

**Fidos and Fi-don'ts: Why the Supreme Court Should  
Have Found a Search in *Illinois v. Caballes***

By Nina Paul\* & Will Trachman\*\*

[Please cite as 9 BOALT J. CRIM. L. 1]

[Please pincite using paragraph numbers; e.g., 9 BOALT J. CRIM. L. 1, ¶ 11]

**I. Introduction**

¶1 As the United States federal government endeavors to win the War on Drugs and state and local governments engage in their own anti-narcotics efforts, police officers are often tempted to skirt the line between legal and illegal searches and seizures under the Fourth Amendment. But it seems that line-skirting is a phenomenon affecting more than just police officers—the Supreme Court is also engaging in its own such behavior. In a recent decision, the Court found that the use of a drug-sniffing dog subsequent to a legal traffic stop—a measure often employed by police officers who suspect that an individual possesses illegal substances<sup>[1]</sup>—did not rise to the level of a “search” under the Fourth Amendment, and therefore did not implicate that Amendment’s terms. Because the Fourth Amendment was inapplicable to the police officers’ actions, said the Court, the canine sniff in *Illinois v. Caballes* was perfectly constitutional.<sup>[2]</sup> Caballes’ twelve-year prison sentence for possession of illegal narcotics was thus affirmed.

¶2 The decision, however, should give pause to those who fear that police officers possess broad investigatory powers in matters that might intuitively seem private. While we do not seek to impugn the motives of police officers generally--nor do we think that every officer attempts to push the outer-boundaries of the Constitution--we are quite concerned that the dilution of the Fourth Amendment attended by the *Caballes* case will give the police a degree of investigatory power that endangers civil liberties and threatens standard notions of privacy. Because the Court failed to sufficiently account for the strong Fourth Amendment interests in Caballes’ favor, it opened the door to a good deal of police conduct that should not be immune from constitutional challenge. In an effort to regain constitutional values already maligned, and preserve those values that remain,

## FIDOS AND FI-DON'TS

we seek to argue that the Court erred in, and should soon reconsider, its *Caballes* decision.<sup>[3]</sup>

### II. *Illinois v. Caballes*

¶3 On November 12, 1998, Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for speeding on Interstate Route 80 in La Salle County.<sup>[4]</sup> Caballes was driving 71 miles per hour in a zone with a posted speed limit of 65 miles per hour.<sup>[5]</sup> In doing so, he was undeniably violating the law, and could constitutionally be seized by the police (through a routine traffic stop). This was the case even if officers had other motivations for initially pursuing the stop.<sup>[6]</sup> Having pulled Caballes over, Officer Gillette radioed the police dispatcher to report the stop and was overheard by State Trooper Craig Graham, a member of the state's Police Drug Interdiction Team. After hearing Officer Gillette's transmission, Trooper Graham informed the central police dispatcher that he was driving to the scene of the stop, and planned to conduct a canine sniff of Caballes' car.<sup>[7]</sup>

¶4 Many of the facts may at first seem routine. Gillette—the only officer initially at the scene—informed Caballes that he had been stopped for speeding and then asked for his driver's license, vehicle registration, and proof of insurance.<sup>[8]</sup> Caballes gave Gillette these items without incident.<sup>[9]</sup> Gillette then directed Caballes to move his car to the side of the road and to come back to his squad car because it was raining.<sup>[10]</sup> While Caballes was in the rear of the squad car, Gillette informed him that he was only writing him a warning ticket.<sup>[11]</sup> Gillette then called the dispatcher to verify Caballes' license and to check for any outstanding warrants.<sup>[12]</sup> From there, the encounter seemed to turn from a routine traffic stop into a bona fide police investigation.

¶5 While waiting for the dispatcher to verify the validity of the license, Gillette engaged Caballes in conversation. He first asked for Caballes' destination, and why he was "dressed up."<sup>[13]</sup> Caballes told Gillette that he was moving from Las Vegas to Chicago, and was "dressed up because he ... usually dressed for business."<sup>[14]</sup> At trial, Gillette testified that Caballes seemed nervous, which the officer felt was unusual and suspicious.<sup>[15]</sup> The dispatcher told Gillette that Caballes had once surrendered a valid

## FIDOS AND FI-DON'TS

Illinois license in Nevada, but soon after confirmed that Caballes' Nevada license was authentic.<sup>[16]</sup> Even after receiving this information, however, Gillette continued to question Caballes about his criminal history and asked him for permission to search his car. <sup>[17]</sup> Caballes declined Gillette's request.<sup>[18]</sup>

¶6 Continuing the conversation, Gillette asked Caballes if he had ever been arrested. Caballes responded in the negative.<sup>[19]</sup> Soon after, however, the police dispatcher reported (while Caballes remained in the squad car) that the suspect had indeed been arrested twice for distribution of marijuana.<sup>[20]</sup> Despite catching Caballes in what seemed like an outright lie, Gillette began to write Caballes' a mere warning ticket for speeding. Gillette was still in the process of writing the ticket as Trooper Graham arrived at the scene with his drug-sniffing canine.<sup>[21]</sup> With Gillette and Caballes still in the squad car, Graham walked the dog around Caballes' car in an effort to look for narcotics. The dog ultimately alerted Graham to the presence of drugs in defendant's trunk.<sup>[22]</sup> Graham informed Gillette about the alert and subsequently searched Caballes' trunk, finding marijuana.<sup>[23]</sup> According to the testimony of the police at trial, "[t]he entire incident lasted less than 10 minutes."<sup>[24]</sup>

¶7 Upon discovery of the marijuana, Caballes was charged with one count of cannabis trafficking under Illinois' Cannabis Control Act.<sup>[25]</sup> Caballes then moved both to suppress the marijuana found in the trunk and to quash the arrest.<sup>[26]</sup> The trial court denied both motions, holding that "the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search."<sup>[27]</sup> Caballes was found guilty after a bench trial and was sentenced to twelve years in prison and fined the street value of the marijuana, \$256,136.<sup>[28]</sup> Although Caballes appealed the conviction, the Illinois Court of Appeals affirmed the lower court's decision, finding that "the police did not need reasonable articulable suspicion to justify the canine sniff and that, although the criminal history check improperly extended defendant's detention, the delay was *de minimis*."<sup>[29]</sup>

¶8 The Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any "specific and articulable facts" to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug

## FIDOS AND FI-DON'TS

investigation.”<sup>[30]</sup> The United States Supreme Court granted certiorari on the question of “whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”<sup>[31]</sup> In a short opinion written by Justice Stevens, the Court noted that 1) Gillette’s initial stop and seizure of Caballes on the highway was based on probable cause and was therefore lawful, and 2) that the stop was not unnecessarily prolonged by the canine sniff procedures employed by the police.<sup>[32]</sup> While the Illinois Supreme Court had held that the stop became unlawful due to the canine sniff,<sup>[33]</sup> the United States Supreme Court found that “any intrusion on respondent’s privacy expectations [did] not rise to the level of a constitutionally cognizable infringement.”<sup>[34]</sup>

### **III. The Dog Sniff of Caballes’ Car was a Search**

¶9 By finding that canine sniffs fail to even trigger the most basic of protections under the Fourth Amendment, the Court unnecessarily and dangerously expanded the scope of lawful police investigatory techniques. In doing so, the Court has gone astray from accurate constitutional interpretation and a protective vision of the Fourth Amendment. Moreover, it has set a new baseline of what constitutes a “reasonable expectation of privacy.” Where the Court successfully divests from individuals one form of a privacy right, other forms of privacy are subsequently more easily divested. That is, the less privacy the law offers to individuals, the less that individuals can “reasonably expect” to maintain their remaining privacy interests. These concerns weigh heavily in considering the validity of the original *Caballes* decision, as well as its continuing relevance in future cases.

#### **A. A Valid Search under the Fourth Amendment May Generally Not Infringe Upon a Reasonable Expectation of Privacy**

¶10 As one of the more distinctive and well-known components of original Bill of Rights, the Fourth Amendment of the United States Constitution guarantees that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

## FIDOS AND FI-DON'TS

For the purposes of the Fourth Amendment, “[a] ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”<sup>[35]</sup> While there are many types of searches that require warrants, the Supreme Court has stated clearly that the touchstone of the Amendment is that state officials act “reasonably” in their efforts to investigate crimes—regardless of whether a warrant is constitutionally required.

¶11 For a portion of this country’s history,<sup>[36]</sup> the Supreme Court interpreted the terms of the Fourth Amendment narrowly, often using the location of the police investigation as the dispositive determination of whether or not a “search” had occurred.<sup>[37]</sup> This jurisprudence however—ostensibly established in the 1925 case of *Olmstead v. United States*—ultimately collapsed under its own weight.<sup>[38]</sup> The Court instead gave content to the term “search” by employing a two-part test, first elaborated in Justice Harlan’s concurrence in *Katz v. United States*.<sup>[39]</sup> That test requires individual litigants, in order to argue successfully that a search by state officials has occurred, to demonstrate that “[they] exhibit an actual (subjective) expectation of privacy,” and that their “expectation [is one] that society is prepared to recognize as ‘reasonable.’”<sup>[40]</sup>

¶12 In *Katz*, the defendant appealed the Ninth Circuit Court of Appeals’ ruling allowing the introduction of evidence from “an electronic listening and recording device” that agents of the Federal Bureau of Investigation (FBI) had attached “to the outside of the public telephone booth” from which the defendant placed calls.<sup>[41]</sup> The Government argued that the defendant was as visible from inside the glass telephone booth as he would be from the outside.<sup>[42]</sup> However, the Court noted:

But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.<sup>[43]</sup>

Since the FBI agents in *Katz* ignored “the procedure of antecedent justification,” and because their surveillance led directly to the defendant’s conviction, the Court concluded that the judgment should be reversed.<sup>[44]</sup>

## FIDOS AND FI-DON'TS

¶13 Unless an individual reasonably expects a type of privacy that society is willing to recognize, however, that state officials are generally free to pursue their criminal investigations unhampered by constitutional restrictions. That is, governmental conduct that does not “compromise any legitimate interest in privacy is not a search” within the confines of the Fourth Amendment.<sup>[45]</sup> As a relevant corollary to this rule, the Court has held that police conduct that detects the possession of an illegal substance—and only the presence of that substance—“does not compromise any legitimate interest in privacy.”<sup>[46]</sup> Thus, governmental conduct that reveals only whether a substance is illicit, but no other information, does not compromise any judicially cognizable privacy interest.<sup>[47]</sup> A canine sniff by a well-trained narcotics detection dog “discloses only the presence or absence of narcotics, a contraband item,” and thus, the sniff is a unique form of police investigation.<sup>[48]</sup> The United States Supreme Court in *Katz* held that:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>[49]</sup>

The Court thus found that a drug detection canine sniff does not “expose noncontraband items that otherwise would remain hidden from public view.”<sup>[50]</sup> As such, the Supreme Court does not view canine sniffs as even triggering the privacy rights contained in the Fourth Amendment.<sup>[51]</sup>

¶14 In *Caballes*, the Supreme Court presented its decision as a mere application of the doctrine that it had set forth previously.<sup>[52]</sup> If canine sniffs do not constitute searches for the purposes of the Fourth Amendment, there is no apparent reason to require police officers to possess reasonable articulable suspicion before conducting their canine investigations.<sup>[53]</sup> But the principle is a dangerous one indeed. By offering police the degree of power that it did, the Court dramatically expanded the potential for invasions of privacy rights.<sup>[54]</sup>

### **B. Caballes Had a Reasonable Expectation of Privacy in the Trunk of His Vehicle**

## FIDOS AND FI-DON'TS

¶15 Admittedly, the Court's decision was far from surprising. Indeed, even before *Caballes*, a majority of federal courts had held that a sniff by a drug-detection canine did not constitute a search under the Fourth Amendment.<sup>[55]</sup> A canine sniff was seen as less intrusive than alternative investigative techniques that might otherwise be employed by the police.<sup>[56]</sup> Moreover, a canine sniff generally occurs in public places, where there is a reduced expectation of privacy on the part of individuals.<sup>[57]</sup> Since a canine sniff has never been considered by the Court to be an invasion of a reasonable expectation of privacy, it has never constituted a "search" for the purpose of triggering the Fourth Amendment. Thus, the Court found that there is generally no probable cause or reasonable suspicion requirement for the police to conduct a canine sniff of an individuals' property.<sup>[58]</sup>

¶16 However, at the time of *Caballes*, a handful of federal courts had indeed found that dog sniffs do constitute searches under the Fourth Amendment in certain instances.<sup>[59]</sup> In *Horton v. Goose Creek Independent School District*,<sup>[60]</sup> for example, the Fifth Circuit reversed in part a grant of summary judgment in favor of the school district because dog sniffs of students were held to violate the Fourth Amendment.<sup>[61]</sup> The court held that dog sniffs constituted searches in this instance because the students had a strong interest in the integrity of their persons.<sup>[62]</sup> Moreover, the court found that the school district did not possess individualized suspicion of drug use or possession by the students; rather, its drug searches constituted mere random investigations of the students.<sup>[63]</sup> The court in *Horton* distinguished the students subjected to the drug-detection dogs from cars and hallways in the school. The dogs could be used for alerting to the presence of drugs in school parking lots and hallways, said the Fifth Circuit, because the expectation of privacy in those places was substantially less than each student possessed for his or her person. Thus, without individualized suspicion of criminal activity, the dog sniffs of students' persons were unjustified, and held to violate the Fourth Amendment.<sup>[64]</sup>

¶17 In a separate appellate court decision—this time from the Second Circuit—a court in *United States v. Thomas*<sup>[65]</sup> held that using a drug detection dog to sniff outside of an apartment door constituted a search under the Fourth Amendment.<sup>[66]</sup> This was based

## FIDOS AND FI-DON'TS

on the reasonable expectation of privacy inside one's home.<sup>[67]</sup> That the dog had sniffed the air outside of the apartment made little difference in the dispute. In a similar vein, the Nebraska Supreme Court in *State v. Ortiz* found that even though an anonymous source tipped the police that the suspect had been actively distributing cocaine from his apartment, the police still lacked sufficient evidence to support a dog sniff outside of the apartment.<sup>[68]</sup>

¶18 In *United States v. Fifty-Three Thousand Eight-Two Dollars in U.S. Currency*, the Sixth Circuit Court of Appeals affirmed a grant of summary judgment for the plaintiffs, holding that a dog sniff of the plaintiffs' cash was an illegal search under the Fourth Amendment and could not be admitted against the plaintiffs to prove that they were involved in illegal drug transactions.<sup>[69]</sup> The court described the litigants' privacy interests "in the belongings on their respective persons" as "of a different order" than "the privacy interests in luggage,"<sup>[70]</sup> establishing a dichotomy similar to that of the Fifth Circuit in the *Horton* case discussed above. While drug-detection dogs used for most areas other than one's person do not constitute searches, the same dogs do implicate the terms of the Fourth Amendment when used on individuals or the belongings on their persons.<sup>[71]</sup>

¶19 In *Caballes*, however, the Court was silent on this issue, explicitly resolving the question of canine sniffs exclusively as it applied to those conducted pursuant to routine traffic stops.<sup>[72]</sup> But instead of constructing a comprehensive doctrine of permissible canine sniffs, the majority in *Caballes* swept broadly in relying on *United State v. Place* for the proposition that a dog sniff does not violate the Fourth Amendment since it only reveals the presence of contraband. This characterization of *Place*, however, is somewhat problematic. In *Place*, the officers conducting the canine sniff possessed reasonable articulable suspicion that the suspect's baggage contained illegal narcotics.<sup>[73]</sup> Indeed, law enforcement officers detained Place only because they suspected that he might be carrying such narcotics in his luggage.

¶20 The officers in *Place* became suspicious of the defendant while he waited in line at Miami International Airport to purchase a ticket to New York's LaGuardia Airport. Dressed in nondescript airport uniforms, the agents approached Place as he proceeded to



## FIDOS AND FI-DON'TS

his gate and asked for his identification and his ticket.<sup>[74]</sup> Upon checking his baggage tags, they decided to check the addresses on Place's two checked bags.<sup>[75]</sup> The two tags displayed different addresses.<sup>[76]</sup> Upon further investigation, the agents discovered that neither address existed, though the telephone number Place had given to the airline belonged to a third address on the same street.<sup>[77]</sup> Due to these discrepancies and Place's behavior, the agents informed Drug Enforcement Administration (DEA) authorities in New York about Place's suspicious behavior.<sup>[78]</sup> Two DEA agents waited for Place at the arrival gate at LaGuardia Airport.<sup>[79]</sup>

¶21 After claiming his two bags and calling a limousine, Place was approached by the DEA agents that had been awaiting his arrival.<sup>[80]</sup> One of these agents informed Place that they believed he was carrying narcotics and asked for his consent to a search of his luggage, which he declined.<sup>[81]</sup> The agents told Place that they were taking his luggage to a federal judge to obtain a search warrant and that he could accompany them if he wished.<sup>[82]</sup> He declined their invitation and the agents took the luggage to John F. Kennedy airport in order to conduct a drug detection dog sniff.<sup>[83]</sup> The dog reacted positively to one bag and ambiguously to another.<sup>[84]</sup>

¶22 The facts above demonstrate the uniqueness of Place's situation. In *Caballes*, Officer Gillette possessed no independent grounds for suspicion that Caballes was transporting drugs. The Illinois Supreme Court held that Gillette's observations of Caballes (that he was moving to Chicago, but only had two sport coats in the backseat, that the car smelled of air freshener, that Caballes was unemployed, but dressed for business, and that Caballes seemed nervous) gave police "nothing more than a vague hunch" of "possible wrongdoing."<sup>[85]</sup> In its own decision, the United States Supreme Court assumed that none of these factors contributed to the probable cause determination made by the police officers.<sup>[86]</sup>

¶23 This framing of the issue by the Supreme Court seems proper. Indeed, there are several reasons why a reasonable person in Caballes' situation might have acted in the manner that he did. He could have shipped his belongings to Chicago instead of transporting them himself, or he could have been planning to retrieve them after settling down in Chicago. His car could have smelled like air freshener because he is a smoker.

## FIDOS AND FI-DON'TS

Caballes himself told Gillette that he was dressed for business because he was used to dressing in that manner because he was a salesman.<sup>[87]</sup> Many individuals, when stopped and questioned by the police, may be nervous for obvious and explainable reasons. Any suspicious behavior by Caballes was far less suspicious than that of Place, who had luggage tags for non-existent addresses.

¶24 For this reason, the Caballes majority's heavy reliance on *Place* was, in a word, misplaced.<sup>[88]</sup> At the very least, the Court should have been hesitant to use parts of the decision as controlling, and thus settled, law. While the holding in *Place* is not irrelevant to the decision, there remain compelling arguments for finding that at least some genres of dog sniffs should be considered searches under the Fourth Amendment. Even if the Court is unlikely to revisit its ruling in *Caballes* on stare decisis grounds, or for other reasons, it should be extremely hesitant to expand the ruling in that case further.<sup>[89]</sup> So long as the police have at their fingertips the ability to conduct canine sniffs whenever they choose, the threat of such sniffs will be ever-present. While the Court may not yet have cast its net so broadly, its language in *Caballes* gives rise for serious concern. As Justice Souter wrote in dissent:

I do not take the Court's reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car...or on the person of any pedestrian minding his own business on a sidewalk. But the Court's stated reasoning provides no apparent stopping point short of such excesses. For the sake of providing a workable framework to analyze cases on facts like these, which are certain to come along, I would treat the dog sniff as the familiar search it is in fact, subject to scrutiny under the Fourth Amendment.<sup>[90]</sup>

In other words, the guarantees of the Fourth Amendment are endangered by, and become more fragile as a result of, piecemeal reductions in privacy rights by the Court. Sweeping language, perhaps used in one context, can be extended to others, and may have the aggregate effect of seriously undermining constitutional values. This should not be so. At some point, the Fourth Amendment must speak conclusively to the privacy interests that are reasonably expected by American citizens.

**C. Caballes Was Wrongly Decided Given Current Law**

¶25 Although no Supreme Court case was directly on point in *Caballes*, a number of valid precedents could have, and should have, led the Court to make the finding opposite of the one it did—that the use of a drug-detection dog during a routine traffic stop constitutes a search under the Fourth Amendment. Note first that locked, closed car trunks “are accorded some level of privacy protection.”<sup>[91]</sup> Federal courts have stated that owners of cars parked in public places still have a reasonable expectation of privacy.<sup>[92]</sup> In *United States v. Holmes*, for instance, the Fifth Circuit held that the installation of a beeper on the underside of a parked vehicle in a public parking lot was a search.<sup>[93]</sup> The court reasoned that “[w]hen a person parks his car on a public way, he does not thereby give up all expectations of privacy in his vehicle.”<sup>[94]</sup> The court explained:

[T]here is no way to protect against this type of intrusion once one leaves home and enters the public streets. There is no way to lock a door or place the car under a protective cloak as a signal to the police that one considers the car private.<sup>[95]</sup>

If an individual has a reasonable expectation of privacy in the underside of his vehicle, he certainly should have a reasonable expectation of privacy in the containers inside of a locked, closed trunk of a vehicle.

¶26 Appellate courts that have disagreed with the Fifth Circuit have done so by effectively distinguishing *Holmes* with evidence of reasonable suspicion on the part of the police officers.. For instance, in *United States v. McIver*, the Ninth Circuit held that the placement of a beeper on the undercarriage of a vehicle in fact did not constitute a search.<sup>[96]</sup> However, in *McIver*, police officers placed two magnetized tracking devices on the undercarriage of a Toyota 4Runner that had been photographed at the site of a marijuana field where the vehicle’s registered owner had also been photographed.<sup>[97]</sup> Thus, in *McIver*, the police had a greater suspicion that the vehicle was involved in illicit activity than in *Holmes*; the situation in *Caballes* was thus more analogous to the facts in *Holmes* than those in cases like *McIver*.

¶27 The Court in *Caballes* also should have given heavy weight to Caballes' reasonable expectation of privacy in his trunk. In rejoinder, critics of this contention may argue that courts have constructed a "plain smell" doctrine analogous to the "plain view" doctrine; that is, when an officer observes an object left in plain view, no search occurs because the owner has exhibited "no intention to keep [the object] to himself."<sup>[98]</sup> However, an object kept in a locked, closed trunk clearly shows the owner's manifestation of an expectation of privacy. While there is no legitimate expectation to privacy in illegal objects, there are limits to using technological enhancements in investigation.<sup>[99]</sup> Since the police in *Caballes* had no independent grounds for suspecting illegal objects in the trunk, Caballes had a reasonable expectation of privacy. With this reasonable expectation, the Court should have held that the dog sniff was an illegal search in violation of the Fourth Amendment.

**D. The Fallibility of Drug Detection Dogs Proscribes a Sniff from Being Treated as a Unique Crime-Fighting Tool**

¶28 Even if one believes that the situation in *Place* is legally analogous to the situation in *Caballes*—thus making *Place* controlling law for the latter case—a drug detection dog's fallibility seemingly "ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment."<sup>[100]</sup> The argument that canine sniffs are *sui generis*—or, in other words, unique because they are trained only to sniff out illegal contraband—relies on the fact that such dogs genuinely are capable of accurately alerting to only such contraband. Several judicial opinions, however, have noted the fallibility of even well-trained dogs.<sup>[101]</sup> The Court of Appeals for the Tenth Circuit noted that a dog in one case had a seventy-one percent accuracy rate and that a dog in another case erroneously alerted four times out of nineteen while working for the postal service and eight percent over its entire career.<sup>[102]</sup> A federal court held that a dog that gave false positives between seven and thirty-eight percent of the time was reliable.<sup>[103]</sup> Another court examined a dog that had made between ten and fifty errors during its services as a drug-sniffer, and a third federal court noted that dog alerts are of little value when used to sniff cash because as much as eighty percent of all currency in circulation contains drug residue.<sup>[104]</sup> Even the state of Illinois cited a study that found dogs in artificial testing

## FIDOS AND FI-DON'TS

situations return false positives between twelve and a half and sixty percent of the time.<sup>[105]</sup> In one case—*Doe v. Renfrow*—a drug detection dog sniff of a student yielded a false positive because the dog reacted to the smell of the student's own dog, which was in heat, not to the smell of illegal drugs.<sup>[106]</sup>

¶29 Due to the great fallibility of drug detection dogs, “a sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime.”<sup>[107]</sup> Thus, a sniff alert

cannot claim the certainty that *Place* assumed.... [Canine sniffs] are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced.... Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area.<sup>[108]</sup>

Since a dog sniff is far from infallible, the sniff is the “first step in a process that may disclose ‘intimate details’ without revealing contraband.”<sup>[109]</sup> This is noticeably similar to the type of investigatory tactic used in *Kyllo v. United States*.<sup>[110]</sup> In *Kyllo*, the Court held that the employment of a thermal-imaging device to detect the growth of marijuana plants in a home constituted an unlawful search.<sup>[111]</sup> Although the device could detect the heat lamps necessary for growing the drugs, thermal imaging techniques could also detect perfectly lawful activity, including intimate details in a home, such as when an individual takes a bath.<sup>[112]</sup> Although intimate details of the vehicle's trunk would only be revealed if the trunk were opened, where as the thermal-imaging device in *Kyllo* would reveal intimate details immediately, “in practical terms the same values protected by the Fourth Amendment are at stake in each case.”<sup>[113]</sup> Thus, the Court in *Caballes* should have examined the dog sniff in the context of how the search is conducted in practice, and in light of the Court's past precedents under Fourth Amendment law.<sup>[114]</sup> Under *Kyllo*, since the dog sniff would reveal intimate details that violated an individual's expectation of privacy, the Court should have held that the dog sniff was

indeed a search and could not be conducted without a particular suspicion of wrongdoing.<sup>[115]</sup>

#### **IV. Even if the Dog Sniff of Caballes' Vehicle Was Not a Search, the Scope of the Stop Was Broadened to Render the Sniff Unconstitutional**

¶30 The United States Supreme Court has held that a search that is reasonable at its inception may yet violate the Fourth Amendment by virtue of its intolerable intensity and scope.<sup>[116]</sup> The scope of the search must be “strictly tied to and justified by” the circumstances which rendered the initiation of the search permissible.<sup>[117]</sup> Although it is rare for the police to stop a car for speeding only six miles above the speed limit, the Illinois Supreme Court held in *Caballes* that the inception of the traffic stop was legal.<sup>[118]</sup> However, in conducting a dog sniff of the car, the seizure of the car became “unwarranted and nonconsensual . . . from a routine traffic stop to a drug investigation . . . in a manner that . . . runs afoul of the Fourth Amendment.”<sup>[119]</sup>

¶31 While the Fourth Amendment requires that the police have probable cause before a warrant issues, there are several types of searches that do not actually require warrants in the first place. These sorts of limited—and theoretically less invasive--searches need only meet a more generous *Terry* standard, named for the case in which the standard originated.<sup>[120]</sup> The *Terry* test considers (1) “whether the officer’s action was justified at its inception” and (2) “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>[121]</sup> In *Caballes*, however, the Court improperly ignored the second aspect of the *Terry* inquiry.<sup>[122]</sup> If reasonableness is necessary for a search for weapons, reasonableness should presumably be required for a search for drugs. Even though the issue in *Terry* was a frisk for weapons and not a traffic stop, many courts, like the Illinois Supreme Court, have traditionally applied the two-prong test to determine the reasonableness of routine traffic stops.<sup>[123]</sup>

¶32 In the case of weapons, the courts have balanced the competing interests of public and police safety with Fourth Amendment protections. In the case of drugs, courts have balanced the competing interests of stopping drug sales and distribution with standard Fourth Amendment protections. While decreasing the amount of drugs available is

## FIDOS AND FI-DON'TS

obviously an important social goal, the public and the police are not in direct, immediate harm as they are when weapons might be present. One useful illustration of this point is made in *United States v. Walker*, where a police officer stopped a speeding motorist longer than the time needed to write him a ticket and questioned the motorist about whether he had weapons, drugs, or large amounts of cash in the car.<sup>[124]</sup> The Tenth Circuit held that such conduct violated the Fourth Amendment because the circumstances did not justify any reasonable suspicion of criminal activity other than speeding.<sup>[125]</sup> Given the reasoning exhibited in *Walker* by the Tenth Circuit, the Supreme Court should have at least examined the second prong of the *Terry* test and considered whether the dog sniff may have unconstitutionally expanded the seizure of Caballes.

¶33 In this regard, even if the drug detection canine sniff in *Caballes* is not considered a search under the Fourth Amendment, the sniff “surely broadened the scope of the traffic-violation-related seizure.”<sup>[126]</sup> A drug detection canine is not the equivalent of a normal pet dog and is often intimidating.<sup>[127]</sup> As Justice Ginsburg noted in dissent, “[i]njecting such an animal into a routine traffic stop changes the character of the encounter between the police and motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”<sup>[128]</sup>

¶34 Some members of the Court might respond to this argument by noting that in *Caballes*, the stop lasted a mere ten minutes, and that Gillette did not intend to prolong the stop so that Graham would be able to use the drug detection canine to sniff for illegal substances.<sup>[129]</sup> But the use by the police of drug-detection dogs and the Court’s framing of the question presented, are particularly dangerous. Any and all traffic stops might now include a canine sniff of an individual’s vehicle. This is troubling in part because speeding is entirely unrelated to the possession or sale of illegal narcotics, and should therefore be treated as such by the law. But perhaps it is even more troubling because the crime that permits the police to conduct canine sniffs is one of which we are all likely guilty—speeding.

¶35 Undoubtedly then, Caballes’ stop did become broader once the dog sniff occurred. If nothing else, Caballes was subjected to a more adversarial situation than he would have been with a mere speeding ticket. Receiving such a ticket, even if only as a

## FIDOS AND FI-DON'TS

warning, is of course an uncomfortable situation in itself. But the further questioning by Officer Gillette, followed by an outright inspection of his personal property by a canine, clearly created an adversarial situation. Finally, as the dissent noted, Caballes was also “exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs.”<sup>[130]</sup> After *Caballes*, there is little reason to expect the rest of us will not soon be the target of a canine sniff in the course of a routine traffic stop. But the Supreme Court failed even to acknowledge these broad social implications. And by offering the police such wide leeway in conducting investigations, the Court permits the police to treat anyone stopped for speeding as a suspect in a narcotics investigation.

¶36 The Court should have instead found that by conducting a dog sniff for illicit substances of Caballes’ vehicle, the Illinois State Police Department changed a routine traffic stop for speeding into an illegal search under the Fourth Amendment. That this use of a drug-detection dog necessarily expands the scope of a traffic stop is undeniable. Notably, a drug-detection dog adds “no value to the investigation of a simple traffic infraction.”<sup>[131]</sup> And as the dissent recognized, the dog cannot “ascertain the speed at which a vehicle was traveling or the true state of an apparently broken tail-light, let alone the real identity of a detained motorist.”<sup>[132]</sup> Thus, a dog sniff for the purpose of searching for illicit substances is not even vaguely connected to “the class of infractions that result in a routine traffic stop.”<sup>[133]</sup>

¶37 Gillette’s stop of Caballes for excessive speed is entirely unrelated to an investigation for drugs. Thus, Caballes was unnecessarily subjected to a more intimidating, adversarial search and increased embarrassment. Drug detection canines do not add any positive investigative technique to a traffic stop. As a result, the Court should have held that the dog sniff was illegal under the Fourth Amendment.

### **V. The Court’s Decision Is Contrary to Public Policy**

¶38 The Court’s decision in *Caballes* is a dangerous precedent that could lead to the erosion of numerous Fourth Amendment protections. If a dog sniff is not considered a search, the police may use a drug detection dog to conduct investigations for illegal substances without fear of substantial constitutional limitations. Without question,



## FIDOS AND FI-DON'TS

motorists often drive at speeds above the speed limit. Under *Caballes*, an individual's car could be subjected to a drug detection canine sniff even with the commission of a negligible offense or infraction. These lawful seizures could include situations where drivers are traveling only one mile above the speed limit or have broken or malfunctioning headlights. Thus, these motorists, and possibly their passengers, would be subjected to longer, more adversarial stops. Still, the Solicitor General's brief encouraged a blanket approval of dog sniffs for drug detection. Given the perhaps overzealous use of dog sniffs currently, the government could easily fall down the slippery slope of using dog sniffs regularly and anywhere.<sup>[134]</sup>

### **A. The *Caballes* Decision Will Lead to Greater Infringements of Privacy**

¶39 The Solicitor General's argument lends credence to Justice Ginsburg's dissenting opinion where she contends that the decision "clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots."<sup>[135]</sup> Motorists would not "have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green."<sup>[136]</sup> Moreover, even though the Court has ruled that a police officer cannot subject an individual to longer questioning to allow time for a drug sniffing dog to arrive, an unreasonable length of time is a somewhat nebulous standard that will be difficult to apply in courts that could also lend itself to abuse.<sup>[137]</sup> For instance, a police officer could submit questions about license validity or arrest history to dispatchers one-by-one, as opposed to in a group, so as to increase the detention period of the stop.

¶40 *Caballes'* broad language could even be found applicable for searches of individuals. Though the integrity of one's person under the Fourth Amendment has been highly guarded by the courts, it would seem perplexing for the judiciary to find a search triggering the Fourth Amendment in the context of automobiles but not individuals. This is particularly the case where drug detection is at issue, since the Court has often relied on the fact that the act of conducting a canine sniff is constitutionally acceptable because it reveals only illegal contraband.

## FIDOS AND FI-DON'TS

¶41 In addition to the concerns the noted above, it seems that the Court in *Caballes* is itself playing a role in its own test, since the definition of a “reasonable” expectation of privacy can presumably be affected by the pronouncements of the Court. That is, since finding a search under *Katz* relies in part on society’s expectations, the ruling that a dog sniff does not violate a reasonable expectation of privacy functions to alter future individual expectations of privacy. A police officer could walk his dog down the sidewalks of a city street, and if the dog alerted to an individual, the police would have probable cause to search that individual further. There would be nothing to stop officers from circling an individual suspected of a crime or repeatedly visiting a high-crime neighborhood in an attempt to get an alert. Given the fallibility of drug detection dogs, this is an especially dangerous possibility. Individuals would not only be subjected to a dog sniff, but if the dog alerted, to a further invasive search.

### **B. The Decision Has the Potential to Undermine Past Supreme Court Precedent**

¶42 The *Caballes* decision also undermines the “Court’s situation-sensitive balancing of Fourth Amendment interests in other contexts.”<sup>[138]</sup> In *Bond v. United States*, the Court held that “a bus passenger had an expectation of privacy in a bag placed in an overhead bin and that a police officer’s physical manipulation of the bag constituted an illegal search.”<sup>[139]</sup> The dissent in *Caballes* may prove prescient in saying that “[i]f canine drug sniffs are entirely exempt from Fourth Amendment inspection, a sniff could substitute for an officer’s request to a bus passenger for permission to search his bag,” with one significant difference—that the passenger would not have the option of refusing.<sup>[140]</sup> That is, we will soon observe whether police officers have occasion to walk into public restaurants, theatres, or other locations armed with sniffer dogs that are nearly immune from constitutional limitations.

### **C. Finding that the Situation in Caballes Was a Search Would Not Harm Public Safety**

¶43 A holding that a dog sniff for drugs is a search would not preclude dog sniffs for explosives or agricultural products detection as the Court has distinguished between a

## FIDOS AND FI-DON'TS

general interest in crime control and more immediate threats to public safety.<sup>[141]</sup> For example, the Court held that sobriety traffic checkpoints are constitutional in *Michigan Department of State Police v. Sitz*.<sup>[142]</sup> However, a decade after its decision in *Sitz*, the Court held in *Indianapolis v. Edmond*, that drug interdiction checkpoints did violate the Fourth Amendment because a general interest in crime control did not justify the stops.<sup>[143]</sup> The *Edmond* Court distinguished its decision from the one in *Sitz* by noting that sobriety checkpoints attempted to eliminate the much more serious dangers of drunk driving and the immediate threat of bodily injury and even death.<sup>[144]</sup> Thus, a holding in *Caballes* that a dog sniff is a search would not seriously compromise investigations into the most severe threats to public safety.

### VI. Conclusion

¶44 It is our opinion that Caballes' legitimate privacy rights were violated by the canine search that followed his lawful stop. Because the guarantees of the Fourth Amendment, as supported by previous case law, argue for a broader vision of privacy rights than does the Court in *Caballes*, the Court's decision is in error and ought to be reconsidered. The canine sniff itself was a search because Caballes' reasonable expectation of privacy was violated, and because dog sniffs are unreliable to the extent that they reveal legal, intimate, personal information and items. Further, even if the dog sniff at its inception is not considered a search—given that Caballes' only crime at the time of the sniff was his speeding violation—the scope of the constitutional seizure was unconstitutionally enlarged. Caballes was then subjected to an invasive, embarrassing, and adversarial process. Finally, the decision in *Caballes* clearly goes against public policy. The decision permits police officers to use dog sniffs at the scene of any illegal act, even for the most minor of traffic violations. Future decreased expectations of privacy could even lead to courts ruling that it is not a violation of the Fourth amendment to use a dog to sniff outside of a home or even on an individual's person. While decreasing the amount of illegal drugs on the street is an important goal, the Court has put in jeopardy those bedrock Fourth Amendment protections that are important to us all.

---

## FIDOS AND FI-DON'TS

\* J.D. Candidate, University of California, Hastings College of the Law, 2006.

\*\*J.D. Candidate, University of California, Berkeley School of Law (Boalt Hall), 2005. The authors wish to thank the editors of the Boalt Journal of Criminal Law, particularly Ms. Maybell Romero, for their time and helpful suggestions.

[1] See Wayne R. Lafave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1894 (2004) (“[A] not uncommon tactic these days in police efforts to use traffic stops as a means of drug interdiction is to lead a drug dog around the detained vehicle to see if the dog will ‘alert.’”); WAYNE R LAFAVE, ET AL., CRIMINAL PROCEDURE 137 (3d. ed. 2000) (“In recent years police have made extensive use of specially trained dogs to detect the presence of explosives or, more commonly, narcotics.”) [hereinafter CRIMINAL PROCEDURE].

[2] *Illinois v. Caballes*, 125 S. Ct. 834 (2005).

[3] Of course, a more thorough reconsideration of more than just the *Caballes* decision may be justified. Indeed, although such a task is outside the scope of this piece, some scholars have advanced compelling arguments for dramatic overhauls. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 33 (1997) [hereinafter FIRST PRINCIPLES] (describing the modern Court’s jurisprudential model as roughly analogous to the often-shifting Ptolemaic epicycle system).

[4] *Illinois v. Caballes*, 207 Ill. 2d 504, 506 (2003).

[5] *Id.* at 506.

[6] See *Whren v. United States*, 517 U.S. 806 (1996). For a discussion of the sometimes problematic nature of routine traffic stops, see Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1 (2001); see also WAYNE R. LAFAVE, *A TREATISE ON THE FOURTH AMENDMENT* 4-400 (4th ed. 2004) (“Allowing the dogs to be used serves only as a positive encouragement for police to engage in pretext and subterfuge, hardly a defensible move given the common knowledge that traffic law enforcement has been diverted from its justified objectives to serve as a means for seeking out drugs.”) [hereinafter A TREATISE].

[7] *Caballes*, 207 Ill. 2d at 506.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 506-07.

[11] *Id.* at 507.

## FIDOS AND FI-DON'TS

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* This sort of questioning is apparently common during such stops:

During a routine traffic stop turned consent search, the second, and critical, stage of Fourth Amendment “search” or “seizure” occurs after the traffic stop has ended. At that point, the police officer has already issued a warning or citation for the traffic offense, and, next, usually asks the motorist whether the vehicle contains anything illegal and for consent to search.

Whorf, *supra* note 6, at 4.

[18] The request to conduct a consensual search of Caballes’ car did not constitute a seizure to the extent that he felt free to decline such a request. *See* United States v. Drayton, 536 U.S. 194, 202 (2002) (“The proper inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”) (citation and quotation marks omitted).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* Upon seeing that the police dog had “alerted,” Trooper Graham almost certainly had probable cause to search the trunk of Caballes’ vehicle. *See, e.g.,* United State v. \$404,905.00 in U.S. Currency, 182 F.3d 643 (8th Cir. 1999); Osorio v. State, 569 So.2d 1375 (Fla. App. 1990). Whether police officers should necessarily arrive at such a conclusion is discussed below.

[24] Illinois v. Caballes, 125 S. Ct. 834, 836 (2005).

[25] 720 Ill. Comp. Stat. 550/1.5(a) (West 1998); Caballes, 207 Ill. 2d at 506.

[26] Caballes, 125 S. Ct. at 836.

## FIDOS AND FI-DON'TS

[27] *Id.*

[28] Caballes, 207 Ill. 2d at 508.

[29] *Id.*

[30] *Id.* at 510. Illinois was not alone in finding that the Fourth Amendment required reasonable suspicion prior to conducting a canine sniff during a routine traffic stop. *See State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002) (requiring “reasonable, articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics.”).

[31] 541 U.S. 972 (2004).

[32] Caballes, 125 S. Ct. at 837.

[33] Caballes, 207 Ill. 2d at 510.

[34] Caballes, 125 S. Ct. at 838.

[35] *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (citations omitted).

[36] We use this phrase primarily to refer to early 20<sup>th</sup> Century criminal procedure jurisprudence. The history of criminal procedure in the United States is quite sparse prior to 1891. Before this date, the provisions of the Bill of Rights most often associated with criminal procedure were inapplicable to the states, and Congress had yet to invest in the Supreme Court general appellate review over federal criminal cases. *See Akhil Reed Amar, The Future of Constitutional Criminal Procedure* 110-11, in *THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM* 108-28 (Bradford P. Wilson & Ken Masugi eds., 1998) [hereinafter *The Future*].

[37] *Olmstead v. United States*, 277 U.S. 438 (1928) (finding that the wiretapping of a public pay telephone did not constitute a search because the wires were not an “effect” under the terms of the Fourth Amendment).

[38] *Katz v. United States*, 389 U.S. 347, 353 (1967) (“Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.”).

[39] *Id.* at 360 (Harlan, J., concurring).

[40] *Id.*

[41] *Id.* at 349.

## FIDOS AND FI-DON'TS

[42] *Id.* at 352

[43] *Id.*

[44] *Id.* at 359.

[45] *United States v. Jacobsen*, 466 U.S. 109, 122 (1984)

[46] *Id.* Some scholars contend that this rule seems to follow logically from the fact that the Fourth Amendment is designed to protect the innocent, not the guilty. *See Amar, The Future, supra* note 36, at 121 (“Law breaking, *as such*, is entitled to no legitimate expectation of privacy, and so if a search can detect only law breaking as such, it poses little threat to Fourth Amendment values.”) (emphasis in original).

[47] *Jacobsen*, 466 U.S. at 122.

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

[49] *Katz*, 389 U.S. at 351.

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

[51] One scholar has noted that the Court has reached the right result in these cases, even if its analysis is perhaps problematic. *See Amar, FIRST PRINCIPLES, supra* note 3, at 112 (“Though the Court’s particular approach—labeling these searches non-searches—was not particularly helpful, its deep instinct was sound: the searches were *reasonable*, and thus constitutional.”) (emphasis in original).

[52] *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005) (“[T]he use of a well-trained narcotics-detection dog—one that does not expose noncontraband items that otherwise would remain hidden from public view—during a lawful traffic stop, generally does not implicate legitimate privacy interests.”) (citations and quotation marks omitted).

[53] *Id.*

[54] The decision may also have consequences for searches that do not involve canines at all. *See Orin Kerr, Dog Sniff Precedent Reaffirmed, Volokh Conspiracy*, Jan. 24, 2005, at [http://www.volokh.com/archives/archive\\_2005\\_01\\_23-2005\\_01\\_29.shtml#1106585518](http://www.volokh.com/archives/archive_2005_01_23-2005_01_29.shtml#1106585518):

The Fourth Amendment traditionally has focused on how the surveillance occurred, rather than the nature of the information obtained. Under the rationale followed by the Court today, the government may be free to invade your property so long as they only obtain “non private” information. This is particularly troubling in the context of computer searches and seizures. Can the police send a computer virus to your computer that searches

## FIDOS AND FI-DON'TS

your computer for obscene images, or images of child pornography, and then reports back to the police whether such images are on your computer—all without probable cause, or even any suspicion at all? The traditional answer would have been no: the police cannot enter your private property to search even for non-private stuff. But thanks to the increasing focus on the nature of the information rather than how the information is obtained, it's no longer so clear.

[55] *See, e.g.*, *Place*, 462 U.S. 696 (concluding that a canine sniff of personal luggage is not a search because an individual has no legitimate privacy interest in contraband, the sniff is less intrusive than alternate investigative techniques, and the sniff only reveals the presence of illegal substances.); *United States v. Garcia*, 42 F.3d 604 (10th Cir. 1994) (holding that an individual does not have an expectation of privacy in the air surrounding his luggage); *City of Indianapolis v. Edmond*, 121 S. Ct. 447 (2000) (finding that a canine sniff at city drug interdiction checkpoints did not transform the seizure of the vehicle into a search of the vehicle because a canine sniff only reveals the presence of or absence of narcotics and a canine search is less intrusive than alternative investigative means); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997) (affirming a denial of defendant's motion to suppress evidence of cocaine seized during a search of his hotel room after a drug detection canine alert because an officer can obtain evidence within "plain smell" of a canine without a warrant and defendant did not have a reasonable expectation of privacy in the hallway outside of his room), *reh'g denied*, 1997 U.S. Att. LEXIS 30406; *United States v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993) (holding that a dog sniff of the exterior of defendant's warehouse was not a search under the Fourth Amendment because there is no legitimate privacy interest in contraband); *United States v. Robinson*, 390 F.3d 853 (6th Cir. 2004) (determining that dog sniff of a package and dog's subsequent ripping open the package did not violate the Fourth Amendment because a dog sniff is not a search under the Fourth Amendment and the dog alerted before opening the package; therefore, the police would have obtained the same evidence with a warrant).

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

[57] *Id.*

[58] *City of Indianapolis v. Edmond*, 531 U.S. 32, 52-53 (2000) ("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.").

[59] *See United States v. Kelly*, 302 F.3d 291 (5th Cir. 2002) (holding that dog sniff of individuals crossing the U.S.-Mexico border infringes upon a reasonable expectation of privacy and is a violation of the Fourth Amendment); *Jones v. Latexo Indep. Sch. Dist.*, 499 F.Supp. 223 (E.D. Tex. 1980) (finding that dog sniff of students violated their



## FIDOS AND FI-DON'TS

reasonable expectation of privacy and there was no individualized suspicion of drug activity on campus); *Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979), *aff'd in part, remanded in part on other grounds*, 631 F.2d 91 (7th Cir. 1980), *reh'g denied*, 635 F.2d 582 (7th Cir. 198) (dog sniff of a student violated her reasonable expectation to privacy and subsequent search of student violated the Fourth Amendment because there was no basis for the search except for the dog alert); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999) (concluding that dog sniff of high school students infringed upon their reasonable expectation of privacy and was a search under the Fourth amendment).

[60] 690 F.2d 470 (5th Cir. 1982), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982).

[61] *Id.* at 488.

[62] *Id.* at 481.

[63] *Id.*

[64] *Id.* at 488.

[65] 757 F.2d 1359 (2d Cir. 1985).

[66] *Id.* at 1367.

[67] *Id.*

[68] 257 Neb. 784, 794 (1999) (“[I]t is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.”)

[69] 985 F.2d 245, 251 (6th Cir. 1993).

[70] *Id.* at 249.

[71] But there is no obvious reason why at least some automobile searches would not be included as within the arena of protection guaranteed by the Fourth Amendment. *See* LAFAVE et al., *CRIMINAL PROCEDURE*, at 141 (“There will occasionally be instances, however, in which the scrutiny [of the police engaging in an automobile search] will be intense, resulting in the discovery of what had been concealed by reasonable means, that under the *Katz* rationale the police conduct must be designated a search.”).

[72] *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005) (“The question on which we granted certiorari is narrow: ‘Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.’”) (citations omitted).

[73] *Id.* at 841 n.5 (Souter, J., dissenting) (“Thus, in *Place* itself, the Government officials had independent grounds to suspect that the luggage in question contained contraband before they employed the dog sniff. 462 U.S., at 698, 103 S. Ct. 2637

## FIDOS AND FI-DON'TS

(describing how Place had acted suspiciously in line at the airport and had labeled his luggage with inconsistent and fictional addresses).”).

[74] *United States v. Place*, 462 U.S. 696, 699 (1983).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* The question of ambiguous alerts, and the implications that these canine reactions may have for probable cause determinations, is addressed below.

[85] *Illinois v. Caballes*, 207 Ill.2d 504, 509-10 (2003).

[86] *See Illinois v. Caballes*, 125 S. Ct. 834 (2005).

[87] *Caballes*, 207 Ill. 2d at 507.

[88] This was noted aptly by Justice Souter in dissent. *See Caballes*, 125 S. Ct. at 841 (“That [the canine sniff was a search in Caballes’ case] has to be the rule unless *Terry* is going to become an open-sesame for general searches, and that rule requires holding that the police do not have reasonable grounds to conduct sniff searches for drugs simply because they have stopped someone to receive a ticket for a highway offense.”).

[89] *Id.* at 842 (noting the dangers inherent in finding any valid seizure of an individual an “open sesame” for canine sniffs).

[90] *Id.* at 842-43.

[91] *See New York v. Belton*, 453 U.S. 454, 460, n.4 (1981) (noting that a search of the cabin of a car, incident to arrest, may take place, but may not include the trunk absent probable cause).

## FIDOS AND FI-DON'TS

[92] *United States v. Holmes*, 521 F.2d 859, 864 (5th Cir. 1975), *aff'd by an equally divided court*, 537 F.2d 227 (5th Cir. 1976) .

[93] *Id.*

[94] *Id.* at 864.

[95] *Id.*

[96] 186 F.3d 1119, 1123 (9th Cir. 1999).

[97] *Id.*

[98] *Katz v. United States*, 389 U.S. 347, 361 (1967) ; *see also United States v. Tarazon-Silva*, 960 F. Supp. 1152 (W.D. Tex. 1997) (“In other words, if a police officer, positioned in a place where he has a right to be, recognizes the odor of, for example, marijuana, no search has occurred. The emanation of an odor from a person or property is considered to be exposed to the public ‘view’ and, therefore, not protected.”).

[99] *Illinois v. Caballes*, 125 S. Ct. 834, 842 n.6 (2005) (Souter, J., dissenting) (“[I]f Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness, lest everything be deemed in plain view.”); *see also Kyllo v. United States*, 533 U.S. 27 (2001) (finding unconstitutional the use of a thermal-imaging device that detected the heat under which many marihuana plants grow).

[100] *Caballes*, 125 S. Ct. at 840 (Souter, J., dissenting).

[101] *Id.* at 839.

[102] *Id.* (citing *United States v. Scarborough*, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997)).

[103] *Id.* (citing *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001)). *See also Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 433-34 (1997) (“The judiciary should be most skeptical of sniffs conducted in a random, unfocused manner. All but the most carefully planned random sniffs using highly-trained dog teams will likely result in many false detections.”).

[104] *Caballes*, 125 S. Ct. at 839 (citing *United States v. \$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003)).

[105] *Id.* at 840 (citing K. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* 12 (Apr. 2001)).

[106] 475 F. Supp. 1012, 1017 (N.D. Ind. 1979).

## FIDOS AND FI-DON'TS

[107] Caballes, 125 S. Ct. at 840 (Souter, J. dissenting).

[108] *Id.*

[109] *Id.*

[110] 533 U.S. 27 (2001).

[111] *Id.* at 38.

[112] *Id.*

[113] Caballes, 125 S. Ct. at 840 n.3 (Souter, J., dissenting).

[114] *Id.* at 840-41.

[115] *See id.* at 841; *see* *Kyllo v. United States*, 533 U.S. at 29-41 (2001).

[116] *See* *Kremen v. United States*, 353 U.S. 346 (1957).

[117] *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

[118] *See* *Illinois v. Caballes*, 207 Ill. 2d 504, 509 (2003). Justice Souter even shows his incredulity at the stop in his dissent, but notes that the case came to the Supreme Court only for the reason that the stop was for excessive speed. *See* Caballes, 125 S. Ct. at 841 n.4. Of course, under the *Whren* decision noted above, police officers may constitutionally stop traffic violators even for discriminatory reasons, as long as there is a legal basis.

[119] Caballes, 125 S. Ct. at 845 (Ginsburg, J., dissenting).

[120] *Terry v. Ohio*, 392 U.S. 1 (1968).

[121] *Id.* at 843 (citations omitted).

[122] *See* Caballes, 125 S. Ct. at 843-46.

[123] *Id.*

[124] *United States v. Walker*, 933 F.2d 812 (10th Cir. 1991).

[125] *Id.*

[126] Caballes, 125 S. Ct. at 845 (Ginsburg, J., dissenting).

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

## FIDOS AND FI-DON'TS

[128] *Id.* at 845.

[129] *See id.* at 836.

[130] *Id.* at 845 (Ginsburg, J., dissenting).

[131] Brief of Amici Curiae ACLU and ACLU of Illinois at 9, *Illinois v. Caballes*, 125 S. Ct. 834 (No. 03-923).

[132] *Id.*

[133] *Id.*

[134] This may have been precisely what the state of Illinois had in mind when it argued the case before the Supreme Court. *See id.* at 8-9 (“Indeed, what is perhaps most remarkable about this case is the government’s insistence that it should instead be free to use targeted criminal investigatory techniques against particular citizens based on nothing more than its general interest in crime control, without any specific jurisdiction whatsoever.”).

[135] *Illinois v. Caballes*, 125 S. Ct. at 845-46.

[136] *Id.* at 846.

[137] *See* LAFAVE, A TREATISE, at 4-399.

But precisely because the dog sniff itself takes so little time, courts in this context have been especially willing to employ a “fudge factor” regarding the temporal limits of the traffic stop; if the dog sniff is conducted immediately after completion of those tasks actually connected with the traffic violation, the resulting additional custody is deemed so *de minimis* as to be of no consequence.

*Id.* at 4-399

[138] *Caballes*, 125 S. Ct. at 846.

[139] *Id.* (citing *Bond*, 529 U.S. 334, 338-39 (2000)).

[140] *Id.*

[141] *Id.* at 846-47.

[142] *Id.* at 847 (citing *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)).

[143] 531 U.S. 32 (2000).

## FIDOS AND FI-DON'TS

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