Tulsa Law Review

Volume 41
Number 1 *Indian Property Rights*

Volume 41 | Number 1

Fall 2005

Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations

Kristen A. Carpenter

ILLINOIS V. CABALLES: LOVE AFFAIR WITH A DRUG-SNIFFING DOG

Chris Blair*

I. INTRODUCTION

In *Illinois v. Caballes*,[1] the United States Supreme Court continued its love affair with a drug-sniffing dog by allowing the government to use such dogs to detect contraband during the course of an otherwise lawful traffic stop. Blinded by its flirtation with these dogs in previous cases, such as *United States v. Place*[2] and *City of Indianapolis v. Edmond*,[3] the Court finally committed itself in *Caballes* by refusing to reconsider its primarily unexamined initial attraction. It must be love. The Court seems to think its drug-sniffing lover can do no wrong and, since true love is not jealous, no reasonable citizen should take offense when drug-sniffing dogs come sniffing around.

This article will attempt to explore this love affair by first describing the sordid details of the Court's most recent encounter with a drug-sniffing dog in *Caballes*. Following a brief overview of Fourth Amendment search and seizure law, this article will attempt to explain how the Court's abbreviated analysis of drug-sniffing dogs and the Fourth Amendment "search" doctrine has led to an unfortunate and potentially far-reaching conclusion about the reasonable expectations of privacy that are shared amongst the American people.

II. BACKGROUND

On November 12, 1998, Roy I. Caballes was driving on Interstate Route 80 in La Salle County, Illinois when Illinois State Police Trooper Daniel Gillette stopped him for driving seventy-one miles per hour in a sixty-five mile per hour zone.[4] Trooper Gillette radioed the police dispatcher that he was making the traffic stop.[5] Another trooper, Craig Graham of the Illinois State Police Drug Interdiction Team, overheard Gillette's transmission and announced to the dispatcher he was going to meet Gillette to

* Associate Professor of Law, University of Tulsa College of Law; LL.M., Columbia University; J.D., Ohio State University.

1. 125 S. Ct. 834 (2005).
2. 462 U.S. 696 (1983).
3. 531 U.S. 32 (2000).
4. *People v. Caballes*, 802 N.E.2d 202, 203 (Ill. 2003).
5. *Id.*

conduct a canine sniff.[6] Trooper Gillette, however, did not request Graham's assistance.[7]

Trooper Gillette approached Caballes's car, told him that he was speeding, and asked for his driver's license, vehicle registration, and proof of insurance.[8] Caballes complied with the trooper's request.[9] Gillette told him he was only writing a warning ticket for speeding.[10] Trooper Gillette then called the dispatcher to determine the validity of Caballes's license and to check for outstanding warrants.[11]

The dispatcher reported that Caballes had two prior arrests for distribution of marijuana.[12] Trooper Gillette then began to write the warning ticket, but was interrupted by another officer calling him on the radio on an unrelated matter.[13] Gillette was still writing the ticket when Trooper Graham arrived with his drug-detection dog and began walking the dog around Caballes's car.[14] After the dog alerted to Caballes's trunk in less than a minute, Trooper Gillette searched the trunk and found marijuana.[15] The entire incident lasted less than ten minutes.[16]

Caballes was charged with one count of cannabis trafficking.[17] The trial court denied Caballes's motion to suppress the drugs found in his trunk and, after a bench trial, found him guilty.[18] Caballes was sentenced to twelve years in prison and ordered to pay a street value fine of $256,136.[19] The Illinois Court of Appeals affirmed the trial court, finding that the police did not need "reasonable articulable suspicion to justify the canine sniff and that, although the criminal history check improperly extended [Caballes's] detention, the delay was *de minimis*."[20] The Illinois Supreme Court reversed the appellate court concluding the "canine sniff was performed without 'specific and articulable facts' to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation."[21] The Illinois Attorney General then sought review in the U.S. Supreme Court, which granted certiorari on the question of "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[22] The Supreme

6. *Id.*
7. *Id.*
8. *Id.*
9. *Caballes*, 802 N.E.2d at 203.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Caballes*, 802 N.E.2d at 203.
15. *Id.*
16. *Caballes*, 125 S. Ct. at 836. Curiously, this timeframe is mentioned in the opinion of the U.S. Supreme Court, but not in the opinion of the Illinois Supreme Court.
17. *Caballes*, 802 N.E.2d at 203.
18. *Id.*
19. *Id.*
20. *Id.* at 204.
21. *Id.* at 205 (internal quotation marks omitted).
22. *Caballes*, 125 S. Ct. at 837 (quoting Pet. for Cert. i, *Caballes*, 125 S. Ct. 824) (internal quotation marks omitted).

Court, in a six-to-two decision,[23] vacated and remanded the judgment of the Illinois Supreme Court, holding that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[24]

III. OVERVIEW OF A FOURTH AMENDMENT "SEARCH"

Before discussing the details of the *Caballes* decision, a brief overview of Fourth Amendment search and seizure law is appropriate to set the stage. The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and *seizures*, shall not be violated."[25] If the government engages in a search or seizure in violation of the Fourth Amendment, the exclusionary rule generally requires suppression of evidence obtained as a result of the violation.[26] The first step, however, in deciding whether the Fourth Amendment has been violated is to determine whether the government conduct in question amounts to a search or a seizure.

Prior to the 1967 decision in *Katz v. United States*,[27] the Supreme Court's analysis of whether the government engaged in a search under the Fourth Amendment focused on whether the government's conduct involved physical intrusion, or "trespass" into a "constitutionally protected area."[28] *Katz* involved the use of an electronic listening device attached to the exterior of a public telephone booth, enabling FBI agents to overhear Charles Katz's telephone conversations.[29] Not surprisingly, both Katz and the United States focused their arguments on whether the telephone booth was a constitutionally protected area, and whether there had to be a physical intrusion into that area.[30] The Court, however, announcing the "Fourth Amendment protects people, not places,"[31] replaced its previous test with what is known as the "reasonable expectation of privacy" test. The test derives from Justice Harlan's concurring opinion, where he stated the rule has a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[32] Thus, the current test for determining if the government has engaged in a Fourth Amendment search is whether it has intruded into one's reasonable expectation of privacy.

Similarly, the Supreme Court has had to determine when the government has engaged in a Fourth Amendment "seizure." Generally, "[a] 'seizure' of property occurs

23. Justice Stevens delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer joined. *Id.* at 836. Souter filed a dissenting opinion. *Id.* Ginsburg filed a dissenting opinion, in which Souter joined. *Id.* Rehnquist took no part in the decision of the case. *Id.*

24. *Caballes*, 125 S. Ct. at 838.

25. U.S. Const. amend. IV (emphasis added).

26. *See Mapp v. Ohio*, 367 U.S. 643, 654–60 (1961); *but see U.S. v. Leon*, 468 U.S. 897 (1984) (discussing a "good faith" exception to the exclusionary rule).

27. 389 U.S. 347 (1967).

28. *Silverman v. U.S.*, 365 U.S. 505, 512 (1961); *see Olmstead v. U.S.*, 277 U.S. 438 (1928).

29. *Katz*, 389 U.S. at 348.

30. *Id.* at 350.

31. *Id.* at 351.

32. *Id.* at 361 (Harlan, J., concurring).

when there is some meaningful interference with an individual's possessory interests in that property."[33] A seizure of a person occurs when the government arrests or stops someone.[34] A stop, which is a less intrusive type of seizure than an arrest, occurs when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[35]

Once it has been determined that the government has engaged in either a search or a seizure within the meaning of the Fourth Amendment, the next issue is whether the government has complied with the requirements of the Fourth Amendment in engaging in such conduct. Generally, those requirements are a warrant[36] (or a warrant exception[37]), and probable cause[38] (or some lesser type of reasonable suspicion based on articulable facts[39]). Of course, if the government has not engaged in a Fourth Amendment search or seizure, the government is not required to comply with any type of warrant or "articulable suspicion" requirement.

IV. ANALYSIS OF *CABALLES*

In *Caballes*, it was uncontested that when Trooper Gillette pulled Caballes over for speeding, he was "seized" under the Fourth Amendment.[40] Trooper Gillette complied with the Fourth Amendment in making that seizure because he had probable cause to believe that Caballes was speeding.[41] No warrant was needed because of the warrant exception for arrests or stops made in a public place.[42] However, as the *Caballes* opinion pointed out, "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."[43] Thus, the Court needed to analyze whether Trooper Gillette or Trooper Graham engaged in any additional search or seizure activity that would require additional Fourth Amendment justification beyond that necessary for the initial traffic stop.

---

33. *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).

34. *See Terry v. Ohio*, 392 U.S. 1 (1968).

35. *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). Although this test appeared in an opinion written by Justice Stewart, and was joined by only one other justice, it has been approved by a majority of the Court in subsequent cases. *See Fla. v. Bostick*, 501 U.S. 429, 439 (1991); *Fla. v. Royer*, 460 U.S. 491, 501–02 (1983).

36. The Fourth Amendment provides, in what is generally referred to as the "Warrants Clause," that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. amend. IV.

37. As the Court stated in *Katz*, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." 389 U.S. at 357 (footnotes omitted). This language, referring to "exceptions," is repeated in subsequent Supreme Court opinions, such as *United States v. Ross*, 456 U.S. 798, 802 (1982).

38. *See Ill. v. Gates*, 462 U.S. 213, 238–39 (1983) (discussing how Fourth Amendment probable cause is analyzed).

39. The Court in *Terry* approved a lesser type of "seizure," generally referred to as a "*Terry* stop" or a "stop," provided that the government actor making the stop has a lesser type of probable cause, generally referred to as reasonable or articulable suspicion. *See Terry*, 392 U.S. at 21.

40. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (stating "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest" (citation and footnote omitted)).

41. *Caballes*, 125 S. Ct. at 837.

42. *See Payton v. N.Y.*, 445 U.S. 573, 587 (1980); *Terry*, 392 U.S. at 20.

43. *Caballes*, 125 S. Ct. at 837 (citing *Jacobsen*, 446 U.S. at 124).

The Court primarily focused on whether the use of the dog sniff to determine the presence of marijuana in the trunk of Caballes's car constituted a search that needed Fourth Amendment justification beyond that necessary for the initial traffic stop. The Court concluded the dog sniff was not an intrusion into Caballes's reasonable expectation of privacy and therefore not a "search" because the dog sniff only disclosed the presence of contraband, which Caballes had no "legitimate interest in privacy."[44] Since the dog sniff was not a search, the government did not need to comply with the Fourth Amendment.

This type of investigative procedure, that only discloses the presence, or not, of contraband, has sometimes been referred to as a "binary search,"[45] even though the Supreme Court does not consider it a Fourth Amendment search. Although this doctrine seems fairly well entrenched after the *Caballes* decision, and thus promises to have far-reaching results with the advent of new technologies,[46] it has a remarkably short and shallow history in the Supreme Court. This doctrine had its origin in *United States v. Place*,[47] where the Supreme Court, in dicta,[48] similarly held that a canine sniff of a suitcase by a trained narcotics dog was not a search under the Fourth Amendment.[49] In reaching its conclusion, the Court appeared to rely on two different rationales. First, the Court suggested that since the canine sniff differed from "an officer's rummaging through the contents of the luggage,"[50] the canine sniff "is much less intrusive than a typical search."[51] The second rationale, which was crucial to the *Caballes* decision, was that "the sniff discloses only the presence or absence of narcotics, a contraband item."[52]

---

44. *Id.*

45. The term "binary" was first used in *United States v. Colyer*, where the Court stated "[a]s in *Place*, the driving force behind *Jacobsen* was the recognition that because of the binary nature of the information disclosed by the sniff, no legitimately private information is revealed." 878 F.2d 469, 474 (D.C. Cir. 1989). For an excellent discussion of the history and future of the binary search doctrine, see Ric Simmons, *The Two Unanswered Questions of* Illinois v. Caballes*: How to Make the World Safe for Binary Searches*, 80 Tul. L. Rev. 411 (2005).

46. The Supreme Court has only applied the binary search doctrine in two types of procedures: dog sniffs and a drug-field test. In *United States v. Place*, the Court suggested the doctrine would have almost no application beyond the dog sniff when it was "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." 462 U.S. at 707. The doctrine would seem, however, to apply to a number of new technologies that purport to be able to detect only the presence of specific items. *See* David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 Temp. L. Rev. 1 (1996) (discussing gun detection); Simmons, *supra* n. 45 (discussing gun detectors, handheld mechanical explosive detectors, and computer software that can filter only illegal messages from e-mail, and facial recognition devices).

47. 462 U.S. 696 (1983).

48. The Court's decision was actually based on its determination that, even though a suitcase was subject to a "*Terry* stop" based on reasonable suspicion, the detention of the suitcase in order to expose it to the canine sniff was too long, and therefore unreasonable under *Terry*. *Id.* at 709–10. The Court's discussion of the canine sniff was not necessary to that decision. Justices Brennan, Marshall, and Blackmun criticized the majority for even raising the canine sniff issue since the district court had expressly observed that *Place* "[did] 'not contest the validity of sniff searches *per se*.'" *Id.* at 719 (quoting *U.S. v. Place*, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980)). The issue was also not raised in the court of appeals and it was not briefed or argued in front of the Supreme Court. *Id.*

49. *Id.* at 706–07.

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

51. *Id.* at 707.

52. *Id.*

The Court then reasoned that "despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."[53] This was the extent of the *Place* Court's discussion of the canine sniff as a "search." Justices Brennan, Marshall, and Blackmun criticized the majority for even raising the issue since Place had not raised the issue in the district court, or the court of appeals, and it had not been briefed or argued in the Supreme Court.[54] They also pointed out that "the issue is more complex than the Court's discussion would lead one to believe."[55]

The fact that the canine sniff issue was not briefed or argued in the Supreme Court may account for the scant discussion of the issue in the majority opinion. Perhaps the primary reason why the Court did not engage in a more expansive discussion of why a canine sniff did not constitute a search is because the majority, perhaps rather naively, did not seem to think the issue would have any applicability beyond a canine sniff itself. It characterized the canine sniff as "*sui generis*"[56] and 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."[57]

The Court was made aware of such a procedure, however, during its next Term. In *United States v. Jacobsen*,[58] the Court held a drug field test of a substance, which the government had already lawfully obtained, was not a Fourth Amendment search because the test could only disclose whether the substance in question was contraband.[59] In deciding the case, the Court seemed to have abandoned the "less intrusive" rationale[60] used in *Place*, and instead relied primarily on the second rationale, that a dog sniff was not a search because it only disclosed the presence of contraband. Since the drug test in *Jacobsen* could only disclose whether the substance was contraband, the Court's decision in *Place* "dictated"[61] the same conclusion in *Jacobsen*.[62] Thus, less than a year after the Court purported to announce a rule on an issue that was not briefed and argued, the Court used that rule to dictate its conclusion about a procedure that had previously seemed unimaginable. The drug-field test was soon seen as an investigative procedure that actually was the equivalent of a dog sniff, and perhaps the Court's inability to have originally imagined such a procedure was not naive since the Court did not revisit the issue until the *Caballes* decision in 2005, which involved the same dog sniff issue in *Place*.[63] The Court has not yet applied the binary search doctrine to any other investigative technique.

---

53. *Id.*

54. *See supra* n. 48 and accompanying text.

55. *Place*, 462 U.S. at 719.

56. *Id.* at 707.

57. *Id.*

58. 466 U.S. 109 (1984).

59. *Id.* at 122–26.

60. The Court did determine that the destruction of a "trace amount" could "at most, have only a *de minimus* impact on any protected property interest." *Id.* at 125. This point, however, was not made relative to its search analysis, but rather in the context of determining whether the field test had resulted in a seizure.

61. *Id.* at 123.

62. *Id.*

63. In *City of Indianapolis v. Edmond*, the Court reiterated its position in *Place* that a dog-sniff of an

In its decision in the *Caballes* case, the Illinois Supreme Court sidestepped the issue of whether a dog sniff was a search under the Fourth Amendment. Instead, it based its holding, that the dog sniff was a Fourth Amendment violation, on *Terry v. Ohio*[64] and its analysis of whether the officer's action "'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[65] The Illinois Supreme Court held that since the canine sniff unjustifiably enlarged the scope of a routine traffic stop into a drug investigation, it exceeded the permissible bounds of a "*Terry* stop" and was, thus, a violation of the Fourth Amendment because the troopers lacked reasonable suspicion to justify the search.[66] As a result, the trial court should have suppressed the drugs found as a result of the dog sniff.[67] While the U.S. Supreme Court essentially agreed "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution,"[68] that infringement can only occur if the manner of execution actually involves conduct that could be characterized as an additional search or seizure that could not be justified on the same basis as the original seizure.[69] The Illinois Supreme Court assumed that if the dog sniff had occurred during an unreasonably prolonged traffic stop, the results of such a sniff could not be used because they would be the result of an unconstitutional seizure.[70] The U.S. Supreme Court, however, accepted the Illinois Supreme Court's conclusion that the duration of the stop was entirely justified by the traffic offense itself and had not been prolonged by the dog sniff.[71] Thus, there was no

---

automobile was not a search. 531 U.S. 32, 40 (2000). However, that part of the decision was again dicta, because the Court invalidated the suspicionless drug-detection roadblock at issue in *Edmond* on the basis that its primary purpose was the detection of ordinary criminal activity. *Id.* at 41–42.

64. 392 U.S. 1 (1968).

65. *Caballes*, 802 N.E.2d at 204 (quoting *Terry*, 392 U.S. at 19–20).

66. The Illinois Supreme Court stated:

Moreover, the observations made by Officer Gillette during the stop that (1) defendant said he was moving to Chicago, but the only visible belongings were two sport coats in the backseat of the car, (2) the car smelled of air freshener, (3) defendant was dressed for business while traveling cross-country, even though he was unemployed, and (4) defendant seemed nervous were insufficient to support a canine sniff.

Id. at 204–05. The Court further stated "when these factors are viewed together, they constitute nothing more than a vague hunch that defendant may have been involved in possible wrongdoing." *Id.* at 205.

67. *Id.* at 205.

68. *Caballes*, 125 S. Ct. at 837.

69. *Id.*

70. *Id.*

71. *Id.* Despite that Trooper Graham only overheard Trooper Gillette's transmission to the dispatcher about the traffic stop, he managed to arrive at the site of Caballes's car from another location and walk his dog around the car in under the ten minutes it took Trooper Gillette to process the traffic stop. *Id.* at 836. While that may be exactly what happened, a more cynical person might think that a suspicious Trooper Gillette did what he could to make Caballes's car available for the dog sniff. There was some evidence in the record that Trooper Gillette himself was suspicious about drug activity. He seemed suspicious that Caballes was "dressed up" even though he said he was unemployed; he noticed the odor of air freshener (which can be used to mask the odor of contraband); he considered Caballes's continued nervousness unusual; he noted that there was no visible luggage, except for two suits hanging in the back seat even though Caballes was supposedly moving from Las Vegas to Chicago; and Gillette asked Caballes for consent to search the car, which Caballes refused. *Caballes*, 802 N.E.2d at 204. Even though the Illinois Supreme Court concluded that such information was insufficient to support the dog sniff, it does indicate that Trooper Gillette was suspicious and interested in his own drug investigation of Caballes. Even though Gillette supposedly kept the entire stop to less than ten minutes, there are some facts that indicate an attempt to prolong the stop just long enough for Trooper Graham to arrive. The Illinois appellate court had found that Gillette's request for a criminal record check had improperly extended Caballes's detention, although the delay was *de minimus*. *Id.* Gillette also took time to

additional seizure of Caballes that could invalidate the results of the sniff. The remaining issue was whether the dog sniff amounted to an additional unjustifiable search.

The Court quickly decided that a dog sniff "performed on the exterior of respondent's car while he was lawfully seized for a traffic violation" did not constitute a Fourth Amendment search.[72] The Court's decision relied exclusively on its decisions in *Place* and *Jacobsen*. The decision reiterated the Court's position in *Jacobsen* that governmental conduct that does not "'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment."[73] And since no interest in possessing contraband can be deemed legitimate, any "governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"[74] The decision then pointed out that Caballes had conceded in his brief that "'drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband.'"[75] Although Caballes had argued that error rates among drug-sniffing dogs called into question whether such sniffs *only* reveal the presence of contraband, the Court simply responded that "the record contains no evidence or findings that support his argument."[76]

The heart of the Court's rationale for its holding in *Caballes* is that any possible expectation of privacy in the possession of contraband is simply not legitimate. It should be noted that the original language from Justice Harlan's concurrence in *Katz*, with respect to the nature of the expectation of privacy that is protected by the Fourth Amendment, was whether the "expectation be one that society is prepared to recognize as 'reasonable.'"[77] By the time the Court decided *Jacobsen* in 1984 the Court seemed to be using "reasonable" and "legitimate" interchangeably. The use of the word "legitimate," however, seems to put an inappropriate emphasis on the legality of the conduct on which one's expectation of privacy might depend, rather than on the reasonableness of that expectation. In *Jacobsen*, the Court equated the fact that cocaine possession was illegal, with the conclusion that "Congress has decided . . . to treat the interest in 'privately' possessing cocaine as *illegitimate*,"[78] which then made it but a simple slight of tongue to say that Jacobsen had no "*legitimate* privacy interest"[79] in the tested cocaine. Furthermore, the switch from emphasizing "legitimate" over "reasonable" originated with the 1978 case of *Rakas v. Illinois*.[80] Prior to *Rakas*, the Court generally afforded standing to challenge the legality of a search to "anyone

take a call from another officer on an unrelated matter. *Id.* at 203. By the time the dog alerted to Caballes's trunk, Trooper Gillette was apparently finished with the traffic stop because he is the one who actually searched the trunk and found the marijuana. *Id.*

72. *Caballes*, 125 S. Ct. at 838.

73. *Id.* at 837 (quoting *Jacobsen*, 466 U.S. at 123).

74. *Id.* (quoting *Jacobsen*, 466 U.S. at 123) (emphasis in original).

75. *Id.* at 838 (quoting Br. of Respt. 17, *Caballes*, 125 S. Ct. 834).

76. *Id.*

77. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

78. *Jacobsen*, 466 U.S. at 123 (emphasis added).

79. *Id.* (emphasis added).

80. 439 U.S. 128 (1978).

legitimately on [the] premises where a search occurs."[81] When the Court in *Rakas* replaced that standing test with the current test that links standing to the *Katz* reasonable expectation of privacy test, the Court rephrased the standing question to ask whether the person had a "legitimate expectation of privacy in the invaded place."[82] Of course, the *Katz* decision itself marked an attempt to move away from a reliance on the technical legality of the government's conduct as a matter of trespass law, to a reliance on an analysis of the reasonableness of one's expectation of privacy. By replacing the word "reasonable" with the word "legitimate," and by emphasizing the illegality or illegitimacy of the conduct in which one claims an expectation of privacy, the Court has altered the nature of the analysis that the *Katz* Court emphasized through the use of the word "reasonable."

The Court's emphasis on illegality, or the contraband nature of the substance being detected, incorrectly presupposes that the individual claiming a reasonable expectation of privacy is guilty of possessing the contraband substance. This is evident by the way the Court has attempted to explain why one's expectation of privacy in contraband is not legitimate. In *Jacobsen*, the Court differentiated "an interest in privacy that society is prepared to recognize as reasonable . . . from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities."[83] In a footnote, which originally appeared in the *Rakas* opinion,[84] the Court then gave the example of a "burglar plying his trade in a summer cabin during the off season [who] may have a thoroughly justified subjective expectation of privacy, but it is not one that the law recognizes as 'legitimate.'"[85] And in *Caballes*, the Court reiterated its distinction between an expectation "'that certain facts will not come to the attention of the authorities'"[86] and a "'privacy [interest] that society is prepared to consider reasonable.'"[87] One article summarized these statements: "In short, the Fourth Amendment does not protect expectations of privacy that only a criminal would have."[88] And in *Florida v. Bostick*,[89] in the context of determining whether a seizure had taken place, the majority stated that "the 'reasonable person' test presupposes an *innocent* person."[90]

The *Caballes* decision, however, did not analyze the reasonableness of any expectation of privacy from the viewpoint of an innocent person, but rather from the viewpoint only a criminal would have. Portraying people who are trying to claim an expectation of privacy as drug dealers, who are instead sneaking around in an attempt to

81. *Jones v. U.S.*, 362 U.S. 257, 267 (1960).

82. *Rakas*, 439 U.S. at 143.

83. *Jacobsen*, 466 U.S. at 122 (footnote omitted).

84. *Rakas*, 439 U.S. at 143 n. 12.

85. *Jacobsen*, 466 U.S. at 122 n. 22 (quoting *Rakas*, 439 U.S. at 143 n. 12) (internal quotation marks omitted).

86. *Caballes*, 125 S. Ct. at 837 (quoting *Jacobson*, 466 U.S. at 122).

87. *Id.* at 838 (quoting *Jacobson*, 466 U.S. at 122).

88. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L.J. 727, 732 (1993).

89. 501 U.S. 429 (1991).

90. *Id.* at 438 (emphasis in original).

hide illegal contraband from the authorities, or as criminals who would have the chutzpah to claim some sort of privacy in a summer cabin that they had burglarized, makes it easy to define their expectation of privacy as illegitimate or even unreasonable. And while it might very well be true that Place, Jacobsen, and Caballes were drug dealers who hoped to keep their wares from coming to the attention of the authorities, certainly not everyone whose property is exposed to a dog sniff, whether positive or not, will fall into that category. The presence of a contraband substance in a person's car does not mean the person possesses it illegally or illegitimately. One can easily imagine a drug-detection dog alerting to contraband that a previous customer left in a rental car, to contraband that a passenger, but not the owner-driver, has placed in the car, or to the cocaine residue that is purportedly on a substantial amount of the currency in this country.[91] Such people whose cars are subjected to a dog sniff are not relying on the "mere expectation . . . that certain facts will not come to the attention of the authorities."[92] They are innocent people relying on the reasonable expectation that their privacy will not be infringed by the government, at least in the absence of some reasonable, articulable suspicion.[93]

The *Caballes* opinion ended with an attempt to explain how its "conclusion is entirely consistent"[94] with its recent decision in *Kyllo v. United States*.[95] In *Kyllo*, law enforcement authorities used a thermal-imaging device to detect the amount of heat emanating from a house to determine if the resident might be growing marijuana under heat lamps.[96] The use of the thermal-imaging device was done without compliance with the Fourth Amendment warrant or probable cause requirements and, thus, would have been unconstitutional if its use constituted a Fourth Amendment "search." Even though the device could be used to detect heat without entering the house or the property of the suspect, the Court held its use was a "search" because it "obtain[ed] by sense-enhancing technology . . . information regarding the interior of the home that could not otherwise have been obtained without physical intrusion,"[97] at least where the technology in question "is not in general public use."[98] The parallel to a dog sniff is readily apparent since the dog sniff also discloses information *that could not otherwise have been obtained without physical intrusion*. A distinction was obviously in order.

---

91. *See Caballes*, 125 S. Ct. at 839–40 (Souter, J., dissenting).

92. *Jacobsen*, 466 U.S. at 122 (footnote omitted).

93. In *Rakas*, the Court pointed out that one of the sources of reasonable expectations of privacy are "understandings that are recognized and permitted by society." 439 U.S. at 143 n. 12. In an effort to ascertain the public's understanding of the interests implicated by various types of police investigative techniques, Professors Slobogin and Schumacher surveyed 217 subjects by presenting them with fifty search and seizure scenarios derived primarily from Supreme Court or lower court cases. Slobogin & Schumacher, *supra* n. 88, at 736–37. The subjects were asked to rate the extent to which they considered each investigative technique an invasion of privacy or autonomy. *Id.* Although the survey did not include a scenario involving a dog sniff of a car, the scenario called "Dog sniff of body" (ranked twenty-third) and was considered more intrusive than a "Pat-down" (ranked nineteenth), which, of course, is considered a Fourth Amendment search. *Id.* at 738.

94. *Caballes*, 125 S. Ct. at 838.

95. 533 U.S. 27 (2001).

96. *Id.* at 29.

97. *Id.* at 34 (internal quotation marks omitted).

98. *Id.*

Since *Kyllo* was primarily a case about what reasonable expectations of privacy are still protected by the Fourth Amendment in the face of increasingly sophisticated sense-enhancing devices, the Court could easily distinguish the dog sniff from the thermal-imaging device, by pointing out a dog is simply not sophisticated technology, and is obviously in general public use. Some courts have simply compared a dog sniff to the "plain smell" doctrine in finding that "the dog is merely an 'extension' of the police officer, enhancing his or her senses rather like a flashlight or binoculars help the officer use his or her plain sight."[99] Such a distinction could simply have the effect of limiting the *Caballes* decision to the rather low tech drug-detection dog, rather than paving the way for its application to highly intrusive high-tech devices that are not in general public use. The Court, however, did not distinguish *Kyllo* on that basis. Instead, the Court commented the critical distinction in *Kyllo* was that the device "was capable of detecting lawful activity[,] . . . intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'"[100] As Justice Souter pointed out in his dissent, drug-detection dogs are not infallible and return false positives in a number of instances.[101] Thus, a falsely alerting dog could disclose the presence of some unknown private information other than the presence of contraband. One counter that the majority decision seems to make to this point is that Caballes "does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information."[102] If Caballes had made such a suggestion the majority might have responded by pointing out that the intimate details in a home that were disclosed in *Kyllo* were more specific and knowable than the perhaps unknown disclosures of a false-positive dog sniff alert. The Court did refer to the disclosure of "what hour each night the lady of the house takes her daily sauna and bath." But, of course, the thermal-imaging device discloses no such information. While it might be true that the bath or sauna could be the *cause* of the increased heat being detected by the thermal-imager, there is no way an officer monitoring the device can know the device is detecting such intimate details in a home as opposed to the use of heat lamps to illegally grow marijuana. Similarly, an officer monitoring a drug-detection dog, which is subject to making false positives, cannot actually know whether the dog is alerting only to the presence of contraband or to some other private information in the car.[103]

This latter point obviously raises the issue of how accurate drug-detection dogs should be in order to justify their use as not constituting a Fourth Amendment search.[104]

---

99. Simmons, *supra* n. 45, at 26 (citing *U.S. v. Johnson*, 660 F.2d 21(2nd Cir. 1981); *U.S. v. Bronstein*, 421 F.2d 459 (2nd Cir. 1975); *U.S. v. Sullivan*, 625 F.2d 9 (4th Cir. 1980); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982)).

100. *Caballes*, 125 S. Ct. at 838 (quoting *Kyllo*, 533 U.S. at 38).

101. *Id.* at 839 (Souter, J., dissenting).

102. *Id.*

103. Another distinction that might come to mind here is that *Kyllo* was concerned with the expectation of privacy in the home, which is generally afforded the greatest Fourth Amendment protection, while *Caballes* was concerned with the expectation of privacy in an automobile, where such expectation is said to be reduced. *See e.g. Cal. v. Carney*, 471 U.S. 386 (1985). That distinction, however, has generally been used to justify the reduced Fourth Amendment protections required for automobile searches and not to justify excluding the automobile from such protections all together. Likewise, the *Caballes* decision did not make that distinction.

104. This issue also applies to other, more technologically enhanced detection devices. *See generally supra* n. 46. The accuracy rate of such devices, however, is beyond the scope of this article. For an excellent

Since the primary basis of the Court's conclusion that dog sniffs are not searches is that they detect "*only* the presence or absence of narcotics, a contraband item,"[105] it might seem the Court is requiring absolute accuracy in drug-detection dogs.[106] Drug-detection dogs, however, are not absolutely accurate. In his dissent in *Caballes*, Justice Souter discussed the fallibility of drug-detection dogs by citing to a variety of cases discussing the error rates of such dogs.[107] A study cited by Illinois, in *Caballes*, in support of the proposition that "dog sniffs are 'generally reliable' [showed] that dogs in artificial testing situations return false positives anywhere from 12.5 to 60% of the time, depending on the length of the search."[108] And in *United States v. $242,484.00*,[109] the Eleventh Circuit noted that a dog alert "is of little value"[110] since as much as 80% of all currency in circulation contains drug residue.[111] However, in response to Caballes's argument that the error rate among drug-detection dogs, particularly the existence of false positives, undermined the premise that such dogs *only* detect contraband, the Court simply responded that "the record contains no evidence or findings that support his argument."[112] Ironically, the Court in *Place* was able to conclude that "the sniff discloses *only* the presence or absence of narcotics,"[113] without any evidence whatsoever in the record to support that conclusion since the issue had not been raised in the trial court and it had not been briefed or argued in the Supreme Court.[114] Perhaps the Court is suggesting, however, that if an adequate record was actually made with respect to the error rate of drug-detection dogs, the Court might reconsider its conclusion in *Caballes*, that a dog sniff of an automobile is not a Fourth Amendment search. The Court, however, followed up its comment about the lack of an adequate record, with the somewhat cryptic conclusion that "the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk."[115] If the Court is suggesting that probable cause sets the standard for the accuracy of drug-detection dogs, and presumably for any other alleged binary search device, it is clear that it would not really have to be all that accurate. In *Illinois v. Gates*[116] the U.S. Supreme Court characterized the quantum of information necessary to establish probable cause as a "fair probability"[117] or a "substantial chance."[118] It seems

discussion of that very issue, see Simmons, *supra* n. 45.

105. *Place*, 462 U.S. at 707 (emphasis added).

106. *See Caballes*, 125 S. Ct. at 839 (Souter, J., dissenting).

107. *Id.* (citing *U.S. v. Limares*, 269 F.3d 794 (7th Cir. 2001); *U.S. v. Kennedy*, 131 F.3d 1371 (10th Cir. 1997); *U.S. v. Scarborough*, 128 F.3d 1373 (10th Cir. 1997); *Laime v. State*, 60 S.W.3d 464 (Ark. 2001)).

108. *Id.* at 840 (citing Br. of Pet. 13, *Caballes*, 125 S. Ct. 834; Kelly Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* 12, http://www.vetmed.auburn.edu/ibds/pdf/dutycycle.pdf (2001)).

109. 351 F.3d 499, 510–11 (11th Cir. 2004).

110. *Id.* at 511 (footnote omitted).

111. *Id.*; *see U.S. v. Carr*, 25 F.3d 1194, 1215 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence.").

112. *Caballes*, 125 S. Ct. at 838.

113. *Place*, 462 U.S. at 707 (emphasis added).

114. *Id.* at 719.

115. *Caballes*, 125 S. Ct. at 838.

116. 462 U.S. 213 (1983).

117. *Id.* at 238.

118. *Id.* at 243 n. 13.

difficult to say that a dog sniff, that only indicates a fair probability of the presence of contraband, is *only* detecting the presence of contraband.[119]

V. CONCLUSION

Even though the issue has received very little discussion and analysis, the Supreme Court in *Caballes* seems committed to the proposition that the use, by the government, of a well-trained narcotics-detection dog, that can only detect the presence of some contraband substance, does not constitute a "search" under Fourth Amendment, and is thus not subject to any warrant or probable cause requirements. In reaching this result, however, the Court has altered its previous "reasonable expectation of privacy" analysis for determining when a Fourth Amendment search has occurred. Instead of determining the reasonableness of one's expectation of privacy from the standpoint of an innocent person, the Court has proceeded from the unfounded position that anyone on whose person or property contraband is detected is a criminal whose expectation of privacy is per se illegitimate. Although the Court has previously suggested that this proposition would not seem to have any application beyond the dog-sniff situation, its attempt to distinguish the result from that in *Kyllo* clearly seems to indicate that the Court is willing to apply the *Caballes* rational to the future use of increasingly sophisticated technology capable of only detecting contraband.

119. For a detailed discussion of the accuracy necessary to justify a search as a binary one, see Simmons *supra* n. 45.