B. Criminal Law and Procedure

1. Fourth Amendment — Canine Sniff. — For the Supreme Court, the most wonderful thing about canine sniffs is that they are one of a kind. On the theory that they are unique in both their unobtrusiveness and the limited nature of the information that they reveal, the Court has generally allowed canine sniffs in situations in which traditional searches are forbidden.[1] Last Term, in *Illinois v. Caballes*,[2] the Supreme Court held that police use of a well-trained narcotics-detection dog to sniff the exterior of a car for drugs at a lawful traffic stop was not a search for Fourth Amendment purposes.[3] An unsurprising decision given precedent, the case attempts to resolve a tension between the Court's canine sniff jurisprudence and its decisions involving searches using technological sense-enhancers such as thermal imagers. While canine sniffs have generally escaped Fourth Amendment scrutiny, the use of a technological sense-enhancer is a search and presumptively unreasonable without a warrant, according to *Kyllo v. United States*.[4] For the Court, the key difference is the character of the information revealed: canine sniffs reveal only evidence of wrongdoing, while sense-enhancers currently reveal more than just illegal activity. While this distinction is consistent with the result in *Kyllo*, it is less clear that it is in harmony with that case's spirit and reasoning. *Kyllo* seemed to take an absolutist stand against continued encroachment on privacy in the home through technological advancement; *Caballes* undercuts that absolutism.

On November 12, 1998, Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving 71 miles per hour in a 65 mile-per-hour zone and radioed the police dispatcher to report the stop.[5] Upon hearing the report, Trooper Craig Graham of the Illinois State Police Drug Interdiction Team proceeded to the stop with a narcotics-detection dog, though Gillette had not requested any assistance.[6] When Graham arrived, Gillette was still in the process of writing a warning ticket. Graham walked his dog around Caballes's car, and the dog alerted at the trunk.[7] The officers searched the trunk, found

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[1] *Compare* Bond v. United States, 529 U.S. 334, 338–39 (2000) (forbidding physical manipulation by police of a bag placed in an overhead bin), *with* United States v. Place, 462 U.S. 696, 707 (1983) (holding that a dog sniff of luggage is not a Fourth Amendment search).

[2] 125 S. Ct. 834 (2005).

[3] *Id.* at 838.

[4] 533 U.S. 27, 40 (2001). *Kyllo* did emphasize, however, that the technological device in question was used against a home. *Id.*

[5] People v. Caballes, 802 N.E.2d 202, 203 (Ill. 2003).

[6] *Id.*

[7] *Id.* Prior to Graham's arrival, Gillette had asked for permission to search Caballes's car but had been refused. *Id.*

approximately $250,000 worth of marijuana, and arrested Caballes.[8] At trial, Caballes filed a motion to suppress the seized marijuana and quash the arrest.[9] The trial judge denied the motion, and the Illinois Appellate Court affirmed, holding that the police did not need reasonable articulable suspicion before using the dog sniff and that the stop length had not been excessive.[10] The Illinois Supreme Court reversed,[11] holding that, absent "specific and articulable facts" justifying its use, calling in a canine unit impermissibly broadened the scope of the traffic stop to include a drug investigation.[12]

The Supreme Court vacated and remanded. Writing for the majority, Justice Stevens[13] first considered whether the fruits of the dog sniff were the product of an unconstitutional seizure. Though he indicated that a traffic stop improperly extended in duration to allow for a dog sniff would have been unconstitutional, Justice Stevens accepted the state court's finding that the total duration of the *Caballes* stop was appropriate for the traffic offense.[14]

Justice Stevens then considered whether the dog sniff infringed upon a constitutionally protected privacy interest. He noted that because no one has a legitimate privacy interest in the possession of illegal items, government activity that reveals only possession of contraband is not a search under the Fourth Amendment.[15] Citing *United States v. Place*,[16] which had concluded that a canine sniff of personal luggage at an airport was not subject to Fourth Amendment scrutiny,[17] he noted that the use of narcotics-detection dogs is a procedure that discloses only the presence or absence of contraband.[18] He therefore concluded that a dog sniff at a lawful traffic stop did not constitute an unlawful search.[19]

Justice Souter dissented, arguing that because narcotics-detection dogs are not infallible,[20] the belief that canine sniffs cause no Fourth

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8 *Id.*

9 *Id.*

10 *Id.* at 203–04.

11 *Id.* at 205.

12 *Id.* at 204 (quoting People v. Cox, 782 N.E.2d 275, 278 (Ill. 2002)). Justice Thomas of the Illinois Supreme Court dissented, arguing that U.S. Supreme Court precedent made clear that a canine sniff was not a search, *id.* at 206 (Thomas, J., dissenting), and that the police needed no additional information to conduct the sniff, *id.* at 207.

13 Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer joined the opinion. Chief Justice Rehnquist did not participate.

14 *See Caballes*, 125 S. Ct. at 837.

15 *Id.* at 837–38.

16 462 U.S. 696 (1983).

17 *Id.* at 707.

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

19 *See id.*

20 *See id.* at 839–40 (Souter, J., dissenting) (collecting cases discussing canine sniff accuracy rates).

Amendment injury is mistaken. Since dogs make errors, he reasoned that a canine sniff is little different from any other search of an enclosed area, and that a sniff is "the first step in a process that may disclose 'intimate details' without revealing contraband."[21] Accordingly treating the canine sniff like any other search, and following the principles of *Terry v. Ohio*,[22] Justice Souter argued that the sniff was unrelated to the purposes of the stop and therefore constituted a Fourth Amendment violation.[23] He concluded by noting that the majority had reserved judgment on sniffs more intrusive than simply walking a dog around a stopped car; Justice Souter therefore argued that *Caballes* did not necessarily grant authority for suspicionless dog sniffs of parked cars and pedestrians, though he recognized that such authority seemed to be a logical result of the Court's reasoning.[24]

Justice Ginsburg also dissented.[25] Working from *Terry*'s requirement that conduct at investigatory stops must be "reasonably related in *scope* to the circumstances which justified the interference in the first place,"[26] she agreed with the Illinois Supreme Court that the canine sniff impermissibly broadened the traffic stop into a drug investigation.[27] In response to the majority's holding that dog sniffs disturb no legitimate privacy expectation, Justice Ginsburg rejoined that narcotics-detection dogs are "intimidating animal[s]," and that the insertion of such dogs into traffic stops "changes the character of the encounter."[28] Furthermore, she warned that the majority decision cleared the way for suspicionless dog sweeps of parked cars and cars stopped at traffic lights[29] and undercut Fourth Amendment precedent

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[21] *Id.* at 840. Justice Souter took care to distinguish dog sniffs from the forensic analysis at issue in *United States v. Jacobsen*, 466 U.S. 109 (1984), in which federal agents performed a field test on a white powder to determine if it was cocaine. *See Caballes*, 125 S. Ct. at 842 (Souter, J., dissenting). While the forensic test can identify only a substance the police already possess, a dog sniff is a potentially erroneous building block toward a police search of a previously forbidden area. *Id.*

[22] 392 U.S. 1 (1968).

[23] *Caballes*, 125 S. Ct. at 841 (Souter, J., dissenting). In addressing this concern, the majority opinion noted that the record contained no evidence that drug-detection dogs are inaccurate and that erroneous alerts alone do not reveal legitimate private information. *Id.* at 838 (majority opinion). The resulting search would have been unconstitutional only if the dog sniff were so unreliable that it could not establish probable cause. *Id.*

[24] *Id.* at 842 (Souter, J., dissenting). Justice Souter took pains to reserve judgment on the constitutionality of suspicionless dog sniffs for explosives and other terrorist weapons. *See id.* at 843 n.7.

[25] Justice Souter joined her dissent.

[26] *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting) (quoting *Terry*, 392 U.S. at 20 (emphasis added)) (internal quotation marks omitted).

[27] *See id.*

[28] *Id.*

[29] *Id.* at 845–46.

in other contexts, such as searches of overhead bins in buses or trains.[30]

The Court's decision in *Caballes* is not surprising given precedent.[31] The reasoning of the opinion, however, highlights a tension between the Court's canine sniff jurisprudence and its jurisprudence with respect to the use of sense-enhancing technologies. Although they fulfill much the same function, *Caballes* held that a canine sniff by itself is never a Fourth Amendment search, while *Kyllo* implied that the use of certain technological aids, like a thermal imager, is a Fourth Amendment search.[32] While valid, *Caballes*'s attempt to distinguish the two lines by the amount of information revealed by each marks a retreat from the bright-line rule announced in *Kyllo*.

The *Caballes* opinion is broader than it may first appear. Under *Katz v. United States*,[33] government action constitutes a Fourth Amendment search when it "violates a subjective expectation of privacy that society recognizes as reasonable."[34] Following precedent, the *Caballes* Court identified the dog sniff as revealing "no information other than the location of a substance that no individual has any right

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[30] *Id.* at 846. Like Justice Souter, Justice Ginsburg emphasized that the dog sniff in this case was for drug detection; dogs used to detect explosives would address a more important and immediate threat to public safety and therefore would be allowable under the special needs doctrine. *See id.* at 846–47.

[31] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000); United States v. Place, 462 U.S. 696, 707 (1983). However, neither *Edmond* nor *Place* formally stated that canine sniffs could never be searches. *See* United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985) ("It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search."); Brief for the Respondent at 10, *Caballes*, 125 S. Ct. 834 (2005) (No. 03-923), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/03-923/03-923.mer.resp.pdf. *Caballes* arguably does not change this. *See Caballes*, 125 S. Ct. at 842 (Souter, J., dissenting); Craig M. Bradley, *Court Sniffs at Dog-Search Concerns*, TRIAL, Apr. 2005, at 62, 64. But the vast majority of lower court opinions have permitted warrantless canine sniffs of residences, where one would expect the restrictions against searches to be at their highest. *See, e.g.*, United States v. Tarazon-Silva, 960 F. Supp. 1152, 1162–63 (W.D. Tex. 1997). *But see Thomas*, 757 F.2d at 1368 (finding that a canine sniff at the door of an apartment was a Fourth Amendment search). *See generally* Brian L. Porto, Annotation, *Use of Trained Dog To Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. FED. 399 (2005). Furthermore, many opinions have explicitly indicated that dog sniffs are not Fourth Amendment searches. *See, e.g.*, United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998); United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993).

Additionally, a decision in favor of Caballes would have dramatically restricted the allowable use of narcotics-detection dogs. *See* Brief of Amici Curiae the Illinois Association of Chiefs of Police and the Major Cities Chiefs Association in Support of Petitioner at 7–9, *Caballes*, 125 S. Ct. 834 (No. 03-923), 2004 WL 1530262 (noting the frequent use of dogs at pretextual traffic stops); John F. Decker et al., *Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois*, 36 LOY. U. CHI. L.J. 819, 869 (2005).

[32] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

[33] 389 U.S. 347 (1967).

[34] *Kyllo*, 533 U.S. at 33 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

to possess."[35] However, a dog's nose is not a highly specialized device that picks up only the scent of narcotics. Rather, it is a highly powerful and general device[36] that, if it were attached to a human, would reveal an incredible amount of information.[37] The information revealed, to return to the *Katz* privacy test, would almost certainly include details in which an individual would have a reasonable expectation of privacy. The dog sniff is therefore functionally equivalent to a situation in which a police officer operated a device that displayed, in code, a list of all scents present in the area, but the officer knew only the code word for marijuana.[38] Thus, *Caballes* possibly stands for more than the idea that procedures revealing no information other than the presence or absence of illegal activity are not searches; rather, it indicates that information-gathering procedures are not searches if no information other than the presence or absence of illegal activity is *comprehensible* to the observer.

While the distinction is minor, it is possibly important. A ruling that limited this "no search" exception to procedures that gather information only on the presence or absence of wrongdoing would have been relatively narrow, possibly limited to binary-result chemical tests such as those used to identify a white powder as cocaine.[39] The logic of *Caballes*, in contrast, potentially indicates that the government is constitutionally permitted to gather as much information as it wishes without a warrant so long as the process by which it does so ensures that no private information is exposed in a comprehensible manner to any individual who comes in contact with the data.[40]

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[35] *Caballes*, 125 S. Ct. at 838.

[36] *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 408–09 (1996); *cf. Reed*, 141 F.3d at 646–47 (reporting an instance in which a canine trained to search for either drugs or intruders based on the command given alerted to drugs in the process of a search for intruders).

[37] *See* Bird, *supra* note 36, at 409.

[38] One might argue that the shift from a dog to a technologically assisted human carrying out the sniff is enough to make the two procedures nonequivalent. However, it is difficult to see how this would be the case. A human who does not know which scents are registering on a device is arguably less intrusive than a dog who very well might, and in any event, neither searcher could convey any evidence of knowledge.

Additionally, it could be argued that the procedure at issue here is not the sniff itself, but the officer's response to the alert by the dog. Under this argument, the police officer has gathered no information other than the fact that the dog has alerted, so the dog has acted as a firewall to private information. But it is unclear why a dog would be a better firewall than an indecipherable code. In addition, the question before the Court was not whether the response to the alert was a constitutional issue, but whether the sniff itself was.

[39] *See Caballes*, 125 S. Ct. at 841–42 (Souter, J., dissenting).

[40] This is not necessarily a constitutional problem. *Cf.* United States v. Karo, 468 U.S. 705, 712 (1984) (finding that the transfer of a container containing an unmonitored beeper did not infringe any privacy interest because no information was conveyed). However, government power of this nature might be disconcerting to some, *see id.* at 735 (Stevens, J., concurring in part and dissenting in part) ("I find little comfort in the Court's notion that no invasion of privacy occurs

If dog sniffs were truly unique, this distinction would not have any significance. However, as scholars have previously noted, there are strong similarities between the use of dogs to detect contraband and the use of technological devices to do the same.[41] Jurisprudence on the use of technological aids is much more convoluted than dog sniff jurisprudence,[42] but of particular note is the "firm [and] bright" line established by *Kyllo*: if the "[g]overnment 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.'"[43] Like the thermal imager in *Kyllo*, a trained narcotics-detection dog arguably is a device not in general public use that allows the government to learn details of a closed space that previously would have been unknowable.

Ever since *Kyllo* was announced, courts and scholars have recognized the tension between the *Kyllo* rule and the logic permitting suspicionless dog sniffs.[44] To distinguish the dog sniff of *Caballes* from

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until a listener obtains some significant information by use of the device. . . . A bathtub is a less private area when the plumber is present even if his back is turned."), and may partially underlie Justice Ginsburg's fear of having every traffic stop turn into "an occasion to call in the dogs," *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting). Application of this reasoning implies that, for example, recording a wiretapped phone conversation is not a search if no one listens to the tape, *but see* Amati v. City of Woodstock, 829 F. Supp. 998, 1000–01, 1008 (N.D. Ill. 1993) (arguing that such a scenario did interfere with privacy interests), or that the government can surreptitiously copy an individual's hard drive if no one looks at the files afterwards, *cf.* United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001) (concluding that the downloading and copying of computer files did not implicate Fourth Amendment concerns). It seems strange to suggest that these processes implicate no legitimate privacy expectation. One could argue that this approach to Fourth Amendment review insufficiently protects individuals from eventual harm by leaving the potential for exposure in the hands of the authorities; it might be better to regulate the information gathering instead of the exposure. *See Amati*, 829 F. Supp. at 1008 (rejecting the idea that a conversation recorded but not listened to did not affect privacy interests because "the individual's privacy interests are no longer autonomous"). *But see* Orin S. Kerr, *Rethinking Searches and Seizures in a Digital World*, 119 HARV. L. REV. (forthcoming Dec. 2005) (manuscript at 23–25), *available at* http://ssrn.com/abstract=697541 (concluding that a search is best defined as the process by which data is exposed to human observation).

It should be noted that the scenarios just described, unlike canine sniffs, involve storage of gathered information and that it may be the storage, rather than the data collection, that causes privacy concerns. A closer analogy therefore might be to the police wiretapping a phone line, but destroying the tape before anyone hears it. If, however, *Caballes* is focused on the comprehension of information by humans, then it theoretically leaves the door open for the government action just described.

[41] *See, e.g.*, David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 29–32 (1996); Ric Simmons, *The Two Unanswered Questions of* Illinois v. Caballes*: How To Make the World Safe for Binary Searches*, 80 TUL. L. REV. (forthcoming Winter 2006) (manuscript at 4), *available at* http://ssrn.com/abstract=711183.

[42] *See* Ric Simmons, *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1344–45 (2002).

[43] 533 U.S. 27, 40 (2001).

[44] *See, e.g.*, *id.* at 47–48 (Stevens, J., dissenting); United States v. Richard, No. CRIM. 01-20048-01, 2001 WL 1033421, at *6 n.4 (W.D. La. Aug. 29, 2001); State v. Wiegand, 645 N.W.2d

the thermal imager use *Kyllo* held to be a search, the Court in *Caballes*, as it did in *Place*, focused on the limited information that the dog sniff could provide.[45] Because the search was effectively "binary," that is, it could reveal only the presence of contraband,[46] the sniff did not infringe upon any legitimate expectation of privacy and was therefore not a search for Fourth Amendment purposes.[47] The *Caballes* Court emphasized that the thermal imager in *Kyllo*, in contrast, could also detect lawful activity.[48]

The *Caballes* opinion's emphasis on the *Kyllo* thermal imager's ability to detect both lawful and unlawful activity strongly suggests that the Court would treat the use of technological aids that, like a dog sniff, detect only illegal activity as nonsearches for Fourth Amendment purposes.[49] Given technological progress, it is easily conceivable that government agents will have the capability to conduct such binary searches on a wide variety of activities in the future.[50] *Caballes* suggests that such searches will be permissible without any justification.[51]

Although the *Caballes* reasoning is perfectly reconcilable with *Kyllo*'s holding, it arguably conflicts with *Kyllo*'s spirit. *Caballes* suggests that if private information collected is carefully insulated from exposure, the act of gathering is not a constitutional event. As the *Kyllo* thermal imager simultaneously gathered and exposed the information it received, *Kyllo*'s facts left an opening that *Caballes* fills in a

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125, 130 (Minn. 2002); Tracey Maclin, Katz, Kyllo, *and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 101–06 (2002).

[45] While the Court could have distinguished *Kyllo* from *Caballes* by noting that the dog sniff was directed against a car and not a private home, and petitioner briefed both arguments, *see* Reply Brief for the Petitioner at 5, *Caballes*, 125 S. Ct. 834 (2005) (No. 03-923), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/03-923/03-923.mer.pet.rep.pdf; *see also* Transcript of Oral Argument at 16–17, *Caballes*, 125 S. Ct. 834 (2005) (No. 03-923), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-923.pdf (noting that the argument that a dog sniff is not a Fourth Amendment search indicates that sniffs may be used on houses as well), the opinion focused solely on the binary nature of the search.

[46] The first case to classify a dog sniff as a binary search was *United States v. Colyer*, 878 F.2d 469, 474 (D.C. Cir. 1989). *See* Simmons, *supra* note 41 (manuscript at 6 n.21).

[47] *Caballes*, 125 S. Ct. at 837–38.

[48] *See id.* at 838. Scholars had predicted the Court's method of harmonization. *See* Maclin, *supra* note 44, at 105 n.242.

[49] Justice Scalia hinted at oral argument that this might be the case. *See* Transcript of Oral Argument, *supra* note 45, at 9.

[50] *See* Simmons, *supra* note 41 (manuscript at 18–19).

[51] Justice Souter correctly noted that *Caballes* does not explicitly state that dog sniffs will always get a "free pass" under the Fourth Amendment. *Caballes*, 125 S. Ct. at 842 (Souter, J., dissenting). *But see id.* at 845–46 (Ginsburg, J., dissenting) ("Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots."). Even using Justice Souter's narrow reading of the *Caballes* decision, however, it appears clear that the decision allows police officers to use binary search devices during legitimate traffic stops.

manner perfectly consistent with *Kyllo*.[52] Yet the tone of *Kyllo* seems absolutist, drawing a line that is "not only firm but also bright,"[53] and shows concern about the implications of future technological developments on privacy.[54] Furthermore, the opinion suggests that the act of gathering the information is the constitutional event, not how the information is used afterwards.[55] *Caballes*'s emphasis on exposure as determinative of constitutionality thus seems contrary to *Kyllo*.[56]

However, even if the binary search doctrine of *Caballes* is not perfectly in keeping with the spirit of *Kyllo*, its deviance is minor. Although *Caballes* might allow the government to gather private information that it previously could not have acquired, the damage to law-abiding citizens is arguably negligible since no person actually becomes privy to the information.[57] While Justice Ginsburg's nightmare scenario of suspicionless dog searches of parked cars is a theoretical possibility after *Caballes*, it is unclear why such power is problematic.[58] To the extent that Justice Ginsburg's argument revolves around the idea that injecting a dog into the process "changes the character of the encounter between the police and the motorist," making it more adver-

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[52] *See* Kerr, *supra* note 40 (manuscript at 25). Professor Kerr argues that because heat radiation is always being emitted, "it must be the transformation of the existing signal into a form that communicates information to a person that constitutes the search," *id.*, and that *Kyllo* therefore supports an "exposure" theory on searches. However, it is also possible that the mere act of transforming the signal, even if the form into which it is converted means nothing, constitutes the search.

[53] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[54] *See id.*; *see also* Michele M. Jochner, *Privacy Versus Cyber-Age Police Investigation — The Fourth Amendment in Flux*, 90 ILL. B.J. 70, 75 (2002) (suggesting that *Kyllo*'s language indicates that the Court intended the scope of the ruling to be broad); *cf.* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 802–04 (2004) (noting that *Kyllo* was in line with the belief that the Fourth Amendment should be interpreted broadly with respect to new technologies).

[55] *See Kyllo*, 533 U.S. at 37 n.4 (noting that it was the high-tech measurement of emanations from the house, and not the use of such emanations to infer that marijuana was present in the house, that was the search).

[56] *Cf.* Harris, *supra* note 41, at 41–43 (noting that a binary search's focus on what is revealed indicates that "the contraband nature of the evidence could justify any search necessary to find it, precisely the opposite of the well-established rule" that the evidence a search reveals plays no part in determining the search's constitutionality). On the other hand, one might resolve this tension by fully adopting an exposure model: while the use of a thermal scanner to gather private information would not be a search, the information's later exposure to an observer would be.

[57] *Cf.* United States v. Karo, 468 U.S. 705, 712 (1984) ("[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment."). However, while one is clearly harmed when a legitimate secret is revealed to another person, one might also be subjectively harmed if the secret merely left the exclusive control of the individual, even if nothing were done with the data.

[58] Given limited police funding, such searches would probably be limited. *See* Brief of Amici Curiae the Illinois Association of Chiefs of Police and the Major Cities Chiefs Association in Support of Petitioner, *supra* note 31, at 12.

sarial,[59] that argument goes only to the appearance of the search "device" and not to the idea of binary searches in general.[60] It might be that the mere ability of a police officer to check for contraband at any time is problematic in that it raises the stakes of any encounter with the police: even the most minor confrontation carries the risk of arrest for possession of contraband. However, increased fear of the police, while perhaps not good public policy, is probably not an issue that the test of "expectation[s] of privacy . . . that society is prepared to recognize as 'reasonable'"[61] is meant to address directly.[62]

Alternatively, the underlying issue may be decreasing privacy over time. Before dogs could be trained to detect drugs, explosives, or other forms of contraband, all citizens arguably had more privacy than they do now, as searches to detect such contraband inherently implicated other, legitimate, privacy interests.[63] With the adoption of binary search theory, developments that allow dogs to be trained to detect new objects, or that allow mechanical devices to become more sensitive and accurate, cause the individual's sphere of privacy — that is, the ability of an individual to remain completely anonymous to the world if he so chooses — to contract. Regardless of whether the searched individual is engaged in illegal activity, subjecting him to a binary search conveys information — that he is or is not carrying contraband — that previously could have remained hidden within a zone of privacy.[64] But such an argument implicitly assumes a legitimate privacy interest in not revealing any information — including whether or not one is law-abiding — to the government.[65] While this is a

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[59] *Caballes*, 125 S. Ct. at 845 (Ginsburg, J., dissenting); *see also* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 740–41 (1993) (suggesting that the public believes a dog sniff to be about as intrusive as a *Terry* frisk).

[60] For example, the police could reduce the intimidating effect of the search by using smaller dogs, *see* Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1154 (1992); *see also* Simmons, *supra* note 41 (manuscript at 22 n.99), and, over time, replacing the dog with a near invisible technological device — it is, after all, impossible for drivers to be intimidated by a procedure of which they are unaware.

[61] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[62] On the other hand, Fourth Amendment jurisprudence clearly has an effect on the public's relationship with the police. For example, officers allowed to engage in *Terry* frisks probably trigger more fear than officers who can only ask questions.

[63] *Cf., e.g.*, Bond v. United States, 529 U.S. 334, 338–39 (2000) (forbidding physical manipulation by police of a passenger's bag placed in an overhead bin).

[64] *See Caballes*, 125 S. Ct. at 846 (Ginsburg, J., dissenting) (noting that canine drug sniffs could permissibly replace currently unacceptable physical manipulations of luggage); Harris, *supra* note 41, at 44–45.

[65] *See* James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 388–91 (2002).

slightly different interest from the correctly denied[66] interest in concealing wrongdoing, similar logic would seem to apply. If a person has no legitimate interest in concealing wrongdoing, he should also have no legitimate interest in withholding information about whether or not there was any wrongdoing in the first place.[67]

The *Caballes* Court's logic assumes that the binary search device, be it a dog or a technological device, is accurate. As Justice Souter noted, each time the device provides a false positive, it can lead to a search that will reveal information that society would normally treat as private.[68] The *Caballes* majority's response[69] sets a relatively low standard for binary search accuracy: such searches will not trigger Fourth Amendment protection as long as the process is sufficiently accurate to establish probable cause.[70] Although this standard may seem too low,[71] any intuitive discomfort more likely stems from the probable cause standard than from the dog sniff itself.[72]

The binary search doctrine of *Place* and *Caballes* fits somewhat uncomfortably with *Kyllo*. *Kyllo* confirmed that if information is gathered constitutionally, reasonable inferences made from that data are inherently constitutional. *Caballes* indicates that if the process of inferring reveals only information that is not considered private (particularly evidence of illegal activity), then there are no constitutional limits on the scope of data that can be collected. These two holdings are not mutually exclusive, but neither do they sit perfectly well with one another in spirit. In *Kyllo*, the Court established a bright-line rule to regulate searches of the home using advanced technology. The *Caballes* Court could have distinguished *Kyllo* by emphasizing that *Kyllo* dealt with homes while *Caballes* dealt with cars, or by truly considering dog sniffs as one of a kind and not analogous to technological ad-

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66 Some scholars have argued otherwise. *See, e.g.*, *id.* at 388–89; Harris, *supra* note 41, at 40–41.

67 *Cf.* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2458–59 (2004) (holding that a statutory obligation to disclose one's name during an investigative stop does not violate the Fourth Amendment).

68 *Caballes*, 125 S. Ct. at 840 (Souter, J., dissenting).

69 *See supra* note 23.

70 *See* Simmons, *supra* note 42 (manuscript at 41–42). On the other hand, if one extends Justice Souter's argument to its logical conclusion, only absolutely accurate binary searches would be allowed without a warrant — an impossible standard in practice. *Id.* (manuscript at 44).

71 *See, e.g.*, *id.* (manuscript at 41–42).

72 The opinions therefore stem from differing conceptions of when police actions should be treated separately and when they should be treated as a whole. Which conception is more in line with doctrine is unclear. It cannot be the case that any police action that eventually leads to a search becomes part of the search itself, because that proposition would suggest that any activity intended to obtain probable cause, such as pretextual traffic stops, would be impermissible without a warrant. However, a rule that prohibits police action that itself obtains information beyond the scope of conventionally enhanced senses in order to establish probable cause for a traditional search appears to be in line with *Kyllo*.

vances. But in a surprise to no one, it chose not to do so, instead emphasizing the "binary" nature of the sniff. *Caballes*'s reinforcement of binary search doctrine suggests that the *Kyllo* rule, while still a bright line, is more conditional than *Kyllo*'s rhetoric implied.

2. Sixth Amendment — Federal Sentencing Guidelines. — Two decades ago, the Sentencing Reform Act of 1984[1] (SRA) ushered in an era of guided, determinate sentencing.[2] Alarmed by evidence of widespread sentencing disparities and undue leniency, Congress created the United States Sentencing Commission (USSC) to develop the Federal Sentencing Guidelines,[3] a set of mandatory sentencing ranges designed to cabin judicial discretion and promote uniform sentencing.[4] Since then, determinate sentencing has become firmly entrenched at both the federal and state levels.[5] With its 2000 decision in *Apprendi v. New Jersey*,[6] however, the Supreme Court called into question the constitutionality of determinate sentencing schemes.[7] Four years later, in *Blakely v. Washington*,[8] the Court cast still more doubt on their viability, striking down Washington's sentencing guidelines on Sixth Amendment grounds.[9] That decision sparked turmoil in the states[10] and led many to predict the demise of the Federal Sentencing Guidelines.[11]

Last Term, in *United States v. Booker*,[12] the Court confirmed these predictions, holding that the Guidelines violate the Sixth Amendment insofar as they require judges to increase sentences above the statutory maximum based on facts, other than prior convictions, not found by a

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[1] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[2] *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381–86 (2005) (defining guided determinate sentencing systems as those that operate under sentencing guidelines and that do not employ discretionary parole release).

[3] *See* Craig Green, Booker *and* Fanfan*: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 396 (2005).

[4] *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1323–24 (2005) (discussing the SRA's legislative history).

[5] *See id.* at 1317–18.

[6] 530 U.S. 466 (2000).

[7] The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

[8] 124 S. Ct. 2531 (2004).

[9] The Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 2537 (citing Ring v. Arizona, 536 U.S. 584, 602 (2002)).

[10] For a thorough review of state responses to *Blakely*, see An Overview of *Blakely* in the States, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/07/another_view_of.html (July 21, 2005, 9:04 EST).

[11] *See The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 334 (2004).

[12] 125 S. Ct. 738 (2005).