness represented by a sniff search of the body forced some courts to the realization that such activity did constitute a search.[55]

In *Doe v. Renfrow,*[56] officials conducted an investigation employing the aid of drug-sniffing dogs in response to concern over the perceived high level of drug use. The dogs were allowed to sniff the students; those students to whom the dogs alerted during the sniff were escorted to a nurse's office and subjected to a nude body search.[57] Using a combination of the plain smell doctrine,[58] in loco parentis,[59] and the lesser standard of "resonable cause to believe,"[60] as the basis for using the canines to detect narcotics, the district

[53]Peebles, *supra* note 32, at 95.

[54]United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981); United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981), *cert. denied,* 452 U.S. 962 (1981); United States v. Lewis, 708 F.2d 1078 (6th Cir. 1983).

[55] The dog's inspection was virtually equivalent to a physical entry into the students' pockets and personal possessions. In effect, he perceived what the students had secreted and communicated that information to his handler . . . .

Like an X-ray machine, his superhuman sense of smell invaded the students' outer garments and detected the presence of items they were expecting to keep private.

Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233 (E.D. Tex. 1980).

[56]475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd per curiam,* 631 F.2d 91 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981).

[57]*Id.* at 1024.

[58]*Id.* at 1020, 1026.

[59]*Id.* at 1023.

[60] This Court now finds that in a public school setting, school officials clothed with the responsibilities of caring for the health and welfare of the entire student population, may rely on such general information to justify the use of the canines to detect narcotics . . . . This lesser standard applies only when the purpose of the dog's use is to fulfill the school's duty to provide a safe, ordered and healthy educational environment.

Id. at 1021.

court found: 1) that the use of the dogs to sniff the students did *not* constitute a search; 2) that the subsequent search of the students' pockets was reasonable and therefore did not violate the fourth amendment; and 3) that the nude body search was unreasonable and therefore violated the fourth amendment.[61] Evidently, the doctrine of in loco parentis, which modifies the constitutional rights of the students and allows for the search of pockets based on a dog sniff, will not allow for a nude search based on the same information.

Ironically, the plaintiff in *Doe v. Renfrow* was not found to be in possession of any contraband. She had been playing with one of her own dogs that morning and that dog had been in heat.[62] The *Doe* court blithely ignored the issue of the reliability of the dog, which in earlier cases had been such a major factor in finding that the alert of such dogs could provide probable cause.[63] The court also chose to ignore the fact that although the dog alerted fifty times, only seventeen students were found to be in possession of contraband.[64] The case was remanded by the Seventh Circuit[65] on the question of damages when the circuit court reversed the district court's finding that the defendant had limited immunity from such charges.

In his dissent from the order denying certiorari, Justice Brennan vigoriously disagreed with the reasoning of the district court. He thought that the use of the dogs to sniff persons constituted a search. He also rejected the plain smell rationale,[66] stating that actions taken under the in loco parentis doctrine must be consistent with the fourth amendment.[67] The depth of Justice Brennan's concern about the issue is evident from his concluding statement:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects "[t]he right of the people

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[61] The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself . . . . Therefore, the alert of the dog alone does not provide the necessary reasonable cause to believe the student actually *possesses* the drug.
Id. at 1024.

[62] *Id.* at 1017.

[63] *See, e.g.,* United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (per curiam); United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States v. Race, 529 F.2d 12 (1st Cir. 1976); People v. Matthews, 112 Cal. App. 3d 11, 169 Cal Rptr. 263 (1980).

[64] Doe v. Renfrow, 451 U.S. 1022, 1024 (1981).

[65] 631 F.2d 91 (7th Cir. 1980).

[66] I cannot agree that the Highland School officials' use of the trained police dogs did not constitute a search. The dogs were led from student to student for the express purpose of sniffing their clothing and their bodies to obtain information that the school authorities and police officers, with their less developed sense of smell, were incapable of obtaining.
Doe v. Renfrow, 451 U.S. 1022, 1025 (*cert. denied*) (Brennan, J., dissenting).

[67] "While school officials acting *in loco parentis* may take reasonable steps to maintain a safe and healthful educational environment, their actions must nonetheless be consistent with the Fourth Amendment." *Id.* at 1022.

> to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures," and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been committed.[68]

In *Jones v. Latexo Independent School District,*[69] the district court decided that the use of drug-sniffing dogs to detect contraband in the possession of students constituted a search.[70] This determination was followed by an analysis of whether or not a dragnet search was reasonable in the absence of individualized suspicion. Engaging in a *Terry*-type balancing analysis, the court considered the scope, manner and justification of the intrusion. Noting that the scope of the intrusion was somewhat less than that of a physical search; that the dog would signal only if contraband was detected; and that the school officials had warned students that such sweeps would be conducted, the court found that other factors militated against the reasonableness of such searches in the absence of the individualized suspicion required for a *Terry* stop.[71] The other factors were: 1) the fact that large German Sheperds, which had also been trained as attack dogs, actually touched, and in some cases slobbered on the children, causing intimidation and fright; and 2) "the mere announcement by officials that individual rights are about to be infringed upon cannot justify the subsequent infringement . . . . Thus, the reasonable expectation of students to be free from such an intrusion survived all warnings by school officials that such searches were to take place."[72] In deciding that the sweep search of the students by the dogs was unreasonable under these circumstances, the court focused on the need for articulable facts to support a reasonable suspicion, stating:

> Just as the police could not lawfully bring Merko into a restaurant, football stadium, or shopping center to sniff-search citizens indiscriminately for hidden drugs, the school officials exceeded the bounds of reasonableness in using Merko to inspect virtually the entire Latexo student body without any facts to raise a reasonable suspicion regarding specific individuals.[73]

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[68] *Id.* at 1027.

[69] 499 F. Supp. 223 (E.D. Tex. 1980).

[70] "Students, like all other 'persons' under our Constitution, have fundamental rights which must be respected by state authorities." *Id.* at 231. "All citizens have a reasonable expectation that their privacy will not be intruded upon by electronic surveillance, X-ray machines, or sniffing dogs at the whim of the state." *Id.* at 233.

[71] *Id.* at 233, 234.

[72] *Id.* at 234.

[73] *Id.* at 235. The court also specifically rejected the "plain smell" argument relied on by the Doe v. Renfrow Court, stating, "The court's approval of a blanket high school sniff-search in that case stemmed from an erroneous view that the dog merely augmented or enhanced school officials in their own inspection of the school." *Id.* at 236.

In *Horton v. Goose Creek Independent School District,*[74] the court decided, on the basis of *Jones,* that a school district could not subject students to exploratory sniff-searches in an effort to detect contraband.[75] In rejecting the *Doe*[76] court's rationale, the *Horton* court focused on the nature of the intrusion as measured against the interest in the integrity of one's body, stating "society recognizes the interest in the integrity of one's person, and the fourth amendment applies with its fullest vigor against any intrusion on the human body."[77] In rejecting any use of the plain smell doctrine to justify the sniff in such cases, the court stated that "most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell."[78] The offensiveness and intimidation involved in the close quarter sniffing by a large animal was held to render such a search unreasonble.[79]

The *Horton* court found that the blanket sniff of lockers and cars did not constitute a search under the fourth amendment. As a result the court remanded to the district court for a determination regarding the reliability of the dogs as a basis for the requisite reasonable suspicion needed to justify the further search of the lockers.[80]

III. Airport Luggage Cases

The airport sniff-searches of luggage in the early 1980's usually involved the use of dogs to sniff unattended luggage in an effort to detect contraband. Most courts continued to hold that this activity did not constitute a search, but implicitly required that there be some sort of reasonable suspicion to provide a basis for the dog-sniff.[81] This suspicion was provided in many cases when an individual exhibited behavioral characteristics consistent with the so-called

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[74]690 F.2d 470 (5th Cir. 1982).

[75]*See supra* note 72 and accompanying text.

[76]*see supra* note 56 and accompanying text.

[77]690 F.2d 470,·478 (5th Cir. 1982).

[78]*Id.*

[79]"Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human." *Id.* at 479. One commentator has stated:

> Being smelled by another is more demeaning than being seen or heard by another because one's smells are tied closely to those bodily functions considered to be particularly intimate. Hence, having one's person sniffed by a police dog in order to discover evidence constitutes a violation of the right to be free from indecent intrusions and therefore constitutes an unreasonable search under the fourth amendment. [footnotes omitted.]

Gardner, *Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope,* 74 Nw. U.L. Rev. 803, 851 (1980).

[80]"Although the use of the dogs in dragnet sniffing of lockers and cars is permissible, we must remand to the district court for the case to proceed to trial on the reliability of the dogs' reactions as the basis for further searches." Horton v. Goose Creek Ind. School Dist., 690 F.2d 470, 488 (5th Cir. 1982), *cert. denied,* ___ U.S. ___, 103 S. Ct. 3536 (1983).

[81]*E.g.,* United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981); United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981), *cert. denied,* 452 U.S. 962 (1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. Anderson, 663 F.2d 934 (9th Cir. 1981); United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982); People v. Price, 54 N.Y.2d 557, 446 N.Y.S.2d 906, 431 N.E.2d 267 (1981); *But see,* People v. Mayberry, 117 Cal. App. 3d 360, 172 Cal. Rptr. 629 (1981); *superceded,* 31 Cal. 3d 335, 182 Cal. Rptr. 617, 644 P.2d 810 (1982).

"drug courier profile."[82] This courier profile was an informal compilation of characteristics which drug enforcement personnel perceived as being common to many of those engaged in drug smuggling activities. The seven primary characteristics were articulated as: 1) travel to or from a known "source city"; 2) little or no luggage or a large quantity of empty luggage; 3) an unusual itinerary with a rapid turn around; 4) the use of an alias in booking a flight or on baggage tickets; 5) carrying large amounts of cash, sometimes in the many thousands of dollars; 6) the purchase of a ticket with large amounts of small denomination currency; and 7) "unusual" nervousness.[83] The use of this profile as a means of supplying the reasonable suspicion necessary to justify a *Terry*-type investigative stop of the individual generated a substantial amount of litigation.[84] Its use as a means of directing the dog to luggage that seemed likely to conceal contraband was not seriously challenged.

In *United States v. Beale,*[85] the Ninth Circuit addressed the propriety of subjecting a traveler's luggage to a dog sniff in the absence of a reasonable suspicion. The Court held "that the use of trained canines in this case was improper absent a showing of 'founded suspicion.' "[86] In reaching this conclusion, the court reconsidered the earlier dog-sniff cases and found that a polarization of analyses concerning the dog-sniff issue had led to a troubling inflexibility in this area which seemed to allow for the wholesale intrusion upon traveler's fourth amendment rights.[87]

In beginning its analysis, the *Beale* court reconsidered the reasonable expectation of privacy analysis of *Bronstein* and *Fulero* and determined that holdings which would deny this reasonable expectation of privacy in personal luggage are of doubtful validity.[88] The court found that "[i]f the potentially 'hazardous'

[82] *E.g.,* United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981), *cert. denied,* 452 U.S. 962 (1981); United States v. Morin, 665 F.2d 765 (5th Cir. 1982); United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982); People v. Price, 54 N.Y.2d 557, 446 N.Y.S.2d 906, 431 N.E.2d 267 (1981).

[83] United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982).

[84] United States v. Mendenhall, 446 U.S. 544 (1980), *reh. denied,* 448 U.S. 908 (1980); Reid v. Georgia, 448 U.S. 438 (1980); Florida v. Royer, 103 S. Ct. 1319 (1983).

[85] 674 F.2d 1327 (9th Cir. 1982).

[86] *Id.* 1328.

[87] Unfortunately, the parties have treated the "dog sniffing" issue in absolute terms. Beale argues, for instance, that the primary issue is whether the use of "Nick" to sniff his suitcase was a search requiring probable cause. The District Court, in the suppression hearing, held that the use of trained canines in this case was not a search and, hence, that no showing of suspicion was required . . . . Not only do these arguements oversimplify our holding in *United States v. Solis* . . . they also misapprehend the importance of a person's privacy interest in personal luggage.

Id. at 1330.

[88] We seriously doubt whether the reasoning employed in *Bronstein* and *Fulero* is still sound. In *Bronstein* the Second Circuit stated that "[t]here can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta." . . . By applying *Chadwick* to transcend and limit the "automobile exception" to the warrant requirement in *Arkansas v. Sanders* . . . the Supreme Court seems to have rejected the *Bronstein* reasoning.

Id. at 1330-31. In United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981) the court stated, "[i]t should be noted that searches in the interest of drug enforcement cannot be justified on the same basis as those

or 'dangerous' nature of a cargo is sufficient to abrogate traveler's reasonable expectation of privacy in containers being transported, the *Bronstein* approach would justify unrestricted roadblocks and vehicular searches, dragnet monitoring of domestic mail, and other unacceptable results."[89]

Having established that an individual does indeed have an expectation of privacy in his luggage greater than that articulated in *Bronstein,*[90] the court avoided labeling the activity as a "search" and focused its inquiry on whether such activity was "an invasion of the owner's 'inevitable' and 'inherent' privacy interest in the contents therein."[91] The first step in this inquiry was a square rejection of the plain smell doctrine. Citing Judge Mansfield's concurring opinion in *Bronstein,*[92] the court stated:

> [T]he dog does not amplify its handler's perception; it is an independent detection device, alerting the officer to information he would have been utterly unable to detect with his own senses. Nick's nose did not enhance Detective Berk's senses; it replaced them . . . .
>
> The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest, in the contents of the container.[93]

The court next addressed the argument that since the dog would only detect the presence of contraband, the nature of such intrusion, if indeed it was an intrusion at all, was so minimal so as to remove it from the realm of fourth amendment protection. The court rejected this argument, stating that "[t]he fact that trained canines may detect *only* contraband diminishes, but does not obliterate, the nature of the intrusion."[94] While this "lesser intrusion" did not

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in the airport security context; instead drug searches are to be analyzed under traditional Fourth Amendment principles." *Id.* at 361 n.6. Although the Goldstein court held that a dog-sniff did not constitute a search, it relied on the artificial and much criticized plain smell doctrine, stating. "[t]he passenger's reasonable expectation of privacy does not extend to the airspace surrounding that luggage." *Id.* at 361.

[89]United States v. Beale, 674 F.2d 1327, 1331 (9th Cir. 1982). The court also stated, "The Supreme Court has recognized that 'luggage' is a common repository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." *Id.* at 1331 n.5.

[90]*See supra* note 20 and accompanying text.

[91]United States v. Beale, 674 F.2d 1327, 1331 (9th Cir. 1982).

[92]*See supra* note 21.

[93]United States v. Beale, 674 F.2d 1327, 1333-34 (9th Cir. 1982). Chief Justice Bird expressed acord with this view in her dissenting opinion in People v. Mayberry, 31 Cal. 3d 335, 349, 182 Cal. Rptr. 617, 625, 644 P.2d 810, 818 (1982). In that opinion she states:

> The officers in this case were relying wholly on the perceptions of Corky and not on their own faculties. Consequently, the luggage's contents were not "exposed to the public," unless we are to interpret "the public" as meaning specially trained dogs. Nor can it be said that appellant "knowingly" exposed the contraband to the public, since he, not being a specially trained dog himself, would not have known that any aroma was escaping from his luggage.

Id. at 818. *See also supra* note 21 and accompanying text.

[94]United States v. Beale, 674 F.2d 1327, 1334 (9th Cir. 1982); *See also supra* note 21.

require a warrant[95] for its exercise, the court wondered under what circumstances a positive alert by such a dog would provide probable cause and/or support the issuance of a warrant. While the reliability of such dogs had on occasion been expressly challenged,[96] false alerts by the dogs were apparent in some of the cases.[97] There are also cases in which the absence of a "full alert" forces the dog handler and the investigating agent to make an on-the-spot determination whether or not to continue the investigation on less than a clear indication that there is contraband present.[98] Keenly aware of the danger associated with the possibility of false alerts, the court stated:

> Our decision is expressly premised on this concept of canine reliability and on the fact that the Government must establish the dog's reliability as part of its showing to support the issurance of a warrant or a finding of probable cause . . . .
>
> It must be emphasized that dogs, like humans and machines, are not infallible, and that, not withstanding the optimistic views of some commentators, on occasion a narcotics dog may err. Thus, the mere fact that a dog alerts to a suitcase, even when there is founded suspicion to allow the dog to sniff, is not necessarily ground for probable cause to open and inspect it. Knowledge that the dog is reliable is central to establishing the necessary probable cause.[99]

In many of the luggage-sniff cases a troubling issue was that of the acceptable length of time between receipt of the drug courier profile or some other

[95] Therefore, we hold — consistent with the unarticulated reasoning of *United States v. Solis; United States v. Klein; United States v. Bronstein;* and *United States v. Fulero* — that the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause. *Id.* at 1335. For the "articulable suspicion" requirement of Terry v. Ohio see *supra* notes 47, 48 and accompanying text.

[96] United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982). *Cf.* People v. Price, 54 N.Y. 557, 564, 446 N.Y.S.2d 906, 909, 431 N.E.2d 267, 270 (1981), where the court responds to defendant's contention that he should have been allowed to examine the dog which sniffed his luggage with the statement:

> There is no validity to defendant's argument where he has failed to present any evidence to rebut the People's documentary proof of the dog's ability to detect in every instance the presence of controlled substances. Had he come forward with any indication of questionable reliability, it would have been within the trial court's discretion to grant the requested discovery.

[97] In Doe v. Renfrow, the dog "alerted" to the plaintiff not because the plaintiff possessed any contraband, but because earlier that day plaintiff had been playing with a dog which was in heat. In the same case it was noted by Justice Brennan, in his dissent from the order denying certiorari, that although the dogs had alerted fifty times, only seventeen of the students were found to be in possession of contraband. In Jones v. Latexo Indep. School Dist., it was indicated that the dog "Merko" would alert upon detection of the odor of lighter fluid.

[98] *See, e.g.,* United States v. Morin, 665 F.2d 765, 767 (5th Cir. 1982); United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982). In *Jodoin,* the court noted, "Although a drug detecting dog did not react when it sniffed the suitcase, the agents pointed out that, according to dog handlers, 'the dogs are not foolproof,' they 'are less accurate on hot muggy days . . . .' " *Id.* at 236.

[99] United States v. Beale, 674 F.2d 1327, 1335 n.2 (9th Cir. 1982). *Accord,* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd per curiam,* 631 F.2d 91 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981); Horton v. Goose Creek Ind. School Dist., 680 F.2d 470 (5th Cir. 1982), *cert. denied,* _____U.S._____ 103 S. Ct. 3536 (1983); United States v. Traylor, 656 F.2d 1326 (9th Cir. 1981); United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 3543 (1983); People v. Matthews, 112 Cal. App. 3d 11, 169 Cal. Rptr. 263 (1980). *See also supra* note 38.

source of information giving rise to a reasonable suspicion that luggage held contraband, and the time when the luggage must be subjected to a sniff investigation which could yield the requisite probable cause needed for a warrant to open it.[100] The Supreme Court addressed this issue in *United States v. Place,*[101] in which it affirmed the Second Circuit's holding[102] that the detention of luggage for almost two hours was beyond the limits of a *Terry*-type investigative stop and therefore violated the fourth amendment.[103] The Second Circuit applied a *Terry*-type analysis to the facts and found that a brief detention and exposure of the baggage to a drug-sniffing dog would not, of itself, violate the fourth amendment.[104]

The Supreme Court justified the use of the *Terry*-type investigative stop in this situation on the "inherently transient nature of drug courier activity at airports" and the fact that such activity "substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels."[105] While the court was viewing the dog-sniff issue in conjunction with the *Terry*-type investigative stop and brief detention of luggage, it articulated the reasonable suspicion requirement in a fashion that indicates that it is needed not only to justify the stop and the detention, but also the intrusion itself.[106] The Court declined, however, to characterize the dog-sniff as a search:

> We have affirmed that a person possesses a privacy interest in contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that

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[100]United States v. Martell, 654 F.2d 1356 (9th Cir. 1981) (twenty minute period of detention between initial stop and sniff search is reasonable under Terry); United States v. Regan, 687 F.2d 531 (1st Cir. 1982) (twenty-two hour detention of luggage based only on a reasonable suspicion is unreasonable under Terry and therefore violates the fourth amendment); United States v. Moya, 704 F.2d 337 (7th Cir. 1983) (three hour detention is reasonable under Terry); State v. Dupay, 62 Or. App. 798, 662 P.2d 736 (1983) (one hour and twenty minute detention on only reasonable suspicion is too long and violates the fourth amendment).

[101]103 S. Ct. 2637 (1983).

[102]United States v. Place, 660 F.2d 44 (2d Cir. 1981).

[103]"[E]ven assuming that circumstances justifying an investigatory stop existed, the prolonged seizure of Place's baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights." *Id.* at 50.

[104] In the present case, if the agents had, on the basis of a reasonable suspicion but without probable cause, merely exposed Place's baggage to a trained sniffer as he was passing through LaGuardia, this brief detention might, assuming reasonable grounds for suspicion, fall within the limits of *Terry* and its progeny . . . . Here, howver, the "investigative" seizure lasted for almost two hours (from slightly before 4:00 p.m. until 5:45 p.m. when the sniffer established probable cause) . . . .

In our view this protracted dispossession cannot reasonably be characterized as a *Terry*-type "investigative stop."

Id. at 51-52.

[105]United States v. Place, ___ U.S. ___, 103 S. Ct. 2637, 2643 (1983).

[106] Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

Id. at 2644.

otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosre also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the 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. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure 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.[107]

It is significant that the Court did not rely on the discredited[108] plain smell doctrine in reaching its conclusion.[109] By focusing on the minimal nature of the intrusion represented by the dog sniff, the Court implicitly recognized that the reasonable expectation of privacy formulated in *Katz* is implicated to some degree in this context.[110] In his concurring opinion, Justice Brennan questioned the propriety of reaching out to decide the dog sniff issue. He felt that this case, in which the resolution of the limits of the *Terry*-type investigative detention of luggage was the major issue, was inappropriate for reaching a decision on the distinct issue of the use of the dog. In that concurring opinion he stated:

> I have expressed the view that dog sniffs of people constitute searches. In *Doe,* I suggested that sniffs of inanimate objects might present a different case. In any event, I would leave the determination of whether dog sniffs of luggage amount to searches, and the subsidiary question of what standards should govern such intrusions, to a future case providing an appropriate, and more informed, basis for deciding those questions.[111]

As a result of the decision in *United States v. Place,*[112] the Supreme Court vacated the Ninth Circuit's decision in *United States v. Beale*[113] and remanded

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[107] *Id.* at 2644-45.

[108] *See* United States v. Beale, 674 F.2d 1327 (9th Cir. 1982); *See supra* note 21 and accompanying text. *Contra,* United States v. Lewis, 708 F.2d 1078 (6th Cir. 1983).

[109] *See supra* note 21.

[110] *Cf.,* United States v. Beale, 674 F.2d 1327, 1330, where the court states, "Focusing on the precise physical nature of the canine sniffing obscures, we believe, the underlying Fourth Amendment interests."

[111] United States v. Place, ___ U.S. ___, 103 S. Ct. 2637, 2651 (1983) (citations omitted).

[112] *Id.*

[113] 674 F.2d 1327 (9th Cir. 1982).

the case to the Ninth Circuit for further consideration of its opinion in light of *United States v. Place.*[114] In its reconsideration[115] the Ninth Circuit declined to decide whether or not the use of the dog in this case constituted a search. The court instead examined whether or not the use of a trained canine to sniff luggage *implicates* the fourth amendment.[116] In deciding that such activity did indeed implicate the fourth amendment, the court held that the case "must be remanded to the district court to permit it to determine whether the canine investigation of Beale's luggage was supported by articulable, founded suspicion."[117]

The court was careful to distinguish the circumstances presented in *Beale* from those forming the basis for the decision in *Place.* In making this distinction, the court noted that the consideration concerning the *Terry*-type investigatory detention of luggage which had influenced the outcome in *Place* was entirely lacking in *Beale.*[118] Circuit Judge Ely, the author on the *Beale* slip opinion, then noted that since the resolution of the dog sniff issue was not essential to the holding in *Place,* the language indicating that a dog sniff was not a search[119] was dictum and therefore not binding.[120]

> We recognize that this passage is dictum and are aware that the Supreme Court has often remarked that its dicta are not binding . . . . The *Place* dictum, however, is so recent and appears to have been so carefully considered that we feel obliged to apply it to the case at hand . . . . After thoughtful study, we conclude that the Court's statement that a canine sniff investigation "did not constitute a "search" [sic] within the meaning of the Fourth Amendment", must be read in the context of the entire decision in *Place.*[121]

After declining to follow the *Place* dictum, the court considered the dog

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[114] *See* United States v. Beale, _____U.S._____, 103 S. Ct. 3529 (1983).

[115] United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983) (available on LEXIS, Genfed Library, Cir. file).

[116] The court stated that the issues to be resolved were:

> (1) whether a police officer's use of a trained canine, with an established record of reliability, to sniff the exterior of a traveler's luggage, located in an airport, to detect the presence of contraband, implicates the fourth amendment; and (2) if so, to what extent the officer's use of the canine is limited by the fourth amendment.

Id.

[117] *Id.*

[118] In Beale I, questions concerning the existence, duration, and validity of a detention of Beale's luggage prior to the canine sniff were not presented in the facts as stipulated by the parties. We therefore addressed the dog sniffing question in isolation. Under *Place,* any detention incident to the sniff would be permissible if it were supported by articulable, founded suspicion and if it were not unreasonable, in length and scope.

Id.

[119] *See supra* note 106 and accompanying text.

[120] United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983) (available on LEXIS, Genfed library, Cir. file).

[121] *Id.* (citations omitted).

sniff issue in isolation, and while not actually labelling the activity a search,[122] decided that the dog sniff investigation should be subject to some degree of judicial control. The court stated that "[t]he general consensus appears to be that canine investigations are or ought to be subject to some limitations. In recognizing that canine investigations implicate the Fourth Amendment, *Beale I* took the stance essential to the imposition of some level of Fourth Amendment scrutiny over the procedure."[123] The need for this type of limit or scrutiny was premised on a negative answer to the question of whether or not this kind of activity is the kind of intrusion that a free society would tolerate if that activity were completely unrestrained.[124] The court reasoned that the proper level of restraint or limitation would be achieved by requiring that agents have a reasonable suspicion before subjecting a traveler's luggage to a dog sniff. The court stated that it found this requirement to be consistent with *Place,*[125] which was primarily concerned with the reasonable suspicion necessary to justify the initial detention of luggage: "We instead interpret *Place* to conclude that no additional suspicion is required to justify exposing luggage to a trained canine once founded or articulable suspicion has been established."[126]

In defending its requirement that a reasonable suspicion be present before a dog sniff is justified, the court criticized some of the other circuits' mechanical reliance on stale arguments,[127] and noted other cases which support such a requirement.[128] The court also addressed and answered the argument that the minimal nature of the intrusion removed it from the fourth amendment, stating:

> The selectivity and other unintrusive aspects of canine investigations of luggage do not exempt the process from fourth amendment scrutiny but,

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[122]"The term 'search,' however, though conceptually convenient, is not essential to the conclusion that investigative activity is subject to the fourth amendment . . . . The crucial inquiry is whether the investigative activity is the kind of intrusion a free society is willing to tolerate if unregulated by constitutional restraints." *Id.*

[123]*Id.*

[124]*See supra* notes 10 and 122.

[125]"We do not believe that *Place* should be read to validate a canine sniff in the absence of the reasonable suspicion required for a minimally intrusive detention of luggage, whenever fortuity makes a canine sniff feasible without any seizure of the luggage." United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983) (available on LEXIS, Genfed library, Cir. file).

[126]*Id.*

[127]"Opinions concerning the fourth amendment significance of canine investigations, rendered after Beale's publication, have offered no new insights into the dog sniffing question and, indeed, have perpetuated arguments that were and continue to be 'short on reasoning.' " *Id.*

[128]"Several courts have expressly noted the existence of prior suspicion in affirming the validity of the sniff, . . . *See, e.g.,* United States v. Goldstein; United States v. Goldstein; United States v. Sullivan; United States v. Klein." (citations omitted.) *Id. Accord,* People v. Mayberry, 31 Cal. 3d 335, 345, 182 Cal. Rptr. 617, 623, 644 P.2d 810, 816 (1982), where Chief Justice Bird in her dissent notes,

> While the cases do perhaps state that this particular police activity does not amount to a search, the underlying reasoning is generally tied to the reasonableness of the activity and the existence of specific cause to suspect the presence of contraband . . . . Of course, there is no Fourth Amendment command that police activity be reasonable or justified by good cause unless it amounts to a "search."
>
> Therefore, it requires a blind leap of faith for the majority to jump from these cases to the conclusion that the same results would have been reached if, as in the present appeal, there were no "particularized cause" or "reasonable suspicion" to justify the police activity.

> rather, make application of the traditional probable cause and warrant requirements unnecessary to protect the privacy rights of those travelers whose luggage is under investigation. The majority of courts that have addressed the dog sniffing question have confused the relative unintrusiveness of the investigation with its eligibility for inclusion within the scope of the fourth amendment. The unintrusiveness of a search does not reduce, or have any effect on, the basic expectation of privacy in the thing searched.[129]

The *Beale* court was acutely aware of the consequences of holding that a dog sniff did not implicate fourth amendment rights.[130] By taking the stance that it did, the court made a courageous and honest effort to respond to the criticism of those commentators[131] and courts[132] who feared the effect of complete judicial abdication of responsibility in this area.[133] The result reached in *Beale* represents a conscientious attempt to achieve an acceptable balance between the severe restriction on the use of these dogs that would result from a determination that this activity constituted a full search triggering the probable cause and warrant requirements, and the potential for abuse that would result from a determination that the use of dogs in no way implicated the fourth amendment.

This attempt has not gone uncriticized.[134] One commentator, responding to the opinion published in *Beale I*[135] stated:

> At first glance, *Beale* appears to grant increased constitutional protection from police intrusions. And in the narrow area of police dog usage, it accomplishes this purpose; it brings the use of these dogs under a system of regulation which affords protection from unrestrained "sniff" searches. But upon further reflection, this decision has a stronger, more detrimental impact upon the broad constitutional guarantees of the fourth amendment. It introduces another exception to the warrant clause and, perhaps

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[129] United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983) (available on LEXIS, Genfed library, Cir. file).

[130] The effect of holding that a canine sniff investigation requires no articulable suspicion in circumstances in which the luggage is not detained, even briefly, in order that the investigation be performed, would be to encourage the indiscriminate use of roving trained dogs at public airports. We decline to reach this result.

Id.

[131] *See supra* note 32 and accompanying text.

[132] In her scholarly and well-reasoned dissenting opinion in People v. Mayberry, 31 Cal. 3d 335, 345, 182 Cal. Rptr. 617, 623, 644 P.2d 810, 816 (1982), Chief Justice Bird warned,

> By its judgment and reasoning in this case, a majority of this court is apparently "prepared to leave totally uncontrolled" the government's use of trained detector dogs. I use the words "apparently" because nowhere in its opinion is there reflected any appreciation that this is the necessary consequence of its holding.

[133] "Police actions not amounting to searches or seizures may, with only limited exceptions, be as unreasonable, arbitrary, or groundless as the officers please to make them." *Id.*

[134] Rouse, *Use of Drug-Trained Canines as a Search: Increased Protection under the Fourth Amendment or a Further Erosion of Constitutional Guarantees?,* 13 GOLDEN GATE U. L. REV. 163 (1983).

[135] United States v. Beale, 674 F.2d 1327 (9th Cir. 1982).

more significantly, to the probable cause requirement.[136]

The logic of this argument is difficult to discern. Since the dog sniff is not presently deemed to constitute a full search, there is no warrant or probable cause requirement protection in danger of being lost. Further, since the Ninth Circuit's decision is specifically limited to the area of the canine sniff intrusion, enforcement officials will not be able to use it as a means of avoiding the probable cause and warrant requirements with respect to other modes of surveillance and intrusion. Since the canine sniff is, as the Supreme Court notes, sui generis[137] there is no chance that the lesser reasonable suspicion standard will be appliedi beyond the clearly defined limits of the canine search. Surely it is not unreasonable to apply the *Terry*-type analysis — balancing legitimate law enforcement interests against an individual's reasonable expectations of privacy — to the sniff itself as well as to the detention of luggage.

IV. Implications for the Future

Although the Supreme Court has held that the use of a trained canine to sniff luggage does not of itself constitute a search, this holding was made in conjunction with a determination of the limits of a *Terry*-type investigatory detention of baggage.[138] The Supreme Court has not yet addressed the precise issue of the dragnet use of such dogs to sniff luggage in a public place in the absence of reasonable suspicion. Since the Court has recognized that the use of such dogs does constitute an intrusion to some degree,[139] it seems unlikely that, were it to view the dragnet sniff circumstances in isolation, it would allow the use of such dogs to be completely unrestrained.

In *United States v. West,*[140] a case remanded from the Supreme Court for reconsideration in light of *United States v. Place,*[141] the First Circuit found that in *Place,* "requiring luggage to undergo a sniff test was held not to amount to a 'search' within the fourth amendment; rather the limitations applicable to *Terry*-type stops of the person were said to define the permissible scope of an investigative detention of luggage on less than probable cause."[142] It is clear from this language that the dog-sniff issue is not being viewed in isolation, but as an integral aspect of the investigatory detention. As a result, the factors which will be crucial for the disposition of detention-sniff cases under *Place* will be those having an impact on the length of the detention. Recognizing this, and the importance of the issues,[143] the First Circuit remanded to the district

[136]Rouse, *supra* note 134 at 175.

[137]United States v. Place, _____U.S._____ 103 S. Ct. 2637, 2644 (1983).

[138]*Id.* at 2644-45.

[139]*See supra* note 106 and accompany text.

[140]No. 80-1127 (1st Cir. Dec. 12, 1983) (available on LEXIS, Genfed library, Cir. file).

[141]____ U.S. ____, 103 S. Ct. 2637 (1983).

[142]United States v. West, No. 80-1727 (1st Cir. Dec. 12, 1983) (available on LEXIS, Genfed library, Cir. file).

[143]"Especially as this is the first case to be decided in this circuit after *Place,* we believe that the development of a full factual record oriented toward the *Place* standard will assist in the development of reliable precedent." *Id.*

court for factual findings.

> To enable us to resolve and weigh the matters, the parties should be permitted to explore and the court should make express findings upon the following questions: . . . (2) the reasons the agents did not have the detection dog on hand, or in the immediate vicinity, when West arrived from Florida, and any proper law enforcement purposes that those reasons served; (3) the time within which diligent officers stationed at a major airport like Logan can reasonably be expected to secure the presence of a detection dog after they first determine they need one; (4) the time which a properly conducted sniff examination will take from the moment the dog arrives until its completion . . . .
>
> In making findings, the district court may, if it wishes, admit expert evidence on the practicalities involved in the use of detection dogs and the investigative techniques relevant thereto (e.g., the desirability of a so-called "building search" versus exposure of a piece of luggage directly to a detection dog), to assist in determining the standard of speed and dispatch to which agents should reasonably be held.[144]

As long as the dog-sniff issue is paired with that of the *Terry*-type stop and detention, the need for any reasonable suspicion to justify the sniff itself will remain submerged. Since each *Terry* investigative stop must in itself be based upon specific, articulable facts upon which a reasonable suspicion may be grounded, the subsequent sniff, by definition, will be justified by the same reasonable suspicion. Given the predilection of law enforcement personnel for optimum utilization of effective enforcement devices, it appears inevitable that a random sniff of an array of luggage for which there is no reasonable suspicion to believe that there is contraband present, will force the federal courts to decide whether or not such suspicion is necessary to justify the sniff itself. When this happens, one can only hope that in the interests of individual privacy and freedom the courts will take note of and follow the undeniably sound and honest position which the Ninth Circuit articulated in *Beale*.

> We adhere to our position in *Beale I* in the belief that it presents a coherent framework for judicial oversight of canine investigations. Rather than follow an illogical approach of ignoring the source of the judicial authority to establish reasonable restraints on canine investigations, we think it infinitely more sensible to recognize that the scope of the fourth amendment encompasses this investigative technique. Moreover, the restraint adopted here is the eminently reasonable one of simply requiring that before using a trained dog to investigate the very private contents of personal

[144] *Id.*

luggage for evidence of crime, the police have some articulable reason, not necessarily amounting to probable cause, to suspect that the luggage may contain contraband.[145]

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[145]United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983) (available on LEXIS, Genfed library, Cir. File).