NOTES

Rethinking Canine Sniffs: The Impact of *Kyllo v. United States*

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I. INTRODUCTION

On October 26, 2001, the United States Congress hastily passed (and President Bush signed) legislation[1] that significantly expanded the tools available to law enforcement agencies to combat terrorism and gather intelligence domestically.[2] Concern about the impact of this new legislation on civil liberties inspired lawmakers to initiate a "sunset provision" that requires the bill to be reauthorized by 2005 in order for it to remain effective.[3] Senator Patrick Leahy (D-Vt.), the Senate negotiator for the bill, reluctantly acquiesced to President Bush's demands for anti-terrorism powers that may infringe on the civil liberties of Americans.[4] Despite these reservations, both Congress and the American public appear willing to relinquish some personal privacy in times of war for the greater public interest.

Even when the nation is not at war, law enforcement personnel use surveillance and investigative technologies on a daily basis. The Supreme Court recently determined in a series of contradictory cases whether the use of certain law enforcement investigative devices are "searches" within the meaning of the Fourth Amendment. Two of these technologies are addressed in this Note: the use of heat-imaging technology and the use of drug-sniffing dogs.

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1. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

2. Jim McGee, *An Intelligence Giant in the Making; Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, WASH. POST, Nov. 4, 2001, at A4.

3. *Id.*

4. *Id.*

In its 2000-01 term, the Supreme Court held in *Kyllo v. United States* that the use of a thermal imager is a "search" within the meaning of the Fourth Amendment.[5] A thermal imager is a device that detects infrared radiation and converts that radiation into images according to its relative warmth.[6] With the help of the thermal imager, the person operating the device can see images of objects and people inside a building that emit infrared radiation.[7] The use of this device was a search because a thermal imager was not available to the general public and was being used to gather details that could not have been known but for physical intrusion into the home.[8] Therefore, its use is presumptively unreasonable without a warrant.[9] During the same term, the Court reiterated, in dicta, in *City of Indianapolis v. Edmond* that the use of a drug-sniffing canine by law enforcement is not considered a search within the meaning of the Fourth Amendment.[10] Even though these two investigative tools are used to gather information that would otherwise not be available without physical invasion, the Court has concluded that while one is a search, the other is not.

This Note does not attempt to reconcile these seemingly contradictory conclusions. Instead, the following paragraphs argue that the Court's holding in *Kyllo* requires courts to rethink whether a canine sniff is a search or not within the meaning of the Fourth Amendment.

In 1983, the United States Supreme Court stated, in dicta, that a canine sniff of an object is not a search.[11] This conclusion was based largely on the limited nature of the intrusion of a dog sniff, both because of the manner in which the information is obtained and the type of information that is revealed.[12] The argument is that the canine sniff is so unintrusive that it could not infringe on an individual's expectation of privacy and therefore does not trigger the protections of the Fourth Amendment.[13]

With most other investigative techniques, the Court has considered four general factors unrelated to the characteristics of the search

5. 533 U.S. 27, 40 (2001).

6. *Kyllo*, 533 U.S. at 29–30.

7. *Id.* at 29. Virtually all objects emit infrared radiation, though it is not visible to the naked eye. *Id.*

8. *Id.* at 40.

9. *Id.*

10. City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). The Court held that a roadblock set up for the purpose of drug interdiction was unconstitutional because it dealt with general crime abatement rather than some more specific problem, such as checking for terrorists or to catch a criminal who is likely to flee via a particular route. *Id.* at 42–44.

11. *See* United States v. Place, 462 U.S. 696, 707 (1983).

12. *See id.*

13. *See id.*

itself to determine if there is an expectation of privacy.[14] Although the thermal imager used in *Kyllo* had essentially the same characteristics as a canine sniff in terms of the nature of the intrusion, the Court considered the traditional four factors rather than the limited-nature factors. This Note argues that, in light of the reasoning in *Kyllo*, canine-sniff jurisprudence should be reexamined under the "expectation of privacy" framework, which this author argues requires examination of four factors, rather than the limited-nature framework, which examines the nature of the intrusion. Application of the expectation of privacy framework to dog sniffs would likely lead to a different finding: the use of a drug-sniffing dog *is* a search, though it could be a minimally intrusive one depending on the context.

The argument develops as follows. Part II provides a general background on how the court has determined whether an investigative technique or device is a search within the meaning of the Fourth Amendment, and the implications for finding that something is a search. This section focuses primarily on *Katz v. United States*, the pivotal case in which the Supreme Court departed from previous Fourth Amendment jurisprudence by recognizing that the Fourth Amendment's core value is the protection of individual privacy, not the protection of places.[15] In light of this background, Part III provides examples of how the Supreme Court has applied *Katz* to certain factual situations, and what factors it has traditionally considered to determine if a reasonable expectation of privacy exists. Part IV examines the reasoning of the *Kyllo* decision and evaluates it in terms of those traditional factors. Part V looks closely at the landmark case in canine sniffs, *United States v. Place*, and analyzes the Court's reasoning in finding that a dog sniff was not a search. Finally, Part VI explores how and why the reasoning in *Place* and other dog-sniff cases has been eroded by the Court's reasoning and holding in *Kyllo*.

II. WHEN IS A SEARCH REALLY A SEARCH? *KATZ V. UNITED STATES*

The Fourth Amendment establishes the right of individuals to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[16] Since its adoption, the question of when a Fourth Amendment search[17] has occurred has not been easily

14. *See* Part III *infra* for a discussion of the four general factors considered by courts when determining whether there is a reasonable expectation of privacy under *Katz*.

15. *See* Katz v. United States, 389 U.S. 347, 351 (1967).

16. U.S. CONST. amend. IV.

17. To "search" means "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a

answered.[18] However, the implications for such a finding are significant.

Characterizing an action as a search is essentially a conclusion about whether the Fourth Amendment even applies.[19] Police tactics are not subject to judicial regulation unless deemed a search[20] (although techniques deemed not a search could still be regulated statutorily[21]). Without judicial regulation, the police are free to use such methods at random, with little or no constitutional limit on their discretion.[22] Moreover, any evidence gathered in the course of such action would always be admissible in a criminal trial, unless excluded under some theory other than a Fourth Amendment violation.[23]

However, if an action is a search then it must satisfy the Fourth Amendment requirements: it must be reasonable; the officer must have probable cause; and the search may only be properly conducted when a warrant is obtained from a neutral magistrate, unless there are exigent circumstances.[24] Therefore, calling a police action a search within the meaning of the Fourth Amendment has implications for both the rights of the individual and the permissible actions of law enforcement officers.

Prior to *Katz v. United States*, arguments regarding whether a police tactic was a search centered on the common law idea of trespass.[25] Under this common law approach, a tactic was only a search if it was in the form of trespass on tangible property; an "invasion" was required to trigger Fourth Amendment protections.[26] The *Katz* Court rejected this traditional formulation.[27] In *Katz*, the Court reconceptualized the Fourth Amendment, turning the focus from the trespassory formulation to the core value that –p[the modern Fourth Amendment

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thief." N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (1828) (reprint 6th ed. 1989). This is what was in the mind of the framers at the time the Fourth Amendment was adopted, and the definition is still considered by the Supreme Court today. *See* Kyllo v. United States, 533 U.S. 27, 33 n.1 (2001). It is instructive to keep this common usage in mind when analyzing police tactics.

18. *Kyllo*, 533 U.S. at 31.

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

20. David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 39 (1996).

21. *Id.* at n.226.

22. *Id.* at 39.

23. *Id.* at 19.

24. U.S. CONST. amend. IV; *see generally*, 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.1(a)-(b), § 4.2 (§ 4.1 discusses the Court's preference for warrants and the requirements of warrants under the Fourth Amendment; § 4.2 discusses general circumstances in which a search may be permissible without a warrant).

25. *Katz*, 389 U.S. at 352–53.

26. Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928).

27. *Katz*, 389 U.S. at 350, 353.

was intended to protect: individual privacy against certain kinds of governmental intrusion.[28] This is what Justice Stewart meant when he claimed that "the Fourth Amendment protects people, not places."[29]

In *Katz*, the Government attached an electronic eavesdropping device to the outside of a public telephone booth, which enabled the FBI to overhear the defendant's incriminating statements.[30] In the presentation of its case, the Government confidently advanced the traditional property-based rationale by arguing that use of the device was not a search because it merely detected and translated sound waves emanating from the phone booth.[31] Therefore, there was no physical penetration or trespass into the phone booth.[32]

The Court rejected this mechanical application.[33] Despite the prior cases equating Fourth Amendment protection to trespass, the Fourth Amendment does not protect anything a person knowingly exposes to the public, even in his own home or office.[34] By the same token, what a person seeks to preserve as private, even in a public area, may be constitutionally protected.[35]

According to the *Katz* Court, a person has a reasonable expectation of privacy when a person enters a phone booth, shuts the door behind him, and deposits the fee for the call.[36] And society recognizes this expectation of privacy as reasonable.[37] Given the defendant's reasonable privacy expectations, the Court found that the use of the eavesdropping device was an unconstitutional search, regardless of the fact that the phone booth was in a public area and had glass walls that exposed the caller further to the public eye.[38]

In his concurring opinion, Justice Harlan articulated the two-part test that is now commonly used to determine what protection the Fourth Amendment affords to individuals in the context of searches.[39] The first prong is subjective: Did the person exhibit an actual expectation of privacy?[40] The second prong is objective: Is society willing to recognize that expectation as reasonable?[41] Harlan emphasized the

28. *Id.* at 350.
29. *Id.* at 351.
30. *Id.* at 348.
31. *Id.* at 352.
32. *Id.*
33. *Id.* at 352–53.
34. *Id.* at 351.
35. *Id.*
36. *Id.* at 352.
37. *See id.*
38. *Id.*
39. *Id.* at 361.
40. *Id.*
41. *Id.*

importance of considering the context of the search.[42] Understanding the context illuminates how much protection the Fourth Amendment affords in a given situation.[43] Therefore, deciding how much protection the Fourth Amendment affords requires reference to "place."[44] In this sense, Harlan was unwilling to completely abandon the traditional understanding that there are constitutionally protected areas. The *Katz* expectation of privacy test is the starting point for any inquiry into whether a search is really a search under the Fourth Amendment.[45]

III. APPLICATION OF *KATZ* IN CASE LAW

The Supreme Court's application of the *Katz* expectation of privacy test to determine Fourth Amendment protections is not only difficult to apply, but has often been criticized as circular, subjective, and unpredictable.[46] The difficulty in application generally arises with the search of places that are not seen as "constitutionally protected areas," such as telephone booths, automobiles, and uncovered portions of residences.[47] Departing from the pre-*Katz* bright-line trespass test and moving to the more subjective expectation of privacy rationale has generated extremely fact-specific inquiries.[48]

Given the required case-by-case analysis, courts have been reluctant to develop an overall construct to classify situations that are governed by the Fourth Amendment and those that are not. However, most cases have focused on balancing four primary factors, each of which the *Kyllo* Court evaluated,[49] to determine the privacy expectations in a given situation. These factors are the meat of the two-pronged *Katz* test and are used to analyze whether a reasonable expectation of privacy exists in a given situation.

The four factors gleaned from the case law are as follows. First, is the technique sense-enhancing?[50] If not, there is generally no Fourth Amendment problem. Second, is the intrusion into an area

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Harris*, *supra* note 20, at 17.

46. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(d) (3d ed. 1996); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188.

47. Kyllo v. United States, 533 U.S. 26, 34 (2001).

48. Dow Chem. Co. v. United States, 476 U.S. 227, 239 n.5 (1986).

49. *See Kyllo*, 533 U.S. at 34. These four factors are not laid out specifically in the *Kyllo* decision, but each is mentioned in leading to the conclusion that use of a thermal imager is a search.

50. *Id.*

traditionally associated with personal privacy, like a home?[51] This factor returns to the language of the Fourth Amendment and traditional notions of constitutionally protected areas. Third, is the kind of device or technique in question generally available to the public?[52] If yes, this factor permits an inference that the public should be on notice that such a device may be used against them to gather information. Finally, is the information obtained of a kind that could only have been acquired with physical trespassory invasion into the area if not for the assistance of the device?[53] This final factor echoes the framers' intent behind the Fourth Amendment.

A. *When Courts Find "No Search" Because There Is No Reasonable Expectation of Privacy*

In applying these four factors, the courts have determined that some activities are not searches and therefore not subject to the reasonableness limitations of the Fourth Amendment. For instance, if the information gathered by a device could have been gathered without using that device, then there may not be a search.[54] Similarly, there may be no search if the kind of device or technique employed is available and known to the general public, even if this kind of device or technique is used to gather information in a constitutionally protected area, like a home.[55] The court also may find no search where the defendant assumed the risk that revealing incriminating information to a third party would be passed on to the police. By doing so, the defendant exposes what is private to the public, in the words of *Katz*.[56] The following examples demonstrate how, in certain fact patterns, courts have used these general concepts to find that there is no legitimate expectation of privacy.

United States v. Knotts provides a good example of how use of a sense-enhancing device might not be a search if the same information could be obtained by the senses alone.[57] In *Knotts*, the Court held that the warrantless use of a homing device or "beeper" on the defendant's car was not a search as long as the vehicle stayed in public areas.[58] Because the same information could be revealed by visual surveillance, use of the beeper to augment the police's sensory faculties was neither

51. *Id.*
52. *Id.*
53. *Id.*
54. *See* United States v. Knotts, 460 U.S. 276, 282–85 (1983).
55. *See* Florida v. Riley, 488 U.S. 445, 450 (1989).
56. *See* United States v. White, 401 U.S. 745, 749 (1971).
57. *Knotts*, 460 U.S. at 276.
58. *Id.* at 282.

a search nor a seizure.[59] However, if the device revealed information that was not available to the public eye, the Court hinted that the use would become a search (for example, if the car was monitored while inside a private garage).[60] Therefore, in some situations, a police activity is not a search if the same information could have been gained without use of the device.

Florida v. Riley illustrates how a technique might not be a search, even when the invasion is into a private home or curtilage, because it is available to the general public.[61] In *Riley*, a police officer flew a helicopter low over the defendant's greenhouse to see if he was growing marijuana inside of it.[62] The greenhouse was located in the defendant's enclosed backyard but happened to have portions of the roof missing, permitting anyone above to see inside with the naked eye.[63] The majority agreed that the defendant clearly had a subjective expectation of privacy in the greenhouse given his efforts to prevent people on the ground from looking in, such as placing tall fences, hedges, and no trespassing signs around the area.[64] However, there was no objective expectation of privacy because the helicopter had a legal right to fly overhead.[65] Moreover, there was no evidence suggesting that helicopters flying at four hundred feet were so uncommon that a property owner would not be on notice of the possibility.[66] Because helicopters were a commonly available means of observation, the defendant was on notice and assumed the risk that his property could be observed from above by law enforcement.[67]

As suggested by *Riley*, courts often consider a defendant's assumption of risk in determining whether a given technique is a search. If a court finds that a defendant assumed a certain risk, the court will likely find that the technique did not amount to a search. For example, in *United States v. White*, the defendant made incriminating statements to a friend, who happened to be a wired informant transmitting conversations to government agents nearby.[68] The Court held that the defendant could not have had a privacy expectation in his conversation because every time two people converse, each assumes

59. *Id.*
60. *Id.*
61. *Id.* at 445.
62. *Id.* at 448.
63. *Id.*
64. *Id.* at 448, 450.
65. *Id.* at 451.
66. *Id.*
67. *Id.* at 450–51.
68. *White*, 401 U.S. at 746–47.

the risk that the conversation will be repeated to the police.[69] In this case, White knowingly exposed to the public what he should have kept private.[70]

The Supreme Court's reasoning in *Dow Chemical Co. v. United States*[71] illustrates how all four factors are applied to determine if there was a reasonable expectation of privacy. In *Dow Chemical*, the Environmental Protection Agency took aerial photographs of the Dow chemical plant using an expensive but commercially available camera commonly used in mapmaking.[72] Because of this commercial availability and the fact that the pictures did not reveal "intimate details"—that is, information that could only be gained by trespassory invasion—the Court held that the action was not a search within the meaning of the Fourth Amendment.[73] However, if the chemical plant had been near houses rather than in an industrial area, or if the technology was sophisticated surveillance equipment not available to the public, such as satellite technology, a warrant may have been required.[74]

These cases illustrate situations where courts have determined that specific investigative techniques were not searches because the defendant had no reasonable expectation of privacy in regard to the item being searched. The Court's findings were based on such factors as whether the technique was merely sense-enhancing, whether it was available to the general public, whether the defendant assumed the risk of exposure, and whether there was any invasion into a constitutionally protected area. In addition to this type of expectation of privacy analysis, there is another line of cases where courts find that certain techniques are not searches. In contrast, however, this line of cases finds no search because of the limited nature of the search itself, not for lack of a reasonable expectation of privacy in the item being searched.

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69. *Id.* at 752.

70. *See also* Smith v. Maryland, 442 U.S. 735 (1979) (no legitimate expectation of privacy with respect to numbers dialed on one's telephone because the information is in the hands of the phone company); United States v. Miller, 425 U.S. 435 (1976) (no legitimate expectation of privacy in certain banking records because customer has assumed the risk of disclosure by providing the information to a third party).

71. *Dow Chem.*, 476 U.S. at 227.

72. *Id.* at 229.

73. *Id.* at 238.

74. *Id.*

B. When Courts Find "No Search" Because of the Limited Nature of the Intrusion

In contrast to the factors generally considered, as described above, a small number of cases have turned on examining the nature of the intrusion itself in order to determine whether there is an expectation of privacy. The primary example of the "limited-nature" application is the canine drug sniff. In *United States v. Place*, the Court held that while a person has a protected privacy interest in the contents of personal baggage at an airport, a sniff test is not a search because the technique is "much less intrusive than a typical search" (the bag need not be opened) and it reveals only a single objective (contraband items).[75] The Court said that this investigative technique was *sui generis*—one of a kind—because of these unique factors.[76]

Apparently the technique was not so *sui generis* as the Court believed, because the same rationale was applied only a year later to a chemical field test technique. In *United States v. Jacobsen*, the Court found that a chemical field test performed by a federal agent to detect cocaine did not constitute a search because it produced limited information by means of a limited intrusion.[77] It is worth noting that in both *Place* and *Jacobsen*, law enforcement officers had a reasonable suspicion that the defendants were involved in wrongdoing; these were not random drug sniffs or testing.[78] In *Jacobsen*, the Court emphasized that the chemical field test did not infringe on any constitutionally protected privacy interest because the subjects were engaged in illegal activity; thus, any legitimate privacy interest the defendants had was frustrated by their wrongful private conduct.[79] However, the Court has not generally followed this rationale because if a person had no privacy interest in illegal activity, then the Fourth Amendment would be rendered meaningless.[80]

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

76. *Id.*

77. United States v. Jacobsen, 466 U.S. 109, 122–24 (1984).

78. In *Place*, the defendant's behavior in the airport had aroused suspicion, and his identification did not check out as accurate. *Place*, 462 U.S. at 698. In *Jacobsen*, a package containing a duct-taped tube with plastic bags inside that had a white powder residue was damaged by Federal Express, a private actor, and opened by them pursuant to their private insurance claims policy. Once the Federal Express supervisor saw what was inside, he called in the Drug Enforcement Agency and told them what was in the box. *Jacobsen*, 466 U.S. at 111.

79. *Jacobsen*, 466 U.S. at 126.

80. Logically, the Fourth Amendment must still apply to searches for illegal contraband or illegal activity. If it did not, then a police search for, say, illegal drugs would never have to comply with reasonableness protections established by the Constitution. In other words, if illegal activity was not protected, then the fruits of the search would justify its legality. The Supreme Court has expressly rejected this notion in what is known as the "fruit of the poisonous tree"

As *Kyllo* demonstrates, the Fourth Amendment protects privacy interests regardless of the legality of the behavior under investigation.[81] The next sections look closely at the *Kyllo* decision and the *Place* and *Jacobsen* decisions to determine why the *Kyllo* Court did not apply the limited-nature analysis found in *Place*, despite many reasons why it might have, and whether this choice requires a reconsideration of whether a canine sniff is a search.

IV. THERMAL IMAGING: *KYLLO V. UNITED STATES*

A. *The* Kyllo *Facts*

In 1991, federal agents received information from an informant that Danny Lee Kyllo was growing marijuana in his unit of a triplex in Florence, Oregon.[82] At 3:20 a.m. on January 16, 1992, law enforcement officers sat in their car across the street from Kyllo's home and scanned the unit for a few minutes with an Agema Thermovision 210.[83] This thermal imager detects infrared radiation that is invisible to the naked eye but is emitted by virtually all objects.[84] Though the imager would now be considered unsophisticated, at that time it was cutting-edge technology and not available to the general public.[85] The imager converts radiation into images based on relative warmth—black is cool, white is hot, and shades of gray indicate gradations of warmth.[86]

From the heat distribution across the triplex revealed by the scan, the agents concluded that Kyllo was using high-intensity halide lamps inside his home, a use that is consistent with a marijuana-growing operation.[87] Based on informants' tips, utility bills, and the thermal imaging data, a federal magistrate judge issued a warrant authorizing a search of Kyllo's home.[88]

B. *The Lower Courts' Rationales and Holdings*

The trial court held that the warrantless use of the thermal imager on Kyllo's home did not violate the Fourth Amendment be-

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doctrine. *See, e.g.*, Byars v. United States, 273 U.S. 28, 29 (1927) (stating that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.").

81. Mr. Kyllo was growing marijuana inside his home, which is, of course, illegal.

82. *Kyllo*, 533 U.S. at 29–30.

83. *Id.*

84. *Id.* at 29.

85. *Id.* at 36, 40.

86. *Id.* at 29–30.

87. *Id.* at 30.

88. *Id.* at 30.

cause no intimate details of his home were observed, and there was no actual intrusion upon the privacy of the people inside the house.[89] Therefore, the trial court reasoned, the use of the thermal imager was not a search.[90]

After a tortuous series of rulings and remands,[91] the Ninth Circuit affirmed the lower court's finding that thermal imaging use was not a search.[92] Applying the subjective prong of the *Katz* privacy test, the court found that, while moving the grow operation indoors might indicate Kyllo's expectation of privacy, he did nothing to conceal the heat radiating from his roof and walls.[93] Kyllo was not trying to keep the information private, and the court found that this lack of concern indicated that he had no subjective expectation of privacy in the waste heat.[94]

Next, under the objective prong, the court found that there was no objectively reasonable expectation of privacy because the device revealed only "hot spots" on the roof and walls rather than any intimate details of the home.[95] It is interesting to note that the court analogized the thermal imager to a drug-sniffing dog, saying that "[t]he Agema 210 scan simply indicated that seemingly anomalous waste heat was radiating from the outside surface of the home, much like a trained police dog would be used to indicate that an object was emitting the odor of illicit drugs."[96]

C. The Supreme Court's Rationale and Holding

The Supreme Court, in a decision written by Justice Scalia and joined by Justices Souter, Thomas, Ginsburg, and Breyer, disagreed with the Ninth Circuit's analysis. Rather than consider the limited-nature factors used for dog sniffs, the Court considered the four factors that have traditionally been used to determine the expectation of privacy in a given situation.

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89. United States v. Kyllo, 809 F. Supp. 787, 792 (D. Or. 1992).

90. *Id.*

91. The procedural history of this case was long and involved, spanning from the initial trial court decision in 1992 until the Supreme Court reversal in 2001. The history is as follows: United States v. Kyllo, 809 F. Supp. 787 (D. Or. 1992); *aff'd in part, remanded in part*, 26 F.3d 134 (9th Cir. 1994); *opinion superseded*, 26 F.3d 526 (9th Cir. 1994); *on remand*, No. CR 92-51-FR, 1996 WL 125594 (D. Or. Mar. 15, 1996); *on reconsideration*, No. CR 92-51-FR, 1996 WL 571832 (D. Or. Oct. 3, 1996); *rev'd*, 140 F.3d 1249 (9th Cir. 1998); *opinion withdrawn*, 184 F.3d 1059 (9th Cir. 1999); *opinion superseded on rehearing*, 190 F.3d 1041 (9th Cir. 1999); *cert. granted*, 530 U.S. 1305 (2000); *rev'd and remanded*, 533 U.S. 27 (2001).

92. United States v. Kyllo, 190 F.3d 1041, 1046 (9th Cir. 1999).

93. *Id.*

94. *Id.*

95. *Id.* at 1047.

96. *Id.* at 1046.

Focusing on the context of the search, the Court emphasized that the thermal imager was used against a man's home.[97] Consequently, the Court held that "[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[98] Notably, all four factors that are generally evaluated to determine if there is a reasonable expectation of privacy are represented in the *Kyllo* holding. Specifically, the Court held that: 1) the imager was a sense-enhancing device; 2) it was not in public use; 3) it was used against a constitutionally protected area; and 4) it collected information that was not otherwise available without physical intrusion.[99]

The rule adopted in *Kyllo* represents a long view because it encompasses both the relatively unsophisticated thermal imager at issue in this case and the present and future sense-enhancing technologies that may reveal details that cannot otherwise be exposed without physical intrusion.[100] This long view differs from the rule adopted by the Ninth Circuit, which made a point of strictly limiting its decision to the facts at hand.[101]

It is not clear if *Kyllo* would have been decided differently if the device had been pointed at a structure other than a home, though arguably it would have produced the same result. While language in the decision suggests that the fact that the imager was used against Kyllo's home was critical in determining that there was a reasonable expectation of privacy,[102] there is no indication that the Court intended a *heightened* protection of homes to apply when it came to the use of technology. Two reasons support this interpretation.

First, as mentioned above, the *Kyllo* Court considered four factors to determine if there was a reasonable expectation of privacy.[103] Whether the technology was directed at a constitutionally protected area like a home was only one factor weighed among several, and was

97. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001).

98. *Id.* at 40.

99. *See id.* These four factors are extracted from the holding mentioned in the quotation immediately preceding.

100. *Id.* at 36.

101. "While this technology may, in other circumstances, be or become advanced to the point that its use will step over the edge from permissible non-intrusive observation into impermissible warrantless search, we find no violation of the Fourth Amendment on these facts." *Kyllo*, 190 F.3d at 1047.

102. *See Kyllo*, 533 U.S. at 34.

103. As mentioned before, this test is not laid out explicitly in the case, but rather is gleaned from reading the decision as a whole. *See Kyllo*, 533 U.S. at 31–40.

likely not a dispositive one. Remember that in *Florida v. Riley* the Court found no search when police used helicopter surveillance even though the surveillance was on the defendant's curtilage, which has been given the same status as a home.[104] Similarly, in *Smith v. Maryland*, the use of a pen register at the telephone company by police to find out what numbers had been dialed was held to be no search despite the fact that the numbers dialed were on a phone in a private home.[105] In both of these cases, the Court found that the defendant had no subjective expectation of privacy that was objectively reasonable, despite the fact that the object sought was inside a home.

Second, in cases in which the Court has established a heightened standard for homes, there usually has been a physical invasion. For example, even with probable cause, the police must secure an arrest warrant to arrest a felon inside his home (unless there are exigent circumstances), though the same person may be arrested without a warrant if he is contacted outside his home.[106] In *Kyllo*, there was no actual physical invasion of the home. Thus, it is likely that the Court did not intend to establish, in this situation, a heightened protection in homes for sense-enhancing technology similar to the higher protection developed for felony arrests in homes.

D. Implications of the Kyllo *Reasoning*

Kyllo rejects the limited-nature analysis used to review the properties of canine sniffs, as applied by the Ninth Circuit and by other circuits that had previously decided the issue. Instead, after acknowledging that a thermal imager is a sense-enhancing device, the *Kyllo* Court analyzed the facts in light of the remaining three factors mentioned above: (1) the location of the item subjected to the search; (2) the availability of the technology to the general public; and (3) the type of information revealed.

First, in addressing the factor that the use of the thermal imager was against a constitutionally protected area, the Court recognized that a search of a home provides a ready criterion of the "minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."[107] The Court gave great weight to the fact that all people have a subjective expectation of privacy in their homes regardless of the ac-

104. *Riley*, 488 U.S. at 450.

105. 442 U.S. 735, 743–44 (1979).

106. *See* Payton v. New York, 445 U.S. 573 (1980) (the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest); *compare* State v. Smith, 767 So.2d 1 (La. 2000) (extended *Payton* to the defendant's arrest within the curtilage of his home).

107. *Kyllo*, 533 U.S. at 34 (emphasis in original).

tivity that is going on inside.[108] The Court stated, "To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."[109] Therefore, the *context* of the search was a crucial factor in the Court's analysis of the issue; the Court looks far beyond the *mechanics* of the search, which are the focus in the limited-nature analysis.[110] As Justice Harlan explained in his concurring opinion in *Katz*, the context of the search is critical in determining the objective expectation of privacy.[111]

Second, the Court noted that at the time of the search, the thermal-imaging device used by the agents was not commonly available to the general public.[112] Examining this factor is entirely consistent with cases in which the court adopted the assumption of risk argument by applying the *Katz* expectation of privacy analysis.[113] For example, in *Dow Chemical*, the mapmaking camera was available in the public marketplace, and the public assumed the risk of being observed and photographed by it.[114] Because the thermal imager was not commonly available, a person could have a reasonable expectation of privacy regarding the use of it against him or her.

Third, by measuring heat waves emanating from the garage and one wall of a home, the imager revealed information about the interior of the home that could not otherwise have been obtained without physically entering the home.[115] The Court thought it irrelevant whether the details revealed were possibly benign or not "intimate," as described in *Dow Chemical*; inside the home, "*all* details are intimate details."[116] Nor is it relevant that the information requires an inference in order to be meaningful of wrongdoing.[117] According to the Court, law enforcement used the device to obtain *any* information, regardless of whether that information was intimate or even meaningless without inferences.[118]

The Court rejected the argument that there was no search merely because a thermal imager detects only heat waves radiating from the

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108. *Id.*

109. *Id.*

110. See text accompanying notes 75–80.

111. *Katz*, 389 U.S. at 361.

112. *Kyllo*, 533 U.S. at 34.

113. See discussion above of Florida v. Riley and United States v. White in text accompanying notes 61–70.

114. *Dow Chem.*, 476 U.S. at 238.

115. *Kyllo*, 533 U.S. at 34.

116. *Id.* at 37 (emphasis in original).

117. *Id.* at 36.

118. *Id.* at 38–39.

external surfaces of the house and does not see through the walls.[119] This mechanical application of the Fourth Amendment was not accepted in *Katz* (where the same argument was made that an eavesdropping device detected only sound waves bouncing off the exterior of the phone booth) and was rejected again here.[120] In fact, the Court went so far as to say that "[r]eversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home."[121]

By not taking up the issue of whether the defendant took deliberate and affirmative actions to conceal the heat emanations from the suspected area, the *Kyllo* Court rejected the rationales advanced by the lower court and the circuit courts in prior cases concerning thermal imaging. The fact that Danny Lee Kyllo took no steps to conceal the excessive heat waves coming from his home was immaterial to the expectation of privacy analysis under question.

Notably, the Supreme Court never addressed the rationale advanced by the Ninth Circuit that the thermal imager is like the canine sniff because it is a nonintrusive device that reveals limited information, and therefore is not a search. It appears from the silence and the explicit use of the expectation of privacy factors that the limited-nature factors were not relevant to the *Kyllo* Court in determining whether an expectation of privacy existed that was reasonable to society.

Kyllo is an important decision. It applies the contextually based *Katz* expectation of privacy test, utilizing the general four factors rather than the limited-nature factors, to an investigative technique that is completely nonintrusive and reveals only limited information. Because the thermal imager is truly limited in both the amount of intrusiveness and in the information it reveals, the Court could easily have applied the *Place/Jacobsen* rationale, as the lower courts did. If it had done so, it would have likely come to the conclusion that the use of such a device was not a search within the Fourth Amendment; but it did not.

This choice in *Kyllo* provides the necessary basis for overturning over twenty years of jurisprudence holding that a canine sniff is not a search. However, to understand how far the *Kyllo* holding reaches, one must first understand the basis for the Court's holding that a canine sniff is not a search.

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119. *Id.* at 35.
120. *Id.*
121. *Id.* at 35–36.

V. THE CANINE SNIFF: *UNITED STATES V. PLACE*

A. The Place *Facts*

In *United States v. Place*, a suspicious airline passenger's luggage was detained at LaGuardia Airport in New York because of a reasonable belief that the bags contained contraband.[122] The officials took the bag to Kennedy Airport to have it sniffed by a trained dog that reacted positively to one of the two confiscated bags.[123] By the time the sniff test was completed, the bags had been out of the possession of the defendant for over ninety minutes.[124] The Court concluded that ninety minutes was an unreasonable amount of time to detain a piece of luggage for investigation based on reasonable suspicion; therefore, the seizure was unconstitutional.[125] After coming to this conclusion, the Court went on to state, in dicta, that while the defendant did have a subjective expectation of privacy in his luggage, the dog sniff did not rise to the level of a search under the Fourth Amendment because a canine sniff was a limited intrusion to the object being sniffed and was only employed for the single objective of detecting contraband.[126] This proposition has made its way into established jurisprudence despite only being dicta.[127]

B. Criticisms of Place

The Supreme Court's decision in *Place* has been criticized for many reasons. Critics have suggested that the Court's decision was unnecessary because the case turned on the unconstitutional seizure and was made without benefit of briefs or argument from counsel.[128] In his concurring opinion, Justice Blackmun took the majority to task for deciding the dog sniff issue at all.[129] He suggested that, while the Court had adopted one plausible analysis of the issue, an equally plausible analysis is that a dog sniff may be a minimally intrusive search that could be justified in certain circumstances based upon mere rea-

122. *Place*, 462 U.S. at 698–99.

123. *Id.* at 699.

124. *Id.*

125. *Id.* at 706. This conclusion echoed the principles voiced in *Terry v. Ohio*, which established that law enforcement may seize a person or an object for a reasonable amount of time without a warrant where there is a reasonable articulable suspicion that criminal activity is afoot. 392 U.S. 1, 20 (1968).

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

127. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109 (1984); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000).

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

129. *Id.* at 723.

sonable suspicion of criminal activity, as opposed to probable cause.[130] This rationale is based on the principles articulated in *Terry v. Ohio*.[131] Under *Terry*, an officer can seize or search a person or object for a reasonable amount of time without a warrant if there is an articulable suspicion that criminal activity is afoot.[132] Reasonable suspicion does not rise to the level of probable cause and is meant to recognize the realities of law enforcement, necessitating swift action to deal with crime.[133] This narrower finding proposed by Justice Blackman would have the benefit of reducing the likelihood of false alerts by the dog because there is already the suspicion that the subject is carrying contraband, thus protecting the privacy interests of innocent people.[134]

Following the narrower rule and defining a canine sniff as a limited search under *Terry* would allow for the flexibility needed to respect alternative scenarios, thus raising another criticism. *Place* dealt with the sniffing of an object rather than a person. The Court makes no explicit distinction between the two and does not take into consideration the context of the search. However, in his concurring opinion, Justice Brennan reminds the Court that in his *Doe v. Renfrow* dissent, he expressed the view that dog sniffs of people constitute searches, but that sniffs of inanimate objects may lead to a different conclusion.[135] Most would agree that having a dog sniff a person for drugs would be intrusive and would probably subject the individual to some embarrassment, inconvenience, and perhaps fear.[136] Therefore, a more qualified rule regarding dog sniffs would serve several important purposes.

Allowing canine sniffs as investigative techniques free from judicial regulation is too far-reaching and threatens individual liberties. When *Place* was decided, the Court said that the dog sniff rule, which departed from the traditional *Katz* expectation of privacy analysis by focusing only on the limited intrusion of the technique, was valid be-

130. *Id.*

131. *Id.*

132. *Terry*, 392 U.S. at 20–22.

133. *Id.*

134. *Id.*

135. *Place*, 462 U.S. at 720. In *Doe*, a drug-sniffing dog falsely alerted a thirteen-year-old student in a junior high school because she had been playing with her own dog earlier, which was in heat. The student was then forced to submit to a strip search. *See* Doe v. Renfrow, 451 U.S. 1022, 1022–24 (1981) (Brennan, J., dissenting to Court's denial of *certiorari*).

136. One of the justifications the Court gave in *Place* was that the limited disclosure of the technique "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place*, 462 U.S. at 707.

cause the canine sniff was *sui generis*.[137] However, a year later in *Jacobsen*, the Court found yet another technique which fit the *Place* limited-intrusion/single-objective criteria: a chemical field test for cocaine. In their dissenting opinion, Justices Brennan and Marshall feared that the *Place/Jacobsen* rationale would permit law enforcement officers to roam the streets at random with a "canine cocaine connoisseur," alerting the officers to anybody walking down the street carrying cocaine.[138] They went on to say:

> In fact, the Court's analysis is so unbounded that 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. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even 'reasonable suspicion' may very well become notions of the past.[139]

The day dreaded by Brennan and Marshall may well have come without the intervention of *Kyllo*, which sought to create limits upon the "power of technology to shrink the realm of guaranteed privacy."[140]

The *Place* rationale is criticized also because its efficacy depends on the infallibility of the tactic; that is, in order not to invade a person's privacy, the well-trained dog must never falsely alert to a subject without contraband, or the field test must never indicate a false positive for cocaine. In reality, false alerts and false positives do occur, and no investigative tactic is foolproof. In the case of these tactics, when a mistake occurs, serious intrusions on the privacy of individuals could result.[141] For this reason, some argue, drug-sniffing dogs should not be given *carte blanche* in our society.[142]

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137. *Place*, 462 U.S. at 707. The Court admitted that the defendant probably had a reasonable expectation of privacy in his luggage, but that it did not matter given the nature of the search.

138. *Jacobsen*, 466 U.S. at 138.

139. *Id.*

140. *Kyllo*, 533 U.S. at 34.

141. There are many examples in case law that illustrate the serious invasions of privacy that can occur as a result of false alerts. *See, e.g.*, Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (dog alerted to a schoolgirl who had no drugs but had been playing earlier with her dog that was in heat); United States v. $639,558.00 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992)

Finally, the *Place* rule has been criticized because it justifies the imposition on the individual by focusing on the result of the search—illegal contraband. The *Jacobsen* Court, in making a reference back to *Place*, claimed that persons engaging in private illegal activity have relinquished their expectation of privacy with respect to the illegal product.[143] However, this is counter to the basic constitutional principle that what police find as a result of a search cannot play a part in determining whether the search was justified.[144] In other words, the ends do not always justify the means, though the *Place* rule suggests differently where drug-sniffing dogs are concerned.

C. *States' Application of* Place

Individual states have demonstrated some reluctance in accepting without qualification the broad rule of *Place* in regard to their own constitutional challenges to the dog sniff.[145] This may be because in the vast majority of cases, including *Place*, there is already reasonable suspicion before the sniff test is performed; therefore, getting a warrant to perform a sniff test legally is not a hardship to law enforcement.

In addition, states are free to grant greater protection to their citizens through their state constitutions than what is provided in the Federal Constitution.[146] Although about one half of the states have held that dog sniffs do not inherently raise constitutional issues, thus accepting the Supreme Court's rule of no search,[147] many others re-

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(70 to 97 percent of all currency in circulation has traces of cocaine sufficient to alert a dog); State v. Joyce, 885 S.W.2d 751 (Mo. Ct. App. 1994) (trained dog failed to alert to 132 pounds of marijuana in a police car that it walked past on its way to sniff the suspect's car).

142. *See* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246 (1983).

143. *Jacobsen*, 466 U.S. at 123.

144. *See, e.g.*, Byars v. United States, 273 U.S. 28, 29 (1927).

145. See notes 147 and 148 for a list of cases that illustrate states' disagreement over this issue.

146. *See, e.g.*, State v. Pellicci, 580 A.2d 710, 715 (N.H. 1990) ("[O]ur [State] Constitution may be more protective of individual rights than the Federal Constitution.").

147. The following cases illustrating jurisdictions that feel there is no constitutional issue raised by dog sniffs are cited from Pat J. Merriman, *One Dog Finally Has His Day: Canine Searches and Probable Cause After State v. Joyce*, 52 J. MO. B. 136 n.7 (1996): State v. Paredes, 810 P.2d 607 (Ariz. Ct. App. 1991); State v. Bass, 609 So.2d 151 (Fla. Ct. App. 1992); State v. Foster, 433 SE.2d 109 (Ga. Ct. App. 1993); Idaho Dep't of Law Enforcement v. $34,000 U.S. Currency, 121 Idaho 211 (Idaho Ct. App. 1991); State v. Daly, 789 P.2d 1203 (Kan. Ct. App. 1990); State v. Fikes, 616 So.2d 789 (La. Ct. App. 1993); State v. Morrison, 500 N.W.2d 547 (Neb. 1993); State v. McDaniels, 405 S.E.2d 358 (N.C. Ct. App. 1991); State v. Cancel, 607 A.2d 199 (N.J. Super. Ct. App. Div. 1992); State v. Villaneuva, 796 P.2d 252 (N.M. Ct. App. 1992); State v. Riley, 624 N.E.2d 302 (Ohio Ct. App. 1993); State v. Slowikowski, 743 P.2d 1126 (Or. Ct. App. 1987); Walsh v. State, 743 S.W.2d 687 (Tex. Ct. App. 1987); Brown v. Com-

quire that law enforcement demonstrate reasonable suspicion before using a canine.[148] At least one state, moreover, has found as a matter of state constitutional law that a dog sniff is a search regardless of the circumstances.[149] There is certainly no consensus in the states regarding this issue.

The state of Washington, in its tradition of granting more protection to the individual than that stipulated by the U.S. Constitution with regard to the Fourth Amendment,[150] requires an examination of the circumstances before determining whether a dog sniff is a search under Article I, section 7 of the state constitution.[151] The Washington Court of Appeals has stated that "[a]s long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred."[152] This framework appears to be a combination of the limited-nature analysis adopted by the Supreme Court for dog sniffs and four-factored analysis used for other techniques. Nevertheless, the Washington courts are concerned with the context of the sniff.

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monwealth, 421 S.E.2d 877 (Va. Ct. App. 1992); State v. Stanphill, 769 P.2d 861 (Wash. Ct. App. 1989).

148. The Supreme Court of Minnesota, in a case decided since *Kyllo*, has determined that under the Minnesota constitution, while a dog sniff around the exterior of a car in a public place is not a search, an officer must still have reasonable articulable suspicion of drug-related criminal activity in order to lawfully conduct a dog sniff around a car stopped for a routine equipment violation. State v. Wiegand, 645 N.W.2d 125, 134 (Minn. 2002). See also cases cited from Pat J. Merriman, *One Dog Finally Has His Day: Canine Searches and Probable Cause After State v. Joyce*, 52 J. MO. B. 136 n.7 (1996): States requiring reasonable suspicion before using canine: McGahan v. State, 807 P.2d 506 (Alaska Ct. App. 1991); People v. Boylan, 854 P.2d 807 (Colo. 1993); State v. Phaneuf, 597 A.2d 55 (Me. Ct. App. 1991) (dog sniff is not a "search" of a package in Maine); People v. Lynch, 609 N.E.2d 889 (Ill. Ct. App. 1993); State v. Watkins, 515 N.E.2d 1152 (Ind. Ct. App. 1987); In re Montrail M., 589 A.2d 1318 (Md. Ct. App. 1991); People v. Rice, 482 N.W.2d 192 (Mich. Ct. App. 1992); McCray v. State, 486 So.2d 1247 (Miss. 1986); State v. Pellicci, 580 A.2d 710 (N.H. 1990); State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988).

149. *See Pellicci*, 580 A.2d at 716.

150. Washington courts have consistently held that article I, section 7 of the Washington State Constitution provides more protection to the individual than the Fourth Amendment. *See, e.g.*, State v. Young, 123 Wash. 2d 173, 186, 867 P.2d 593 (1994) (under art. I, section 7, police cannot use thermal detection devices in warrantless surveillance of an individual's home); State v. Boland, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (art. I, section 7 protects garbage placed in can on curb outside individual's home, whereas Fourth Amendment does not); State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986) (under art. I, section 7, police cannot search locked containers in vehicles in a search incident to arrest).

151. Charles W. Johnson, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 SEATTLE U. L. REV. 337, 350 (1998).

152. State v. Boyce, 44 Wash. App. 724, 730, 723 P.2d 28 (1986).

D. Long-standing Dissent to the Canine Sniff Rule

As the above discussion illustrates, the *Place* rule is controversial. It rests on a belief that the canine sniff is a unique and flawless investigative technique, so much so that the context of the search is without consequence. The dissents to this belief have been vociferous over the years. For example, in *United States v. Beale* (known as *Beale III*), after the Ninth Circuit majority finally determined that the dog sniff was not a search, Judge Pregerson wrote a scathing dissent:

> I write further mainly to point out that the majority, in telling us that a dog sniff is not a *search*, fails to tell us what it *is* . . . . When 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.[153]

Kyllo is the vehicle that the dissenting parties have been hoping for to reexamine the rule. Is the dog sniff really *sui generis*, or can the same expectation of privacy analysis used in *Kyllo* be applied regardless of the investigative technique in question? The next section examines the similarities and differences between the technology of *Place* and the technology of *Kyllo* to establish that a similar analytical framework can be used in each in regard to whether a search is really a search.

VI. IS A CANINE SNIFF REALLY *SUI GENERIS*? APPLYING THE *KYLLO* FRAMEWORK

A. Similarities of Canine Sniffs and Thermal Imagers

When determining if the *Kyllo* framework can be applied to dog sniffs, one must first consider whether the use of a trained dog is "technology" in the same way as a thermal imager. A drug-sniffing canine falls within the technology category for several reasons. First, much like a thermal imager, a drug-sniffing dog is a law enforcement tool used to reveal information that is generally not accessible to normal human senses.[154] Second, a drug-sniffing canine is carefully

153. United States v. Beale, 736 F.2d 1289, 1292–93 (9th Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984) (emphasis in original).

154. It is well known that dogs have an advanced sense of smell. The dog's heightened sense of smell was recently reported in the news with regard to the potential ability to sniff out types of cancer in humans. One expert stated that a dog's sense of smell is anywhere from 1,000 to 100,000 times stronger than a human's. *See* Amanda Onion, *Dog Doctors: Training Dogs to*

trained by his handler to provide the specific data sought—whether there are specific drugs in a particular location.[155] This is analogous to an engineer designing a tool intended to identify certain data such as the intensity of heat waves emanating from a building. Third, the information that is revealed by either the dog or the thermal imager is meaningless without interpretation by someone else. The dog handler must be trained to control and interpret the dog's signs, and a police officer must be trained to use and interpret the data from the thermal imaging device.[156] Finally, while a well-trained and obedient dog may be generally available to the public, a specially trained and certified police work dog used specifically for sniffing out drugs is arguably only available to law enforcement for that purpose. Similarly, a thermal imager is generally unavailable to the general public.[157] Given these commonalities, it appears that a canine sniff is not so singular as to require its own limited-nature analysis.

The second inquiry into the commonalities between the two "tools" or "devices" is the extent of intrusiveness of the two techniques. Is the dog sniff so much less intrusive than other techniques or devices as to justify its own analysis regardless of context? *Place* found that a dog sniff is substantially less intrusive than other typical searches.[158] However, it is clear that, depending on the circumstances, a dog sniff could be highly intrusive—for example, the sniffing of persons instead of inanimate objects. The *Kyllo* Court, on the other hand, did not even consider intrusiveness as a relevant factor in its privacy analysis. If it had considered it, the Court certainly would have concluded that use of a thermal imager is even less intrusive than a dog sniff, which probably would have led to a final conclusion that the use of the thermal imager was not a search at all.

Detect Prostate Cancer With Their Noses, ABCNEWS.COM (June 11, 2002), *at* http://abcnews.go.com/sections/scitech/DailyNews/dogs020611.html (last visited Oct. 9, 2002).

155. For an idea of the expectations of a trained police work dog, visit the website of the North American Police Work Dog Association *at* http://www.napwda.com (last visited Oct. 9, 2002). Specifically, *see* http://www.napwda.com/bylaws/NAPWDA%20Bylaws%20and%20Cert%20Rules%202002.pdf, pp. 8–29, which list the tests that police work dogs must pass in order to be certified by the national association. One area of certification includes narcotics detection. *See also* http://www.wspca.com/PTRLSTND%204-1-02%20Red.pdf (last visited Oct. 9, 2002) for Washington State's General Performance Standards for police work dogs. The gist of the established certification standards is that the dog and its handler must submit themselves to rigorous training.

156. In *Kyllo*, a National Guardsman was brought in to interpret the data and operate the machine. *Kyllo*, 809 F. Supp at 789.

157. *Kyllo*, 533 U.S. at 34.

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

The final issue to overcome in determining whether the *Kyllo* framework can be applied is whether the information revealed by the investigative technique is unique, warranting a different analysis for dog sniffs. When a trained dog alerts to an object, its handler infers from the action that contraband is within the object of the sniff. When a thermal imager detects certain levels of heat from a building, its operator infers the presence of halide lamps, which indicate a marijuana-growing operation.[159] Both techniques reveal a limited amount of information from which illegal activity is inferred. Therefore, it does not appear that the technique reveals a unique factor requiring differing analytical frameworks for different technologies.

The *Kyllo* framework, which reflects the four factors traditionally evaluated under the *Katz* privacy test, is applicable to dog sniffs given that a trained dog is considered technology. And, the unique factors that supposedly were singular to dog sniffs—the low level of intrusiveness and the limited information revealed—also existed in the technology under question in *Kyllo*. However, not everyone agrees that *Kyllo* should change how a court analyzes canine sniff constitutionality questions. In *State v. Bergmann*, the Iowa Supreme Court found that *Kyllo* does not disturb the twenty years of precedent regarding dog sniffs, especially considering the Court's recent affirmation of the blanket rule in *City of Indianapolis v. Edmond*.[160] The Iowa court found that "a drug sniffing dog is not technology of the type addressed in *Kyllo* to merit a divergence from the national and federal case law developed regarding vehicle dog sniffs."[161]

In contrast to the *Bergmann* court, a more plausible interpretation of *Kyllo* is that it *does* require reconsideration of the blanket rule that dog sniffs are not searches within the meaning of the Fourth Amendment. *Kyllo* provides the perfect opportunity to undo the damage of making a ruling on a sensitive and important area like a potential Fourth Amendment search without benefit of argument or briefs. In light of the broad holding in *Kyllo*, the *Place* rationale no longer holds water.

B. Why the Place *Limited-Nature Rationale Should be Abandoned*

By using the same limited-intrusion, single-objective rationale in *Jacobsen* as was used in *Place*, the Supreme Court undermined its own contention that a dog sniff is unique in the world of police tactics. First, if that rationale had withstood the test of time, it would also

159. *See Kyllo*, 533 U.S. at 30.
160. State v. Bergmann, 633 N.W.2d 328, 334 (Iowa 2001).
161. *Id.*

have been applied in *Kyllo* because the factors that supposedly distinguished the dog sniff and the chemical field test from other investigative techniques were also present in the thermal imager. However, the *Kyllo* Court did not choose to apply the limited-nature analysis or give weight to the analogies put forward by the lower court between the thermal imager and the canine.

Second, there is a general recognition that context—or, as Justice Harlan calls it in *Katz*, "place"[162]—does matter in situations examining the constitutionality of dog sniffs, as is indicated by the states' application of the *Place* rule. Circumstances do exist where a dog sniff would be a search by any standards. For example, if a dog was walked around the outside of someone's home to determine if drugs were inside, under *Kyllo*, this certainly would be considered a search. In that scenario, the trained canine is a law enforcement technique being used to gather information that would not be available without physical intrusion, just like the thermal imaging device.

Third, the Court itself rejected the argument in *Place* and *Jacobsen* that there is no legitimate expectation of privacy regarding the subject of illegal private activity. In *Kyllo*, the Court found that, even though Danny Lee Kyllo engaged in illegal activity, he had a reasonable expectation of privacy inside his home. Moreover, it is against long-standing constitutional principles to base the constitutionality of a search on the result it produces.[163] Therefore, *Kyllo* returns the search analysis to strict "reasonable privacy" expectations regardless of the end product.

Fourth, while some may argue that a dog is not the kind of technology that *Kyllo* intended to address, an even more plausible argument is that a highly trained dog is within *Kyllo*'s scope based not on the physical characteristics of the device itself but instead on what it achieves. *Kyllo* was concerned not with what type or how much information about the interior of the house was revealed by the thermal imager, but rather that the technology provided *any* information that was otherwise imperceptible to the human senses. This, too, is what the drug-sniffing dog accomplishes.

For all of these reasons, *Kyllo* requires that courts analyze dog sniffs under expectation of privacy factor terms, not limited-nature terms. Under the traditional analysis, a court would likely conclude, like Justice Blackmun proposed in his *Place* concurrence, that a dog sniff is a minimally intrusive search that may or may not be reasonable depending on the facts of the situation. The public is entitled to the

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

163. Byars v. United States, 273 U.S. 28, 29 (1927).

protection of the Fourth Amendment for such a potentially intrusive investigative technique.

VII. CONCLUSION

In sum, to determine whether a person has a reasonable expectation of privacy in an object that society recognizes as reasonable, courts generally consider whether the item being sought is located in a constitutionally protected area; whether the device used to seek the item is available to the general public; whether the device is merely sense-enhancing; and whether the information obtained could only have been gathered through trespass without use of the device. In contrast, for certain techniques, like the canine sniff, the courts abandon the issue of whether there is a reasonable expectation of privacy in the item being searched and focus on the intrusiveness of the technique itself. This method of analysis for police tactics threatens our notions of privacy. *Kyllo* is an affirmation and a return to consideration of privacy notions for police tactics that are not intrusive and provide limited information .

The holding in *Kyllo v. United States* is far-reaching, as it was intended to be. As Justice Scalia explains, "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."[164] The holding will affect not only future technologies but perhaps also, as argued above, existing police tactics that are used to provide information that is otherwise imperceptible to the human senses.

Law enforcement investigative tools are becoming more and more sophisticated and represent an increasing implication for personal privacy. Although we may be willing to relinquish some of our personal privacy for the greater good, such as in times of war, in general, privacy is something that must be zealously guarded. While drug-sniffing dogs have not yet been used in a random dragnet fashion against the general public,[165] the potential is there under *Place*. Moreover, under *Place*, such an action may be constitutional because there is no valid consideration of the individual's expectations of privacy.

Kyllo, on the other hand, is a guideline intended to limit the power of technology to invade constitutional guarantees of privacy.

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164. *Kyllo*, 533 U.S. at 36.

165. Courts have considered the issue of dragnet searches for drugs using canines in schools, which raises special constitutional issues. *See, e.g.*, Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982); B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999).

All investigative technologies, regardless of their characteristics, should be subject to an analysis based on these constitutional guarantees of privacy to determine whether they are a search within the meaning of the Fourth Amendment.