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Stretching the "Terry" Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard

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I. INTRODUCTION

The Fourth Amendment[1] protects an individual's interest in freedom from unreasonable government intrusions into personal privacy.[2] When a court finds an investigative technique to be a search within the Amendment's meaning, it effectively concludes that Fourth Amendment protection should apply.[3] If the government activity constitutes a search, that activity must be reasonable. If the activity does not amount to a search, however, the government enjoys virtual freedom to conduct that activity as unreasonably as it pleases.[4]

For pure investigatory searches,[5] the United States Supreme Court has found that the probable cause requirement[6] strikes the proper balance in defining reasonableness.[7] Unlike searches in other contexts,[8] the Court has refused to apply any standard of suspicion lower than probable cause.[9] This requirement imposes a substantial burden on police officers to gather significant amounts of evidence before conducting a search. As a result of the cost of meeting this high standard of suspicion, the Court has excused certain police activities that intrude minimally on personal property, such as canine sniffs, from the rigors of the Amendment by concluding that these intrusions are not searches.[10]

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1. The Fourth Amendment provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

2. *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

3. *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 476 (5th Cir. 1982). See also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 356 (1972) (noting that the term "search" is one of limitation).

4. Amsterdam, 58 Minn. L. Rev. at 393.

5. This Note defines pure investigatory searches narrowly as those that have no other purpose than to detect or discover evidence of crime. The term does not include frisks, searches incident to arrest, or inventery searches, all of which find their genesis in a rationale apart from the search for evidence only. See Part II.B for a discussion of the differences between these searches and the pure investigatory search.

6. The probable cause requirement dictates that police may not search or seize without probable cause. The Court has found probable cause when trustworthy facts and circumstances within the knowledge of the officers are sufficient in themselves to warrant a man of reasonable caution in the belief that the items to be searched or seized bear evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

7. See, for example, *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987).

8. See, for example, *Maryland v. Buie*, 494 U.S. 325 (1990) (approving of a protective sweep of a home based on reasonable suspicion to prevent potential harm to officers).

9. *Hicks*, 480 U.S. at 328-29.

10. See, for example, *United States v. Place*, 462 U.S. 696, 707 (1983) (concluding that a canine sniff is not a search).

Canine sniffs[11] pose an interesting Fourth Amendment problem because they can reveal the presence of concealed narcotics that otherwise might remain hidden from detection. The sniff constitutes a search because it discloses the contents of an item in which the suspect possesses a reasonable expectation of privacy.[12] The use of a dog's nose, however, poses less of an intrusion into personal privacy than general rummaging or prying into a physical area because the sniff does not reveal private information about its subject beyond what the dog can detect. Because of the effectiveness and limited scope of intrusiveness, canine sniffs are a valuable tool in the fight against drug trafficking. At the same time, the sniff's limited scope of intrusiveness substantially protects citizens' interests in privacy. By applying a traditional probable cause requirement to sniffs, a court would defeat these attractive features of the canine sniffs because police armed with probable cause could, and presumably would, conduct more indiscriminate searches. With few exceptions, federal courts, which are wed te a strict probable cause requirement for pure investigatory searches, have concluded that canine sniffs do not constitute searches within the meaning of the Fourth Amendment. By concluding that a canine sniff does not amount to a search,

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11. A canine sniff is a police technique that uses highly trained dogs to sniff for contraband items, such as explosives or narcetics. These dogs are used to check people and their effects entering the United States, luggage on airplanes or buses, air freight, automobiles, and storage facilities. Wayne R. LaFave, 1 *Search and Seizure* § 2.2(f) at 366 (West, 2d ed. 1987).

The dogs receive extensive training. To enter a training program, a dog must pass an entrance exam exhibiting the dog's natural retrieving ability, nasal sensitivity, energy, willingness, inquisitiveness, and boldness. Roughly one of every 130 applicants is accepted into the training programs, and trainers rescreen the dogs throughout the course. From the dog's perspective, training is a game of hide and seek. The dog learns the scent of the contraband item, which the trainers hide in open fields, buildings, cars, and other locations that the dogs will encounter during their careers. A dog will alert to the scent of the contraband item by snarling, barking, whining, or pawing at a container, and each dog may respond differently. Max A. Hansen, 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, 415 & n.25 (1976).

Dogs that graduate from the training program are quite accurate and effective. A canine has a sense of smell eight times stronger than a human's and can discover evidence from a distance of seventy-five feet. John Schuster, Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 Fordam L. Rev. 973, 986 (1976). A trained dog may alert to less than one-millionth of a gram of cocaine. *United States v. $639,558.00 in U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992). This accuracy may be misleading because the dogs sometimes err by reacting to noncontraband materials. See id. (noting that dogs may alert te money alone 10% of the time because up to 97% of all currency in the U.S. contains traces of cocaine); *Doe v. Renfrow*, 475 F. Supp. 1012, 1015-17 (N.D. Ind. 1979) (involving the sniff of a student who recently had played with a dog in heat).

12. Justice Harlan developed the reasonable-expectation-of-privacy test in his concurrence in *Katz*. The test asks whether the defendant possessed a subjective expectation of privacy in the object searched and whether society recognizes that expectation as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

however, federal courts cede all discretion to the police to conduct this activity at their whim. This result contradicts the Fourth Amendment's concern with preventing arbitrary intrusions into personal privacy.

Concerned with the lack of limits on police authority, a number of states have concluded that the use of narcotics-sniffing dogs amounts to a search under their state constitutions, but they have added that these minimally intrusive searches may be valid under the reasonable suspicion standard established in *Terry v. Ohio*.[13] In doing so, these courts have stretched the *Terry* doctrine beyond its intended scope.[14] These decisions raise a host of questions about this new exception to the probable cause requirement for pure investigatory searches, particularly with regard to the exception's scope and applicability to other types of police searching activities.

This Note examines the prudence of establishing a reasonable suspicion standard to accommodate minimally intrusive pure investigative activities like canine sniffs. Part II traces the history and development of the reasonable suspicion standard and the Supreme Court's reluctance to apply this standard to pure investigatory searches. Part III examines the result of this reluctance in federal canine sniff cases and surveys several state cases that apply a reasonable suspicion standard to canine sniffs. Part IV discusses the policy reasons behind the use of a reasonable suspicion standard in reviewing minimally intrusive searches, concludes that a reasonable suspicion standard is necessary to regulate certain types of minimally intrusive pure investigatory searches, and develops a test to determine when a pure investigatory technique warrants this lower standard of suspicion. This Note concludes that states creating a canine sniff exception to the probable cause requirement should construe the exception narrowly to prevent the imposition of a broad balancing test in the pure investigatory context.

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13. 392 U.S. 1 (1968). Many commentators agree with this result. See, for example, LaFave, 1 *Search and Seizure* § 2.2(f) at 375-76 (cited in note 11); Thomas H. Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 Ga. L. Rev. 75, 95 (1976). But see Lina Shahin, Comment, *The Constitutional Posture of Canine Sniffs*, 9 Touro L. Rev. 645, 697 (1993) (concluding that the use of dogs does not amount to a search).

14. *Terry* was intended to apply only to limited weapons searches for the safety of the officer. It expressly did not apply to searches for evidence. See notes 68-69 and accompanying text.

II. BACKGROUND

A. *The Evolution of the Reasonable Suspicion Standard*

1. The Probable Cause Requirement

Prior to *Camara v. Municipal Court of San Fransisco*[15] and *Terry v. Ohio*,[16] courts assumed that a search or seizure was reasonable within the meaning of the first clause of the Fourth Amendment only if the government actors possessed a warrant based on probable cause as required by the Amendment's second clause.[17] Although courts recognized exceptions to the second, or "Warrant" Clause, they still required probable cause as a minimum threshold for a search to be reasonable under the first, or "Reasonableness" Clause.[18] The rationale behind this requirement lay in the belief that the meaning of the Warrant Clause would evaporate if courts found searches and seizures reasonable on a standard of suspicion less than probable cause.[19] Probable cause provided a textually rooted standard that preventod subjective judicial decisionmaking or lack of judicial restraint leading to the erosion of the rigors of the Fourth Amendment.[20] Moreover, the Supreme Court believed that rules encouraging police officers to obtain prior judicial approval before acting on their suspicions could prevent unreasonable searches and seizures most effectively.[21] The courts, therefore, strictly applied the probable cause requirement.

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15. 387 U.S. 523 (1967).

16. 392 U.S. 1 (1968).

17. See, for example, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). The reasonableness clause states: "The right of the people te be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const., Amend. IV. The Warrant Clause then provides: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place te be searched, and the persons or things te be seized." Id. Comentaters and jurists have long debated the proper relationship between the two clauses. Essentially this debate is between those who favor strict adherence te the Warrant Clause and those who favor a broader sliding-scale approach te the first clause's command of reasonableness. See Parts IV.A and IV.B for a discussion of this debate.

18. See, for example, *Carroll*, 267 U.S. at 155-56.

19. See, for example, *Wong Sun*, 371 U.S. at 479 (noting that the requirements of reliability and particularity on which an officer may act cannot be less than when a warrant is obtained).

20. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 Minn. L. Rev. 383, 387 (1988).

21. See, for example, *Wong Sun*, 371 U.S. at 479.

Strict application of the probable cause requirement had its costs. Probable cause limited an officer's searching capability in two ways. First, it required police officers to gather a satisfactory quantum of evidence before conducting the search. The greater suspicion required for probable cause increases the investment of police time and resources. Second, a probable cause requirement limitod the scope of the officer's legitimate search.[22] Moreover, the exclusionary rule prevented the admission of evidence gained by a search or seizure not based on probable cause.[23] For traditional police searches, these costs reflect the commensurate benefit to individual privacy that the Fourth Amendment seeks to protect. For searching activities that intrude less than ordinary searches, however, these law enforcement costs exceed the offsetting benefit to individual privacy. Recognizing the imbalance that these restrictions posed to less intrusive searching activities, judges often defined these investigative activities as beyond the scope of the Amendment's protections to allow admission of otherwise tainted evidence.[24] By declining to apply any Fourth Amendment restrictions to these searching activities, courts foreclosed any inquiry into the reasonableness of the activity or its intrusiveness, leaving police officers free to conduct these activities at their discretion.

In *Katz v. United States*,[25] the Court created a two-part test to analyze police investigatory procedures under the Fourth Amendment. The test first asks whether the activity at issue constitutes a search within the meaning of the Fourth Amendment. It then asks whether that search is reasonable. Recognizing that the Fourth Amendment protects people, not places,[26] *Katz* expanded the scope of the Fourth Amendment's protection by redefining the meaning of a search to include any invasion into an area in which an individual has a reasonable expectation of privacy.[27] The Court did not take such revolutionary steps,however, with regard to the reasonableness prong

22. The officer could look for only those items that he had cause to believe were present at the place searched. For example, if the officer was searching for stolen television sets, he could not rifle through the suspect's desk.

23. See, for example, *Mapp v. Ohio*, 367 U.S. 643 (1961).

24. For example, in *Olmstead v. United States*, 277 U.S. 438, 464-65 (1928), the Court held that electronic surveillance of the defendant did not amount to a search within the meaning of the Fourth Amendment because the technique did not intrude physically into an area protected by the Amendment. This narrow definition of search excluded many forms of electronic monitoring from the rigors of the Fourth Amendment.

25. 389 U.S. 347 (1967).

26. Id. at 351.

27. Id. at 351-52. In doing so, the Court overturned *Olmstead*, 277 U.S. 438. *Katz* focused on an individual's expectations of privacy, and subsequent cases have focused on the test set out in Justice Harlan's concurrence. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

of the *Katz* test. Instead, the Court maintained that a search conducted without a warrant and probable cause is per se unreasonable.[28] By linking the Fourth Amendment's requirement of reasonableness to the Warrant Clause, the *Katz* Court retained the same cost-benefit regime that had led the Court to restrict the Fourth Amendment's scope in earlier cases.

In the cases following *Katz*, the Court has relied on *Katz*'s expectation-of-privacy test to establish new and retain old limits on the Fourth Amendment's scope.[29] Moreover, the *Katz* test's preoccupation with probable cause and reasonable privacy expectations forces courts to focus exclusively on an individual's Fourth Amendment interest in privacy. *Katz* and subsequent pure investigatory search cases, in effect, ignored the Amendment's concern that government searching conduct be reasonable and not arbitrary.

2. The Development of Reasonable Suspicion

Although the Court maintained a strong preference for probable cause in the pure investigatory search context, it relaxed this standard in other situations. The housing inspection cases provide insight into the policies underlying this shift. In *Frank v. Maryland*,[30] the Court held that the Fourth Amendment did not apply to housing inspections and upheld the arrest of a Baltimore resident who refused to allow a health inspector to conduct a warrantless search of his house.[31] The Court based its conclusion on several

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28. Id. at 357.

29. See, for example, *California v. Ciraolo*, 476 U.S. 207, 211-12 (1986) (holding that the defendant had no reasonable expectation of privacy in his backyard, which was surrounded by a ten-foot fence, because the fence might not shield the defendant's marijuana patch from the view of a citizen or policeman perched on top of a truck or double-decker bus); *Oliver v. United States*, 466 U.S. 170, 184 (1984) (reaffirming the open fields doctrine of *Hester v. United States*, 265 U.S. 57 (1924), under an expectation-of-privacy analysis); *California v. Greenwood*, 486 U.S. 35 (1988) (holding that an individual has no reasonable expectation of privacy in curbside garbage).

30. 359 U.S. 360 (1959).

31. Although the Court recognized the individual's interest in privacy against arbitrary intrusion by the police, it limited the application of the Fourth Amendment to situations in which the evidence of a search or seizure was sought for use in a criminal proceeding against the defendant. Id. at 366. The Court reasoned that the Framers intended the Fourth Amendment to apply primarily to situations in which evidence was sought for criminal prosecutions or forfeitures. Id. at 365. According to the Court, the inspection's goal was merely to determine if the defendant's residence violated the city's health codes. The city would notify the defendant so that he could cure the problem if evidence of a violation was found. Thus, the Court concluded that the Fourth Amendment could not be invoked in the present case. Id. at 365-66. Moreover, the Court recognized that the use of inspectors to ensure compliance with the state's regulatory scheme dated back to the Revolution. Id. at 367-70. Thus, "the inspection [at issue] touch[ed] at most upon the periphery of the important interests safeguarded by the [Fourth] Amendment's protection against official intrusion." Id. at 367.

factors. First, it found that the privacy interests at stake were not as great as those in the criminal context.[32] Second, the Court recognized the value of the investigatory procedure involved. It noted that the power to inspect residences, either pursuant to a schedule or to treat a specific problem, served as an indispensable tool in maintaining community health.[33] Third, the Court recognized that the traditional warrant and probable cause requirements would undermine the government's enforcement efforts in this area.[34] Fourth, the Court noted that the statutes authorizing the search limited the inspector's discretion. Specifically, it acknowledged that under the statutos, an inspector needed to possess valid grounds before he could demand entry.[35] Rather than amend application of the traditional warrant and probable cause requirements to fit the specific needs of housing inspections, the Court concluded that the Fourth Amendment did not apply.[36]

In overruling *Frank*, the Court in *Camara v. Municipal Court of San Francisco*[37] broadened the scope of the Fourth Amendment to situations beyond criminal law enforcement and, at the same time, signaled an initial shift away from the traditional probable cause requirement. The *Camara* Court recognized that the basic purpose of the Fourth Amendment is to safeguard an individual's privacy and security against arbitrary governmental intrusions.[38] In examining

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32. Id. at 366. Specifically, the Court stated that the attempted inspection of the defendant's residence was merely to enforce the health code, not for criminal investigatory purposes. Moreover, the inspection was conducted with due regard for every convenience of time and place. Id.

33. Id. at 372.

34. Id. By comparison, the dissenters proposed a flexible definition of probable cause to comply with the Warrant Clause. Id. at 383 (Douglas, J., dissenting). The plurality found, however, that if the Constitution required a warrant, the Warrant Clause's mandato of probable cause could not be interpreted flexibly. Id. at 373.

35. Id. at 366. Indeed, the Court found that the pile of rubbish in the yard and the overall disrepair of the house satisfied the proper requirement of suspicion. Id.

36. Id. at 373. The dissenters in *Frank* charged that the majority had construed the scope of the Fourth Amendment too narrowly. The dissenters argued not only that failure to comply with city health ordinances could lead to criminal prosecutions, but also that the Court misread history in claiming that the Fourth Amendment primarily related te searches for evidence to be used in criminal trials. Id. at 375-76 (Douglas, J., dissenting). The dissenters recognized that the Fourth Amendment had a much wider scope. Id. at 377. According to the dissent, the Fourth Amendment protected an individual's privacy right in his home. This right belonged to all people, not just te those accused of a crime. Id. at 377-78. Indeed, the dissenters observed that the public interest in protecting privacy is equally great in the criminal and regulatory contexts. Id. at 382. The dissenters concluded that the Fourth Amendment required a warrant on the facts at issue in *Frank* but added that a health official should not need to show the same quantum of proof to a magistrate as one must show when seeking evidence of a crime. Rather, the test of probable cause required by the Fourth Amendment could account for the nature of the requested search. Id. at 383.

37. 387 U.S. 523 (1967).

38. Id. at 528.

the four underlying factors considered in *Frank*, the Court agreed with three of them. The *Camara* Court agreed that a routine inspection of the condition of private property is less intrusive than a typical search for evidence of a crime[39] and that health regulations had an overriding public value.[40] The *Camara* Court also agreed that the traditional warrant and probable cause requirements would undermine government enforcement efforts.[41] It disagreed, however, with the *Frank* Court as to the value of statutory safeguards as an effective limit on officer discretion.[42] The *Camera* Court found that broad statutory safeguards could not serve as a substituto for individualized judicial review, particularly when a citizen might incur criminal liability by attempting to invoke those safeguards.[43] Moreover, the *Camara* Court recognized that by exempting regulatory inspections from the Fourth Amendment, the Court effectively would leave the resident subject to the discretion of the officer in the field.[44] The Court concluded that the Fourth Amendment must apply to administrative searches like the one at issue in *Camara*.[45] While the Court believed that housing searches generally were reasonable, it apparently recognized a potential for government abuse, prompting the need for Fourth Amendment controls and judicial oversight.

After finding that the Amendment's protections applied, the *Camara* Court next addressed the problem of accommodating the special needs posed by regulatory searches. The Court stated that the test for detormining reasonableness was a balancing of the government's need to search against the individual's interest in

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39. Id. at 530.

40. Id. at 535. The Court noted that the primary governmental interest at stake was the prevention of even the unintentional development of hazardous conditions posing harms to public health and safety. Id. Moreover, the Court recognized that routine periodic inspections may be the only effective method of achieving universal compliance. Id. at 535-36.

41. Id. at 537 (quoting *Frank v. Maryland*, 359 U.S. at 367-71).

42. Id. at 532-33.

43. Id. at 533.

44. Id. at 532. The dissenters sharply disagreed that the challenged ordinances left enough discretion to the officers in the field to be considered unreasonable. Rather, the dissent stated that these inspections met the Amendment's reasonableness requirement consistent with cases interpreting it. Id. at 549 (Clark, J., dissenting). The dissent noted: "There is nothing here that suggests that the inspection was unauthorized, unreasonable, for any improper purpose, or designed as a basis for a criminal prosecution; nor is there any indication of any discriminatory, arbitrary, or capricious action affecting the appellant in either case." Id. According to the dissent, the defendant could have raised questions about the regulatory search at issue by demanding to see the inspector's identification, writing to his supervisor, or asking the district attorney to justify the search. Id.

45. Id. at 534. Specifically, the Court held that regulatery inspections are significant intrusions on the interests protected by the Fourth Amendment and that these searches, conducted outside the scope of the Amendment and absent a warrant, lack the traditional safeguards guaranteed by the Fourth Amendment. Id.

privacy.[46] Rather than rely on the Reasonableness Clause alone, the Court created a flexible definition of probable cause that met the requirements of reasonableness.[47] The Court believed that this approach neither eroded the warrant requirement nor diluted the level of suspicion applicable to criminal investigations. Instead, a flexible probable cause requirement gave content to competing public and private interests and fulfilled the central purpose behind the Fourth Amendment right to remain free from unreasonable government intrusions.[48] In creating a flexible probable cause standard, the Court allowed reasonableness to become a variable factor in Fourth Amendment analysis.[49]

The Court continued this shift away from the probable cause requirement in *Terry v. Ohio*.[50] *Terry* involved the stop and frisk of a suspect who the police officer believed was planning a robbery. The Court defined a stop as a restraint of a suspect's freedom to walk away, not amounting to a full arrest.[51] A frisk, however, involves a limited search for weapons by patting down the exterior of a suspect's clothing.[52] The *Terry* Court rejected the idea that the Fourth Amendment does not limit police conduct not amounting to a technical arrest or full-blown search.[53] Rather, the Court concluded that a stop

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46. Id. at 536-37.

47. Id. at 534. According to the *Camara* Court, the Fourth Amendment required a warrant, but the probable cause requirement and the attendant requirement of individualized suspicion could be met if reasonable legislative or administrative standards for conducting area inspections were satisfied with respect to a particular dwelling. Id. at 538. The Court concluded that a flexible probable cause standard would give content to the Reasonableness Clause without undermining the traditional warrant requirement. Id. at 539. Under the Court's rubric, "[i]f a valid public interest justifie[d] the intrusion contemplated, then there [would be] probable cause to issue a suitably restricted warrant." Id.

48. Id. The dissenters, led by Justice Clark, replied that this new flexible standard would degrade the Fourth Amendment by diluting the probable cause requirement to the point that magistrates would become mere rubber stamps. Id. at 547-48 (Clark, J., dissenting).

49. Sundby, 72 Minn. L. Rev. at 393 (cited in note 20). According to Professor Sundby, the Court simply reversed the roles of probable cause and reasonableness: instead of probable cause defining which practices were reasonable, reasonableness determined when a practice met probable cause. Id. at 394.

50. 392 U.S. 1 (1968). Like the situations underlying *Frank* and *Camara*, the stop and frisk tested the limits of the warrant requirement as a tool for regulating police conduct. Although the conduct did not constitute a full-blown arrest or search, it certainly amounted to an intrusion on personal liberty. The Court was forced to find a way to place limits on this type of police behavior while still allowing officers some freedom to initiate investigations, maintain the peace, and protect themselves. In doing so, the Court abandoned the warrant requirement and probable cause threshold, creating a reasonable suspicion standard that required officers to have some reasonable, articulable suspicion that justified their actions.

51. Id. at 16.

52. Id. at 17.

53. Id. at 19. The Court framed the debate as follows:

> On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For

and frisk amounted to a seizure and search within the meaning of the Fourth Amendment.[54]

As the Court in *Camara* did, the *Terry* Court focused on the Fourth Amendment's underlying concern that governmental intrusions into personal privacy and security be reasonable and not arbitrary. Much of the Court's reasoning lay in the fear that excepting stops and frisks from the limits of the Fourth Amendment would allow the officer in the field too much discretion. The Court also expressed concorn about wholesale police harassment of minority groups.[55] With these underlying concerns in mind, the Court criticized those who sought to insulate the initial stages of contact between the police and citizens from constitutional scrutiny and concluded that the same Fourth Amendment limits must apply to stops and frisks.[56]

Rather than turning to the Warrant Clause to determine whether the search and seizure at issue met the dictates of the Fourth Amendment, tlie *Terry* Court looked only to the Reasonableness Clause[57] and determined, as it had in *Camara*, that reasonableness

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this purpose it is urged that distinctions should be made between a "stop" and an "arrest"... and between a "frisk" and a "search." This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenienco and petty indignity," which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contonded with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary ceoperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protocted personal security, ceupled with a highly developed systeiu of judical controls to enforce upon the agents of the Stato the cemmands of the Constitution. Acquiescence by the courts in the compulsion inherent in the field intorrogation practices at issue here, it is urged, would constituto an abdication of judicial control.

Id. at 10-12 (citations ommitted).

54. Id. at 16. The Court defined a stop as occurring "whenever a police officer accosts an individual and restrains his freedom to walk away." Id. Moreover, the Court observed that any suggestion that a frisk did not constituto a search tortured the English language. To cenduct a frisk, "[t]he officer must feel with sensitive fingers every portion of the prisoner's body[;] a thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Id. at 17 n.13 (quoting L.L. Priar and T.F. Martin, *Searching and Disarming Criminals*, 45 J. Crim. L., Criminology and Police Science 481 (1954)). This action amounts to more than a mere petty indignity. *Terry*, 392 U.S. at 17.

55. Id. at 14.

56. Id. at 17.

57. Id. at 20. The Court explained:

If this case involved police cenduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place.... But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the

must be defined by balancing the competing public and private interests at stake.[58] While the Court recognized the government's interest in stopping and frisking suspects, it indicated that individual interests could not be served properly without an objective test requiring the police officer to point to specific and articulable facts that, along with rational inferences from those facts, reasonably justify the intrusion.[59] The Court created a reasonable suspicion standard, a lesser standard of suspicion than the traditional probable cause requirement, to review stops and frisks. Under this standard, an officer's actions comply with the Fourth Amendment's Reasonableness Clause if they were justified by the officer's reasonable, articulable suspicions.[60]

In applying this standard, the Court differentiated stops from frisks. A step based on a reasonable, articulable suspicion of criminality meets the requirements of the Fourth Amendment because it effects only a minimal intrusion on the suspect's liberty interest while allowing police officers to take reasonable action to detect and prevent crime.[61] A frisk, however, reflects a severe, though limited, intrusion on personal privacy.[62] To be valid, therefore, the frisk must arise not only on reasonable suspicion of criminal activity, but also on reasonable suspicion that the suspect is armed.[63] In addition, the frisk itself is limited to a search for weapons.[64] This distinction between minimally intrusive seizures and minimally intrusive searches has endured; while the Court has recognized minimally intrusive seizures on a reasonable-suspicion-of-crime rationale, minimally intrusive

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officer on the beat—which historically has not been, and as a practical matter could not be, subjectod to the warrant procedure. Instead the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Id. at 20 (citations omitted).

58. Id. at 21 (quoting *Camera*, 387 U.S. at 534-35, 536-37).

59. *Terry*, 392 U.S. at 21. According to the *Terry* Court, the need for specificity of the information on which police action is based is "the central teaching" of Fourth Amendment jurisprudence. Id. at 21 n.18. Moreover, the Court recognized that a test relying on the officer's good faith alone would undermine the protection of the Fourth Amendment. Id. at 22.

60. Id. at 27.

61. See id. at 22. Although a physical intrusion into one's liberty interest, a stop is a seizure short of a technical arrest, and therefore effects only a minimal intrusion on the suspect. Thus, the Court declined te stretch the general rule requiring probable cause for arrests to stops. Instead, the Court treated the stop as a sui generis type of police conduct, which is valid if based on reasonable suspicion. *Dunaway v. New York*, 442 U.S. 200, 209 (1979). This stop rationale also extends to packages. *United States v. Place*, 462 U.S 696, 706 (1983).

62. *Terry*, 392 U.S. at 24-25.

63. Id. at 27.

64. Id.

searches require additional danger to be constitutional under the reasonable suspicion standard.[65]

B. Police Searches on Less Than Probable Cause

Before examining pure investigatory searches and the retention of the probable cause requirement in that area, other types of police searches that are permissible on standards of suspicion below probable cause must be distinguished. The Court has approved police searches that often result in the discovery of incriminating evidence on standards of suspicion lower than probable cause in four general contoxts: *Terry* frisks, searches incident to lawful arrests, inventory searches, and administrative searches. Three key features justify the lesser standards of suspicion and distinguish these searches from pure investigatory searches.

First, in all four situations, some relationship beyond the normal citizen-officer relationship exists between the officer and the searched party. In defending the Court's application of standards less than probable cause for searches not involving the police, one commentator stressed the importance of the relationship of the government actor and the searched party.[66] For example, a teacher's search of a student's purse without probable cause is justifiable, in part, because of the student-teacher relationship, which involves interests beyond those protected by the Fourth Amendment, such as a student's interest in an education and a teacher's interest in maintaining control of the classroom.[67] This relationship factor applies equally well in the police context. In the four recognized exceptions to the probable cause requirement, the nature of the relationship between the officer and the searched party gives rise to interests beyond those protected by the Fourth Amendment. These interests, in turn, justify the underlying search. By comparison, the pure investigatory search arises as part of the standard officer-citizen relationship, involving no interests beyond those envisioned by the Fourth Amendment.

Additionally, all four procedures are linked, in theory, to some rationale beyond the need for criminal law enforcement. In contrast,

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65. Compare *Place*, 462 U.S. at 706 (recognizing a "stop" of luggage on reasonable suspicion), with *Arizona v. Hicks*, 480 U.S. 321, 327-29 (1987) (rebutting the existenco of "minimally intrusive" searches for Fourth Amendment purposes).

66. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 555 (1992).

67. Id. at 565.

a pure investigatory search is based solely on a law enforcement rationale. Consequently, the scope of the four searches relates directly to this relationship and the search's underlying rationale.

As noted above, *Terry* authorizes a limited frisk of a suspect for weapons. The frisk stems from the development of a detainor-detainee relationship that may necessitate the officer's efforts to protect his safety by disarming his detainee.[68] The scope of the frisk is limited to the search for weapons and must be justified by some objective suspicion that the defendant is armed.[69] This limit in scope arises directly from the fact that the difference in a relationship from officer-citizen to detainor-detainee is minor.[70] This distinction does not justify any additional intrusion into privacy beyond the search necessitated by the safety rationale. Thus, if the officer had no suspicion that the suspect was armed, the officer could not frisk his detainee.

By comparison, the right to conduct searches incident to lawful arrest arises automatically upon the lawful arrest of the suspect.[71] Lawful arrest represents the development of an arrestor-arrestee relationship, which is the starting point of the criminal process against the defendant,[72] and the exercise of governmental domination over the arrestee.[73] As arrestor, the officer has two interests: (1) to protect both his own and the public's safety by preventing the suspect's escape; and (2) to preserve evidence for trial by preventing its concealment or destruction.[74] The scope of a search incident to arrest, however, remains limited to a search of the arrestee's person and the area within his immediate control.[75] This limit prevents a valid search incident to arrest from becoming a general exploratory search for evidence, which would require probable cause.[76]

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68. *Terry v. Ohio*, 392 U.S. at 27.

69. Id.

70. See id. at 26. One may classify the detainor-detainee relationship as minor because it falls short of an arrestor-arrestee relationship, which indicates the initiation of the criminal process against the suspect. Id.

71. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

72. See note 70. Because the defendant's arrest is based on probable cause, the officer must believe that he already has gathered enough evidence against the defendant to begin the criminal process.

73. *Robinson*, 414 U.S. at 232 (quoting *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583, 584 (1923)).

74. *Robinson*, 414 U.S. at 230-31. The rationale of preserving evidence for trial differs from a rationale of searching for evidence of guilt. If the defendant has been arrested, presumably the state already has evidence of the defendant's guilt and is preventing its destruction, which may easily occur if the evidence is on the defendant's person or within his reach. *Chimel v. California*, 395 U.S. 752, 764 (1969).

75. *Chimel*, 395 U.S. at 762-63.

76. Id. at 763.

Inventory searches also allow police to search suspects and their possessions when taken into police custody.[77] The rationale for these searches stems from the custodial relationship, typically arising from the arrest of a person or the impoundment of a vehicle.[78] The inventory search protects the suspect from loss or destruction of personal articles and protects the police from frivolous claims of loss or destruction.[79] The inventory of personal articles also provides for the safe administration of jails by preventing arrested individuals from carrying weapons into the jail.[80] While the scope of these searches is potentially broad, they are limited to items in which a bailment relationship arises, and police regulations must govern officer discretion to conduct these searches.[81]

Similarly, administrative searches by police are based on regulations authorizing searches in noncriminal contexts and limiting officer discretion in conducting the searches. The noncriminal purpose may be closely linked to an underlying criminal purpose;[82] its justification, however, lies squarely on the noncriminal rationale.[83] In addition, the search pursuant to regulations presumes some regulatory relationship between the government and the citizen searched.[84] Moreover, the administrative search's rationale directly circumscribes its scope.[85]

C. Reasonable Suspicion and the Pure Investigatory Search

While the Court has entertained a standard of suspicion less than probable cause for police searches in other contexts, it has not

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77. See, for example, *Colorado v. Bertine*, 479 U.S. 367, 369 (1987) (describing the scope of the police inventory of the defendant's van).

78. Id. at 372.

79. Id. at 372-73.

80. *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983).

81. *Bertine*, 479 U.S. at 375-76.

82. See, for example, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding the use of sobriety checkpoints, pursuant to state regulations, as a means of promoting highway safety). While the checkpoints may have reduced the number of persons deciding to drive while intoxicated, checkpoints also allowed the police to catch individuals who were driving drunk, a criminal offense in Michigan.

83. See id. at 451 (describing the need to prevent drunk driving accidents).

84. The search and seizure affirmed in *Sitz* stemmed from the state's regulatory scheme of automobiles and their drivers. The significant regulation of automobiles allows the government to search vehicles in other contexts as well. See, for example, *New York v. Class*, 475 U.S. 106 (1986) (upholding the search for an automobile's vehicle identification number because of the substantial regulation of automobiles).

85. In *Sitz*, the regulations authorized the highway patrol to stop and question motorists briefly to determine if they were sober, but the Court acknowledged that more extensive stops and searches may require additional suspicion to meet Fourth Amendment standards. *Sitz*, 496 U.S. at 450-51.

used a balancing test or the reasonable suspicion standard for pure investigatory searches. Rather, the Court consistently has demanded a probable cause requirement for these searches. The rationale behind this steadfastness lies in the belief that police officers cannot perform the necessary balancing when making split-second decisions and need the guidance of one familiar standard.[86] Moreover, the Court has emphasized that probable cause strikes the proper balance between public and private interests in the pure investigatory search context.[87] Apparently, the Court presumes that all searches for purely criminal investigatory purposes severely intrude on individual privacy interests, obviating any need for a flexible range of suspicion standards similar to those available for seizures.[88] This exclusive focus on privacy interests ignores the existence of other Fourth Amendment interests implicated during police searching activities.

In *Arizona v. Hicks*,[89] the Court issued one of its strongest admonitions against a reasonable suspicion standard for pure investigatory searches. In *Hicks*, a police officer, while investigating a shooting in the defendant's ill-appointed apartment, moved a piece of expensive, and seemingly out of place, stereo equipment to read and record its serial number.[90] The Court held that this activity amounted to a search under the Fourth Amendment because it exceeded the scope of the officer's purpose for being in the apartment—to search for victims, the shooter, or the gun.[91] Absent valid probable cause, the

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86. *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). In contrast, the Court used a similar justification to excuse public employees from the rigors of probable cause when conducting a search: "It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." *O'Connor v. Ortega*, 480 U.S. 709, 724-25 (1987). According to the Court, the police are incapable of learning the intricacies of a reasonableness standard while other public employees could not possibly grasp the difficult subtleties of the probable cause standard. This contradiction begs the question as to which standard is easier to apply.

87. *Dunaway*, 442 U.S. at 214 (stating that "[f]or all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause"). See also *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring in the judgment) (noting that "the Framers . . . balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause"). In *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), Justice Scalia challenged the validity of frisks absent probable cause. See id. at 2139-41 (Scalia, J., concurring). Justice Scalia stated: "I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity . . . ." Id. at 2140 (emphasis in original).

88. See text accompanying notes 61-65.

89. 480 U.S. 321 (1987).

90. Id. at 323. The police officer suspected that the equipment was stolen and wanted to report the serial numbers to his headquarters. Id.

91. Id. at 324-35. Specifically, the Court observed:

search was unreasonable.[92] In her dissent, Justice O'Connor urged that the officer's actions were minimally intrusive because the primary invasion of privacy occurred when the officers entered the home.[93] She believed that the officer made a mere cursory examination of the stereo equipment, justified by his reasonable suspicion that the stereo was stolen.[94] In a sharp response, Justice Scalia, writing for the majority, replied that the Court had never recognized a procedure that falls between a plain-view observance, which is not a search and does not require any level of suspicion,[95] and a full-blown search, requiring probable cause.[96] The majority remained unwilling to recognize a new reasonable suspicion standard for minimally intrusive searches.[97] Instead, the Court chose to adhere to the traditional probable cause standard.[98]

Adherence to the probable cause requirement has created an all-or-nothing regime for pure investigatory searches. Either a pure

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> The officer's moving of the equipment . . . did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of [the officer's] entry into the apartment . . . . [T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. . . . It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. Because the underside of the stereo could not contain the shooter, victims, or the weapon, turning the stereo over exceeded the scope of the original search and, thus, amounted to a new search.

Apparently, the fact that the stereo equipment was suspected contraband did not affect this conclusion. But see notes 119-29 and accompanying text (discussing the holding in *United States v. Jacobsen*, 446 U.S. 109 (1984), that an individual does not have a legitimate expectation of privacy in contraband). Two factors distinguish *Hicks* and *Jacobsen*: (1) unlike *Jacobsen*, *Hicks* involved police activity occurring within a residence, and (2) moving the stereo equipment exposed areas of the apartment that otherwise would have remained concealed.

92. See *Hicks*, 480 U.S. at 326.

93. Id. at 338 (O'Connor, J., dissenting).

94. Id. at 335.

95. As noted in *Katz v. United States*, an object exposed to the public in plain view receives no Fourth Amendment protection. 389 U.S. 347, 351 (1967).

96. *Hicks*, 480 U.S. at 328.

97. Id. at 328-29. Specifically, the Court stated that it was "unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description . . . ." Id. While Justice O'Connor asserted in her dissent that the Court previously had recognized that searches may vary in intrusiveness and that some brief searches may be so minimally intrusive as to be justified on reasonable suspicion, the cases on which she relied refer to minimally intrusive seizures, which indeed have been recognized by the Court. See id. at 327 (cataloging cases that classify minimally intrusive seizures). Compare id. at 337 (O'Connor, J., dissenting) (quoting *United States v. Place* as stating that minimally intrusive searches may be justified on reasonable suspicion) with *United States v. Place*, 462 U.S. 696, 706 (1983) (stating that seizures, not searches, may be justified on articulable suspicion).

98. *Hicks*, 480 U.S. at 329.

investigatory activity amounts to a search within the meaning of the Amendment and requires probable cause to be reasonable, or it does not constitute a search and thus requires no inquiry into reasonableness whatsoever. The practical effect is to subject the more intrusive searching activities to the probable cause requirement and to excuse lesser intrusions from judicial scrutiny altogether. For example, rummaging through a suspect's garbage,[99] walking across his open fields,[100] looking over his ten-foot fence into his backyard,[101] flying over his property to peer through a hole in the roof of his greenhouse,[102] and recording the telephone numbers he dialed[103] do not constitute searches. The Court has explained these cases by concluding that society does not recognize as reasonable an expectation of privacy in the searched item.[104] Yet, one might better understand these cases as expressing a judicial decision that a probable cause standard should not apply to these minimally intrusive types of police activity.[105]

The Court never addressed this issue expressly; yet, in deciding these cases, the Court arguably made implicit findings that the costs of imposing a probable cause requirement outweighed the corresponding benefits to individual privacy.[106] In these cases, the

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99. *California v. Greenwood*, 486 U.S. 35 (1988).

100. *Oliver v. United States*, 466 U.S. 170 (1984).

101. *California v. Ciraolo*, 476 U.S. 207 (1986).

102. *Florida v. Riley*, 488 U.S. 445 (1989).

103. *Smith v. Maryland*, 442 U.S. 735 (1979). This catalog of exceptions from the Fourth Amendment certainly is not intended to be exhaustive.

104. See notes 25-29 and accompanying text (discussing *Katz v. United States*).

105. In *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982), the Fifth Circuit expressly observed that finding a police activity to be a search was, in effect, a conclusion about whether the Fourth Amendment applied at all. Id. at 476. In concluding that the Fourth Amendment did not apply to canine sniffs of lockers or automobiles in a school parking lot, the Fifth Circuit reasoned that sniffs of the lockers and cars occurred from a vantage point where the officer and dog lawfully stood and were, therefore, within the "plain smell" of the officer and dog. Id. at 477.

While similar logic could apply to the sniffs of students, the court believed this circumstance presented an entirely separate problem. Id. Why this assertion should be true is unclear. The police and dogs were as lawfully situated when the dogs sniffed the students as when they sniffed the lockers, and a person's odor is as plainly apparent in the area around him as his locker's smell is around it. Yet, the court recognized that the cost to individual privacy and dignity is greater when the dog sniffs a person rather than his unattended locker or car. Id. at 478 (quoting Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 Nw. U. L. Rev. 803, 850 (1980) (agreeing that the intensive smelling of people is indecent and demeaning)). Thus, the court classified this activity as a search in order to place some constitutional restrictions on the use of dogs to sniff people. Id. at 478-80.

106. More specifically, the Court may believe that rummaging through someone's garbage intrudes minimally on his privacy and that the gain from this practice outweighs the loss to individual privacy in the abandoned matter. Implicit in this conclusion is an understanding that the cost of imposing a probable cause requirement would not provide a commensurate benefit to the privacy interests at stake.

intrusion into individual interests was low, and the Court seemed unconcerned about the prospect of arbitrary government use of these searching methods.[107] If the Court finds the potential costs to individual privacy higher, though, the same activity may constitute a search requiring probable cause.[108] By excusing activities from the rigors of the Fourth Amendment with bold, categorical strokes, however, the Court allows police to conduct searches arbitrarily and makes no inquiry into their reasonableness. Thus, in pure investigatory searches, no middle standard exists between suspicionless searches and those searches based on probable cause.

III. CANINE SNIFFS AND THE REASONABLE SUSPICION STANDARD

A canine sniff constitutes a pure investigatory searching activity because its sole purpose is crime detection. Federal and state decisions relating to canine sniffs reflect the inherent tension between the desire for strict adherence to the probable cause requirement in the pure investigatory search context and the desire to place some Fourth Amendment limits on police discretion to conduct canine sniffs, which intrude significantly less on personal privacy than other forms of searches. Federal courts, with few exceptions,[109] exempt canine sniffs from the Fourth Amendment because they do not exact heavy

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107. By comparison, the Court in *Terry* believed that the Fourth Amendment was intended to assure that all degrees of government intrusion on personal security are reasonable. *Terry v. Ohio*, 392 U.S. 1, 19 (1960).

Another consideration may rest on the belief that the police would not rummage through someone's garbage unless they suspected that person of commiting a crime. Either the distaste in rummaging through refuse provides a sufficient limit on police discretion or the belief that individuals produce too much garbage to search everyone's garbage undergirds the belief that individualized suspicion must be present before the police would go to such great lengths. Because of these practical limits already inherent in the process, warrant and probable cause requirements would exact too high a cost to police investigations without adding any comparably valued benefit to individual privacy. The same analysis could be made of the overflight cases if flights were made on an individual basis; however, this conclusion would ignore the possibility that the police would achieve economies of scale in flying over large areas at one time to search for narcotics. In each of the overflight cases, however, the government officials possessed individualized suspicion. See *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

108. This rationale would reconcile the differences between *Class* and *Hicks*. Both cases involved similar police activity of moving objects to detect identification numbers, but *Hicks* occurred in a home where the cost imposed on individual privacy is high while *Class* occured in a car where the cost to individual privacy is lower. Presumably, anyone can see the papers on top of the defendant's dashboard, but few people can see what potentially lies beneath the stereo in an apartment. Therefore, probable cause is required in one case, but not the other. This reason also would explain the difference between sniffing lockers and sniffing people in *Horton*. See note 105.

109. See notes 129-36 and accompanying text.

costs on individual privacy.[110] Several states, however, have imposed some limited constitutional restrictions on the use of drug-sniffing dogs.[111] Thus, these states have created a new exception to the probable cause requirement based on their state constitutions.

A. The Federal Approach

In *United States v. Place*,[112] the Court concluded that police officers may seize luggage briefly to expose it to a narcotics-sniffing dog if they have reasonable suspicion that the luggage contains narcotics.[113] In two paragraphs unnecessary to the decision of the case,[114] the Court addressed the issue of whether the use of the dog in this context amounted to a search. The court pointed to the unique[115] and limited nature of the canine sniff, concluding that while the defendant had a privacy interest in the contents of his luggage, the sniffing procedure did not disclose any noncontraband items to public view.[116] This limited disclosure ensured that the police did not subject

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110. See Part III.A.

111. See Part III.B.

112. 462 U.S. 696 (1983). The majority of canine sniff cases before federal courts prior to *Place* held that a canine sniff did not constitute a search, although the reasoning in the cases varied. *Horton*, 690 F.2d at 476. But see *United States v. Beale*, 674 F.2d 1327 (9th Cir. 1982), vacated in 463 U.S. 1202 (1983).

113. *Place*, 462 U.S. at 706. The 90-minute seizure of the defendant's luggage, however, was not brief enough to fall under this exception to probable cause. Therefore, the seizure was invalid. Id. at 708-10.

114. Id. at 719 (Brennan, J., concurring in the judgment). In fact, the defendant never raised the argument that the sniff at issue was a search, and neither party briefed the issue before the Court. Id. at 723 (Blackmun, J. concurring in the judgment). See also LaFave, 1 *Search and Seizure* §2.2(f) at 369-70 & n.215 (cited in note 11).

115. *Place*, 462 U.S. at 707. The unsupported claim of the uniqueness of a canine sniff begs the question as to how unique it really is. Some analogous procedures include breathalyzer tests, metal detectors, radar guns, voice exemplars, and telephone pen registers. In each circumstance, the procedure determines either the culpability of the individual or "nothing of special interest." See *United States v. Jacobsen*, 466 U.S. 109, 123 (1984). Courts have found that the use of breathalyzers and metal detectors constitute searches under the Fourth Amendment. See, for example, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (breathalyzers); *United States v. Albarado*, 495 F.2d 799, 802-03 (2d Cir. 1974) (metal detectors). The Court has held the use of telephone pen registers, however, not to amount to a search within the Fourth Amendment. See *Smith v. Maryland*, 442 U.S. 735, 745-46 (1976).

116. *Place*, 462 U.S. at 707. Specifically, the Court stated:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limitod disclosure also ensures that the owner of the property is not subjected to the

the defendant to the embarrassment or inconvenience inherent in broader searches.[117] Thus, the canine sniff in this particular case did not constitute a search within the meaning of the Fourth Amendment.[118] By concluding that the sniff was beyond the scope of the Fourth Amendment, the Court foreclosed any inquiry into the reasonableness of the procedure.

In *United States v. Jacobsen*,[119] the Court affirmed this holding, deciding that a chemical test to determine if a substance is cocaine did not amount to a search.[120] The *Jacobsen* Court stated that a search occurs when the government infringes on an expectation of privacy that society recognizes as reasonable.[121] The Court opined, however, that a reasonable expectation of privacy differs critically from the expectation, however well justified, that certain criminal facts will not come to the police's attention.[122] Thus, according to the Court, a chemical test that discloses whether a substance is cocaine does not

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embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constituto a "search" within the meaning of the Fourth Amendment.

Id. (citation omitted).

117. Id.

118. Id. Essentially, the sniff constituted much less of an intrusion than other searching methods that required probable cause and, therefore, could not itself constitute a search requiring probable cause. This analysis, excluding canine sniffs from the Fourth Amendment because the intrusion on personal privacy is slight, differs significantly from the Court's understanding of minimally intrusive seizures. In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court explained that because limited seizures, or stops, constituted much less of a personal intrusion than typical arrests, the *Terry* Court "declined to stretch the concept of 'arrest'—and the general rule requiring probable cause te make arrests reasonable under the Fourth Amendment—to cover such intrusions." Id. at 209. Rather, the Court treated the stop as unique police conduct within the scope of the Fourth Amendment. Id. To determine the step's reasonableness under the Amendment, the Court balanced the limited intrusion on personal interests against the government's opposing interest in crime prevention and detection. Id. While *Dunaway* implied that a stop may require suspicion that the suspect is armed and dangerous, see id., the Court in *Place* approved these limited seizures based on reasonable suspicion of criminality, without any overriding safety rationale. *Place*, 462 U.S. at 706.

119. 466 U.S. 109 (1984).

120. In *Jacobsen*, Federal Express agents discovered a powdery substance during an investigation of a damaged package and called the police. A police officer conducted a field test and determined that the substance was cocaine. Id. at 111-12. The test involved the use of three test tubes. When cocaine is placed in one tube after another, liquids within the tubes change to specific colors. Id. at 112 n.1.

121. Id. at 113. This test is essentially the same as the Harlan test established in *Katz*. See notes 99-108 and accompanying text (discussing the use of Harlan's test to limit the Fourth Amendment's scope).

122. *Jacobsen*, 466 U.S. at 122.

compromise any legitimate privacy interest.[123] Under the Court's analysis, because Congress decided to treat the possession of cocaine as an illegitimate interest, government conduct revealing only the presence or absence of cocaine does not intrude on any legitimate interest in privacy.[124]

In his dissent, Justice Brennan derided this narrow definition of a search and criticized the Court's failure to focus on the Fourth Amendment's interest in protecting individuals from unreasonable government intrusions. Brennan's concern stemmed from the belief that by excluding a class of surveillance techniques from the scope of the Fourth Amendment, the Court foregoes any opportunity to ensure that police officers conduct those activities reasonably.[125] According to Brennan, the Court paved the way for technology to surpass the limits of the Fourth Amendment in criminal investigations.[126] Brennan also denounced the shift in focus from the context of the search to the product of the search.[127] He stated that the Court should have concluded that procedures, like canine sniffs, constitute minimally intrusive searches that may be conducted as long as they are reasonable under the balancing formula used in *Terry*.[128]

Arguably, *Place* and *Jacobsen* are limited to their facts, leaving open a number of questions regarding Fourth Amendment limits on the use of drug-sniffing dogs.[129] A minority of federal courts reviewing

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123. Id. at 123.

124. Id. Under the Court's analysis, the *Katz* inquiry into the suspect's expectations of privacy shifts from the area subject to the search to the object of the search. Thus, the *Place* Court, after acknowledging the defendant's reasonable expectation of privacy in his luggage, focused on the object of the procedure—the cocaine—to determine whether the ssearching activity invaded any legitimate expectation of privacy. The *Jacobsen* Court characterized the likelihood that these procedures, which disclose only the presence of contraband, would reveal any private information as too remote to warrant regulation under the Fourth Amendment. Id. at 124.

125. Id. at 137 (Brennan, J., dissenting).

126. Id. at 137-38. Justice Brennan recognized that under the Court's analysis, "if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present." Id. at 138.

127. Id. at 138-39. Quoting from *Katz* that what a person seeks to preserve as private may be constitutionally protected, 389 U.S. at 351-52, Justice Brennan stressed that the Court always had looked to the manner in which an individual had attempted to preserve the privato nature of an item before determining whether an individual's expectation of privacy was reasonable. *Jacobsen*, 466 U.S. at 139-40. Thus, under Justice Brennan's view, a search would occur whenever the police use any technique, like a dog sniff, to secure any information about an item that is concealed in a container that supports a reasonable expectation of privacy. Id. at 142.

128. Id. at 141. Justice Brennan concluded that under the *Terry* approach, "the Fourth Amendment inquiry would be broad enough to allow consideration of the method by which a surveillance technique is employed as well as the circumstances attending its use." Id.

129. LaFave, 1 *Search and Seizure* § 2.2(f) at 366 (cited in note 11). LaFave asserts that "[i]t is extremely important to recognize that the *Place* holding does not validate the use of drug detection dogs in all circumstances. The Court said only 'that the particular course of

canine sniff cases have taken this approach, refusing to assume automatically that the use of a canine sniff is not a search. For example, in *United States v. Thomas*,[130] the Second Circuit held a canine sniff of the defendant's apartment door to be a search requiring probable cause.[131] The court observed that *Place*'s finding that a sniff in an airport does not constitute a search did not mean that a sniff could never be a search.[132] Rather than focusing on the lack of intrusion of a canine sniff, the *Thomas* court focused on the defendant's expectation of privacy in his home.[133] Because that expectation is heightened, a practice deemed unintrusive at the airport nonetheless may be intrusive in the home.[134] The *Thomas* court reasoned that a canine sniff remained a way of detecting the contents of a private, enclosed area that the officer could not derive from his own senses.[135] Thus, the canine sniff intruded on the defendant's reasonable expectation of privacy and amounted to a search within the meaning of the Fourth Amendment.[136]

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investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a search within the meaning of the Fourth Amendment.'" Id. at 373 (quoting *Place*, 462 U.S. at 707). LaFave presents a number of hypotheticals in which canine sniffs may constitute searches. For example, "[w]hat . . . if the agents, anticipating Place's arrival, had simply been standing by with a drug detection dog and, when Place paused momentarily in the corridor, had confronted him with the dog who reacted positively?" LaFave, 1 *Search and Seizure* § 2.2(f) at 373. LaFave's argument is simply that the use of dogs may require a different result when the objects sniffed are attended or if the items sniffed include a person or residence. Id. at 373-74. The Court's logic in *Place* and *Jacobsen*, however, is sufficiently broad te cover each of these situations. See *Jacobsen*, 466 U.S. at 138 (Breiman, J., dissenting) (noting that the Court's logic is unbounded). Yet, LaFave indicatos that a canine sniff ceuld amount te a search if the cost to individual security escalates, see LaFave, 1 *Search and Seizure* § 2.2(f) at 374, but this analysis remains separato from the Court's conclusion that: (1) Place had a reasonable expectation of privacy in the contents of his luggage, and (2) because none of those contents, other than the contraband, were disclosed, no intrusion occurred. See *Place*, 462 U.S. at 707.

130. 757 F.2d 1359 (2d Cir. 1985).

131. Id. at 1367.

132. Id.

133. Id. at 1366. The court recegnized that an individual's privacy interest in checked luggage is less than his privacy interest in his home. Id.

134. Id.

135. Id. at 1367.

136. Id. Importantly, *Thomas* required a warrant and probable cause for the sniff ef the defendant's apartment. Other circuit ceurts have attempted to fashion some reasonable suspicion standard on which te analyze canine sniffs within the confines of the Fourth Amendment. For example, in *United States v. Whitehead*, 849 F.2d 849, 857-58 (4th Cir. 1988), the court held a canine sniff of the interior of the defendant's sleeper compartment on a train valid because the authorities reasonably suspected the defendant of drug trafficking. To the extent that *Whitehead* establishes a reasonable suspicion standard for this type of search, it conflicts with the Court's refusal in *Arizona v. Hicks* to employ this standard in pure investigatery searches and raises serious questions as te its precedential value.

In *United States v. Colyer*,[137] the D.C. Circuit criticized *Thomas* for departing significantly from the reasoning used in *Place* and *Jacobsen*.[138] The *Colyer* court interpreted the *Place-Jacobsen* holdings to stand for the proposition that an individual can maintain no reasonable expectation of privacy in contraband items;[139] thus, government conduct that reveals nothing about noncontraband items compromises no legitimate expectation of privacy.[140]

This broad conception of the *Place-Jacobsen* rule has become the majority approach among the federal circuit courts.[141] Thus, the police may use dogs with impunity when sniffing train compartments,[142] bus luggage compartments and overhead bins,[143] unoccupied automobiles,[144] and occupied automobiles.[145] In addition, the Fourth

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137. 878 F.2d 469 (D.C. Cir. 1989). *Colyer* involved the sniffing of the defendant's sleeper compartment on a train.

138. Presumably, under the *Place* Court's analysis, the *Thomas* court would have concluded that although the defendant had a reasonable expectation of privacy in the contents of his apartment, the use of the dog only disclosed that the defendant's apartment contained contraband items and no other private fact. Because, by congressional fiat, an individual has no privacy or possessory interest in drugs, the use of the dog effected no intrusion. See *Place*, 462 U.S. at 707.

139. *Colyer*, 878 F.2d at 475.

140. Id. (citing *Jacobsen*, 466 U.S. at 124 n.24).

141. These decisions rest partially on the premise that dog sniffs are highly accurate weapons in the police arsenal, but this assumption may be fairly challenged. In *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), school officials used a dog to sniff 2,780 junior and senior high school students. 451 U.S. at 1022-23 (Brennan, J. dissenting from denial of certiorari). Of those students sniffed, the dogs alerted to approximately 50 students, but only 17 of those possessed illegal drugs or alcohol—an accuracy rate of only 34%. 475 F. Supp. at 1017. Following the dog's alert to the plaintiff, school officials ordered her to empty her pockets. Id. Because the dog continued to alert te her, the plaintiff was subjected to a strip search conducted by female nurses. Id. The nurses found no drugs in the plaintiff's possession. Id. The dog had reacted to the scent of the plaintiff's dog that was in heat and with which the plaintiff had played that morning. Id. See also *United States v. $639,558.00 in U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992) (noting that dogs alert to money alone about 10% of the time and citing studies indicating that as much as 97% of all bills in circulation are contaminated by cocaine).

As LaFave notes, these inaccuracies may bear more on whether the dog sniff alone constitutes probable cause to conduct a full-blown search than whether the canine-sniff procedure is itself a search. LaFave, 1 *Search and Seizure* § 2.2(f) at 372 (cited in note 11). However, the inaccuracy of a dog's sniff also raises the question as to whether the sniff can reveal private facts aside from the presence of contraband. For example, dogs might alert to the presence of cat hairs on an individual's clothes packed in luggage, or a dog in heat within an apartment, or the presence of rodents in a garage or storage facility.

142. *Colyer*, 878 F.2d 469. But see *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988) (holding that entry into a sleeper compartment to conduct a sniff is a search requiring reasonable suspicion). The *Whitehead* court did not clarify which activity the Fourth Amendment restrains—the use of the dog or the entry into the compartment.

143. *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992). This case also may apply to sniffs of checked and carry-on luggage aboard airplanes.

144. *United States v. Seals*, 987 F.2d 1102 (5th Cir. 1993); *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).

145. *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990). If the stop of the vehicle is a pretext for the sniff, then the seizure of the vehicle violates the Fourth Amendment. *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992).

Amendment does not constrain sniffs of locked storage facilities,[146] garages,[147] warehouses,[148] and, perhaps, apartment doors when the dog is sniffing from an alley or other area open to the public.[149] Cases involving sniffs of people are scarce, and at least twice the Supreme Court has declined the opportunity to decide whether the Fourth Amendment limits this practice.[150] Thus, whether the Fourth Amendment provides constraints on the sniff of a person or objects within his possession remains an open question.[151] The logic of *Place* and *Jacobsen,* however, certainly seems to apply equally to canine sniffs of people.[152]

Under this broad conception, a canine sniff does not constitute a search if the dog and officer are lawfully situated during its occurrence. By foreclosing any Fourth Amendment scrutiny of canine sniffs, these courts make no inquiry as to the reasonableness of using the dogs.[153] Instead, the courts focus on the fact that a canine sniff reveals no legitimately private information about an individual. By narrowly defining a search in this manner, the courts cede wide

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146. *States v. Slowikowski,* 307 Or. 19, 761 P.2d 1315, 1320 (1988). In *Slowikowski,* the dog handlers were using the storage facility as a training area. The police had placed drugs in one locker, but the dogs also alerted to the defendant's. Id.

147. *United States v. Vasquez,* 909 F.2d 235 (7th Cir. 1990).

148. *United States v. Lingenfelter,* 997 F.2d 632 (9th Cir. 1993).

149. See id. at 638 (criticizing *United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985)). See also note 138 and accompanying text (discussing how *Thomas* varied from the reasoning in *Place* and *Jacobsen*).

150. Compare *Horton v. Goosecreak Ind. School Dist.,* 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983) (holding canine sniffs of students by school officials to be searches) with *Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979), cert. denied, 451 U.S. 1022 (1981) (holding that canine sniffs of students by school officials do not constitute searches). The Court's language in *Place* indicatos that part of its reasoning lay in the belief that the sniff of luggage at issue did not subject the defendant to any embarassment, harassment, or public accusation of guilt. *United States v. Place,* 462 U.S. 696, 707 (1983). As one cemmentator noted, however, the sniff of a person is highly embarrassing, indiscriminate, and harrowing at best. Arnold M. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent,* 81 Mich. L. Rev. 1229, 1246-47 (1983).

151. See *United States v. Turpin,* 920 F.2d 1377, 1385 (8th Cir. 1990) (reserving decision as to whether a canine sniff of a person amounts to a search).

152. If an individual has no expectation that his criminality will come te the attention of authorities, that the sniff is of a person rather than checked luggage should not matter because, arguably, no other privato facts about the individual have been revealed. But see noto 105 (discussing how the *Horton* court shifted logic when analyzing sniffs of lockers and students). This analysis illustrates the inherent balancing that occurs before a court will classify a procedure as a search.

153. According te Judge Pregerson, this all-or-nothing approach te defining searches suffers from three defects. First, it eliminates the judiciary's responsibility for reviewing limitod invasions of Fourth Amendment interests. Second, it overlooks circumstances indicating that some intormediate level of suspicion may exist to regulato limited intrusions on these interests while assuring officers adequate flexibility in detecting crime. Third, this approach forfeits Fourth Amendment protoction against arbitrary policy activity. *United States v. Beale,* 736 F.2d 1289, 1294-95 (9th Cir. 1984) (Pregerson, J., dissenting).

authority to the police to use drug-sniffing dogs at their discretion, with or without valid suspicion. Thus, the federal courts have left open the possibility that the dogs will be used in a harrassing or menacing manner.[154]

B. The State Approach

Although several questions remain open regarding the applicability of the federal constitution to canine sniffs, some states[155] have found limits on the use of dog sniffs within their state constitutions' search and seizure clauses. These decisions allow the courts to retain some control over this practice to prevent arbitrary police action.[156] These states have agreed that the warrant and probable cause requirements should not apply to canine sniffs, but have found the Supreme Court's decision to leave canine sniffs beyond the scope of judicial review under the Fourth Amendment unsatisfactory. This subpart surveys how these states have resolved this inherent tension by fashioning a limited exception to the probable cause requirement.

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154. Arguably, the fact that the detention of the suspect may be conducted only if police have reasonable suspicion largely circumscribes the ability te use a dog for harassment. See *Place*, 462 U.S. at 706. Moreover, not every police officer may have a canine unit. Therefore, if an officer wishes to subject an individual or object to a sniff, he must have valid cause to detain that person or object until the dog arrives. This view ignores the possibility that the police can conduct a sniff without a seizure. For example, no seizure occurs when police officers move personal belongings in the passenger compartment of a bus to expose them to a dog's nose. See *Harvey*, 961 F.2d at 1364. For a more complete discussion of practical limits on police discretion to use canine sniffs, see Part IV.C.3.

155. This Note focuses on New Hampshire, Colorado, and Pennsylvania, but other states also have recegnized that canine sniffs fall within the purview of their state constitutions. For example, New York recegnized that a canine sniff of a defendant's apartment constituted a search. *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054 (1990). But see *People v. Offen*, 78 N.Y.2d 1089, 585 N.E.2d 370, 372 (1991) (declining to decide whether a canine sniff of a package in the custody of a parcel service constituted a search under the New York Constitution). In addition, an appellate court in Washington left open the possibility that a canine sniff may constitute a search under its state constitution. *State v. Boyce*, 44 Wash. App. 724, 723 P.2d 28, 31 (1986) (holding that a canine sniff of a safe-deposit box is not a search under the Washington Constitution, but noting that the inquiry as to what constitutes a search for state constitutional purposes differs from *Place* and *Jacobsen*). In addition, an Alaska appellate court held that a sniff of luggage at an airport constitutes a minimally intrnsive search, requiring only reasonable suspicion that the luggage contains drugs. *Pooley v. State*, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985).

156. Other state courts have declined to find that dog sniffs are searches under their state constitutions. See, for example, *People v. Mayberry*, 31 Cal. 3d. 335, 644 P.2d. 810 (1982). In *State v. Snitkin*, 67 Hawaii 168, 681 P.2d 980 (1984), the Hawaii Supreme Court held that a canine sniff was not a search under its state constitution, but then held that courts mnst examine the reasonableness of the dog's use in each circumstance. Id. at 983.

1. Colorado

In *People v. Unruh*,[157] the Colorado Supreme Court made its first foray into this issue, holding that a canine sniff amounted to a search under its state constitution.[158] The *Unruh* court upheld the sniff of a safe, which had been stolen from the defendant's home, but which the police had recovered and held in custody.[159] The court's analysis resembled the Second Circuit's analysis in *United States v. Thomas*[160] because it focused on the area subject to the search rather than its object. While the *Unruh* court conceded that dog sniffs amount to less of an intrusion than other, more indiscriminate searches, the court recognized that a canine sniff reveals concealed objects not readily apparent to human senses,[161] with or without enhancing devices.[162] The *Unruh* court concluded that the sniff of the defendant's safe amounted to a search because it disclosed the contents of a container in which the defendant had a reasonable expectation of privacy.[163]

Having concluded that the sniff amounted to a search under the Colorado Constitution, the court upheld the search based on a

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157. 713 P.2d 370 (Colo. 1986) (en banc).

158. Article II, Section 7 of the Colorado Constitution provides: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." Colo. Const., Art. II, § 7.

159. Indeed, *Unruh* involved a very unique set of facts. Police observed burglars with the defendant's safe, which they had stolen from the defendant's basement. One burglar told the police that he believed the safe contained money or drugs. Another officer located the house where the robbery took place and proceeded to search its basement. *Unruh*, 713 P.2d at 372. Presumably, an exigent circumstance existed warranting the search because the house had been the scene of a recent crime. The officer determined that the safe had been removed from the wall of a closet in the defendant's basement. In the closet, the officer also found a triple-beam scale, mirror, two teaspoons, and a playing card all bearing a white residue. Id. at 372.

160. 757 F.2d 1359 (2d Cir. 1985).

161. No search occurs in which the scent of narcotics is discoverable by human senses. Instead, the sniff is analyzed as if the narcotics were in plain view of human senses. See *United States v. Lovell*, 849 F.2d 910, 913 (5th Cir. 1988).

162. *Unruh*, 713 P.2d at 377 (quoting *United States v. Bronstein*, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring)). Judge Mansfield recognized: "The important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search." *Bronstein*, 521 F.2d at 464 (Mansfield, J., concurring).

163. *Unruh*, 713 P.2d at 377-78. The court distinguished *Place* because people at airports may expect some inspection of their luggage for safety reasons. Id. By comparison, the defendant in *Unruh* never expected police to gain custody of or search the safe that he kept hidden in his basement. Id. at 378. This distinction ignores *Place*'s reasoning that the defendant had an expectation of privacy in the contents of his luggage, but the canine sniff did not intrude into his privacy because the sniff revealed the presence or absence of centraband only. See *Place*, 462 U.S. at 707.

reasonable suspicion standard.[164] This approach represents a substantial departure from the reasoning of *Terry* and *Hicks*. In *Terry*, the Court justified its use of this lower standard of suspicion in reviewing a frisk for weapons because of the need to protect the safety of the officer who must make a quick decision whether to frisk.[165] In a pure investigatory context, in which the need to protect safety does not exist, *Hicks* clarified that the Fourth Amendment requires probable cause to validate a search.[166] While the *Unruh* court verbally approved of this standard,[167] it adopted the balancing approach under *Terry* without much discussion as to why the probable cause and warrant requirements did not apply.[168] The court simply concluded that the balance between public and private interests in this case required a reasonable suspicion standard.[169] It did not recognize any limits on the scope of this exception to the probable cause requirement.

Since *Unruh*, the Colorado Supreme Court has remained sharply divided regarding the scope of the canine sniff exception.[170]

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164. *Unruh*, 713 P.2d at 379. Specifically, the court recognized the government's compelling interest in suppressing the use and distribution of illegal drugs and the minimal intrusion accorded by a canine sniff. Id.

165. *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

166. See *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987). See also *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that searches conducted outside the warrant process and unsupported by probable cause are per se unreasonable).

167. *Unruh*, 713 P.2d at 378. Specifically the court stated that "warrantless searches are presumptively unreasonable . . . . Moreover, even in the limited types of situations in which a warrantless search or seizure might be justified, the requirement of probable cause to obtain a warrant has generally been retained." Id.

168. Id. at 378-79. Two key points distinguish the canine sniff in *Unruh* from the frisk in *Terry*. First, the frisk authorized in *Terry* was predicated on the overriding need to protect the safety of the officer and those around him. *Terry*, 392 U.S. at 28-29. The police conducted the sniff in *Unruh* for the sole purpose of discovering evidence. See *Unruh*, 713 P.2d at 379. Second, the lower suspicion standard in *Terry* was predicated on the need for necessarily swift action by the officer in disarming a suspect. *Terry*, 392 U.S. at 24. In *Unruh*, the police had possession of the safe and ample time to procure prior judicial approval for the sniff. *Unruh*, 713 P.2d at 373 (noting that following the sniff, the officers applied for a warrant to search the safe).

169. *Unruh*, 713 P.2d at 379. Specifically, the court recognized the government's compelling interest in suppressing the use and distribution of illegal drugs and the minimal intrusion accorded by a canine sniff. Id.

170. In *People v. Wieser*, 796 P.2d 982 (Colo. 1990), the court upheld a canine sniff of a locker at a storage facility. Three judges believed that the sniff did not constituto a search within the meaning of the Colorado Constitution and fell outside the scope of judicial scrutiny because it disclosed only the presenco or absence of contraband. Id. at 985. Three judges believed that the sniff did constitute a search, but the search in the instant case complied with the Colorado Constitution because the police had reasonable suspicion that the locker contained drugs. Id. at 987-88 (Mullarkey, J., concurring in the judgment). The dissenting judge agreed that the sniff amounted to a search, but did not believe that the police had proven reasonable suspicion to justify the sniff. Id. at 992 (Quinn, J., dissenting).

In *People v. Boylan*, 854 P.2d 807 (Colo. 1993), the court upheld the sniff of a Federal Express package at the Federal Express office because the police had reasonable suspicion that the

The court has justified the use of a reasonable suspicion standard, rather than the traditional probable cause requirement, because the sniff is less intrusive than other searching methods.[171] Yet, the court has provided little insight into the scope and implications of creating a balancing test for these minimally intrusive searches.

2. New Hampshire

In *State v. Pellicci*,[172] the New Hampshire Supreme Court took an approach similar to the Colorado court's analysis, applying a reasonable suspicion standard for a canine sniff of the defendant's automobile. The court upheld the stop and sniff of the defendant's automobile based on reasonable suspicion that he was in the process of a drug sale.[173] In its analysis, the *Pellicci* court first determined that the sniff represented a prying into a hidden place in search of a concealed item, thereby amounting to a search under the New Hampshire Constitution.[174] The court then examined whether the warrant or probable cause requirements applied to the canine sniff of a stopped vehicle. The court found that the canine sniff was, indeed, a mere minimal intrusion.[175] It concluded that when the intrusion on individual interests is sufficiently small and the government's interest is sufficiently great, a reasonable suspicion standard is appropriate.[176]

In his majority opinion, Justice Johnson noted several reasons for this departure from the probable cause and warrant requirements.

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package contained drugs. The same issues that divided the *Wieser* court split the *Boylan* court. The majority believed that the sniff constituted a search justifiable on a reasonable suspicion standard, id. at 810-12, while the concurring justices believed the sniff did not amount to a search within the scope of the Colorado Constitution. Id. at 813-14 (Vollack, J., specially concurring in the result).

171. *Unruh*, 713 P.2d at 379.

172. 133 N.H. 523, 580 A.2d 710 (1990).

173. Id. at 711-12.

174. Id. at 716. Part I, Article 19 of the New Hampshire Constitution provides: "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. Const. Pt. I, Art. 19. The New Hampshire court never adopted or rejected the reasonable-expectation-of-privacy analysis used by the post-*Katz* Supreme Court; rather, the New Hampshire court used a test for a search akin to the one used by the *Katz* majority, asking whether the procedure reveals the presence of something concoaled from public view. *Pellicci*, 580 A.2d at 716.

175. Id. at 715-16 (quoting LaFave, 1 *Search and Seizure* §2.2(f) at 375 (cited in noto 11)).

176. *Pellici*, 580 A.2d at 717. Thus, the court specifically held "that where, as here, a canine sniff: (1) is part of an investigative stop based on a reasonable and articulable suspicion of imminent criminal activity involving controlled substances; (2) is employed to search a vehicle; (3) in no way increases the time necessary for the moderate questioning our prior cases allow; and (4) is itself based on a reasonable and articulable suspicion that the property searched contains controlled substances, it satisfies the requirements of" the stato constitution's search and seizure clause. Id.

He first noted that although the procedure is decidedly less intrusive than other police investigatory tools, the sniff still constitutes a search that should be subject to constitutional scrutiny.[177] He then added that because the sniff procedure is so distinguishable from other searching activities governed by the probable cause requirement, the application of *Terry*'s balancing formula to canine sniffs would not erode the probable cause standard.[178] The *Pellicci* majority believed that forcing police to provide some articulable reasons for the sniff would prevent the court from abdicating its constitutional responsibility to review investigatory searches.[179]

In his concurring opinion, Chief Justice Brock further analyzed the analogy between a canine sniff and the limited search for weapons in *Terry*. Justice Brock observed that the historical purpose of the search and seizure clause and the probable cause requirement[180] was to protect individuals from arbitrary intrusions by the state.[181] According to Justice Brock, *Terry* recognized a type of government intrusion that constitutes a search, but falls outside the traditional mechanics of a warrant and probable cause.[182] Under Justice Brock's conception, the *Terry* Court recognized a frisk to be unique because of the limited scope of discovery and brief intrusion on personal security.[183] This technique did not constitute a full search and, therefore, fell within a category that did not warrant application of the probable cause requirement.[184] Justice Brock believed that a canine sniff would fit equally well into this category of minimally intrusive searches, valid under reasonable suspicion.[185] A sniff by a dog, according to

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177. Id. at 717-18.

178. Id. at 717 (quoting LaFave, 1 *Search and Seizure* §2.2(f) at 375 (cited in note 11)).

179. *Pellici*, 580 A.2d at 718.

180. Justice Brock explained these mandates as follows:

> From an histerical perspective, the most faithful interpretation of the fourth amendment and part I, article 19 would require that there be a formal warrant for any search to be reasonable. Therefore, *all* warrantless searches would be *per se* unreasonable. That may have been the framers' original intent, but this court has not adhered to such a strict interpretation of search and seizure provisions. Instead, like the fourth amendment, part I, article 19 has been extended to deal with exigent circumstances by creating limited exceptions to the warrant requirement. All warrantless searches remain *per se* unreasonable unless they come within one of these few exceptions. Although each of the . . . exceptions negates the need for a prerequisite search warrant, the State must still satisfy the Warrant Clause by showing that its actions were supported by probable cause.

Id. at 720-21 (Brock, C.J., specially concurring).

181. Id. at 721.

182. Id. (quoting *Terry*, 392 U.S. at 20).

183. *Pellici*, 580 A.2d at 722.

184. Id.

185. Id. Specifically, Justice Brock noted that "[l]ike a frisk, [a canine sniff] . . . is uniquely limited in both discovery and intrusiveness and it does not rise to a level necessary to trigger the

Justice Brock, constituted an intrusion inflicting potential indignity to the subject and causing popular resentment of the government, which the framers of the state constitution intended to prevent.[186] He recognized that this approach represented a significant departure from *Terry*'s reliance on exigent circumstances and danger to support the frisk. Nonetheless, he believed that the sniff was uniquely limited in scope as to both its object and its intrusiveness, thereby offsetting any lack of exigency occasioned by *Terry*.[187]

In his dissent, Justice Batchelder challenged the assertion that a canine sniff fit within the scope of the *Terry* exception. He believed that the sniff at issue went beyond the limited intrusion on Fourth Amendment rights approved in *Terry* because *Terry* only authorized a limited search for weapons in exigent circumstances.[188] Justice Batchelder observed that *Terry* had rejected precisely the analysis adopted by the *Pellicci* court.[189] He had concerns that by excusing canine sniffs from the probable cause and warrant requirements, the court was creating an exception that would swallow the Warrant Clause in favor of a more flexible reasonableness standard.[190] Moreover, he believed that the court should not engage in a process diluting individual rights simply to comply with law enforcement needs.[191] The warrant and probable cause mandates, according to Justico Batchelder, stood as a bulwark against this erosion.

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warrant requirement. Yet, it is a search within the plain meaning of the word. To have one's person or possession 'sniffed' by a dog is certainly an affront to personal dignity, and the fact that discovery is limited does not make it any less so." Id.

186. Id. Although Justice Brock recognized that this approach represented a significant departure from *Terry* because *Terry* was based largely on the danger supporting the frisk, he nonetheless believed that the sniff was uniquely limited in scope so as to offset any lack of exigency occasioned by *Terry*. Id. The Supreme Court, however, had rejected similar analyses. See *Hicks*, 480 U.S. at 328. See also *Sibron v. New York*, 392 U.S. 40, 65 (1968) (noting that a frisk, not limited in scope to the disarmament of the suspect, violates the Fourth Amendment if not supported by probable cause).

187. *Pellicci*, 580 A.2d at 722.

188. Id. at 727 (Batchelder, J., dissenting).

189. Id. at 727. Specifically, the *Terry* Court noted that a frisk could not be justified by any need to prevent the loss or destruction of evidence. Id. (quoting *Terry*, 392 U.S. at 29). The Supreme Court had rejected similar analyses in other contexts as well. See, for example, *Hicks*, 480 U.S. at 328.

190. *Pellicci*, 580 A.2d at 728. Justice Batchelder feared that applying a *Terry* analysis to *Pellicci*'s facts would represent "the first step into a constitutional thicket from which our extrication will be neither supportive of civil rights nor helpful to the difficult task of law enforcement." Id. at 729.

191. Id. at 730 (noting that the court "inust not allow our zeal for effective law enforcoment to blind us te the peril to our free society that lies in . . . [the] disregard of the protections afforded by the Fourth Amendment") (quoting *Florida v. Royer*, 460 U.S. 491, 513 (1983) (Brennan, J., concurring in the result)).

The *Pellicci* court's debate focused on whether the court should abandon the warrant and probable cause requirements in favor of a balancing test for canine sniffs. The majority seemed willing to use a reasonable suspicion standard to balance individual interests in not being sniffed against the police interest in conducting the sniff. The majority recognized that its state search and seizure clause should regulate all degrees of intrusiveness of police searches.[192] The dissent found that this rule would undermine the guarantees provided by the state constitution's search and seizure clause in areas beyond canine sniffs.

3. Pennsylvania

Pennsylvania's Supreme Court tackled these issues in *Commonwealth v. Johnston,*[193] in which the court upheld the canine sniff of a storage locker under the state constitution[194] based on reasonable suspicion that it contained drugs.[195] In deciding whether to apply *Terry*'s reasonable suspicion standard to canine sniffs, the court recognized that it should use this approach only in the most limited circumstances.[196] The *Johnston* court observed that the probable cause requirement functions as the appropriate balance between personal privacy and police objectives. It further noted that the protections intended by the framers could vanish too easily in a broad application of a more lenient balancing rule.[197] The Court's main concern with exempting canine sniffs from constitutional scrutiny was that the police may use the dogs arbitrarily, with no requirement of any suspicion and no prospect of judicial inquiry into the reasonableness of the officer's conduct.[198]

Having framed both sides of the debate, the court stated that the issue was not whether a search occurred, but whether the search

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192. See *Terry*, 392 U.S. at 15, 17.

193. 515 Pa. 454, 530 A.2d 74 (1987). The Pennsylvania court also found that a canine sniff constituted a search under its state constitution because the sniff revealed a concealed object that the defendant had expected to keep private. Id. at 76.

194. Article I, Section 8 of the Pennsylvania Constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Pa. Const., Art. I, § 8.

195. A drug enforcement agent ordered the sniff of the defendant's locker after observing the defendant carrying packages that appeared to be bales of marijuana from the facility. *Johnston*, 530 A.2d at 75.

196. Id. at 77.

197. Id. at 77-78 (quoting *Place*, 462 U.S. at 718-19 (Brennan, J., concurring in the judgment)).

198. *Johnston*, 530 A.2d at 78.

that did occur implicated the usual warrant and probable cause requirements necessary in police investigatory searches.[199] The court then used a balancing test to determine whether the canine sniff at issue necessarily triggered the traditional warrant and probable cause requirements.[200] The court narrowed its inquiry to whether some middle ground of reasonableness existed between the traditional probable cause standard and no standard at all.[201] By applying an intermediate standard of reasonableness, the court subjected canine sniffs to some constitutional restraints, thereby preventing police from using them in a random, harassing, and unprincipled fashion.[202] This standard also would not destroy the sniff's effectiveness by imposing the same constitutional limitations applicable to broader searches.[203] The court struck the balance as follows: on one side, the probable cause requirement would eviscerate the utility of these sniffs, while on the other, random and suspicionless use of drug-sniffing dogs, or any other crime detection device, would destroy many societal freedoms.[204] The court concluded that a Fourth Amendment middle ground did exist to accommodate both of these needs.

Thus, the debate in establishing a middle ground of reasonableness for canine sniffs resembles the debate in establishing a flexible probable cause requirement in the housing inspection cases.[205] The same three issues are present in both contexts. First, the *Johnston* court agreed with the *Place* Court that a canine sniff is substantially less intrusive than a traditional search.[206] Second, the *Johnston* court observed that the use of dogs is a valuable surveillance technique.[207] Third, the court recognized that a probable cause requirement would impose too great a burden on police and undermine the usefulness of canine sniffs.[208] Although not expressly

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199. Id. at 79.

200. Id. The *Johnston* court found this balancing approach preferable to the approach taken in *Place*. The *Johnston* court viewed *Place*'s conclusion that a canine sniff did not constitute a search within the Fourth Amendment, despite the defendant's reasonable expectation of privacy in his luggage, as the result of a balancing test. Id. at 77. According to the *Johnston* court, *Place* weighed the individual's expectation of privacy and interest in freedom from police searches against the narrow intrusiveness that a canine sniff entails in carrying out drug enforcment. Id. The *Johnston* court believed that this balancing goes not to the question of whether a search occurred, but to the reasonableness of the search. Id. at 79.

201. Id. (quoting LaFave, 1 *Search and Seizure* §2.1(e) at 315 (cited in note 11)).

202. *Johnston*, 530 A.2d at 79.

203. Id.

204. Id.

205. See text accompanying notes 30-49.

206. *Johnston*, 530 A.2d at 79.

207. Id. (quoting LaFave, 1 *Search and Seizure* § 21 at 315 (cited in noto 11)).

208. *Johnston*, 530 A.2d at 79.

stated by the *Place* Court, its decision implies that it would have agreed with these three sentiments.[209] *Johnston* and *Place,* however, differed on the issue of whether constitutional safeguards were necessary to limit the discretion of the officer in the field. Implicit in this consideration is a decision that the search and seizure clause protects interests beyond the privacy interests protected by the probable cause requirement. While the *Johnston* court found the need for judicial oversight of canine sniff procedures to prevent arbitrary police conduct, the *Place* Court focused on the limited privacy interests at stake and found concerns about unreasonable police behavior irrelevant.[210]

Pennsylvania limited the scope of its canine sniff exception to the probable cause requirement in *Commonwealth v. Martin.*[211] In *Martin,* the police suspected the defendant and his companions of consummating a drug transaction and conducted a canine sniff of the satchel the defendant was carrying.[212] The *Martin* court found that the satchel constituted part of the defendant's person, as if it were a wallet or jacket, and held that the sniff required probable cause.[213] The court reasoned that a canine sniff of a person implicated different interests than a sniff of property and constituted a significant intrusion into personal privacy interests.[214] Thus, a sniff of a person could not qualify for the lesser suspicion standard established in *Johnston.*[215]

This decision, in effect, will eliminate the use of canines to sniff people and objects they may be carrying. If the police had probable cause, then they could have arrested the defendant lawfully and subjected his satchel and his person to a full search incident to arrest.[216] By requiring probable cause for a sniff of a person, the court eliminated the value of the canine sniff technique as an effective law enforcement tool. At the same time, the value of the sniff as a limited intrusion will be lost because police, armed with probable cause, will use more intrusive methods to discover exactly what they would have

209. See *United States v. Place,* 462 U.S. 696, 707 (1993). The *Place* Court stressed that the sniff did not disclose any private information about the defendant that other searching techniques might reveal. Id. Because a sniff detects criminality without detecting private information, it is a perfect crime detection tool. It detects crime without any embarassment or inconvenience to the innocent subject of the search. Thus, the Court found that a sniff serves as a highly useful tool in narcotics detection, and a probable cause standard, typically required for more intrusive searches, would prove unworkable. Id.

210. See id.

211. 626 A.2d 556 (Pa. 1993).

212. Id. at 558.

213. Id. at 560.

214. Id.

215. Id.

216. Id. at 565 (Montemuro, J., dissenting).

found with a less intrusive search.[217] *Martin*'s holding thus may be interpreted as a belief that canine sniffs of people are so embarassing that they should not occur at all.[218]

IV. FINDING SOME MIDDLE GROUND OF REASONABLENESS

The use of a reasonable suspicion standard to analyze canine sniffs under state search and seizure clauses represents a significant departure from Federal Fourth Amendment case law. *Terry, Katz,* and *Hicks* all stand for the proposition that to be reasonable, a pure investigatory search requires probable cause.[219] Some states, however, have extended *Terry*'s balancing rationale to canine sniffs. These holdings raise the specter of a general reasonableness standard in the pure investigatory search context without reference to the probable cause requirement. If a reasonable suspicion standard is sufficient for canine sniffs, courts potentially may reclassify those pure investigatory activities, considered beyond the scope of the Fourth Amendment, as searches requiring reasonable suspicion.[220] Nonetheless, courts have been reluctant to expand a sliding-scale approach to reasonableness in this area. In addition, a number of commentators disagree about whether this broad reasonableness standard is valuable at all.[221]

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217. As the dissent noted, "[i]f the dog sniff indicates the presence of drugs, then nothing has been gained because the police already had probable cause te believe that the satchel contained contraband. However, if the dog sniff does not indicate tho presence of drugs, then the police are in a quandary.... It stands to reason that the police will not use a technique, which they are not required to use, that could only work to undermine their law enforcement efforts." Id.

218. See id. at 563 (Cappy, J., concurring) (noting that no citizen should be subjected to a governmental intrusion of this nature absent probable cause). Similarly, *Terry v. Ohio*, 392 U.S. 1 (1967), precluded frisks of individuals absent reasonable suspicion that the suspect was armed. Id. at 29. Because no overriding safety concern justifies a canine sniff, police must have probable cause to believe that the defendant pcssesses narcotics before exposing him to a dog. *Martin*, 626 A.2d at 561.

219. See Part II.A.1 and Part II.C.

220. This standard potontially could apply te searches of curbside garbage, see *California v. Greenwood*, 486 U.S. 35, 37 (1988), searches of open fields, see *Oliver v. United States*, 466 U.S. 170, 173 (1984), overflights, see *Florida v. Riley*, 488 U.S. 445, 448 (1989); and telephone pen registers, see *Smith v. Maryland*, 442 U.S. 735, 737 (1979).

221. See Sundby, 72 Minn. L. Rev. at 384-85 (cited in noto 20) (criticizing a balancing approach); Amsterdam, 58 Minn. L. Rev. at 390-95 (cited in note 3) (entortaining and, then, rejecting the sliding-scale approach). But see Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 68-75 (1991) (adopting a sliding-scale, balancing model); Silas J. Wasserstrom and Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Georgetown L. J. 19, 44-50 (1988) (favoring a balancing approach); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1471-72 (1985) (urging that the Court should either adopt a balancing tost or a warrant requirement for all searches and seizures but should not maintain the current amalgamation of the two models).

This Part examines the disadvantages of a strict probable cause requirement, as well as the advantages and weaknesses of a general reasonableness approach as an alternative to a probable cause requirement.[222] This Part concludes that federal and state courts[223] should apply a limited, narrowly construed reasonable suspicion standard, not based on a balancing formula, to minimally intrusive searches like canine sniffs. This rule would provide some constitutional limits on minimally intrusive police searching activities without undermining their efficacy or usefulness.

A. Disadvantages of a Strict Probable Cause Requirement

A strict probable cause requirement for pure investigatory searches transforms the Fourth Amendment into a monolith. When the Amendment restricts police actions, it subjects each of them to the same extensive restrictions imposed on physical entries into dwellings.[224] Thus, when a court concludes that a pure investigatory activity constitutes a search, the probable cause requirement applies.[225] This all-or-nothing approach puts substantial pressure on the process of defining the scope of the Fourth Amendment.[226] As noted in Part II.A, this pressure has led the Court to exclude a significant amount of police investigative activity from the scope of the Amendment.[227] Moreover, wherever one draws the line as to which situations require probable cause, other similar cases lie quite close on the opposite side of the line.[228] This line-drawing creates enormous consequences as to how police conduct certain activities out of proportion to the differences in intrusiveness between the cases lying near each other on either side.[229] In the pure investigatory context, the probable cause

222. A reasonableness or sliding-scale model of the Fourth Amendment would allow police officers to conduct more intrusive activities when they have greater degrees of suspicion. The rationale is that the more intrusive an investigative technique is, the more assured society wants to be that the procedure will result in the discovery of probative evidence before police are allowed to undertake that activity. Slobogin, 39 UCLA L. Rev. at 49-50 (cited in note 221). This proportionality approach is reflected, to some degree, in the balancing analysis undertaken by the Court in the noncriminal context. See, for example, *New Jersey v. T.L.O.*, 469 U.S. 325, 337-43 (1985).

223. Absent a Supreme Court decision changing its interpretation of the Fourth Amendment, see *Hicks*, 480 U.S. at 328-29, state courts should interpret state search and seizure clauses to provide for a limited reasonable suspicion standard for pure investigatery searches.

224. Amsterdam, 58 Minn. L. Rev. at 388 (cited in note 3).

225. See *Pellicci*, 580 A.2d at 723 (Brock, C.J., specially concurring) (observing that the *Place* majority held that the dog sniff was not a search within the Fourth Amendment because to hold otherwise would require the police to have probable cause before using the dog).

226. Amsterdam, 58 Minn. L. Rev. at 388 (cited in note 3).

227. See notes 21-29 and 99-108 and accompanying text.

228. Amsterdam, 58 Minn. L. Rev. at 388 (cited in note 3).

229. Id.

requirement effectively creates a regime in which every procedure that is intrusive up to the point that courts mandate probable cause falls beyond the scope of the Amendment's protection altogether. Once excluded from the Amendment's requirements, police may conduct a searching procedure in a random and wanton manner. This regime reverses the Fourth Amendment inquiry: rather than determining whether the searching activity at issue requires probable cause to be reasonable, the courts implicitly determine whether the activity requires probable cause so as to constitute a search within the meaning of the Fourth Amendment.

The focus on probable cause also distracts courts from addressing substantive questions and policies underlying the Amendment.[230] In the typical criminal case under the Fourth Amendment, a court focuses on whether a procedure intrudes on a defendant's reasonable expectation of privacy to determine whether the searching activity constitutes a search under the Fourth Amendment.[231] Generally, the court weighs the intrusiveness of the challenged procedure against its benefits to determine which standard of reasonableness to apply.[232] A probable cause requirement distorts the balance by fixing the standard of reasonableness at probable cause.[233] Thus, only those activities that are so intrusive as to require probable cause qualify as searches under the Fourth Amendment. Virtually all other less intrusive activities require no standard of suspicion at all. [234]

If the rationale behind the Amendment is to balance competent law enforcement and personal privacy effectively,[235] then the Court should conduct this balancing explicitly. Moreover, requiring probable cause for every pure investigatory search within the meaning of the Fourth Amendment is a blunt instrument for enforcing that balance.

When compared to Fourth Amendment analysis in the criminal investigatory seizure context, the reliance on a probable cause requirement in the pure investigatory search context is anomalous. The Court has recognized two types of seizures under the Fourth Amendment: stops and arrests. Stops require a lesser standard of

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230. Wasserstrom and Seidman, 77 Georgetown L. J. at 30 (cited in note 221).

231. See, for example, *California v. Greenwood*, 486 U.S. 35, 39 (1988).

232. See Stuntz, 44 Stan. L. Rev. at 556 (cited in note 66).

233. See id. at 557-58 n.22.

234. See text accompanying notes 99-108.

235. Wasserstrom and Seidman, 77 Georgetewn L. J. at 30 (cited in note 221). This belief is subject to debate, however, because while the historical facts leading up to the Amendment's enactment are clear, the intent of the framers is not. See Amsterdam, 58 Minn. L. Rev. at 401 (citod in noto 3) (noting that "history is a standoff" in that it does not suggest or seem to require a narrow or fixed interpretation of the Fourth Amendment's broad language).

suspicion than arrests, which require probable cause.[236] This regime reflects the reality that police officers need an escalating set of flexible responses, graduated in relation to the level of suspicion they possess.[237] At the same time, the lower suspicion standard prevents the court from also insulating from constitutional scrutiny the initial stages of investigatory conduct and contact between the officer and citizen.[238] By comparison, the probable cause requirement's all-or-nothing approach obscures from constitutional scrutiny police activities that otherwise would warrant restrictions to ensure reasonableness.[239]

By excluding many searching techniques from the purview of the Fourth Amendment, this all-or-nothing approach allows police to conduct these activities arbitrarily. Emerging technologies make modern police practices increasingly discrete, limited in scope and intrusiveness.[240] By placing minimally intrusive searching procedures beyond the reach of the Fourth Amendment, the Court has foreclosed judicial inquiry into the reasonableness of the officer's conduct and cedes all discretion to the officer in the field.[241] If the Fourth Amendment exists to protect citizens from arbitrary police intrusions into personal privacy and security,[242] however, the courts should take some role in reviewing those police actions that intrude, albeit minimally, on individual privacy and security. A standard below probable cause would affirm most uses of these minimally intrusive techniques.[243] However, it also would allow the courts to check egregious abuses of police authority and assure that police searching conduct is reasonable.

B. Advantages and Disadvantages of a Sliding-Scale Model

A reasonableness regime is one method often proposed to resolve the problems inherent in strict application of the probable cause requirement. Rather than asking whether the procedure at issue requires probable cause, the court asks whether the specific procedure

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236. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).
237. *Terry v. Ohio*, 392 U.S. 1, 10 (1968).
238. Id. at 17.
239. Id.
240. See generally David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 Minn. L. Rev. 563, 563-78 (1990) (discussing the Fourth Amendment problems posed by the limited nature of sense-enhanced searches).
241. *United States v. Jacobsen*, 466 U.S. 109, 137-38 (1984) (Brennan, J., dissenting).
242. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).
243. See Stuntz, 44 Stan. L. Rev. at 554 (cited in note 66) (noting that the Court's use of a reasonableness standard below probable cause resembles rational basis review).

was reasonable. Under a pure sliding-scale model,[244] the level of intrusiveness of the procedure governs the level of suspicion the government must obtain before conducting the search.[245] Through this necessary balancing, courts could come to grips with the substantive choices between the competing values at stake.[246] This approach requires a court to weigh the intrusiveness of a specific procedure against the government's need to search on a case-by-case basis. It also encourages more stringent judicial review by allowing courts to balance the competing considerations throughout each level of the judicial process.[247] In contrast, a probable cause regime gives broad discretion to magistrates who make the initial probable cause assessment.[248] In addition, a reasonableness approach forces courts to address explicitly the factors they weigh in their decision.[249]

A reasonableness approach provides greater flexibility in addressing the spectrum between police contact and individual security. It recognizes that modern police work is no longer the blunt, general search conducted by British customs officers; rather, police now have a wide range of technologically advanced options that allow them to investigate crimes in a more discrete and less intrusive manner.[250] In this respect, Justice Brennan's fear that technology may override the Fourth Amendment's limits[251] would not come to fruition because the balancing approach applies to the full range of police investigatory conduct.

A general reasonableness standard also would allow courts to broaden the scope of the Fourth Amendment. Judges could classify a procedure as a search more readily if they could apply a standard of suspicion lower than probable cause and uphold the continued vitality

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244. Pure balancing refers to a situation in which the court would inquire solely into the reasonableness of the procedure without reference to the warrant or probable cause requirements.

245. Slobogin, 39 UCLA L. Rev. at 68 (cited in note 221).

246. Wasserstrom and Seidman, 77 Georgetown L. Rev. at 44 (cited in note 221).

247. Id. at 46-47.

248. Slobogin, 39 UCLA L. Rev. at 72-73 (cited in note 221).

249. Id. at 73.

250. See William M. Fitzgerald, Comment, *The Constitutionality of the Canine Sniff Search: From* Katz *to Dogs*, 68 Marq. L. Rev. 57, 57 (1984). But see Steinberg, 74 Minn. L. Rev. at 568-78 (cited in note 240). Professor Steinberg argues that the view of sense-enhanced searches as less intrusive is incorrect. Because the police often may conduct these searches without alerting the suspect that he is under investigation, sense-enhanced searches encourage police misconduct. Id. at 569. Police officers can conduct sense-enhanced searches from a distance of safety, and this action gives rise te no tangible threat of civil suit. Thus, polico may believe that they can conduct broad, ongoing, and unfocused investigatious of these types with impunity. Id. at 578.

251. *Jacobsen*, 466 U.S. at 137-38 (Brennan, J., dissenting).

of the procedure.[252] A search would not be tied to notions of probable cause. The inquiry into whether a Fourth Amendment search occurred would shift to whether the investigatory procedure at issue should be subject to some judicial control or whether the courts should allow the police to use the procedure in a dragnet and unprincipled fashion.[253]

The reasonableness approach is not without its problems, however. The pitfalls stem from the same fact that a balancing approach is inherently a nonstandard. Thus, adoption of a sliding-scale approach in the pure investigatory context ultimately would lead to broad judicial deference to police discretion, the very danger against which the Fourth Amendment protects.

First, although a general reasonableness approach may broaden the scope of the Fourth Amendment's protections, it ultimately would dilute those protections. Courts would evaluate each case on an individual basis, and judges, already worried about the exclusionary rule's effect on ultimate truthfinding,[254] would be inclined to approve searches and seizures as reasonable for fear of losing evidence and freeing a guilty defendant.[255] The appellate judges would defer to the judges who, in turn, would defer to the police.[256] In practice, use of the balancing standard, with rare exception,[257] arguably has resulted in an undervaluing of individual rights and an

252. Arguably, the Court achieves the same result by calling a police procedure a search in one factual situation but a nonsearch in another. As long as this analysis occurs, however, it should occur explicitly to provide guidance for lower courts te conduct similar analyses and better evaluate the Fourth Amendment interests at stake.

253. Amstordam, 58 Minn. L. Rev. at 393 (cited in note 3). See also LaFave, 1 *Search and Seizure* § 2.1(e) at 315 (cited in note 11).

254. See *United States v. Leon*, 468 U.S. 897, 907-08 (1984) (discussing the substantial costs of the exclusionary rule).

255. Histerically this fear has led to a lukewarm reception of the exclusionary rule by judges. See, for example, *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926) (characterizing the exclusionary rule as permitting the criminal to go free because the constable blundered).

256. Amsterdam, 58 Minn. L. Rev. at 394 (cited in noto 3). In its amicus curiae brief in *Terry*, the NAACP stated:

> The rub is simply that, in the real world, there is no third state; the reasonableness theory is paper thin; there can be no compromise. Probable cause is the objective, solid and efficacious method of reasoning—itself highly approximative and adaptable, but withal tenacious in its insistence that common judgement and detatched, autenomous scrutiny fix the limits of police power—which has become, within our system of criminal law administration, the indispensable condition of non-arbitrariness in police conduct. Police power exercised without probable cause *is* arbitrary. To say that the polico may accost citizens at their whim and may detain them upon reasonable suspicion is te say, in reality, that the police may both accost and detain citizens at their whim.

Id. at 394-95 (emphasis in original) (quoting the NAACP brief).

257. See, for example, *Tennessee v. Garner*, 471 U.S. 1 (1985) (requiring more than probable cause that the suspect committed a crime for police to shoot him).

overstatement of the government's interest.[258] Without the probable cause requirement to provide a yardstick by which to measure police searches and seizures, judges have no standard by which to evaluate police activities except their own opinions,[259] which often are biased in favor of the police and against the guilty defendant after the prosecution produces incriminating evidence.[260]

This general balancing process would weaken the scrutiny of those procedures already subject to the probable cause standard. While the scope of the Amendment's protections would broaden under a balancing rule, cases lying on both sides of the line between searches and nonsearches would fall into the gulf.[261] Courts generally would uphold searches that once required probable cause on lesser standards. This tendency of judges would become more acute because of the judicial inclination to admit evidence against defendants whom they believe are guilty. Thus, although the balancing standard potentially broadens the scope of the Amendment, it threatens to undermine the protections already in place.[262]

A second argument against the use of a balancing or sliding-scale formula is that police would have no bright-line rules to follow. Police would not know what conduct conforms with the dictates of the Amendment and, therefore, could not be deterred from acting ad-

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258. *New Jersey v. T.L.O.*, 469 U.S. 325, 362 (1985) (Brennan, J., concurring in part, dissenting in part) (1985). See also Sundby, 72 Minn. L. Rev. at 439 (cited in note 20) (observing that a balancing test shifts the Fourth Amendment analysis in favor of the government).

259. Sundby, 72 Minn. L. Rev. at 429-30 (cited in note 20) (noting that balancing tests will invariably entail the weighing of individual judges' and justices' values at some point in the process).

260. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 915-25 (1991) (recognizing the judicial bias against criminal defendants once incriminating evidence has been found).

261. This factor motivates a push for retention of a strong probable cause standard. See *New Jersey v. T.L.O.*, 469 U.S. at 358-59 (Brennan, J., concurring in part, dissenting in part) (stating that probable cause is the constitutional minimum for justifying a search and that the probable cause standard reflects the proper relationship between the Warrant and Reasonableness Clauses—the Reasonableness Clause states the purpose of the Amendment, and the Warrant Clause gives content te the word "unreasonable" in the Reasonableness Clause). See also note 256 (citing the NAACP brief in *Terry*).

262. This concern, however, is weakened in the state constitutional context because the states must, at a minimum, meet the standards set by the Fourth Amendment. See *New Jersey v. T.L.O.*, 469 U.S. at 334 (noting that it is settled that the federal constitution, through the Fourteenth Amendment, bans unreasonable searches and seizures by stato officers). Thus, the Fourth Amendment creates a minimum standard for determining what constitutes a search that the states, by themselves, could not erode. Thus, the only procedures that would fall into the gulf in the state constitutional context would be those that would not constitute searches under the federal constitution.

versely.[263] Moreover, judges would sympathize with the police officer's plight and seldom classify the officer's conduct as unreasonable, thereby further undermining the Amendment's protections.[264]

Third, the text of the Amendment makes no reference to balancing, but makes explicit reference to the term "probable cause." Adoption of a balancing approach would leave the Warrant Clause and its probable cause standard without meaning. In fact, one could conceive of a situation in which the Fourth Amendment never would require a warrant based on probable cause as a prerequisite to a reasonable search and seizure.[265] This reliance on the Reasonableness Clause alone would reduce the Warrant Clause to a relic without any practical use. This possibility motivates Justice Scalia's concern that use of a reasonable suspicion standard would create a new standard of reasonableness not rooted in the text of the Amendment and not clearly defined.[266] Moreover, because the warrant and probable cause requirements have textual roots, judicial reliance on those standards reduces some of the fear of subjectivity and provides a yardstick by which judges and police can measure reasonableness.[267]

C. Defining a Middle Ground for Reasonableness

The problems inherent in both the probable cause requirement and the sliding-scale approach ultimately indicate that complete reliance on either extreme is untenable. This acknowledgement, however, does not answer the question of whether some tightly drawn reasonableness formula could be devised to supplement the scope of the Fourth Amendment without eroding its protections.[268] The Supreme Court in *Arizona v. Hicks* emphatically rejected this standard in the pure investigatory search context,[269] but without this lesser standard, many police intrusions into individual security and privacy interests will go unregulated by the Amendment. Courts could devise a reasonable suspicion standard for pure investigatory

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263. See generally Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. Pitt. L. Rev. 307 (1982). But see Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984).

264. Amsterdam, 58 Minn. L. Rev. at 394 (cited in note 3). However, one commentater notes that this argument is weak because it presumes that bright lines are, in fact, possible. Slobogin, 39 UCLA L. Rev. at 71 (cited in note 221).

265. Sundby, 72 Minn. L. Rev. at 416 (cited in note 20).

266. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

267. See Sundby, 72 Minn. L. Rev. at 387 (cited in note 20). But see id. at 415 (observing that strict reliance on the Warrant Clause is equally difficult te justify textually because it renders the Reasonableness Clause at best descriptive and at worst redundant).

268. See LaFave, 1 *Searches and Seizures* §2.1(e) at 315 (cited in note 11).

269. *Hicks*, 480 U.S. at 328.

searches that would reaffirm the traditional reliance on probable cause but acknowledge that certain police activities need limitations to effectuate the Fourth Amendment's underlying concern with arbitrary police behavior.[270] The goal of this approach is to maintain the flexibility of a sliding-scale approach while retaining the predictability and strength of the probable cause requirement. A reasonable suspicion standard would require a low threshold of suspicion to ensure that police officers could state a valid justification to explain why they took their actions. This standard would encourage the use of minimally intrusive alternatives rather than full-blown searches because minimal intrusions would not require the higher probable cause standard. At the same time, the standard would protect individuals from egregious abuses of police authority.

After determining that a reasonable suspicion standard should apply to some police searches, one must decide which searches should fall under this lower standard. To ensure that the middle-ground standard does not become a black hole into which all searching activities fall, courts should develop a tightly drawn test to limit the scope of this exception. The test should examine whether an investigative technique constitutes a search, in a broad sense; whether constitutional limits would provide added protection to individual security; and if so, whether the technique could maintain its usefulness under the probable cause and warrant requirements. This test would examine explicitly the underlying factors that led the Supreme Court to create a balancing formula and that occur implicitly in most cases.[271] Explicit analysis of these factors would provide guidance to lower courts and police. An activity would require reasonable suspicion if: (1) the challenged activity constitutes a minimal intrusion, (2) the application of the probable cause standard would eviscerate the value of the activity at issue without adding significantly to individual interests, and (3) existing procedural or practical safeguards do not place reasonable limits on police discretion. This test for reasonable suspicion reflects the Fourth Amendment test established in *Katz* in that the first factor determines whether a search occurred and the second and third factors determine what standard of reasonableness courts should apply to the search. Thus, this test would treat minimally intrusive searches like the Court treated minimal seizures, or steps, in *Terry*.

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270. See *Delaware v. Prouse*, 440 U.S. 648 (1979) (recognizing that police may not stop vehicles arbitrarily consistent with the Fourth Amendment, but may make these stops when they have reasonable suspicion).

271. See Part II.A.2 and text accompanying notes 99-108.

1. The Intrusion Factor

The intrusion factor discerns whether the procedure at issue constitutes a search. A search would occur when a government official intends the technique at issue to disclose some fact about the defendant or his possessions that the defendant reasonably expects would otherwise remain concealed from public view.[272] This broad conception of a search best effectuates the term's plain meaning[273] and shifts the Fourth Amendment's focus away from determining whether a search occurred to an inquiry of reasonableness. This inquiry would focus on the item searched rather than the object sought to determine if a search occurred. Therefore, it would modernize the scope of the Fourth Amendment to cover a broader range of modern police techniques.[274]

This broadened conception of a search conflicts with the narrower definition used by the Supreme Court. In *Jacobsen*, the Court defined a search as occurring when the technique infringes on an expectation of privacy that society considers reasonable.[275] Although the Court's definition potentially states a broad conception of a search, its analysis narrows the term's potential scope by focusing on the object of the search rather than the area searched. For example, in *Place*, the Court recognized that the defendant had a reasonable expectation of privacy in the contents of his luggage, but because the sniff disclosed only the presence or absence of contraband and no other private fact, it did not constitute a search.[276] Although there may be some credence to the belief that criminals have no reasonable expectation of privacy in their criminality,[277] the Court's test creates the potential that police use of discrete modern technologies will go unchecked by constitutional restraints and may become tools of harassment or abuse.[278]

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272. This broad definition of search is intended to return to *Katz*'s broad conception that what an individual seeks to preserve as private may be constitutionally protected. See *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

273. See *Pellici*, 580 A.2d at 718. The *Pellicci* court stated that "[w]hen using dogs to ferret out contraband, the police are not simply walking around hoping to come across evidence of a crime. Instead they are investigating. They are trying to find something. They are seeking evidence in hidden places. If this activity does not qualify as a 'search,' then I am not sure what does." Id. (quoting *United States v. Beale*, 736 F.2d 1289, 1292 (9th Cir. 1984) (Pregerson, J., dissenting)).

274. See *Jacobsen*, 466 U.S. at 137-38 (Brennan, J., dissenting).

275. Id. at 113.

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

277. *United States v. Colyer*, 878 F.2d 469, 474 (D.C. Cir. 1989).

278. *Jacobsen*, 466 U.S. at 138 (Brennan, J., dissenting).

Understandably, a court wed to a probable cause requirement for pure investigatory searches would classify as searches only those procedures that may be analogized fairly to the intrusions posed by more general rummaging.[279] This high standard upholds the traditional probable cause requirement while allowing police flexibility to serve law enforcement needs by exempting less intrusive investigative activity from the rigors of the Fourth Amendment.[280] Unfortunately, this process also exempts much police conduct from constitutional scrutiny and creates the potential for arbitrary police action.[281] A broader conception of a search recognizes that the Fourth Amendment protects against arbitrary police action and invasions of personal privacy by assuring judicial review of a wider range of police searching activities.[282]

For example, a canine sniff would qualify as a search under this broad conception of the term. Although the sniff discloses a limited amount of information about its subject, it still discloses the contents of an area concealed from public detection. Thus, the procedure would qualify as a search, meriting some degree of justification under the Fourth Amendment or analogous clauses in state constitutions.

2. Viability of Probable Cause

After discerning whether a search occurred, a court must determine what level of reasonableness should apply. This second prong examines whether a probable cause requirement strikes the appropriate balance between individual and government interests in each case. This test classifies searches into two categories: full-blown searches and minimally intrusive searches.[283] Full-blown searches still would be subject to the probable cause requirement, but minimal

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279. See Sundby, 72 Minn. L. Rev. at 415-16 (cited in note 20) (discussing the limited scope of the Fourth Amendment under a Warrant Clause regime).

280. See Stuntz, 44 Stan. L. Rev. at 557 (cited in note 66) (noting that "the reason these tactics are not considered searches is that, at least in the judgment of the Supreme Court, they do not cause substantial injury").

281. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (noting that te insist neither on appropriate factual bases for suspicion directed at particular automobiles nor on some other substantial and objective standard to govern police discretion invitos intrusions based on nothing more than mere hunches) (quoting *Terry*, 392 U.S. at 22).

282. See *Prouse*, 440 U.S. at 661. See also *Terry*, 392 U.S. at 17. *Terry* notes that an all-or-nothing approach to the Fourth Amendment seeks to isolato from censtitutional scrutiny the initial stages of contact between the police officer and citizen and obscures the utility of limitations on the scope, as well as the initiation, of police action as a means of constitutional regulation. Id.

283. See *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

intrusions would be eligible for a lower suspicion standard.[284] This distinction between categories of pure investigatory searches mirrors the distinction applied in the seizure context. In addition, this distinction reflects the differing Fourth Amendment policies at work in each situation. For a full-blown search, the Fourth Amendment protects the citizen from unjustified invasions into privacy and arbitrary police action. For a minimally intrusive search, the Fourth Amendment protects primarily against arbitrary police action because the privacy interests at stake are minimal. In practice, this distinction would preserve police flexibility while maintaining some limited judicial control over the conduct of less intrusive procedures. In addition, it would encourage police officers to use the least intrusive means available to them while still assuring the citizen that the search meets Fourth Amendment standards of reasonableness.

The proper inquiry to distinguish full-blown searches from minimally intrusive ones focuses on the benefits to individual interests and costs to police under a probable cause standard. If probable cause would provide valuable additional protection to individual privacy interests that offset the corresponding costs of employing probable cause, then it should apply. If a probable cause requirement would eviscerate the purpose of the procedure, then a lower suspicion standard should apply.[285] This evisceration would occur when requiring probable cause effectively permits the police to abandon the challenged procedure in favor of significantly more intrusive means. This differentiation would encourage police to use the least intrusive means available to them while still protecting citizens from egregious police behavior.[286]

This inquiry, therefore, focuses on procedures constituting significantly lesser intrusions into privacy than full-blown searches. Drawing this line requires courts to make important value judgments and involves a weighing of several different factors. First, the courts

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284. This approach would satisfy some textualists because more intrusive searches and seizures would require a traditional probable cause standard to justify the intrusion. Lesser suspicion only would attach when the surveillance technique is one that the Framers could not have conceived.

285. See *O'Connor v. Ortega*, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting). Justice Blackmun would allow a reasonable suspicion standard "only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based on probable cause without sacrificing the ultimate goals to which a search could contribute." Id.

286. Police would be more apt te use lesser intrusive techniques if those techniques required less suspicion than more intrusive techniques because the cost to police of acquiring reasonable suspicion is significantly less than the cost of acquiring probable cause.

should ask what area or object was searched.[287] For example, a search of a home should receive more protection than the search of checked luggage at an airport.[288] The home serves as the center of an individual's private life as most intimate activities occur within the home.[289] By comparison, checked luggage is given to a third party to hold, and airline passengers expect that their belongings will be subjected to some type of surveillance for security purposes. In addition, different interests may arise when the individual is present during the search or is the subject of the search.[290] Any searching procedure conducted on a person may be so annoying, frightening, and humiliating, regardless of its limited nature, that it requires probable cause.[291]

Second, the court should determine what information the searching technique could reveal. A surveillance technique that identifies only the presence or absence of a specific item amounts to a lesser intrusion than a general rummaging.[292] If the ability of the officer te discover private items or facts is limited, that procedure may constitute a minimal intrusion, which is eligible for a lower suspicion standard.[293]

Finally, a court should weigh the officer's interest in the procedure as a tool in crime detection and prevention against the precise intrusion that has occurred. Thus, an ineffective procedure may require probable cause even when it constitutes only a minimal

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287. While the Fourth Amendment protects people, not places, one cannot understand an individual's privacy expectation without reference to a place. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

288. See *Unruh*, 713 P.2d at 378. See also Christepher Slobogin and Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Emperical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L. J. 727, 738-39 (1993).

289. *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

290. *Commonwealth v. Martin*, 626 A.2d 556, 560 (Pa. 1993).

291. In *Terry*, the Court relied in part on the annoying, frightening, and humiliating nature of a frisk when labeling it a search, *Terry*, 392 U.S. at 24-25, and in *Place*, the Court noted that the limited sniff of the defendant's luggage did not subject him to the embarrasment and inconvenience entailed in less discriminate methods. *Place*, 462 U.S. at 707. See also *Horton*, 690 F.2d at 477 (observing that the use of dogs to sniff students presented an entirely different problem than sniffing empty automobiles and lockers); Loewy, 81 Mich. L. Rev. at 1246 (cited in note 150); Slobogin and Schumacher, 42 Duke L. J. at 288 (cited in note 289) (ranking a dog sniff of the body as more intrusive than a frisk). However, an approach that focuses on whether the suspect knew of the surveillance may omit many intrusive techniques of which the suspect is unaware from the probable cause standard. See Steinberg, 74 Minn. L. Rev. at 570-72 (cited in note 240) (discussing why the warrant process for surreptitious searches is important in protecting a suspect's procedural rights).

292. *Jacobsen*, 466 U.S. at 137 (Brennan, J., dissenting). Thus, a canine sniff constitutes a lesser intrusion than an officer digging through someone's purse.

293. Although the moving of the turntable in *Hicks* could have exposed photographs or papers, 480 U.S. at 325, the naked-eye viewing of plants from one thousand feet in *California v. Ciraolo*, 476 U.S. 207 (1986), could not disclose anything so intimate or private that was not exposed te a bird's-eye view.

intrusion because the law enforcement benefit does not outweigh the intrusion.[294] Moreover, a procedure that discerns limited information about the contents of a sealed container may be permissible on a showing of reasonable suspicion, while the same procedure conducted on a person or in a home might demand probable cause. By conducting this balance openly, courts would avoid using an expectation-of-privacy analysis that demands inconsistent logic to explain why a procedure would constitute a search requiring probable cause in one situation, while in another it would not amount to a search at all.[295]

If the court has determined that the imposition of probable cause would not provide a commensurate benefit to personal privacy, then it should review the search under a lower suspicion standard to ensure that the challenged activity does not infringe on the individual's right to remain free of arbitrary police action. This test prevents the creation of a large sliding scale by focusing the inherent balancing into tightly formed questions. Although much of these balances are value judgements, the balancing occurs with or without a reasonable suspicion standard. Moreover, the creation of an intermediate alternative allows the impostition of bright-line rules that better reflect the degree of intrusiveness a procedure entails.

In applying this test to canine sniffs, a court can determine in which situations a canine sniff amounts to a minimally intrusive search. Certainly, a sniff of an object or container constitutes a significantly lesser intrusion than rumaging through it. As noted by the Court in *Place*, a canine sniff does not require the opening of the container or the exposure of noncontraband items to public view.[296] Rather, the procedure determines only the presence or absence of drugs or other contraband items. Canine sniffs of people require a different analysis because they resemble the frisks employed in *Terry*.[297] Both procedures involve potential humiliation, fright, embarassment, and intrusion into personal privacy.[298] Thus, a canine sniff of a person constitutes a substantial intrusion into individual security and privacy. In addition, a sniff of a person may be subject to

294. See Stuntz, 44 Stan. L. Rev. at 556 (cited in note 66) (arguing that in the broad category of house searches, probable cause and warrants are required because the gain from searching is ordinarily less than the loss).

295. See note 105 (discussing the inconsistency in *Horton*'s logic).

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

297. See *Pellicci*, 580 A.2d at 722 (Batchelder, J., concurring).

298. *Terry*, 392 U.S. at 25; *Horton*, 690 F.2d at 478. See also Loewy, 81 Mich. L. Rev. at 1246-48 (cited in note 150). Whether canine sniffs of people constitute searches under the Fourth Amendment remains an open question, but it may be analyzed fairly under a broad reading of the *Place-Jacobsen* analysis. See notes 151-53 and accompanying text.

more false alerts than inanimate objects.[299] A canine sniff within a suspect's home also might constitute more than a minimal intrusion because of the heightened interest in privacy and security in the home.[300] In one case remotely addressing the issue, however, the court ruled the sniff of a safe once contained in the home to amount to a search requiring only reasonable suspicion.[301]

With the exception of people and homes, canine sniffs should not require probable cause. If courts required probable cause, police would abandon the use of canine sniffs in favor of more intrusive searching methods, justifiable on the same probable cause standard.[302] If the Fourth Amendment should serve as a tool to encourage police to use the least intrusive means necessary to detect criminal activity,[303] then courts should allow most canine sniffs on a suspicion standard less than probable cause. The standard for determining whether courts should apply probable cause instead of reasonable suspicion should not turn on the fact that probable cause would allow police to conduct an even more intrusive search.[304] Rather, this inquiry should center on whether the cost of applying a probable cause standard outweighs the corresponding benefit to individual interests. Because a canine sniff intrudes only minimally on personal privacy when not conducted on people or in homes, the procedure does not implicate an individual's privacy interest to an extent requiring probable cause. Police may conduct canine sniffs arbitrarily, however, and an individual's interest in remaining free from this conduct dictates that a lower suspicion standard apply to ensure that police act reasonably.

3. Existence of Safeguards

Because a minimally intrusive search primarily implicates an individual's Fourth Amendment interest in freedom from arbitrary government intrusions, a court should inquire into whether the chal-

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299. See *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (involving a false alert on a student that led to a strip search of the student).

300. See *Hicks*, 480 U.S. at 325. But see *Jacobsen*, 466 U.S. at 124 (noting the remoteness that procedures like canine sniffs will disclose any private fact other than criminality).

301. See *People v. Unruh*, 713 P.2d 370 (Colo. 1986). *Unruh* is distinguishable from a sniff occurring within a home because in *Unruh* the sniff of the safe occurred at the police station. Thus, the dogs never entered the defendant's home. Bringing dogs into a house may amount to a public accusation of guilt because the suspect's neighbors may witness it.

302. See *Martin*, 626 A.2d at 565 (Montemuro, J., dissenting).

303. See generally Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1208-53 (1988).

304. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Hicks*, 480 U.S. at 329.

lenged activity was left to the discretion of the officer in the field.[305] In conducting this inquiry, a court should focus on whether existing practical and procedural safeguards place adequate limits on a police officer's discretion. If no adequate safeguards exist, then an officer must show reasonable suspicion to justify the search. This inquiry would serve to ferret out the most egregious abuses of police authority.

Practical safeguards are those limits inherent in the nature of the search that restrict police behavior. For example, the possibility that an officer, acting on a whim or for purposes of harassment, would conduct a chemical field test of the contents of a package at a courier's office to determine if a substance is cocaine is arguably remote. For the field test to occur, the tested substance must be in plain view of the officer; otherwise, he could not know of its presence.[306] Once the officer sees the substance in plain view, he would get no additional satisfaction in subjecting the substance to the test. Practical limits would safeguard against police abuse of discretion in that case. However, an officer may have more incentive to stop a motorist to inspect his driver's license and car registration on a whim.[307] This police behavior could become a tool of harassment or intimidation, and an officer would be more inclined to act on a hunch or whim to flex his authority.[308]

Procedural safeguards are those established by statute or administrative regulations to ensure that police searching activities do not occur in a random, unprincipled manner. In *Delaware v. Prouse*,[309] the Court held that a random stop of a motorist, absent reasonable suspicion, violated the Fourth Amendment because these stops permit the officer to exercise unbridled discretion against individual citizens.[310] The Court noted, however, that the interest in limiting officer discretion could be served by methods other than a reasonable suspicion standard, such as reasonable regulations limiting officer discretion.[311] Although *Prouse* is a regulatory case involving a seizure,

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305. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

306. These facts are adapted from *United States v. Jacobsen*, 466 U.S. 109 (1984).

307. See *Prouse*, 440 U.S. at 661.

308. Limits on police resources, however, could not constitute a fair safeguard against police discretion. If the challenged activity came before the court, by necessity, the limits on resources did not prevent the activity from happening. If the activity occurs only in reasonable circumstances because of funding limits, the inquiry would still collapse into whether that conduct was reasonable. Moreover, police departments always can change their funding priorities. See *United States v. Morales-Zamora*, 974 F.2d 149, 150 (10th Cir. 1992) (discussing the funding of a roadblock).

309. 440 U.S. 648 (1979).

310. Id. at 663.

311. Id.

the same conclusion could apply in the criminal search context because minimally intrusive searches implicate the same Fourth Amendment interest in protecting the citizen from arbitrary police intrusions. Just because a minimally intrusive procedure is a search rather than a seizure does not mean that the potential for unbridled officer discretion is any less, requiring no inquiry into reasonableness, or any greater, requiring a greater justification. Minimally intrusive searches conducted pursuant to reasonable regulation or statute, therefore, would satisfy the reasonableness prong of the Fourth Amendment.[312]

These regulations would benefit individual, police, and judicial interests. Regulations would satisfy individual interests because they limit officer discretion to ensure that police searching activities are conducted reasonably.[313] In addition, the individual can respond to his displeasure with the scope of the police department's searching activities through the political process by lobbying passage of more restrictive police regulations. A regulatory solution would serve government interests because the government can enact regulations that allow police to conduct some minimally intrusive searches without suspicion. Consequently, regulations would provide clear guidance to officers as to what standards of reasonableness they must meet. Moreover, the existence of regulations and statutes would serve as guides to the courts to determine what constitutes reasonable behavior.[314] Finally, by requiring police to show either reasonable suspicion or compliance with a regulation to justify a search, courts would encourage police departments to develop regulations, thereby policing themselves.[315]

These regulatory safeguards will face scrutiny to determine whether they provide adequate limitations on arbitrary police behavior and are reasonable. The court should focus on two factors. First, the court should determine whether the statutes or regulations place meaningful limits on officer discretion. This inquiry would weed out those regulations that are mere attempts at immunizing police

312. See id. at 654-55. See also *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985).

313. Professor LaFave notes that police regulations as a means to control police discretion are attractive because they would afford greater protection against arbitrary searches and seizures, assure a more meaningful use of police expertise, and control Fourth Amendment activities that never reach the courts. Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 502 (1990).

314. Amsterdam, 58 Minn. L. Rev. at 418-19 (cited in note 3).

315. This process would ease many of the difficulties courts have policing the police. See id. at 371.

activity from constitutional scrutiny and ensure that the regulations have meaning and effect. A court also should focus on whether the officer ever could violate the regulation. If he could not, then his discretion is not limited adequately. For some minimally intrusive searches, reasonable regulations may not be an adequate tool to constrain officer discretion. Those procedures always require a reasonable suspicion standard.

If the court finds that some practical or procedural safeguard limits the discretion to conduct the minimally intrusive search, then it would find the search reasonable under the search and seizure clause. If no practical or procedural limtation on officer discretion exists, then the officer would need to produce some objective suspicion to justify his search. The reasonable suspicion standard would accord appropriate deference to police officers to act on objectively articulable suspicions while still placing limits on outrageous police conduct.

With regard to canine sniffs, a court would inquire as to the practical or procedural safeguards that limit police discretion. In the airport context, practical safeguards arguably exist because the police either expose every item to the narcotics-detection dog or have individualized suspicion to discern which bags to sniff. Absent reasonable suspicion for an individualized sniff or regulations to ensure that every bag is searched, however, no practical limits on police discretion exist because the officer still could decide arbitrarily which bags to expose to the dog. This broad police authority would conflict with the Fourth Amendment interest in freedom from arbitrary police behavior. Another practical limit may exist when the officer must seize the object he intends to expose to the dog. Of course, the court must find this seizure reasonable under the Fourth Amendment.[316] In many instances, however, a technical seizure is unnecessary to subject an item to a sniff.[317] In addition, if the police need reasonable suspicion to seize the item, a reasonable suspicion standard for the sniff would impose no additional burden on police. Absent reasonable regulatory or statutory standards ensuring that police may not conduct random, arbitrary canine sniffs, the police must have an individualized, reasonable suspicion to conduct the investigative activity.[318]

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316. See *Place*, 462 U.S. at 706.

317. For example, dogs may sniff luggage in overhead bins aboard a bus without a technical seizure occuring. See, for example, *United States v. Harvey*, 961 F.2d 1361, 1363-64 (8th Cir. 1992).

318. A balancing of the necessity of the regulation against the intrusiveness of the search also may indicate that the procedure should require probable cause before an officer conducts it. The regulatory safeguard envisions canine sniffs of every item to be sniffed, yet sniffs of people or

V. CONCLUSION

By recognizing that *Terry*'s reasonable suspicion standard may apply to canine sniffs, several states have expanded the scopes of their constitutions' search and seizure clauses beyond the Fourth Amendment's scope as defined in *Arizona v. Hicks*.[319] The Supreme Court should recognize a limited reasonable suspicion standard for pure investigatory searches, as it has done for pure investigatory seizures. Absent this change in doctrine, other states should take this approach to effectuate the Fourth Amendment's protection, not only in personal privacy but also in freedom from arbitrary government intrusion, in pure investigatory searches. Otherwise, many searching activities, such as canine sniffs, will continue to go unregulated by the Amendment, and police will have free reign to conduct these searches as they please.

Although this marked shift in doctrine will provide state courts with opportunities to modernize search and seizure law and keep pace with modern police practice, this shift poses dangers as well. A broad shift ultimately could undermine the protections provided by the probable cause requirement. Although the federal constitution places limits on what may constitute a search requiring probable cause, courts applying a reasonable suspicion standard to pure investigatory searches that constitute minimal intrusions must not create a broad rule that will erode their state constitutional protections. These courts should not rely on a broad reasonableness standard too readily, as the Supreme Court has in other contexts.[320] Rather, the states should develop a tightly construed and narrowly defined exception to the probable cause requirement, as the Pennsylvania court did in *Commonwealth v. Martin*.[321] This tightly drawn exception would allow the flexibility to regulate all stages of police contact with the individual while maintaining the bright-line character of the probable cause requirement.

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homes may never be telerable except on some individualized suspicion. This factor would indicate that sniffs of people and homes should require probable cause before they are conductod.

319. 480 U.S. 321 (1987).

320. See, for example, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987).

321. 626 A.2d 556 (Pa. 1993).

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