

Abstract: The use of dogs to sniff for drugs in public schools has given rise to controversy. Circuit courts have divided dog sniffing into two categories holding that a “search” occurs under the Fourth Amendment when the dog sniffs an individual, but not when the dog sniffs students’ possessions. Courts must also decide whether a dog alert to a student or possession creates a reasonable suspicion to further search the student or possession. This Paper analyzes the future of dog sniffs in the public schools after the recent Supreme Court dog sniff decision in *Illinois v. Caballes*.

Who Let the Dogs In: Canine Drug Detection in Public Schools After *Illinois v. Caballes*

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I. Introduction

Sam sits in class and awaits the arrival of his instructor for another exciting hour of college algebra. The person entering the room, however, is not his teacher. It is the assistant principal of the school, together with a uniformed police officer and a large German shepherd. Sam, frightened of dogs since an early age, immediately stiffens. The assistant principal instructs everyone to stand up and file out of the classroom. This makes Sam even more nervous as he will have to walk directly past the dog. Sam overcomes his fear and follows the other students into the hallway, but as he passes the dog, the dog starts to yip and scratch at the ground. The officer and assistant principal take note, but say nothing to Sam.

After the students have exited the classroom, they see the officer leading the dog up and down each row of desks and letting the dog sniff each student’s belongings. When the dog exhibits the same excitement it did when Sam walked

by, the assistant principal picks up the item the dog is sniffing and searches it thoroughly. After all the belongings in the room have been sniffed, the assistant principal, police officer, and dog take their positions in the front of the room and again ask the students to file past and return to their desks. As Sam again nervously walks by the dog, the dog shows the same signs of excitement as it had when Sam left the room. The assistant principal asks Sam to come to his office, where Sam is subjected to a thorough search.

This Paper discusses the constitutional rights of students like Sam when school administrators use random dog sniffing to control drugs in the public schools. When school administrators use dogs to further their compelling interest in preventing drug use in the schools, the investigation implicates the students' Fourth Amendment rights. The question becomes, what protection does the Fourth Amendment provide?

Did a "search" occur when the dog sniffed Sam? Did a search occur when the dog sniffed the students' belongings? If the sniffing was a search, was it reasonable to do randomly during college algebra? Did the fact that the dog alerted to Sam and some student belongings justify the assistant principal in further searching Sam's person and those belongings?

This Paper deals with these questions in light of the Supreme Court's recent dog sniff case, *Illinois v. Caballes*.¹ In Part II, the Paper lays out the jurisprudence of the Fourth Amendment in public schools and the use of drug

¹ 125 S.Ct. 834, 837 (2005).

detection dogs by law enforcement.² In part III.A, this Paper discusses the constitutionality of dog sniffs on lockers, belongings, and cars in school parking lots after *Caballes*.³ In part III.B, this Paper discusses the sniffing of individual students as searches after *Caballes*.⁴ In part III.C, this Paper discusses the level of suspicion that should attach to a person after a dog sniff indicates contraband, and whether the indication of contraband by the dog satisfies the Fourth Amendment requirements for a further search in the school environment.⁵

II. Background

The Fourth Amendment protects individuals “in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁶ While this constitutional protection bars a significant amount of government activity, protection only arises when the government activity can be classified as a search or a seizure.⁷ As laid out in *Katz v. United States*,⁸ a court decides whether a search has occurred based on two distinct inquiries.⁸ The Court requires “first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ”⁹ If an action is considered a search, the government must comply

² See *infra* notes 6 through 92 and accompanying text.

³ See *infra* notes 94 through 97 and accompanying text.

⁴ See *infra* notes 98 through 106 and accompanying text.

⁵ See *infra* notes 107 through 110 and accompanying text.

⁶ U.S. CONST. amend. IV.

⁷ *Illinois v. Caballes*, 125 S.Ct. 834, 837 (2005).

⁸ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

⁹ *Id.* (Harlan, J. concurring). The Court has adopted Justice Harlan’s concurrence as the correct statement of the Fourth Amendment “search” inquiry. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

with the warrant and probable cause requirements of the Fourth Amendment.¹⁰

For the purposes of this Paper the development of Fourth Amendment jurisprudence in two contexts is important. First, this Paper discusses the Fourth Amendment as applied in public schools; second, the discussion turns to the Fourth Amendment as applied to canine drug sniffs.

A. The Fourth Amendment in Public Schools

1. Supreme Court School Search Precedent

The Supreme Court has noted that “[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate.”¹¹ In *New Jersey v. T.L.O.* the Court held that among the constitutional rights students retain in public schools is the Fourth Amendment right to be free from unreasonable searches and seizures.¹² In finding that the Fourth Amendment applies in public schools, the Court answered two constitutionally significant questions. First, the Court decided whether school administrators are representatives of the state to whose actions the Fourth Amendment applies. Second, the Court decided whether a student retains any legitimate expectation of privacy in school sufficient to satisfy the *Katz* test. The Court answered both questions in the affirmative.

The Court first rejected the state’s argument that the Fourth Amendment

¹⁰ U.S. CONST. amend. IV, see *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 476 (5th Cir. 1982) (“If an activity is not a search . . . , then the government enjoys a virtual carte blanche to do as it pleases.”).

¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹² *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

did not apply because school officials stand *in loco parentis*; “school officials act as representatives of the State, not merely as surrogates for the parents.”¹³ The State of New Jersey’s argument that students could have no reasonable expectation of privacy in personal property brought to school was also rejected.¹⁴ The Court then balanced the individual’s rights with the state’s interests to determine the level of Fourth Amendment protection.¹⁵ On one side of the scales were “the individual’s legitimate expectations of privacy and personal security;”¹⁶ on the other side was the “substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”¹⁷ Because of the school’s interest, the Court stated “some easing of the restrictions to which searches by public authorities are ordinarily subject” was required.¹⁸

One way the Court eased application of the Fourth Amendment in the school setting was to eliminate the warrant requirement.¹⁹ Also, the threshold suspicion level to justify a search in school was dropped from “probable cause” to “reasonable suspicion.”²⁰ To satisfy reasonable suspicion, the action must be

¹³ *Id.* at 336.

¹⁴ “[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.” *Id.* at 339.

¹⁵ The Fourth Amendment protects individuals from *unreasonable* searches and seizures. “[W]hat is reasonable depends on the context within which a search takes place.” *Id.* at 337.

¹⁶ *Id.*

¹⁷ *Id.* at 339; see also MICHAEL W. LAMORTE, *SCHOOL LAW: CASES AND CONCEPTS*, 131 (5th ed. 1996) (noting additional interest in maintaining safe environment for students).

¹⁸ *Id.* at 340.

¹⁹ *Id.* The Court noted a warrant requirement would unduly interfere with school administration, who would have to obtain a warrant for any investigation into a rules infraction. *Id.*

²⁰ *Id.* at 340-41.

“justified at its inception,” and be “permissible in scope,” that is, “reasonably related in scope to the circumstances which justified the interference in the first place.”²¹ A search in school is justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”²² A search is permissible in scope when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”²³ While the Court answered several questions of constitutional importance, it left many other questions unanswered.²⁴

The Court next confronted questions about the Fourth Amendment in public schools in *Vernonia School District 47J v. Acton*.²⁵ Faced with an increasing drug problem caused by student athletes—“leaders of the drug culture”—the Vernonia School District instituted a drug-testing program, randomly screening participants in interscholastic athletics.²⁶ A seventh-grader wishing to play football was denied participation because he and his parents

²¹ *Id.* at 341 (internal quotations omitted).

²² *Id.*

²³ *Id.*

²⁴ For example, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies, *Id.* at 338 n.5; the standard for searching such a storage area, *Id.*; the level of Fourth Amendment protection when school officials are acting at the behest of law enforcement, *Id.* at 342 n.7; and whether individualized suspicion is an essential element of the reasonableness standard, *Id.* at 342 n.8. *But see* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random suspicionless drug testing for students who participate in athletic programs); *Board of Education v. Earls*, 536 U.S. 822 (2002) (holding policy of drug testing *all* students participating in extracurricular activity did not constitute unreasonable search or seizure).

²⁵ 515 U.S. 646 (1995).

²⁶ *Id.* at 649-50.

refused to agree to the testing program.²⁷ They filed suit, and the United States Court of Appeals for the Ninth Circuit agreed that the testing policy violated the child's Fourth Amendment rights.²⁸

The Supreme Court reversed, taking into account “the decreased expectation of privacy” student athletes have, “the relative unobtrusiveness” of the urine test used, “and the severity of the need” to eliminate drug use in schools.²⁹ Justice Scalia cautioned that such searching without individualized suspicion should not be assumed “to readily pass constitutional muster in other contexts.”³⁰ The suspicionless searches were tolerable in light of the “most significant element . . . discussed: that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”³¹ Commentators have suggested that this reasoning “breathe[s] new life into what many viewed as the all-but-dead doctrine of *in loco parentis*.”³² Rather than treating the school as a state actor, subject to the full force of the Fourth Amendment, the Court treats the school as a “guardian and tutor” allowed to conduct searches that a “reasonable guardian and tutor might undertake.”³³ The Court reaffirmed *Acton* in *Board of Education*

²⁷ *Id.* at 651.

²⁸ *Id.* at 652. The District Court dismissed the claim, but was reversed by the Ninth Circuit. *Id.*

²⁹ *Id.* at 664. The Court found that the action constituted a search, but that the search was reasonable and thus the protections of the Fourth Amendment did not arise. *Id.* at 664-65.

³⁰ *Id.* at 665.

³¹ *Id.*

³² Anne Profit Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 87 (1996).

³³ *Acton*, 515 U.S. at 665; see Dupre, *supra* note 32, at 59 (visualizing continuum of power school has between treatment solely as parent and treatment solely as state actor); see also KERN

v. Earls,³⁴ holding that drug-testing all participants in any competitive extracurricular activity does not violate the Fourth Amendment.³⁵

Acton and *Earls* do not necessarily open the door to all suspicionless searches in the school setting. The individuals tested were all voluntary participants in extracurricular activities.³⁶ Therefore, by a narrow reading the cases allow suspicionless drug testing only of those individuals who volunteer for extracurricular activity and not the student body as a whole.³⁷ Nevertheless, the cases signal a retreat from *T.L.O.*'s already diminished Fourth Amendment protection of students in public schools.³⁸ These cases indicate that the protection of the Fourth Amendment will be almost non-existent when a search is conducted to detect drugs.³⁹

2. Circuit Court School Dog Sniff Precedent

In the early 1980s, three circuit courts of appeals dealt with the use of

ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW*, 372 (4th ed. 1998) (stating importance of whether court characterizes teacher or administrator as parent or police officer).

³⁴ 536 U.S. 822 (2002).

³⁵ *Id.* at 830.

³⁶ *Id.* at 825; *Acton*, 515 U.S. at 648.

³⁷ Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373, 383 (2000). *But see* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 B.Y.U. EDUC. & L.J. 71, 114 (1999) (stating that it is foreseeable that diminished privacy expectation will extend beyond athletics).

³⁸ See Gardner, *supra* note 37, at 374 ("Taken together, [TLO and Acton] can be read to entail a standard requiring no more than subjective good faith on the part of school officials conducting student searches and seizures.").

³⁹ Robert E. Shepard, Jr., *School Searches After T.L.O. and Vernonia School District*, 13-SUM CRIM. JUST. 45, 47 (1998); see Heder, *supra* note 37, at 114 (reasoning that increase in guns and drugs in schools will result in increase of search and seizure power); Taylor Hanson, Note, *Psst! Janie's Got a Gun: Anonymous Tips and Fourth Amendment Search and Seizure Rights in Schools*, 37 GA. L. REV. 267, 291-92 (2002) (noting compelling government interest in protecting students from drugs).

canine drug detection dogs in public schools.⁴⁰ Although these cases arose before the Supreme Court let the Fourth Amendment through the schoolhouse gate in *T.L.O.*, the reasoning in the cases remains important.

The first set of facts involves the sniffing of inanimate objects. The United States Court of Appeals for the Tenth Circuit in *Zamora v. Pomeroy* held that using a drug detection dog to sniff lockers in public schools did not constitute a search.⁴¹ The court reasoned that because the school retains partial control over the lockers, students' expectation of privacy is diminished.⁴² The court also reasoned

[a student's] rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution and that a reasonable right to inspect is necessary in the performance of its duties, even though it may infringe, to some degree, on a student's Fourth Amendment rights.⁴³

Because of the diminished expectation of privacy in a jointly controlled locker, and the school administration's duty to operate the school, the Fourth Amendment was not implicated by the dog sniff.

The second set of facts involves the sniff of students' persons. In *Doe v. Renfrow*, the Court of Appeals for the Seventh Circuit dealt with a "dragnet" inspection of the entire student body of the Highland Senior and Junior High

⁴⁰ The three cases are *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1981), *Zamora v. Pomeroy*, 639 F.2d 663 (10th Cir. 1981), and *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980).

⁴¹ *Zamora*, 639 F.2d at 670-71.

⁴² *Id.* at 670, *accord* *United States v. Place*, 462 U.S. 696, 707 (1983) (holding dog sniff of luggage at airport not a Fourth Amendment search).

⁴³ *Zamora*, 639 F.2d at 670.

Schools by trained police dogs and their dog-handlers.”⁴⁴ On March 23, 1973, all students at these schools were “detained in their first period classrooms,” and all school entrances were locked or guarded by police officials.⁴⁵ Fourteen teams of dog, dog-handler, school official, and uniformed officer were dispatched to sniff each of the 2,780 students and his or her belongings.⁴⁶ The Seventh Circuit adopted the district court’s reasoning that the sweep was a “justified action taken in accordance with the *in loco parentis* doctrine.”⁴⁷ The district court reasoned that, under *Katz*, students had no reasonable expectation of privacy in the scent of marijuana; that scent was the only information the dogs obtained; therefore, no Fourth Amendment search took place.⁴⁸

The students were denied a rehearing en banc, and four judges—of eight sitting on the Seventh Circuit at the time—vigorously dissented.⁴⁹ The dissenters argued that the cases relied on by the district court to hold that a dog sniff does not constitute a search were inapposite “because in those cases the dogs were sniffing inanimate and unattended objects rather than people.”⁵⁰ The doctrine that what an individual holds in plain view is not protected by the Fourth Amendment, the dissent reasoned, should not apply to the dogs’ “intrusive

⁴⁴ Doe v. Renfrow, 631 F.2d 91, 93 (1980).

⁴⁵ *Id.*

⁴⁶ *Id.* The students were kept at with their hands on their desks with all belongings in view for the three hour duration of the exercise. *Id.*

⁴⁷ Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979).

⁴⁸ *Id.* at 1022, *accord Place*, 462 U.S. at 707 (reasoning “sniff discloses only the presence or absence of narcotics, a contraband item”).

⁴⁹ See *Renfrow*, 631 F.2d at 93-95.

⁵⁰ *Id.* at 94 (Swygert, J. dissenting).

probings.”⁵¹ The dissent also took issue with subjecting all students at the school to the search without individualized suspicion.⁵² The Fourth Amendment would not allow such action when “all 2,780 students were under suspicion, and there was no known crime.”⁵³ Finally, the dissent noted that this sort of search could not be considered a “school” case because of the “extensive police involvement” in the planning and execution of the mass search.⁵⁴

Justice Brennan echoed these objections in dissent from the Supreme Court’s denial of certiorari.⁵⁵ He distinguished cases involving a dog-sniff of inanimate objects,⁵⁶ and he noted the lack of any individualized suspicion.⁵⁷ Despite the strong objections of four judges and one justice, however, the holding stood; no Fourth Amendment search occurred.

Two years later, in *Horton v. Goose Creek Independent School District*, the Fifth Circuit dealt with a similar situation.⁵⁸ The school district used dogs at

⁵¹ *Id.*, see also Martin R. Gardner, *Sniffing for Drugs in the Classroom – Perspective on Fourth Amendment Scope*, 74 Nw. U. L. REV. 803, 833 (1980) (stating it is unclear whether air around students is in “plain smell” of canines).

⁵² *Renfrow*, 631 F.2d at 94, see also Gardner, *supra* note 51, at 850 (stating dog sniff of individual should be Fourth Amendment search because sniff is indecent and demeaning, and difference between casual smelling and intense, intentional, targeted smelling take sniff out of “plain smell”); Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 898 (1988) (urging adoption of individualized suspicion requirement for public school searches).

⁵³ *Renfrow*, 631 F.2d at 94.

⁵⁴ *Id.*

⁵⁵ *Doe v. Renfrow*, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of certiorari).

⁵⁶ *Id.* at 1025-26 & n.4 (“I am astonished that the court did not find that the [sniffing and prodding] of the dogs constituted an invasion of petitioner’s reasonable expectation of privacy.”).

⁵⁷ *Id.* at 1027 (“[A]uthorities had no more than a generalized hope that their sweeping investigative techniques would lead to the discovery of contraband. This Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches.”).

⁵⁸ 690 F.2d 470 (5th Cir. 1982).

random to sniff students, cars, and lockers on campus.⁵⁹ The court followed the majority view, stated in *Zamora v. Pomeroy*⁶⁰ and later affirmed by the Supreme Court in *United States v. Place*, that a dog sniff of inanimate objects is not a search.⁶¹ The court applied the “public smell” doctrine that “student lockers in public hallways and automobiles parked in public parking lots” are open to the senses of those that walk by, therefore the owner has no reasonable expectation of privacy in scents that escape.⁶² The court, however, rejected *Renfrow* and held that the use of dogs to sniff students’ persons constituted a search. Noting that “the Fourth Amendment applies with its fullest vigor against any intrusion on the human body,” the court held that students’ expectation of privacy in “odors emanating from their body” was reasonable.⁶³ Thus, the dog’s sniff, “particularly where the dogs actually touch the person,” was a search.⁶⁴

The most recent circuit court case dealing with canine sniffs in the schools came out of the Ninth Circuit in *B.C. v. Plumas Unified School District*.⁶⁵ *B.C.*, like *Horton* and *Renfrow*, involved a suspicionless, random dog sniff of all students in a particular classroom.⁶⁶ The court agreed with *Horton* and rejected

⁵⁹ *Id.* at 474.

⁶⁰ See *supra* notes 41 to 43 and accompanying text.

⁶¹ *Id.* at 476; see *United States v. Place*, 462 U.S. 696, 707 (1983).

⁶² *Id.* at 477. But see H. Paul Honsinger, Note, *Katz and Dogs: Canine Sniff Inspections and the Fourth Amendment*, 44 LA. L. REV. 1093, 1103 (1984) (noting that plain-view doctrine applies when individual has knowingly revealed something to the public, which cannot be said for scent to faint for detection by human nose but detectable by canine sense of smell).

⁶³ *Horton*, 690 F.2d at 478-79.

⁶⁴ *Id.* at 479.

⁶⁵ 192 F.3d 1260 (9th Cir. 1999).

⁶⁶ *Id.* at 1263. The students in *B.C.*’s class were asked to leave the room and file past “Keesha,” a narcotics detection dog. *Id.* The dog then sniffed the students’ belongings in the classroom

Renfrow by holding that the dog sniff “infringed B.C.’s reasonable expectation of privacy [and] constitute[d] a search.”⁶⁷ The question of whether the search was reasonable without individualized suspicion remained; *T.L.O.* and *Acton*, not available when *Horton* was decided, guided the court’s decision.

The court noted the lower standard searches must satisfy in the school setting as laid out by *T.L.O.*, and the fact that *Acton* illustrated that suspicionless searches would be upheld in certain circumstances.⁶⁸ Nonetheless, the court distinguished *Acton* based on the “highly intrusive” nature of the “sudden and unannounced” dog sniff of each individual’s “body and its odors.”⁶⁹ *Acton*, the court reasoned, was also distinguishable as the drug testing was limited to extracurricular activities, whereas the dog sniff was targeted at “students . . . engaged in compulsory, educational activities.”⁷⁰ Finally, unlike *Acton*, the government’s interest in deterring drug use was weakened “[i]n the absence of a drug problem or crisis.” Based on these distinctions, the court held that the sniffing of the students’ persons was unreasonable.⁷¹

Judge Brunetti dissented from the holdings that a search occurred and that the search was unreasonable.⁷² First, Judge Brunetti reasoned that because the dog could only detect the presence or absence of contraband, no

and sniffed the students’ persons again as they returned to the room. *Id.* The court’s discussion focused on the sniffing of the student’s persons. *Id.*

⁶⁷ *Id.* at 1266.

⁶⁸ *Id.* at 1267.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1267 n.10.

⁷¹ *Id.* at 1268.

⁷² *Id.* at 1269-72 (Brunetti, J. dissenting).

legitimate expectation of privacy was implicated by the sniff.⁷³ Although Judge Brunetti would disagree with *Horton* based on the above reasoning, he also found the case distinguishable because in *Horton* the dog made physical contact with the students, whereas in *B.C.* the dog was always three to four feet away.⁷⁴ Finally, Judge Brunetti found the offensiveness of a dog sniff “irrelevant to Fourth Amendment analysis because Fourth Amendment analysis is not dependent upon whether government conduct is offensive,” it is dependent “on whether government conduct unreasonably invades a reasonable expectation of privacy.”⁷⁵

Moreover, Judge Brunetti found the majority’s analysis of the reasonableness of the search “problematic.”⁷⁶ The school’s compelling interest in keeping the student body drug-free, according to Judge Brunetti, does not depend on whether a drug crisis is currently underway in a school.⁷⁷ Pursuant to the majority’s holding, “school districts must wait until they experience an actual drug epidemic before they can conduct preemptive searches for illegal drugs.”⁷⁸ Without reasoning, Judge Brunetti concluded that “[t]he Fourth Amendment does not support such a rule.”⁷⁹

⁷³ *Id.* at 1270 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). For a discussion of this rationale, see *infra* notes 80 to 93 and accompanying text.

⁷⁴ *B.C.*, 192 F.3d at 1270-71. The dissent found that the level of intrusiveness was relevant to the threshold inquiry of whether a search occurred, not just to the second question of reasonableness. *Id.* at 1271.

⁷⁵ *Id.* at 1271.

⁷⁶ *Id.* at 1272.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

B. Canine Sniffs Outside the School

The Supreme Court recently reaffirmed the view that the drug detection dog enjoys special treatment under the Fourth Amendment.⁸⁰ The original case in which the Court dealt with drug detection dogs was *United States v. Place*. In *United States v. Place*, the Court held that a “canine sniff is *sui generis*” because of the limited nature of the investigation and the information disclosed.⁸¹ Although an individual has a reasonable expectation of privacy in the contents of luggage, a dog sniff obtains information without opening the luggage—the limited nature of the investigation.⁸² Furthermore, the sniff reveals “only the presence or absence of narcotics, a contraband item”—the limited information disclosed.⁸³ Therefore, the court held the exposure of luggage in a public place to a drug detection dog did not constitute a Fourth Amendment search.⁸⁴

In *Illinois v. Caballes*, the Court again focused attention on the drug detection dog, this time in the context of a traffic stop.⁸⁵ Justice Stevens, writing for a six-justice majority, stated that “[o]fficial conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment.”⁸⁶ Because possession of contraband cannot be deemed

⁸⁰ See *Illinois v. Caballes*, 125 S.Ct. 834 (2005).

⁸¹ 462 U.S. 696, 707 (1983).

⁸² *Id.* But see Honsinger, *supra* note 62, at 1102 (reasoning *Place* constitutes departure from *Katz* because when reasonable expectation of privacy is violated, it is violated no matter how limited the scope of intrusion).

⁸³ *Place*, 462 U.S. at 707. But see *Doe v. Renfrow*, 451 U.S. 1022, 1024 n.1 (1981) (Brennan, J., dissenting from denial of certiorari) (stating dogs alerted to Doe because she had been playing with her dog on morning of the raid, and her dog was in heat).

⁸⁴ *Place*, 462 U.S. at 707.

⁸⁵ *Caballes*, 125 S.Ct. at 834.

⁸⁶ *Id.* at 837 (quotations omitted).

legitimate, any investigation “that *only* reveals to possession of contraband” cannot be deemed a search.⁸⁷ Respondent Caballes conceded that drug sniffs generally only reveal the presence of contraband and presented no evidence of error rates or false positives.⁸⁸ Moreover, the court reasoned, a false positive “in and of itself” does not reveal any private information.⁸⁹ Therefore, the sniff performed on the exterior of Caballes’s car while he was lawfully seized during a traffic stop did not intrude on his privacy expectations “to the level of a constitutionally cognizable infringement.”⁹⁰

Justice Souter dissented, citing numerous sources establishing the reality that the “infallible dog. . . is a creature of legal fiction.”⁹¹ Thus, he reasoned, “the sniff and alert cannot claim the certainty that *Place* assumed, both in treating the deliberate use of sniffing dogs as *sui generis* and then taking that characterization as a reason to say they are not searches subject to Fourth Amendment scrutiny.”⁹² Because a dog sniff is information purposefully obtained by government officials about the contents of sealed containers and in many instances leads to the disclosure of the contents of the container, “[i]t makes

⁸⁷ *Id.* (emphasis in original).

⁸⁸ *Id.* at 838.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 839; see *id.* at 839-40 (Souter, J. dissenting) (listing sources); see also *Doe v. Renfrow*, 451 U.S. 1022, 1024 n.1 (1981) (Brennan, J., dissenting from denial of certiorari) (stating dogs alerted to Doe because she had been playing with her dog on morning of the raid, and her dog was in heat); see generally Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405 (1997). Justice Ginsburg dissented on other grounds. *Caballes*, 125 S.Ct. at 843-47.

⁹² *Caballes*, 125 S.Ct. at 840.

sense . . . to treat a sniff as the search that it amounts to in practice.”⁹³

III. Analysis

A. Lockers, Bags, and Other Inanimate Objects

Caballes puts to rest any question about whether lockers, bags, even cars in the school parking lot can be sniffed by drug detection dogs without the Fourth Amendment becoming involved. The Supreme Court is willing to treat drug detection dogs as *sui generis* because they detect nothing but contraband and only sniff the exterior of objects without any intrusion.⁹⁴ The sniff of such possessions would not be considered a search in the outside world, much less in the less restrictive school setting.

A party could make the counterargument, however, that in *Caballes* the person was subject to a level of individualized suspicion because he was pulled over in a traffic stop, whereas in the school setting the usual method of canine detection is the random, suspicionless search.⁹⁵ This argument is susceptible to three attacks. First, the individualized suspicion in *Caballes* pertained only to the individual’s driving, not drug use. Therefore, the holding in *Caballes* represents an instance where a dog sniff will not be considered a search even in the absence of individualized suspicion of drug use.

Second, as *Acton* makes clear, the compelling interest in preventing drug

⁹³ *Id.* at 840-41 (Souter, J. dissenting).

⁹⁴ *Id.* at 837-38; *Place*, 462 U.S. at 707.

⁹⁵ See *Caballes*, 125 S.Ct. at 839 (predicting that majority will rethink “uncritical adherence to *Place*” when case comes before the court involving “suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks”).

use in the school setting is analogous to the heightened interest in airport security in *Place*. On the other hand, school is compulsory whereas air travel, and the extracurricular participation in *Acton* and *Earls*, is voluntary. Hence, air travel and extracurricular activity suggest some level of consent to dog sniffs. If a child grows up in a state, the state compels her to attend public schools, and the public schools institute random dog sniffs, the state subjects her to the possibility of a dog sniffing her possessions without suspicion.

Finally, and controlling, individualized suspicion is relevant only to the determination of whether a search is reasonable, not whether a search has occurred.⁹⁶ If the government action is not considered a search, the government does not need individualized suspicion. As Justice Souter stated in dissent in *Caballes*, “if a sniff is not preceded by a seizure, it escapes Fourth Amendment review entirely unless it is treated as a search.”⁹⁷ Individualized suspicion, a facet of Fourth Amendment review, is thus irrelevant as individuals receive no Fourth Amendment protection from dog sniffs of their possessions whatsoever.

B. Students’ Persons

⁹⁶ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (acknowledging lack of individualized suspicion during reasonableness analysis after finding a search had occurred without mentioning lack of individualized suspicion). *Contra Caballes*, 125 S.Ct. at 847 (Ginsburg, J. dissenting) (“I would hold that the police violated *Caballes*’ Fourth Amendment rights when, without cause to suspect wrongdoing, they conducted a dog sniff of his vehicle.”)
⁹⁷ *Id.* This assertion is incorrect to the extent that the Fourth Amendment requires probable cause to conduct a further search after the dog alerts. The recognized fallibility of canine sniffs will undercut future court findings that a canine alert alone was sufficient to establish probable cause. See *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 482 (5th Cir. 1982) (reasoning that because district court made no findings regarding reliability of the sniffing dogs, the record did not justify summary judgment because of lack of showing “adequate cause for more intrusive searches” after the alert); see also *infra* notes 107 to 110 and accompanying text.

In *Place*, the Court treated a dog sniff as *sui generis* based on two characteristics of the sniff. First, the dog does not disturb the individual's luggage when it sniffs; the investigation is not intrusive.⁹⁸ Second, the dog only detects the presence or absence of contraband, information in which an individual can have no legitimate expectation of privacy.⁹⁹ The Court in *Caballes* concentrated on the second *Place* consideration.¹⁰⁰ The Court spent little time analyzing the intrusiveness of the sniff, stating:

In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.¹⁰¹

The lack of discussion of the first *Place* consideration could mean that the Court is willing to allow government action, no matter how intrusive, if the action results only in the discovery of information over which the individual had no legitimate privacy expectation—the same wooden interpretation of the *Katz* test applied by Judge Brunetti in dissent in *B.C.*¹⁰² On the other hand, the Court may simply have bypassed the discussion because the sniff of the outside of an individual's car, like the sniffing of luggage, is not invasive. The analysis chosen makes a difference in answering the question of whether a distinction lies between sniffing

⁹⁸ United States v. Place, 462 U.S. 696, 707 (1983).

⁹⁹ *Id.*

¹⁰⁰ *Caballes*, 125 S.Ct. at 836-38; see also *id.* at 839 (Souter, J. dissenting) (“At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband.”).

¹⁰¹ *Id.*

¹⁰² *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1269-72 (9th Cir. 1999) (Brunetti, J. dissenting).

school belongings and sniffing students.

1. *Caballes* as a decision based solely on information received

If the Court adopts the view that a search has not occurred, no matter how invasive the action may be, unless information in which the individual has a legitimate expectation of privacy could be discovered by the technique, then there are no grounds for distinguishing a dog sniffing cars and lockers from sniffing students. The dog sniff of the students, though intrusive, reveals nothing but the presence or absence of contraband, just like the sniff in *Caballes*.¹⁰³ Because the sniff therefore compromises no legitimate expectation of privacy, no search will have occurred and the student cannot claim protection under the Fourth Amendment.

2. *Caballes* as a decision based on both *Place* criteria

If, on the other hand, the Court recognizes the first *Place* consideration in the future and requires that the dog sniff not be intrusive to maintain *sui generis* status, students may be able to contest sniffing of the person. As the Fifth Circuit stated in *Horton*, “We need only look at the record in this case to see how a dog’s sniffing technique—i.e., sniffing around each child, putting his nose on the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive.”¹⁰⁴ Large dogs were used for intimidation, the dogs came in mid-class and sniffed around each student, and the students were afraid of the

¹⁰³ Although, the search will reveal whether the student is afraid of dogs.

¹⁰⁴ *Horton*, 690 F.2d at 479.

dogs.¹⁰⁵ In these kinds of circumstances, a “degree of personal intrusiveness” has occurred that is not present when the dog is merely sniffing inanimate objects.¹⁰⁶ If the intrusiveness factor of *Place* is maintained, therefore, the dog sniff would lose its *sui generis* status and become a Fourth Amendment search.

C. Reasonable Suspicion After a Dog Alerts

Justice Souter dissented in *Caballes* based on his reasoning that drug detection dogs are not as reliable as the *Place* Court believed, and so should not be granted special status under the Fourth Amendment. This analysis is novel. The reliability of a test is relevant not to whether a search occurred, but rather to whether a positive result from that test is sufficient to establish probable cause.¹⁰⁷ Accuracy is irrelevant to the question of whether a search occurred because a false positive does not relate more information to the investigator; it merely incorrectly raises the level of suspicion directed at the test’s target. Justice Souter would conflate the two tests in the area of canine sniffs because a positive canine alert leads to a subsequent search of the container sniffed.¹⁰⁸ This begs the question, is an alert sufficient to establish probable cause? In this sense, *Caballes* may be a Pyrrhic victory for law enforcement. Although the drug detection dog remains *sui generis* under the Fourth Amendment, Justice Souter’s dissent raises serious doubts about whether an alert should be sufficient by itself

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 482 (analyzing dog alert as factor in probable cause analysis).

¹⁰⁸ See *Caballes*, 125 S.Ct. at 840 (“This is not, of course, to deny that a dog’s reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure”)

to establish probable cause to conduct a subsequent search.¹⁰⁹ At the very least, it establishes that law enforcement using canine detection will need to maintain records on each dog-trainer team's reliability.¹¹⁰

In the school setting, however, reliability concerns are less problematic. *T.L.O.*, *Acton*, and *Earls* establish that the strong government interest in maintaining order and preventing drug use in public schools requires a less stringent standard of suspicion to conduct a search. A dog alert in a school, therefore, will be sufficient to establish "reasonable suspicion" for a search even when a positive alert by the same dog outside school would not establish probable cause.

The test for "reasonable suspicion," as laid out in *T.L.O.* consists of two inquiries.¹¹¹ The search must first be justified at its inception, and second must be "reasonably related in scope to the circumstances which justified the interference in the first place."¹¹² After a dog sniff has signaled on a student or his belongings, a school administrator has reasonable grounds for suspecting the student possesses contraband. Although this suspicion, as Justice Souter's dissent in *Caballes* points out, may be incorrect, it is nonetheless reasonable. It is certainly more reasonable than the suspicion placed on an individual because they participate in competitive extracurricular activity in *Acton* and *Earls*.

¹⁰⁹ *But see Caballes*, 125 S.Ct. at 838 (stating that trial judge found dog alert "sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk").

¹¹⁰ For a discussion on dog-trainer reliability, see generally Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405 (1997).

¹¹¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

¹¹² *Id.* (internal quotations omitted).

Therefore, a search after a dog alert in school is justified in its inception.

The search after the dog alert must also be reasonably related in scope to the alert. The scope of the search must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹¹³ The objectives of a drug search are simply to find the drugs. Because drugs could be hidden anywhere on the student or in the student's bag, the objectives place little limit on the scope of the search. The intrusiveness is another matter. The fallibility of the drug dog coupled with the fragility of adolescents combine to restrict the scope of the subsequent search. *Doe v. Renfrow* provides an example of a situation where school officials performed an excessively intrusive search.¹¹⁴ In *Doe*, a thirteen year old junior high student was subjected to a strip search after a dog alerted to her in school and a pocket search revealed nothing. The age and sex of the student—early teenage female—required that school officials be very sensitive to the developmentally fragile student. The nature of the infraction was nothing more than having a dog show signs of excitement after smelling her.¹¹⁵ Although the case was decided before *T.L.O.*, under the *T.L.O.* test the search exceeded the permissible scope and violated the child's Fourth Amendment rights.

After Justice Souter's dissent in *Caballes*, it is likely that any strip search of a student based solely on a dog alerting to that student will be found to violate

¹¹³ *Id.* at 342.

¹¹⁴ 631 F.2d 91 (7th Cir. 1980).

¹¹⁵ The dog alerted to the student because she played with her pet dog that morning, and her dog was in heat. *Doe v. Renfrow*, 451 U.S. 1022, 1024 n.1 (1981) (Brennan, J. dissenting from denial of certiorari).

the Fourth Amendment. The fallibility of the drug dog having been established, an unsuccessful pocket search after a dog alert leaves two possibilities: the student is hiding the drugs on her nude body, or the dog exhibited a false positive. No matter the age or sex of the student, the chance of a false positive compels the school to forego an extremely intrusive and embarrassing strip search.

IV. Conclusion

The constitutionality of using drug detection dogs in public schools must be analyzed based on the convergence of two lines of cases. First, the situation must be viewed in light of the special circumstances of Fourth Amendment application in public schools. Second, the practice must be judged under existing Fourth Amendment dog sniff precedent. The Supreme Court in *Illinois v. Caballes* reaffirmed the treatment of the drug detection dog as a special entity in Fourth Amendment jurisprudence. The Court, however, seemed only to concentrate on one facet of previous cases—that the dog sniff reveals only information about contraband. The reliance on only this characteristic of the dog sniff vitiates the distinction some lower courts have drawn between a dog sniff of a student and a dog sniff of a locker, book-bag, or car in the school parking lot.

Justice Souter dissented in *Caballes* because of modern research indicating that drug detection dogs are not as reliable as once thought. Although the dissent misplaced the relevance of this unreliability by finding it weighed in

favor of considering a dog sniff a Fourth Amendment search, the unreliability is relevant in determining whether a positive alert by a dog sniff is sufficient to establish probable cause for a further search. While this may have consequences on law enforcement in everyday life, it will not affect searches in the school setting because of the lowered requirement of “reasonable suspicion” to conduct a search.

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