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# COMMENTS

## THE FOURTH AMENDMENT AND DRUG- DETECTING DOGS

Jeffrey T. Even

### I. INTRODUCTION

The use of trained dogs to detect contraband poses complicated issues of search and seizure law. Society has a strong interest in controlling the possession and transport of certain items, such as drugs and explosives, that trained dogs can detect effectively and efficiently. Some uses of these dogs, however, have been criticized as violating the individual's right to privacy. The United States Supreme Court appears to have limited this objection by indicating that the fourth amendment to the United States Constitution does not apply to the use of dogs to examine inanimate objects.<sup>1</sup> This comment discusses the constitutional parameters for the use of drug-detecting dogs.<sup>2</sup> It also explores the principles that underlie those parameters by closely examining a series of opinions regarding their use.

This analysis begins with an examination of Ninth Circuit Court of Appeals criminal cases involving trained dogs. The treatment of this subject by the United States Supreme Court has been limited, and so will be discussed within the context of Ninth Circuit decisions relying upon it. Civil cases involving drug-detecting dogs also shed light on the parameters for their use. This comment closes with a discussion of general rules and principles extracted from the decisions.

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1. *United States v. Place*, 462 U.S. 696 (1983).

2. This comment concerns only the fourth amendment to the United States Constitution. State constitutions may impose additional limitations. *See, e.g., Pooley v. State*, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985). *See also* *Elison & NettikSimmons, Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177 (1984). For an intriguing, although extreme, analysis of the right to privacy under state constitutions, *see* *Elison & NettikSimmons, Right of Privacy*, 48 MONT. L. REV. 1 (1987).

## II. CRIMINAL CASES

Law enforcement officers use trained dogs to locate contraband inside closed containers. A reaction, or "alert," by the dog indicates that the item contains contraband. This alert may then provide probable cause for a magistrate to issue a warrant to open the container and thoroughly search for the contraband.<sup>3</sup> The controversy over this practice lies in the allegation that the use of the dog itself constitutes a search. Targets of such investigations argue that the warrantless use of a trained dog violates their fourth amendment right to freedom from unreasonable searches or seizures.

A. *United States v. Solis*

The Court of Appeals for the Ninth Circuit first considered the question of whether the sniff of a dog constituted a search in *United States v. Solis*.<sup>4</sup> The court there held that "the use of the dogs was not unreasonable under the circumstances and therefore was not a prohibited search under the Fourth Amendment."<sup>5</sup>

*Solis* involved a search for marijuana in a parked, closed semi-trailer. Federal drug agents received a tip from an informant of unknown reliability that the trailer contained marijuana.<sup>6</sup> The agents brought two drug-detecting dogs to the vicinity of the trailer. Both dogs alerted, indicating the presence of drugs in the trailer.<sup>7</sup> Based on the reaction of the dogs, a federal magistrate issued a warrant for the search of the trailer. The search revealed a large amount of marijuana.<sup>8</sup> The defendant made a motion in district court to suppress the evidence.<sup>9</sup> The district court granted the motion, holding that "The use of the dogs constituted a search *per se* under the Fourth Amendment."<sup>10</sup> Since the use of the dogs was itself a warrantless search, it could not provide the probable cause necessary to support the warrant for the subsequent search.<sup>11</sup>

The court of appeals reversed, stating, "We do not agree that the use of the dogs here constituted a search but rather monitoring

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3. See e.g., *Place*, 462 U.S. at 699. At least one federal appeals court has ruled that the alert of a dog alone provides probable cause to support a search warrant to open the container. *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982).

4. 536 F.2d 880 (9th Cir. 1976).

5. *Id.* at 883.

6. *Id.* at 881.

7. *Id.*

8. *Id.*

9. *Solis*, 393 F. Supp. 325, 325 (C.D. Cal. 1975).

10. *Id.* at 327.

11. *Id.*

of the air in an area open to the public in determining the possible existence of a criminal enterprise nearby."<sup>12</sup> The court found that a contrary result "would require the abandonment of a useful law enforcement tool which can be and here was utilized with minimal invasion of privacy in order to obtain evidence of probable cause . . . ."<sup>13</sup> However, the use of trained dogs in *Solis* was not an indiscriminate, blanket investigation. The agents had a suspicion, not rising to the level of probable cause, based on the tip of the informant.

### B. *United States v. Beale* and the Supreme Court Decisions

The Ninth Circuit Court of Appeals again considered the question of whether the use of trained dogs to detect the scent of contraband is a search in *United States v. Beale*.<sup>14</sup> *Beale* was a criminal case involving the search of luggage checked with an airline. Florida detectives spotted the two defendants, Beale and Pulvano, at the Fort Lauderdale airport.<sup>15</sup> Noting that the defendants fit the typical "profile" of drug traffickers, one of the detectives questioned them briefly. The detectives then used a narcotics detection dog to examine defendants' checked luggage. The dog indicated that the luggage contained drugs. The defendants were then kept under surveillance and arrested on arrival in San Diego.<sup>16</sup> Beale claimed that the dog sniff was a search, and moved to suppress the evidence. The district court denied the motion, and Beale appealed.<sup>17</sup>

The court of appeals issued three separate opinions in the case. In the first decision, the court held that a dog sniff is a search.<sup>18</sup> The United States Supreme Court<sup>19</sup> vacated and remanded this decision for further consideration in light of the Supreme Court's recent decision in *United States v. Place*.<sup>20</sup> On remand, the court of appeals held that *Place* did not alter the decision reached in *Beale I*.<sup>21</sup> The full circuit then withdrew the

12. *Solis*, 536 F.2d at 881.

13. *Id.* at 882.

14. 674 F.2d 1327 (9th Cir. 1982) [hereinafter "*Beale I*"], vacated and remanded, 463 U.S. 1202, *aff'd*, 731 F.2d 590 [hereinafter "*Beale II*"], withdrawn and *reh'g* ordered, 728 F.2d 411 (1983), *rev'd en banc*, 736 F.2d 1289 (1984) [hereinafter "*Beale III*"], *cert. denied*, 105 S. Ct. 565 (1985).

15. *Beale III*, 736 F.2d at 1289.

16. *Id.* at 1289-90.

17. *Id.* at 1290.

18. *Beale I*, 674 F.2d at 1335.

19. 463 U.S. 1202.

20. 462 U.S. 696.

21. *Beale II*, 731 F.2d at 595.

*Beale II* decision and granted a rehearing *en banc*.<sup>22</sup> The court found in its final decision that a canine sniff of luggage is not a search.<sup>23</sup>

Only the holding in *Beale III* has any precedential value, because the United States Supreme Court vacated *Beale I* and the circuit withdrew *Beale II*. A close reading of all three opinions, however, and of the Supreme Court opinion in *Place*, provides insight into the arguments on both sides of this question.

### 1. *Beale I*

The court in *Beale I* held that a canine sniff is a search, invoking the protections of the fourth amendment, but that probable cause is not necessary to justify such a search. An examination by a dog, according to *Beale I*, can be "conducted without a warrant and . . . may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause."<sup>24</sup> The court based this holding on the "unarticulated reasoning" of *Solis* and decisions of other circuits.<sup>25</sup> The agents in *Solis* had a "founded suspicion" based on an informant's tip before the dogs were used.<sup>26</sup> *Beale I* would therefore not alter the result of *Solis*.

The analysis concerned the extent to which investigators could use drug detecting dogs without invading the individual's legitimate expectations of privacy.<sup>27</sup> Had the human investigator detected the drugs with his own senses, that would not have been a search.<sup>28</sup> The court found this irrelevant because the use of the dogs does not simply augment the handler's sense of smell. The court found it more like "an independent detection device, alerting the officer to information he would have been utterly unable to detect with his own senses."<sup>29</sup> It reasoned that therefore a dog sniff differs from a simple "variant of the human plain view or plain smell."<sup>30</sup> This led to the conclusion that a dog sniff constitutes a search because "[t]he molecules of contraband emanating from the interior of the luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion

22. 728 F.2d 411.

23. *Beale III*, 736 F.2d at 1291.

24. *Beale I*, 674 F.2d at 1335. The court limited its holding to the use of dogs to examine luggage. *Id.* at 1331 n.7.

25. *Id.* at 1335.

26. *Solis*, 536 F.2d at 881-82.

27. *Beale I* at 1331.

28. *Id.* at 1332.

29. *Id.* at 1333.

30. *Id.*

into the owner's privacy interest in the contents of the container."<sup>31</sup>

## 2. *United States v. Place*

The United States Supreme Court vacated and remanded the decision in *Beale I* for reconsideration in the light of *United States v. Place*.<sup>32</sup> *Place* also involved the exposure of luggage to a drug-detecting dog. In that case, the police seized the luggage from the defendant at an airport and held it for 90 minutes before exposing it to the dog.<sup>33</sup> After the dog alerted to the luggage, the police held it for two additional days before getting a search warrant to open the bag.<sup>34</sup>

The Court began by considering the propriety of the seizure of the luggage. The Court applied the principles of *Terry v. Ohio*,<sup>35</sup> which established that police may engage in a limited search of individuals (a "stop and frisk" or "*Terry*-stop") on less than probable cause. Reasoning that a brief detention of personal property could be "minimally intrusive" the Court in *Place* allowed the seizure of luggage for a brief period based on only a reasonable belief rather than probable cause.<sup>36</sup> This conclusion related to the initial seizure of the luggage, and not to the subsequent examination by the dog.

The rationale of the decision as to the sniff itself was very different. The Court stated that:

A "canine sniff" by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging 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 disclosure also insures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.<sup>37</sup>

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31. *Id.* at 1333-34.

32. 462 U.S. 696.

33. *Id.* at 699.

34. *Id.*

35. 392 U.S. 1 (1968).

36. *Place*, 462 U.S. at 706.

37. *Id.* at 707.

The Court further stated, "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."<sup>38</sup> This led to the conclusion that the exposure of the luggage to a drug-detecting dog "did not constitute a 'search' within the meaning of the Fourth Amendment."<sup>39</sup>

*Place* involved two distinct acts by law enforcement officers. The officers first seized the luggage and later exposed it to the dog. The Supreme Court applied the *Terry* doctrine to the brief seizure of luggage,<sup>40</sup> but did not apply the doctrine to the examination by the dog. The Court held that the sniff, far from being a "*Terry*-stop," was not a search at all.<sup>41</sup> *Place* therefore involves two separate acts to which differing standards apply.

### 3. *Beale II*

When the court of appeals reconsidered its *Beale I* decision in the light of *Place* it failed to keep this distinction firmly in mind. While noting the *Place* holding that a sniff is not a search,<sup>42</sup> the court nevertheless firmly adhered to its decision in *Beale I*.<sup>43</sup> The court noted that in *Place* the Supreme Court found that the canine sniff was not a search only after first finding that reasonable or articulable suspicion was necessary for the seizure.<sup>44</sup>

Judge Reinhardt dissented from the *Beale II* decision.<sup>45</sup> He argued that the *Place* decision left "no room for application of the fourth amendment to dog sniffs of luggage located in a public place."<sup>46</sup> Judge Reinhardt's point was well taken. The seizure of the luggage and the later examination by the dog in *Place* were distinctly different acts. It is true that the Supreme Court required a degree of suspicion to justify the seizure.<sup>47</sup> It does not follow that a similar requirement existed for every later action of the police merely because it came later.<sup>48</sup>

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38. *Id.*

39. *Id.*

40. *Id.* at 702.

41. *Id.* at 707.

42. *Beale II*, 731 F.2d at 593.

43. *Id.* at 595.

44. *Id.* at 593.

45. *Id.* at 596 (Reinhardt, J., dissenting).

46. *Id.*

47. *Place*, 462 U.S. at 702.

48. See *id.* at 707; see also *Beale II*, 731 F.2d at 596 (Reinhardt, J., dissenting).

4. *Beale III*

The full circuit withdrew the *Beale II* opinion even before it was published.<sup>49</sup> On rehearing *en banc*, the court reached the opposite conclusion of the panel decisions in *Beale I* and *Beale II*.

It may be noted that the statement in *Place* that a canine sniff is not a search has been criticized as dictum.<sup>50</sup> Prior to the *Beale III* decision, however, the Supreme Court handed down its decision in *United States v. Jacobsen*.<sup>51</sup> The Court stated in *Jacobsen* that the *Place* Court had "held that subjecting luggage to a single 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the fourth amendment."<sup>52</sup> This reliance on *Place* clearly indicates that the rule established there was not dictum, but a doctrine that the Court will continue to follow. Justice Brennan vigorously dissented, arguing that the *Jacobsen* and *Place* holdings created a "doctrine wholly at odds with the principles embodied in the Fourth Amendment."<sup>53</sup>

The court of appeals in *Beale III* relied on *Place* and *Jacobsen* to establish a general rule that a dog sniff of an inanimate object is not a search.<sup>54</sup> The reasons given were that a canine sniff, "(1) discloses *only* the presence or absence of a contraband item, and (2) insures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."<sup>55</sup>

Judge Pregerson argued in dissent that a canine sniff should be considered a "Terry-stop."<sup>56</sup> He disagreed with the view, advanced by the majority in *Beale III* and the Supreme Court in *Place* and *Jacobsen*, that a procedure is not a search—and therefore not limited in any way by the fourth amendment—where it reveals only contraband and does not provide any other information about the contents of a container.<sup>57</sup> Judge Pregerson would have held that a canine sniff should require some sort of justification. "I do not believe that a free society should be willing to toler-

49. 728 F.2d 411.

50. *Place*, 462 U.S. at 719 (Brennan, J., concurring in the result).

51. 466 U.S. 109 (1984).

52. *Id.* at 123. *Jacobsen* concerned a chemical test of a white powder discovered when a package broke open. *Id.* at 111. The test could determine only whether the substance was cocaine and nothing else, "not even whether the substance was sugar or talcum powder." *Id.* at 122. The Court held that *Place* dictated the conclusion that no search occurred. *Id.* at 123-24.

53. *Id.* at 136 (Brennan, J., dissenting).

54. *Beale III*, 736 F.2d at 1290-91.

55. *Id.*

56. *Id.* at 1294-95 (Pregerson, J., dissenting).

57. *Id.*



ate the specter of trained dogs randomly sniffing private luggage to help police determine whether someone is carrying contraband."<sup>58</sup>

This belief has been widely rejected by the courts. Other circuits have agreed with the Ninth Circuit view that a canine sniff of inanimate objects is not a search and does not invoke the protections of the fourth amendment. Nine of the twelve federal circuits have so held, with the remaining three silent on the question.<sup>59</sup>

Like *Solis* before it, the *Beale III* and *Place* decisions may be limited on their facts. In both cases the authorities had some reason to suspect particular individuals before using the dogs. While these decisions appear to adopt a blanket rule that the use of drug-detecting dogs to examine inanimate objects is not a search, this view may be challenged where no prior suspicion existed. An examination of the use of dogs in civil investigations indicates that this challenge lacks merit.

### III. CIVIL CASES

Several cases have involved the use of drug-detecting dogs in the public schools. These investigations generally involve dragnet searches without any prior individualized suspicion of the person whose property is searched. In *Doe v. Renfrow*, trained handlers brought teams of drug-detecting dogs into each classroom in a public high school.<sup>60</sup> The students were asked to sit quietly with their hands on their desks while handlers escorted the dogs up each aisle.<sup>61</sup> If a dog alerted to a student, inspectors asked the student to empty his or her pockets or purse. If the dog continued to

58. *Id.* at 1293 (Pregerson, J., dissenting).

59. See *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974) (finding the argument that the use of a dog to sniff the air around a foot locker was a search under the fourth amendment to be "frivolous."); *United States v. Race*, 529 F.2d 12 (1st Cir. 1976) ("We can discern no fourth amendment issue in the use of a dog for routine check of commingled international and domestic freight in an airport warehouse." *Id.* at 14 n.2); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), cert. denied 424 U.S. 918 (1976) (sniffing of cocaine at a baggage terminal not a search); *United States v. Sullivan*, 625 F.2d 9 (4th Cir. 1980) (use of a dog to detect narcotics in luggage not a search); *United States v. Goldstein*, 635 F.2d 356 (5th Cir.), cert. denied 452 U.S. 962 (1981) (the "reasonable expectation of privacy does not extend to the airspace surrounding . . . luggage." *Id.* at 361); *United States v. Lewis*, 708 F.2d 1078 (6th Cir. 1983) (use of dogs to detect drugs in luggage not a search); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980) (use of dogs to detect drugs in luggage not a search, although noting that authorities already had reasonable suspicion to believe luggage contained drugs); *Beale III*, 736 F.2d 1289; *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977) (use of a dog to sniff air outside a rented storage locker not a search).

60. *Doe v. Renfrow*, 475 F. Supp. 1012, 1016 (N.D. Ind. 1979), op. adopted on this issue and rev'd on other grounds, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981).

61. *Id.*

indicate the presence of drugs on the student, school officials conducted a full body search in another room.<sup>62</sup> The use of the dogs was indiscriminate, directed at persons as well as containers, and based on no stronger suspicion of any individual than simply a general drug problem in the school.<sup>63</sup> Police officers aided in the investigation, but with the understanding that no criminal prosecutions would result.<sup>64</sup>

The plaintiff, a student examined by the dogs and later subjected to a nude body search,<sup>65</sup> alleged the violation of her fourth amendment rights.<sup>66</sup> She sued the school district under the federal Civil Rights Act,<sup>67</sup> seeking to enjoin the district's drug-detection practices.<sup>68</sup>

The district court found, in an opinion adopted as its own by the Court of Appeals for the Seventh Circuit,<sup>69</sup> that, "The sniffing of a trained narcotics detecting canine is not a search."<sup>70</sup> The school officials certainly had the right to enter the classroom.<sup>71</sup> The presence of the dogs did not change the character of the activities.<sup>72</sup> The use of the dogs was a "minimal intrusion [and did not] invoke the protection of the fourth amendment."<sup>73</sup>

The court's language contains a troubling inconsistency. The fourth amendment provides protection only against those activities deemed "searches" or "seizures." It logically follows that if an activity is not a search or seizure, the fourth amendment does not impose any limits on it.<sup>74</sup> While the *Renfrow* court twice unambiguously stated that a canine sniff is not a search,<sup>75</sup> the court also held that a canine sniff of students could not be conducted except on reasonable suspicion that drugs would be found.<sup>76</sup>

The *Renfrow* court's requirement of reasonable suspicion is il-

62. *Id.* at 1017.

63. *Id.* at 1015.

64. *Id.* at 1016.

65. *Id.* at 1017.

66. *Id.* at 1015.

67. 42 U.S.C. § 1983 (1983). This provision creates a civil cause of action for the violation of a constitutional right by a party acting under color of state law.

68. *Renfrow*, 475 F. Supp. at 1015.

69. *Renfrow*, 631 F.2d at 92.

70. *Renfrow*, 475 F. Supp. at 1019. The presence of police officers does not change this conclusion. *Id.*

71. *Id.* at 1020.

72. *Id.*

73. *Id.*

74. See *United States v. Jacobsen*, 466 U.S. 109, 122 (1984); see also *id.* at 136-37 (Brennan, J., dissenting).

75. *Renfrow*, 475 F. Supp. at 1019, 1022.

76. *Id.* at 1021.

logical but understandable. Courts have often been reluctant to conclude that trained dogs may be used without any constitutional limitations whatsoever. For example, the Court of Appeals for the Ninth Circuit attempted in *Beale II* to equate a canine sniff to a "Terry-stop."<sup>77</sup> As Judge Reinhardt noted in his *Beale II* dissent, there must first be a search before the fourth amendment applies.<sup>78</sup> The United States Supreme Court classified a "Terry-stop" as a "search."<sup>79</sup> Although different types of searches require different degrees of suspicion, even the modest requirements of *Terry* are inapplicable to an activity that is not a search at all. "The decision to characterize an action as a search is in essence a conclusion about whether the fourth amendment applies at all."<sup>80</sup> It makes no sense to first find that a canine sniff is not a search, and then to hold that such a procedure must meet the requirements of *Terry*.

The Court of Appeals for the Fifth Circuit in *Horton v. Goose Creek Independent School District* provided a more consistent analysis than the district court advanced in *Renfrow*. Like *Renfrow*, *Horton* involved the use of drug-detecting dogs in a public school. As in *Renfrow*, the dogs were taken through the classrooms and allowed to sniff students in order to detect drugs.<sup>81</sup> The dogs were also used to check students' cars and lockers.<sup>82</sup> The court applied a separate analysis to the examination of the inanimate objects than to examination of the students themselves.

The court began by noting the general rule that "the sniffing of objects by a dog is not a search."<sup>83</sup> The court noted that previous courts that had so decided had done so based on facts that created "some basis for suspecting an individual of possessing contraband."<sup>84</sup> The court went on to hold, however, that the canine sniff of a locker or car was not a search and did not require any prior individualized suspicion.<sup>85</sup>

Having decided that a sniff of an object is not a search, the court ceased its inquiry into those actions. Unlike the *Renfrow* court, which held that a sniff is not a search and then applied the fourth amendment to the examination of the students anyway,<sup>86</sup>

77. *Beale II*, *supra* note 14, 731 F.2d at 593.

78. *Id.* at 596 (Reinhardt, J., dissenting).

79. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

80. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 476 (5th Cir. 1982).

81. *Id.* at 474.

82. *Id.*

83. *Id.* at 476.

84. *Id.*

85. *Id.* at 477.

86. *Renfrow*, 475 F. Supp. at 1021.

the *Horton* court did not place any limits on the activity it had just decided was not a search.

The court of appeals in *Horton* properly went on to treat the examination of the students differently. All of the cases discussed previously, with the exception of *Renfrow*, dealt with canine exposure to things and not people. Only the court in *Renfrow* held the sniff of a person—a school child at that—not to be a search.<sup>87</sup> The *Horton* court noted this isolation of the *Renfrow* holding and observed that the commentators universally criticized *Renfrow* on that ground.<sup>88</sup>

As a general rule, an activity is a search where it intrudes on an individual's "reasonable expectation of privacy."<sup>89</sup> The exposure of an inanimate object, such as a car or a locker, to a drug-detecting dog is not a search because there is no reasonable expectation of privacy against such minimal examinations.<sup>90</sup> The court based this conclusion on the cases involving luggage.<sup>91</sup>

None of this reasoning applies to the sniffing of a person by a dog. "The students' persons certainly are not the subject of lowered expectations of privacy. On the contrary, 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."<sup>92</sup> The sniffing by dogs of people therefore is a search.<sup>93</sup>

The court went on to hold that dogs could still be used to sniff students where investigators possess a reasonable suspicion that drugs will be found.<sup>94</sup> However, the court drew this conclusion in the school context. The decision left open the question of whether

87. *Id.* at 1019.

88. *Horton*, 690 F.2d at 477-78. See also note 96 *infra*.

89. *Terry*, 392 U.S. at 9.

90. *Horton*, 690 F.2d at 477. The examination by a dog of an inanimate object not in the possession of the owner—such as a car in a parking lot or luggage checked with an airline—amounts to only a minimal intrusion because it explores only the air around the object and does not expose the owner to the humiliation of a search. *Id.*

An important additional basis for finding that a sniff of a locker is not a search is that the locker is possessed jointly by the school and the student. *Id.* at 475. See also *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

91. *Horton*, 690 F.2d at 477. "If anything, the expectation of privacy in a car is lower than in one's luggage." *Id.* at 477 n.13 (relying on *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977)). Therefore a sniff of a car in a parking lot is not a search. *Id.* at 477.

92. *Id.* at 478.

93. This is true at least where the dog touches the child. *Id.* at 479.

94. *Id.* The *Horton* court arrived at the same result as had the earlier court in *Renfrow*. Both courts held that students could be examined by sniffer dogs only on reasonable suspicion. *Renfrow*, 475 F. Supp. at 1021; *Horton*, 690 F.2d at 479. The *Horton* decision differs only in holding that a dog sniff of a student is a search, thus providing the basis for applying the fourth amendment.

such activities would, in the non-school context, "require the full panoply of fourth amendment protections—probable cause and warrant—or whether such sniffing is less intrusive, requiring only reasonable suspicion."<sup>95</sup>

#### IV. PRINCIPLES AND EXPOSITION

Federal courts have consistently held that at least some uses of drug-detecting dogs fall outside the fourth amendment definition of a search. Commentators, however, have just as consistently arrived at an opposite conclusion, arguing that authorities may not use trained dogs without some fourth amendment limitations.<sup>96</sup> A close examination of the principles underlying the cases already discussed will indicate the parameters of the use of drug-detecting dogs.

##### A. *The Context of the Cases*

###### 1. *The Criminal Cases*

The criminal cases previously discussed all involved situations in which the police had some reason to suspect an individual of drug possession before the use of the dogs. After surveying some of these cases, the *Renfrow* court noted, "A common thread that runs through all . . . of [these] cases was the fact that the law enforce-

95. *Horton*, 690 F.2d at 479.

96. See 1 W. LAFAYE, SEARCH AND SEIZURE § 2.2(f) (1978 & Supp. 1986). See also Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75 (1976); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976); Comment, *Search and Seizure in the Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119 (1979); 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); Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L. F. 1167 (1977). *Contra* Note, *United States v. Place Is There Any Room in this Place for a Sniffing Dog* [sic], 7 CRIM. JUST. J. 141 (1983).

A few courts have maintained that a dog sniff is a search. A federal district court within the Fifth Circuit held, prior to *Horton*, that the use of a sniffer dog by a school constituted a search. *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223, 233 (E.D. Tex. 1980). The court held this to be true even where the search was of vehicles and not of persons. *Id.* at 235. The decision of the court of appeals in *Horton* presumably overruled the decision of the district court in *Jones*. The California Court of Appeals has also excluded evidence resulting from a canine sniff. *People v. Williams*, 51 Cal. App. 3d 346, 350, 124 Cal. Rptr. 253, 255 (1975). The basis for excluding the evidence procured by the dogs in that case, however, was that the police were trespassers. *Id.* The California Supreme Court later upheld a conviction based on a dragnet investigation by a drug-detecting dog, stating, "[O]ne who secrets illegal narcotics in his suitcase has no protectible privacy interest in those narcotics, nor any legitimate objection to an unintrusive method of detection which reacts only to such contraband." *People v. Mayberry*, 31 Cal. 3d 335, 341-42, 182 Cal. Rptr. 617, 620, 644 P.2d 810, 813 (1982) (emphasis in original).

ment officers had previous independent information or 'tips' concerning the whereabouts of the drugs that were later sniffed out by the dogs."<sup>97</sup>

Some have argued that this prior suspicion fundamentally affects the holdings of those cases. For example, the court in *Beale II* stated, "In *Place*, the Supreme Court remarked that a canine sniff was not itself a 'search' only after it concluded that any detention of luggage for the purpose of performing a canine sniff investigation would implicate the Fourth Amendment."<sup>98</sup> The agents in *Place* had reasonable suspicion to briefly detain the luggage.<sup>99</sup> The *Beale II* court interpreted *Place* as approving the use of the dog not because the canine sniff lay outside the fourth amendment definition of a search, but rather because the prior suspicion made it a reasonable search.<sup>100</sup>

The court in *Beale II* erred in this interpretation of *Place*. Prior suspicion cannot logically serve as the basis for a decision that a sniff is not a search. Reasonable suspicion can justify certain minimally intrusive searches.<sup>101</sup> It does so, however, not by rendering a search a nonsearch, but by making the search reasonable.<sup>102</sup> Several state court decisions support this conclusion.<sup>103</sup>

## 2. *The Civil Cases*

Both the *Renfrow* and *Horton* opinions contain substantial discussion of the special application of the fourth amendment in

97. *Renfrow*, 475 F. Supp. at 1021.

98. *Beale II*, *supra* note 14, 731 F.2d at 593.

99. *United States v. Place*, 462 U.S. 696, 706 (1983).

100. *Beale II*, 731 F.2d at 593.

101. *Terry*, 392 U.S. at 30. The Supreme Court has denominated even such a minimal intrusion as a "Terry-stop" as a "search". *Id.* at 24-25. This is not, therefore, a matter of there being a gray area between searches and nonsearches.

102. *See id.* at 27.

103. "[I]f a dog's sniff is not a search, then it is immaterial whether there was pre-sniff knowledge." *State v. Morrow*, 128 Ariz. 309, 313, 625 P.2d 898, 902 (1981). In a similar case, the Washington Court of Appeals upheld a police practice of routinely patrolling the package handling area of a bus station. *State v. Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979). Professor LaFave termed this result "outrageous." W. LAFAVE, *supra* note 96, at 117, n.185 (Supp. 1986). LaFave did not elaborate, and principled support for his view is elusive. As Justice Powell has observed:

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit . . . . Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal drugs may be unmatched in any other area of law enforcement.

*United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). Far from being "outrageous," the use of dogs to detect packages containing drugs is an efficient, unobtrusive method of dealing with a serious problem.

the public schools.<sup>104</sup> These passages may support an argument that their holdings depend upon the reduced application of the fourth amendment within that context. The school context, however, cannot provide the basis for characterizing the use of a drug-detecting dog as a search.

The *Renfrow* court noted that the public schools are "an area where courts have not granted full application of the Fourth Amendment's protections."<sup>105</sup> This reduced application arises out of the duty of school personnel to provide "an environment free from activities harmful to the educational function and to the individual students."<sup>106</sup> The *Horton* decision followed a similar rationale, noting that the lack of mature restraint on the part of school children allowed broader powers to school administrators.<sup>107</sup>

These considerations do not address the characterization of a canine sniff as a search or as a nonsearch. The reduced application of the fourth amendment in the public schools does not transform searches into nonsearches, but rather makes some searches reasonable that would be unreasonable if conducted under other circumstances. The recent Supreme Court decision in *New Jersey v. T.L.O.*<sup>108</sup> supports this conclusion.

The Court held in *T.L.O.* that the school context can serve as a justification for carrying out searches of students that would not be acceptable in society at large.<sup>109</sup> "Although the underlying command of the fourth amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place."<sup>110</sup> The school context therefore relates to what searches will be deemed reasonable, and not to what activities will be deemed searches.

The question of whether the use of a drug-detecting dog constitutes a search does not depend on the presence of prior suspicion or on the reduced application of the fourth amendment in the school context. The characterization of a canine sniff fundamentally involves policy arguments as to what intrusions society should tolerate.

104. *Renfrow*, 475 F. Supp. at 1019-20; *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 480-82 (5th Cir. 1982).

105. *Renfrow*, 475 F. Supp. at 1020.

106. *Id.*

107. *Horton*, 690 F.2d at 480.

108. 469 U.S. 325 (1985).

109. "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340.

110. *Id.* at 337.

## B. *Application to Other Situations*

The rationale of the *Place* and *Beale* decisions indicate important limitations on their application. Both decisions apply only to the use of dogs to examine inanimate objects in a public place.<sup>111</sup> The use of drug-detecting dogs to examine people, or objects that must first be seized from people, implicates fourth amendment privacy interests not present in mere objects.<sup>112</sup>

### 1. *Canine Examinations of People*

Most of the cases discussed have dealt with sniffs of things and not people. The *Horton* case, however, dealt also with the canine sniff of school children. The court held such sniffs to be searches because, "[t]he students' persons certainly are not the subject of lowered expectations of privacy."<sup>113</sup> It seems reasonable to conclude that while a sniff of an object is not a search, the sniff of a person is a search.

This conclusion is justified because the policy reason for holding a canine sniff of a car or luggage not to be a search only partially addresses the situation relating to a person. The Supreme Court in *Place*, for example, reasoned that a canine sniff of property is not a search partly because the sniff does not subject the owner of the property "to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative techniques."<sup>114</sup> The use of dogs to sniff people may violate feelings of personal dignity, a concern not present in inanimate objects.

It has been argued that, "The intensive smelling of people even if done by dogs, [is] indecent and demeaning."<sup>115</sup> The *Horton* court observed that,

Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. In con-

111. *Place*, 462 U.S. at 707; *Beale III*, 736 F.2d at 1291.

112. *United States v. Puglisi*, 723 F.2d 779, 785-88 (11th Cir. 1984). See also *W. LAFAVE*, *supra* note 96, at 120 (Supp. 1986).

113. *Horton*, 690 F.2d at 478.

114. *Place*, 462 U.S. at 707.

115. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 Nw. U.L. Rev. 803, 850 (1980). That commentator continued:

By coming into public, one may very well assume the risk of happening to be smelled by other people or animals in the ordinary course of social life, but it is difficult to believe that one also assumes the risk of being intentionally and intensively smelled. It is a source of justifiable annoyance and outrage when one's person is purposely smelled without consent by another or by a dog acting upon the other's orders.

*Id.*



trast, where the Supreme Court has upheld limited investigations of body characteristics not justified by individualized suspicion, it has done so on the grounds that the particular characteristic was routinely exhibited to the public.<sup>116</sup>

The court therefore held the sniff of a person to be a search.<sup>117</sup> The court went on to liken the sniff of a person to a "Terry-stop" and hold that reasonable suspicion could justify the search.<sup>118</sup>

## 2. *Canine Examinations of Objects in the Possession of a Person*

While the use of dogs to examine an inanimate object in a public place, such as an airline baggage terminal, does not invoke the protections of the fourth amendment, different issues arise if the object remains in the personal possession of its owner. In *Place*, federal agents had to seize the defendant's luggage from his personal possession before the dogs could examine it.<sup>119</sup> This action constituted a seizure within the meaning of the fourth amendment and required reasonable suspicion.<sup>120</sup>

A similar protection exists against canine investigations of a person's home. In *United States v. Thomas*,<sup>121</sup> federal agents received a warrant to search the apartment of a suspected drug dealer. The alert of a drug-detecting dog outside the apartment provided the primary support for the warrant.<sup>122</sup> Citing "the heightened privacy interest that an individual has in his dwelling place,"<sup>123</sup> the court held that the use of the dog constituted a search and could not support the search warrant.<sup>124</sup>

### C. *Drug-Detecting Dogs and the Right to Privacy*

Opponents of the use of drug-detecting dogs have often chal-

116. *Horton*, 690 F.2d at 478.

117. *Id.* at 479.

118. *Id.*

119. *Place*, 462 U.S. at 699.

120. *Id.* at 702. The defendant in *Place* ultimately won because the federal agents held the luggage for 90 minutes before using the dog. "[T]he brevity of the invasion of the individual's fourth amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justified on reasonable suspicion." *Id.* at 709. The agents also held the luggage over a weekend after the alert but before applying for a search warrant. *Id.* at 699. *But see* *United States v. Campbell*, 627 F. Supp. 320 (D. Alaska 1985) (holding, without citing *Place*, that the retention of luggage over a weekend after the alert of the dog but before applying for a search warrant was reasonable where no magistrate was available until Monday).

121. 757 F.2d 1359 (2d Cir. 1985).

122. *Id.* at 1366.

123. *Id.*

124. *Id.* at 1367.

lenged even the examination of inanimate objects on the basis that such investigations impinge the individual's right to privacy.<sup>125</sup> Closer consideration, however, supports the exact opposite view. Because dogs are effective law enforcement tools involving minimal invasions of privacy,<sup>126</sup> they can actually advance privacy interests.

One article has argued that the right to privacy demands that authorities use the methods that least restrict fundamental rights. "In other words . . . reasonableness might very well require that the least restrictive means be used to make searches and seizures."<sup>127</sup> In many situations, the drug-detecting dogs may provide the quickest, least intrusive method of conducting an investigation, making them preferable for privacy considerations.

Much has already been said in this comment about the *Place* holding that a dog sniff of an inanimate object retrieves only information regarding the presence or absence of contraband.<sup>128</sup> Canine investigations allow the authorities quick and easy access to evidence of contraband without intruding into any other personal information. They quickly identify suspects for closer inspection without any interference with the privacy or possessory interests of the innocent.<sup>129</sup> Indeed, the owners of the objects may not even know of the procedure.<sup>130</sup>

Likely alternatives to the use of dogs include "drug courier profiles," a subjective, imprecise technique that can trigger investigations of innocent people who happen to fit the profile, while possibly allowing the guilty to slip by. One court encouraged the use of dogs, stating, "We see no reason to encourage reliance upon the so-called profile when more reliable, less intrusive, means of establishing probable cause exist."<sup>131</sup> Any technique that can make unnecessary the actual opening and rummaging of the object will avoid unnecessary intrusion.

## V. CONCLUSION

An examination of the constitutional principles involved in the use of drug-detecting dogs indicates the parameters for their use. As to the examination of inanimate objects, the general rule is that

125. See, e.g., *Beale III*, 736 F.2d at 1292-94 (Pregerson, J., dissenting).

126. *United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976).

127. *Elison & NettikSimmons, Right of Privacy*, *supra* note 2, at 46. See also *United States v. Campbell*, 627 F. Supp. 320, 325-26 (D. Alaska 1985).

128. See *supra* notes 32-41 and accompanying text.

129. *Puglisi*, 723 F.2d at 788. See also *supra* note 103.

130. *Id.* at 788. But see *Beale III*, 736 F.2d at 1293 (Pregerson, J., dissenting) (terming this a "what you don't know, won't hurt you" argument).

131. *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982).

a canine sniff is not a search. The fourth amendment therefore does not limit such investigations. However, if the object must first be removed from the possession of its owner, that removal is a seizure and the seizure—not the sniff—must be based on reasonable suspicion.

The use of a trained dog to examine a person, on the other hand, is a search. This is true because the sniff may invade other privacy interests than simply the information retrieved. This may include embarrassment and inconvenience. The sniff of a person is equated with a “*Terry-stop*” and requires reasonable suspicion.