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Beware of the Drug Detection Dog: The Fourth Amendment, Drug Detection Dogs, and State Legalization of Marijuana

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BEWARE OF THE DRUG DETECTION DOG: THE FOURTH AMENDMENT, DRUG DETECTION DOGS, AND STATE LEGALIZATION OF MARIJUANA

*Morgan Smith**

ABSTRACT

Under current Supreme Court precedent, the “sniff” of a trained drug detection dog generally does not constitute a search within the meaning of the Fourth Amendment because of the dog’s unique ability to detect contraband items without physical intrusion. Thus, police canines have become valuable tools utilized by law enforcement since the Drug War era. Many questions have arisen, however, as to the validity of warrantless dog sniffs in states where marijuana has been legalized and thus, is no longer contraband. Further, the Supreme Court’s view that a drug dog sniff is not a search has raised concerns because it is an investigatory tactic that escapes Fourth Amendment scrutiny and can be utilized by officers with minimal restraint. The Supreme Court has overlooked these concerns, and thus, has diluted the individual’s privacy interests along the way. This Comment addresses the federal and state jurisprudence concerning drug detection dogs and the implications of state legalization and decriminalization of marijuana. It concludes that the Supreme Court’s approach to drug detection dogs under the Fourth Amendment should be reexamined to provide more protections against these intrusive and outdated Drug War era police tactics.

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I. INTRODUCTION

SINCE President Nixon declared the “War on Drugs,” the presence of drug control agencies and drug enforcement actions have dramatically increased.¹ Intense public support and political enthusiasm for drug prohibition led to the use of especially intrusive investigative tactics that became instrumental in making drug-related arrests.² Law enforcement’s use of police canines to detect the scent of illegal substances is one of these intrusive tactics.³ For the last three decades, police canines have aided law enforcement in detecting illegal drug possession and in making arrests. However, the use of these canines to further national drug control initiatives has slowly diluted the private citizen’s Fourth Amendment protections along the way.⁴ This is especially relevant in light of changes in the American public’s perception of marijuana use.

While marijuana remains illegal under federal law,⁵ two-thirds of the American population supports its legalization.⁶ Further, eleven states have legalized marijuana for recreational use, thirty-three states have legalized marijuana for medical use, and other states are expected to follow

1. *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/KUH5-WFEK>].

2. Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 745–46 (2016) (explaining how drug prohibition incentivized pretextual stops and profiling that led to arrests through the use of uniquely intrusive investigative techniques, such as wiretaps, informants, etc.).

3. *See id.* at 759.

4. Megan Yentes, Note, *Supply the Hand That Feeds: Narcotic Detection Dogs and the Fourth Amendment*, 37 N. ILL. U. L. REV. 461, 462 (2017).

5. Drugs considered “controlled substances” under the Controlled Substances Act, 21 U.S.C. § 811 (2018), are divided into five schedules. An updated list of these schedules is published yearly. Marijuana is currently listed as a schedule one substance. 21 C.F.R. § 1308.11 (2020).

6. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/W722-T7HM>].

this trend in the near future.⁷ While law enforcement officers should continue to use canines and their unique sensory abilities to aid investigations, it is imperative that these intimidating animals are not utilized in an unreasonable manner so as to violate the Fourth Amendment.

As it stands today, a drug dog sniff is not a “search” within the meaning of the Fourth Amendment, allowing officers to evade traditional constitutional requirements.⁸ Drug detection dogs, therefore, may be utilized without requiring officers to demonstrate a showing of probable cause. With the Drug War era coming to an end, it is time to reexamine the relatively broad freedom the Supreme Court has afforded the dog sniff from Fourth Amendment scrutiny.

This Comment will address the plethora of questions that now exist regarding the constitutionality of law enforcement’s use of drug detection dogs under the Fourth Amendment. First, the Supreme Court’s treatment of drug detection dogs effectively exempts law enforcement officers from having to show probable cause to conduct a search. However, this investigatory technique is no minor intrusion, and in order to properly protect a citizen’s privacy rights, it must fairly be regarded as a Fourth Amendment search. Second, state initiatives to legitimize marijuana use have undermined the Court’s justifications for exempting the drug detection dog from the Fourth Amendment’s safeguards. Thus, the issues with the Supreme Court’s treatment of drug detection dogs are exacerbated by the decreasing governmental interest in making marijuana-related prosecutions.

To help address these issues, Part II provides an overview of the Supreme Court’s approach to the use of drug detection dogs. Part II also discusses how some states have provided more stringent protections for their citizens against the use of drug detection dogs, despite the Supreme Court’s precedent. Next, Part III addresses the implications of state initiatives to legalize marijuana. States that have made marijuana possession legal have struggled to apply the Supreme Court’s precedent to drug dogs that are trained to detect marijuana, a now-legal substance under state law. Part III also discusses the varying degrees of legalization and decriminalization among states that make it difficult to apply the Supreme Court’s jurisprudence in today’s pro-marijuana climate.

Finally, Part IV will argue that the Supreme Court’s drug-dog jurisprudence was influenced by the War on Drugs and whittled away Fourth Amendment protections while failing to minimize drug abuse. While drug dogs should remain valuable tools available to law enforcement officers, they cannot be used without restraint. This Comment concludes by suggesting that the drug dog sniff is a search within the Fourth Amendment and that therefore, the Court’s precedent should be reexamined.

7. *Id.*

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

II. THE FOURTH AMENDMENT AND DRUG DETECTION DOGS

Before delving into the implications of state legalization of marijuana, it is necessary to examine the evolution of federal and state Fourth Amendment jurisprudence concerning the use of drug detection dogs. Law enforcement officers are tasked with the application and interpretation of Fourth Amendment principles to varied factual circumstances as cases arise.⁹ Thus, officers have an important legal obligation to protect citizens' constitutional rights in carrying out their duties to enforce the law. The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹⁰ Thus, the Fourth Amendment applies only when a government official conducts a search.¹¹ Not all information gathering by the government, however, falls within the ambit of a Fourth Amendment search.¹²

The Supreme Court developed a two-part test for determining whether an investigative technique is a search.¹³ A Fourth Amendment search occurs when: (1) a person has "a (subjective) expectation of privacy," and (2) that expectation of privacy is recognized by society as "reasonable."¹⁴ Generally, a search of a "person" or an "effect," in which a citizen has a legitimate expectation of privacy, without a warrant, is presumed unreasonable and thus, unconstitutional.¹⁵ While a search without a warrant is presumed unreasonable, a warrantless search *may* nonetheless be constitutional, but only if probable cause exists and the circumstances meet an exception to the warrant requirement.¹⁶

Where probable cause exists, the Supreme Court has allowed a number of exceptions to the warrant requirement.¹⁷ One exception, the automobile exception, is often relied on by law enforcement officers.¹⁸ Under the automobile exception, police officers who have legitimately stopped a vehicle and have probable cause to believe there is evidence of a crime within the vehicle may conduct a warrantless search without running afoul of the Fourth Amendment's protections.¹⁹ In contrast, searches within the home are not within any exception to the warrant requirement, as the home is chief among constitutionally protected areas of the Fourth

9. Karen J. Kruger, *The Legalization of Marijuana and Police Search and Seizure of Vehicles and Persons*, MD. B.J., July/Aug. 2018, at 4, 5.

10. U.S. CONST. amend. IV.

11. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 256 (6th ed. 2018).

12. *Id.*

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

14. *Id.*

15. *See United States v. Jacobsen*, 466 U.S. 109, 114 (1984).

16. *People v. McKnight*, 446 P.3d 397, 402–03 (Colo. 2019).

17. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

18. *See id.*

19. *Id.*

Amendment.²⁰

Modern investigative techniques must be scrutinized to ensure they do not threaten an individual's personal security and privacy. However, because the Fourth Amendment's protections only apply to searches and seizures, any investigative technique that falls outside of the Fourth Amendment's definition of a search need not be reasonable nor justified by a warrant or a showing of probable cause.²¹ As it stands today the dog sniff is generally not a search, and thus, does not require obtaining a warrant, probable cause, or even reasonable suspicion.²² Thus, while some states have attempted to provide citizens with greater protections, the drug detection dog is generally unleashed from constitutional scrutiny under the Fourth Amendment.

A. SUPREME COURT'S APPROACH TO THE DRUG DETECTION DOG

In the midst of the War on Drugs, the Supreme Court first addressed the constitutionality of law enforcement's use of drug detection dogs. In *United States v. Place*, the Court concluded that a dog sniff was not a search within the Fourth Amendment.²³ The Court called the use of a drug detection dog "sui generis," or unique, because the technique was not physically intrusive and could only reveal the presence, or absence, of illegal contraband.²⁴ This doctrine, commonly referred to as the "contraband-only" doctrine, has since been articulated and widely applied.²⁵ The issue in *Place*, however, did not turn on the constitutionality of the drug detection dog, but rather on whether an officer's prolonged seizure of the defendant's luggage amounted to a seizure without probable cause.²⁶ The Court nonetheless briefly and heedlessly addressed the drug detection dog and provided the basis for much of the Court's jurisprudence on dog sniffs that exists today.²⁷

The defendant, Raymond Place, was traveling from Miami to New York City when a Drug Enforcement Administration (DEA) officer became suspicious and seized Place's luggage when he landed at La Guardia Airport.²⁸ Although Place refused to consent to a search, the DEA officer exposed Place's luggage to a trained narcotics detection dog that indicated, by a positive signal, that the scent of drugs was present inside.²⁹

20. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

21. *United States v. Jacobsen*, 466 U.S. 109, 136–37 (1984).

22. The "reasonable suspicion" standard was established by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 31 (1968), which held that a person may be stopped and briefly frisked if an officer has a "reasonable suspicion," (a lesser standard than probable cause) that the person is involved in a crime.

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

24. *Id.*

25. Ben Adams, *What is Fourth Amendment Contraband?*, 69 STAN. L. REV. 1137, 1139 (2017).

26. *Place*, 462 U.S. at 697–98.

27. *See id.*

28. *Id.* at 698–99.

29. *Id.*

In response, the officer detained Place's luggage for three days until the DEA received a warrant based on the dog's positive reaction.³⁰ The Court concluded that although temporary seizures could be justified under the particular circumstances, the initial seizure and prolonged detention of Place's luggage without probable cause violated the Fourth Amendment.³¹ The Court should have stopped there. The constitutionality of the dog sniff was not integral to the Court's decision because it happened after the unreasonable seizure.³² The Court, however, took the occasion to address for the first time the issue of whether a dog sniff of luggage (which happened after the initial seizure) was a search.

In two brief paragraphs,³³ the Court reasoned that a dog sniff does not constitute a search under the Fourth Amendment because the technique does not require officers to open luggage, and "discloses only the presence or absence of narcotics, a contraband item."³⁴ Thus, the majority's contraband-only doctrine effectively exempted law enforcement's use of drug dogs from the warrant and probable cause requirements traditionally necessary before conducting a search.³⁵

Although Justice Brennan and Justice Blackmun agreed with the Court's ruling, in concurring opinions, each Justice criticized the Court's haste to address the validity of drug detection dog sniffs.³⁶ Justice Brennan cautioned that the Court's dog sniff discussion was wholly unnecessary to the opinion and "more complex than the Court's discussion would lead one to believe."³⁷ He also noted that the drug detection dog "adds a new and previously unobtainable dimension to human perception" given that police could not obtain the same information using their own senses, therefore resulting in a "greater intrusion into an individual's privacy."³⁸ Thus, both concurring Justices felt the majority's discussion required greater caution so as to avoid weakening the protections that the Fourth Amendment affords.³⁹ Though the majority limited its discussion to the narrow circumstances of the particular case and suggested that under other circumstances the outcome may be different,⁴⁰ most courts have applied *Place* broadly to dog sniffs.⁴¹

Despite the narrow circumstances addressed in *Place* and the criticism from the concurring Justices, the statements made by the majority have

30. *Id.*

31. *Id.* at 706–08 (applying the standards in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court determined the seizure of the luggage exceeded the permissible bounds of an investigative stop).

32. *See id.* at 699.

33. *Id.* at 706–08.

34. *Id.* at 707.

35. *See id.*

36. *Id.* at 719–21.

37. *Id.* at 719 (Brennan, J., concurring in the result).

38. *Id.* at 719–20.

39. *Id.* at 720–22.

40. *Id.* at 707 (majority opinion).

41. *See, e.g.,* *United States v. Jacobsen*, 466 U.S. 109, 123–24 (1984).

formed the foundation of the Supreme Court's dog-sniff jurisprudence.⁴² In *Illinois v. Caballes*,⁴³ the Court directly relied on *Place* to hold that a dog sniff conducted during a routine traffic stop did not violate the Fourth Amendment.⁴⁴ In that case, the defendant was pulled over by an officer for speeding.⁴⁵ During the traffic stop, while one officer was in the process of writing a ticket, a second police officer arrived on the scene and walked a drug detection dog around the defendant's vehicle.⁴⁶ The second officer testified that he never suspected the defendant possessed illegal drugs, but he nevertheless conducted the dog sniff.⁴⁷ After the dog alerted the officers to something in the defendant's trunk, they searched the vehicle, discovered marijuana, and subsequently arrested the defendant, who was convicted of narcotics offenses, sentenced to twelve years in prison, and fined \$256,136.⁴⁸

While the Illinois Supreme Court concluded that the drug dog converted an otherwise lawful traffic stop into a drug investigation and violated the defendant's constitutional rights without a showing of reasonable suspicion, the United States Supreme Court took a completely different approach to the issue.⁴⁹ The Court held that because there was no legitimate privacy interest in the possession of contraband—in this case, marijuana—the dog sniff was not a search within the meaning of the Fourth Amendment.⁵⁰ In other words, the dog sniff escaped Fourth Amendment scrutiny because it did not in itself intrude on a constitutionally protected privacy interest, the possession of contraband.

The *Caballes* Court distinguished a dog sniff from another investigative technique utilized in a previous case, *Kyllo v. United States*, where law enforcement used a thermal imaging device to detect heat within a home.⁵¹ In *Kyllo*, officers used a thermal imaging device that converted infrared radiation into images based on relative warmth.⁵² Officers pointed the device toward a location where they suspected marijuana was being grown illegally using high-intensity heat lamps.⁵³ Based on images produced by the device, the officers obtained a search warrant.⁵⁴ But unlike a dog sniff, the thermal imaging device was capable of detecting more than just unlawful activities, and therefore intruded on intimate details that would be unknowable to officers absent the device.⁵⁵ The device's ability to detect lawful activities was critical to the Court's conclusion that

42. See *People v. McKnight*, 446 P.3d 397, 403 (Colo. 2019).

43. 543 U.S. 405 (2005).

44. *Id.* at 410.

45. *Id.* at 406.

46. *Id.*

47. *Id.*

48. *Id.* at 407.

49. *Id.* at 408–09.

50. *Id.* at 409–10.

51. *Kyllo v. United States*, 533 U.S. 27 (2001); see *Caballes*, 543 U.S. at 409–10.

52. *Kyllo*, 533 U.S. at 29.

53. *Id.*

54. *Id.* at 30.

55. *Id.* at 38.

the use of such a device constitutes a Fourth Amendment search that is presumptively unreasonable without a warrant.⁵⁶

Thus, following the *Place* analysis, the *Caballes* Court distinguished a dog sniff from the thermal imaging device because while the thermal imaging device could intrude on lawful activities for which a person has a reasonable expectation of privacy, the dog sniff is not an intrusion because there is no legitimate expectation of privacy in the possession of contraband.⁵⁷ The Court reasoned that the dog sniff did not require a showing of suspicion because there is no legitimate interest in possessing illegal drugs, thus, the procedure only exposes illegal contraband and does not compromise any legitimate privacy interest.⁵⁸

The *Caballes* dissent attacked the Court's uncritical adherence to *Place*, urging that a dog sniff "escapes Fourth Amendment review entirely unless it is treated as a search."⁵⁹ The dog sniff expanded the scope of the routine traffic stop to a drug investigation without a warrant or even the suspicion of criminal activity. The dissent cautioned that the *Caballes* decision undermined the "Court's situation-specific balancing of Fourth Amendment interests in other contexts"⁶⁰ and urged that the state's general interest in crime control is not enough to justify the use of a drug detection dog to perform "suspicionless and indiscriminate sweeps."⁶¹

More recently, the Supreme Court has taken a significant diversion from previous decisions concerning the treatment of drug detection dogs. In *Florida v. Jardines*, officers arrived at the defendant's home after receiving an unverified tip that marijuana was being grown on the premises.⁶² While on the porch, the officers allowed a drug dog to sniff the outside of the home, and the canine positively alerted the officers.⁶³ This positive alert formed the basis for the search warrant later granted to the officers; the search later revealed marijuana plants in the home and led to the defendant's arrest.⁶⁴ The Court held that the dog sniff conducted on the defendant's front porch was a search because the officers physically intruded on the defendant's property.⁶⁵ The Court in *Jardines* regarded the home as the core of the Fourth Amendment "'right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"⁶⁶

Therefore, although the Supreme Court found a dog sniff of an automobile outside the scope of Fourth Amendment scrutiny,⁶⁷ law enforce-

56. *Id.*

57. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

58. *Id.* at 408.

59. *Id.* at 410–11.

60. *Id.* at 423.

61. *Id.* at 411.

62. *Florida v. Jardines*, 569 U.S. 1, 3–4 (2013).

63. *Id.*

64. *Id.* at 4.

65. *Id.* at 11.

66. *Id.* at 6 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

67. *Illinois v. Caballes*, 543 U.S. 405, 409–410 (2005).

ment officers are subject to stricter standards for dog sniffs of an individual's home. This shift in reasoning that a dog sniff *may* constitute a search in certain contexts may signal the Court's retreat from earlier decisions. However, outside of the specific context of the home—like in *Jardines*—drug detection dogs remain free from Fourth Amendment scrutiny in most other contexts today.

B. STATES' APPROACH TO THE DRUG DETECTION DOG

Although most states have relied on *Place* to analyze whether a dog sniff constitutes a search, some states have, in contrast, provided their citizens with *more* privacy protections than those laid out in the Supreme Court's drug-dog jurisprudence.⁶⁸ For example, even though the search provision in the Minnesota constitution is textually identical to the Fourth Amendment, the Minnesota Supreme Court's definition of a search provides broader protections than the Supreme Court's interpretation of a search under the Fourth Amendment.⁶⁹ In particular, in *State v. Wiegand*, the Minnesota Supreme Court addressed whether the use of a narcotics dog at a routine traffic stop required a reasonable, articulable suspicion of related criminal activity.⁷⁰ In that case, the defendant's car was stopped by an officer for having a burned-out headlight.⁷¹ Although the officer testified that he did not suspect the defendant was under the influence of drugs, he nonetheless employed a narcotics dog to sniff around the vehicle, and the dog alerted him to a scent under the hood of the car.⁷² The officer opened the hood, found marijuana hidden near the engine compartment, and arrested the defendant.⁷³

While the court recognized that the relevant provisions of the Minnesota constitution were textually identical to the Fourth Amendment, they declared: "We may construe a provision of the Minnesota constitution to extend greater rights than a comparable provision in the U.S. Constitution, but we will not do so cavalierly."⁷⁴ While the court found that a dog sniff of a vehicle was not a search under either the state or federal constitution, it held that under the Minnesota constitution a dog sniff could not be conducted on a vehicle unless the officers had some sort of reasonably articulable suspicion of illegal drug use.⁷⁵ Although the Minnesota court did not find that a dog sniff at a traffic stop constitutes a search, under other circumstances where there are more significant invasions of privacy at stake, the court has determined that a dog sniff is a search under the

68. Yentes, *supra* note 4, at 466.

69. *State v. Carter*, 697 N.W.2d 199, 210–11 (Minn. 2005).

70. *State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002).

71. *Id.* at 128.

72. *Id.*

73. *Id.* at 129.

74. *Id.* at 132.

75. *Id.* at 133–35; *see, e.g.*, *State v. Lor*, No. A17-2079, 2018 WL 6839400, at *9–10 (Minn. Ct. App. Dec. 31, 2018); *State v. Eichers*, 840 N.W.2d 210, 220–21 (Minn. Ct. App. 2013).

state constitution.⁷⁶

Minnesota is not the only state to grapple with defining when a dog sniff is a search and the extent to which the state's constitution protects citizens against invasions of privacy. For instance, Alaska courts have held that a dog sniff of luggage in an airport—a fact pattern identical to *Place*—constituted a search under Alaska law requiring reasonable suspicion.⁷⁷ Likewise, Pennsylvania courts have proposed a middle ground requirement for determining whether a narcotics detection dog may be deployed to test for the presence of drugs.⁷⁸ The Pennsylvania Supreme Court stated:

We believe that there is a Fourth Amendment middle ground applicable to the investigations conducted by police handlers of narcotics detection dogs. On the one hand, much of law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used; but on the other, it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.⁷⁹

The court created a two-prong test that must be met before officers may use a narcotics detection dog: (1) the police must have reasonable grounds for believing drugs may be present in the place they seek to test, and (2) the police must be lawfully present in the place where the canine sniff occurs.⁸⁰ Thus, while the drug-dog jurisprudence remains consistent at the federal level, it is clear that state courts will continue to grapple with balancing the use of drug detection dogs as investigatory tools against the privacy rights of their citizens.

While some states have attempted to provide broader privacy protections to citizens from drug detections dogs, others have rigorously followed *Place* and its progeny. Specifically, Texas courts have interpreted the Texas constitution to be consistent with the Supreme Court's interpretation of the Fourth Amendment.⁸¹ While the relevant provision of the Texas constitution's language differs slightly from the language of the Fourth Amendment, Texas courts have followed the Supreme Court's in-

76. See *State v. Carter*, 697 N.W.2d 199, 210–11 (Minn. 2005) (concluding that a drug-detection dog sniff outside a self-storage unit was not a search within the meaning of the Fourth Amendment, but constituted a search within the meaning of Article I, Section 10 of the Minnesota Constitution); *State v. Edstrom*, 916 N.W.2d 512, 523 (Minn. 2018) (requiring police to have reasonably articulatable suspicion of criminal activity to justify a dog sniff).

77. Jared Willis, *Place Doesn't Apply to My Place; The California Home is Sui Generis Because Medical Marijuana Is Not Contraband and Indiscriminate Residential Dog Sniffs Invade A Patient's Legitimate Expectation of Privacy*, 39 W. ST. U. L. REV. 187, 195 (2012).

78. See *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987).

79. *Id.*

80. *Id.*

81. See *United States v. Holley*, No. 4:12CR29, 2014 U.S. Dist. LEXIS 72873, *6–7 (E.D. Tex. May 21, 2014).

terpretation in the context of dog sniffs.⁸² Notably, in *Jones v. State*, the Texas Court of Appeals in Corpus Christi found that a non-contact dog sniff of a person that is performed by a trained drug dog in a public place, which reveals only the presence of contraband generally, is not a search under Texas law and therefore does not require reasonableness justifications.⁸³

In sum, it is clear that states have grappled with the application of *Place* to their own dog-sniff jurisprudence. Arguably, the discrepancies among state and federal law will make it nearly impossible for citizens to know when and where they have a reasonable expectation of privacy from a dog sniff. For example, while a citizen may have an expectation of privacy from a dog sniff within their state, a federal officer is not precluded from deploying a drug detection dog and could do so without a showing of reasonable suspicion or probable cause. This issue becomes an even greater concern in light of states' legalization of marijuana. While the use of marijuana is still criminalized at the federal level,⁸⁴ marijuana has gained legislative legitimacy in many states. Accordingly, the Supreme Court's jurisprudence on drug detection dogs should be reexamined.

III. IMPLICATIONS OF STATE MARIJUANA LEGALIZATION ON DRUG DETECTION DOG JURISPRUDENCE

With the exception of a few state court decisions, the Supreme Court's treatment of drug detection dogs predicated on *Place* remains widely applied.⁸⁵ The Supreme Court's view that a dog sniff is not a search under the Fourth Amendment is premised on two important concepts: (1) the minimal intrusiveness of a dog sniff, and (2) the fact that the sniff can only reveal contraband, which is unlawful to possess.⁸⁶ These premises, however, are undermined in states where marijuana is no longer a contraband item under their state constitutions. Although marijuana remains illegal at the federal level, some states have amended their constitutions to afford a reasonable expectation of privacy to citizens in their possession of marijuana.⁸⁷ In those states, the question is whether state law enforcement's use of a marijuana-trained drug detection dog without a warrant or probable cause is constitutionally justified when marijuana is contraband at the federal level but not the state level. Eleven states have made marijuana lawful to possess, and in turn, citizens have a reasonable

82. See, e.g., *State v. Rendon*, 477 S.W.3d 805, 806 (Tex. Crim. App. 2015) (following the Supreme Court's holding in *Jardines*); *Jones v. State*, 511 S.W.3d 202, 208 (Tex. App.—Corpus Christi—Edinburg 2015, no pet.).

83. *Jones*, 511 S.W.3d at 208.

84. Federal Controlled Substance Act, 21 U.S.C. § 812 Schedule I (c)(10) (2012).

85. See, e.g., *State v. Dunbar*, 163 A.3d 875, 885–86 (N.J. 2017); *Bunts v. State*, 881 S.W.2d 447, 450 (Tex. App.—El Paso 1994, no pet.).

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

87. See Jeremy Berke & Skye Gould, *Legal Marijuana Just Went on Sale in Illinois: Here are All the States Where Cannabis is Legal*, BUS. INSIDER (Jan. 1, 2020), <https://www.businessinsider.com/legal-marijuana-states-2018-1> [<https://perma.cc/K8DX-VYEC>].

expectation of privacy in their possession of marijuana.⁸⁸ Likewise, thirty-three states have legalized medical marijuana.⁸⁹ State legalization in either form—medical or recreational—raises questions at the state level that call for reconciling the Supreme Court’s reasoning regarding the constitutional validity of a search by a drug detection dog that is trained to detect marijuana. Even states that have not yet legalized marijuana, but have instead simply decriminalized the possession of marijuana, will have to address similar questions. Moreover, this Section will address the many questions that have arisen not only in states that have legalized recreational marijuana but also in states that have decriminalized or legalized marijuana only for medical purposes.

A. LEGALIZATION

The Colorado Supreme Court recently addressed the use of drug detection dogs in *People v. McKnight*, a case that arose following the passage of Amendment 64 of the Colorado constitution which legalized possession of an ounce or less of marijuana by a person twenty-one or older in the state of Colorado.⁹⁰ The issue before the court was whether a drug dog trained to detect marijuana—among other things—constituted a search implicating constitutional protections.⁹¹ Historically, Colorado provided greater protections to its citizens than the Fourth Amendment.⁹² However, in 2012, the court reviewed its jurisprudence in the context of drug detection dogs and stated that “‘an interest in possessing contraband cannot be deemed legitimate under the state constitution any more than under the federal constitution, and that official conduct failing to compromise any legitimate interest in privacy cannot be deemed a search’” under either the state or the federal constitution.⁹³ Thus, Colorado followed the Supreme Court’s precedent that a dog sniff does not constitute a search so long as it only detects contraband, therefore relieving officers of their burden of showing probable cause to utilize a drug detection dog at a routine traffic stop in the state of Colorado.⁹⁴ This issue of whether a drug dog sniff constituted a search, however, had never before been addressed by the Colorado Supreme Court in light of the passage of Amendment 64, legalizing marijuana in the state.⁹⁵

The court in *McKnight* struggled with the question of what effect, if any, Colorado’s legalization of marijuana should have on the constitutionality of law enforcement’s use of drug detection dogs.⁹⁶ *McKnight*, however, did not involve marijuana.⁹⁷ Rather, it involved a challenge to

88. *See id.*

89. *Id.*

90. *People v. McKnight*, 446 P.3d 397, 399 (Colo. 2019).

91. *Id.*

92. *Id.* at 404.

93. *Id.* at 405 (quoting *People v. Esparza*, 272 P.3d 367, 368 (Colo. 2012)).

94. *Id.*

95. *Id.* at 405–06.

96. *Id.* at 399

97. *Id.* at 400.

the constitutionality of a search that revealed a pipe containing trace amounts of methamphetamines in the defendant's vehicle.⁹⁸ The challenge arose based on the fact that the search was performed by a canine trained to detect not only methamphetamines but also a number of other substances including marijuana.⁹⁹ Thus, even a hint of marijuana could trigger the same response from the dog as would the scent of methamphetamines.¹⁰⁰

Historically under Colorado law, just like under federal law, constitutional protections were implicated if a drug detection dog might alert law enforcement to non-contraband items.¹⁰¹ In *McKnight*, however, the court applied this rationale in light of the passage of Amendment 64, which legalized marijuana and provided a reasonable expectation of privacy for the lawful possession of marijuana in the state of Colorado.¹⁰² Therefore, the court held that under state law, a search conducted by a marijuana-trained drug dog had to be constitutionally justified.¹⁰³ The court noted that in Colorado “[m]arijuana is now treated like guns, alcohol, and tobacco—while possession of these items is lawful under some circumstances, it remains unlawful under others.”¹⁰⁴ Further, it recognized that even though possession of guns, alcohol, and tobacco may be unlawful under certain circumstances, citizens still maintain an expectation of privacy in the lawful possession of these items.¹⁰⁵ And after the passage of Amendment 64, the same could be said for the possession of marijuana.¹⁰⁶ Colorado was the first state to address the issue of whether a sniff by a dog trained to detect marijuana was a search under a state constitution that legalized marijuana, but as the court noted, it “probably won’t be the last.”¹⁰⁷ Thus, it seems that when a state has chosen to legalize marijuana, it must also recognize a legitimate expectation of privacy in lawful possession of marijuana.

Although the *McKnight* court addressed the implications of state law enforcement's use of drug detection dogs, it failed to address whether Colorado citizens have the same rights with respect to federal law enforcement. As a result of *McKnight*, Colorado citizens are afforded an expectation of privacy in their possession of marijuana.¹⁰⁸ Because certain amounts of marijuana are no longer contraband, a drug dog trained to sniff for marijuana is no longer limited to the detection of contraband. Under federal law, however, marijuana remains contraband in all circum-

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 399.

102. *Id.* at 408.

103. *Id.* at 400.

104. *Id.* at 408.

105. *Id.*

106. *Id.*

107. *Id.* at 409–10.

108. *Id.* at 408.

stances.¹⁰⁹ Thus, the Supreme Court's justifications for a dog sniff falling outside of the scope of the Fourth Amendment search still hold true in the context of federal law.¹¹⁰ That begs the question, what would happen if a federal officer lawfully stopped a vehicle in Colorado and subsequently utilized a drug detection dog? Would the federal officer's dog-sniff search require constitutional justifications? The answer appears to depend on which constitution—state or federal—governs. Does the application of Fourth Amendment protections change based on law enforcement activities of state officers, as opposed to federal officers? As the dissent in *McKnight* suggests, investigatory conflicts between state and federal law may inevitably expose the marijuana initiative itself to a greater risk of federal preemption than would have been the case otherwise.¹¹¹ Law enforcement officers need uniform procedures to ensure citizens' privacy interests are properly safeguarded. In addition, the inconsistencies between federal and state protections will inevitably create uncertainty and potential injustices if dog-sniff searches are not properly justified.

The state–federal marijuana conflict is not the only obstacle to determining when, where, and under what circumstances a dog sniff is constitutionally permissible. Eleven states have legalized marijuana for adults over the age of twenty-one, and thirty-three states have legalized medical marijuana use.¹¹² Among those states, however, marijuana laws have varying degrees of leniency and stringency. For instance, Colorado, which has more marijuana dispensaries than the number of Starbucks cafés and McDonald's restaurants combined, only allows individuals twenty-one or older to purchase up to one ounce of marijuana or eight grams of concentrates.¹¹³ On the other hand, Oklahoma has only legalized medical marijuana, allowing Oklahoma citizens who possess a state-issued license to possess up to eight ounces of marijuana in their homes and up to seventy-two ounces of edible marijuana.¹¹⁴ Therefore, marijuana is no longer per se contraband in all circumstances. In some states, like Colorado, marijuana is only contraband when possessed in excess of the legal amount or when possessed by underaged persons.¹¹⁵ Even non-Colorado citizens are afforded the right to possess marijuana legally within the state.¹¹⁶ Likewise, in Oklahoma, marijuana is legal when possessed for medical purposes, but it is contraband when possessed without a state-issued license.¹¹⁷

109. Federal Controlled Substance Act, 21 U.S.C. § 812 Schedule I (c)(10) (2012).

110. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

111. *McKnight*, 446 P.3d at 419 (Coats, J., dissenting).

112. Berke & Gould, *supra* note 87.

113. *Id.*

114. OKLA. ADMIN. CODE § 310:681-2-8 (2020).

115. Berke & Gould, *supra* note 87.

116. *Id.*

117. *Oklahoma Medical Marijuana Laws*, NORML, <https://norml.org/legal/item/oklahoma-medical-marijuana-law> [<https://perma.cc/K42H-TGX4>].

Since marijuana is no longer contraband in all circumstances, the Supreme Court's contraband-only doctrine is called into question. The Fourth Amendment's protections have already proved difficult for officers to apply, and they will be especially difficult to apply now that many states have legalized a substance that before was always considered contraband. Leaving the issue unaddressed will cause further confusion among law enforcement officers, courts, and citizens. Further, continuing dog-sniffing procedures in states where marijuana is now legal may violate the Fourth Amendment because citizens have a right to privacy of their legal possession of marijuana in the state.

B. DECRIMINALIZATION

Questions as to the constitutionality of warrantless searches conducted by marijuana-trained drug detection dogs are not confined to marijuana-legal states. State officials have also expressed concerns about the constitutionality of the investigative procedure where state legislatures have taken the initiative to decriminalize marijuana possession.¹¹⁸ Some states have yet to jump on board with the legalization of marijuana but have chosen to nonetheless decriminalize marijuana by imposing fines and lessening, or denying, the possibility of incarceration.¹¹⁹ In states that have decriminalized marijuana, the substance still remains contraband, but the possessor may no longer fear criminal prosecution.¹²⁰ Thus, decriminalization has, and likely will continue to impact the legal authority of officers in the context of dog sniffs especially as mainstream discussions of decriminalizing marijuana continue.¹²¹

The state of Maryland serves as just one example of how police officers have struggled to justify searches after the state decriminalized marijuana. In 2014, the Maryland General Assembly decriminalized possession of less than ten grams of marijuana.¹²² While the Maryland legislature did not legalize the drug outright, it enacted a statute that made the possession of less than ten grams a civil, rather than criminal offense.¹²³ The statute was enacted as “an effort to reduce the considerable time and resources spent on arresting, prosecuting, and adjudicating marijuana cases.”¹²⁴ The statute was supported by many Maryland legislators who believed marijuana possession, especially in small quantities,

118. Michael Barajas, *Texas (Kinda, Sorta) Accidentally Decriminalized Weed. Now What?*, TEX. OBSERVER (Aug. 20, 2019), <https://www.texasobserver.org/texas-kinda-sorta-accidentally-decriminalized-weed-now-what/> [<https://perma.cc/WE9G-JTE3>].

119. Kreit, *supra* note 2, at 765.

120. *Id.* at 766.

121. *US: Bill Seeks to End Federal Marijuana Prohibition*, HUM. RTS. WATCH (July 23, 2019, 10:00 AM), <https://www.hrw.org/news/2019/07/23/us-bill-seeks-end-federal-marijuana-prohibition#> [<https://perma.cc/CD5Q-UEF6>].

122. Pacheco v. State, 214 A.3d 505, 514 (Md. 2019).

123. *Id.*

124. *Id.* at 514 (citing *Criminal Law—Possession of Marijuana—Civil Offense: Hearing on S.B. 364 Before the H. Judiciary Comm.*, 2014 Reg. Sess. (Md. 2014)).

should not be considered a high-priority criminal offense.¹²⁵

Following the statute's enactment, the Court of Appeals of Maryland was confronted with a question of first impression as to whether police were authorized to arrest a person for possession of more than ten grams of marijuana, based solely on facts indicating that the person was committing a civil offense of possession of less than ten ounces of marijuana.¹²⁶ The court answered the question in the negative, finding that the defendant's possession of less than ten ounces of marijuana did not support probable cause to arrest because the civil offense did not alone demonstrate a probability that the defendant possessed a criminal amount of marijuana.¹²⁷

While the Court of Appeals of Maryland was not directly tasked with assessing the validity of a search conducted through the use of a drug detection dog, the case demonstrates how the decriminalization of marijuana has compelled courts to reexamine and interpret how decriminalization laws apply to the Fourth Amendment's protections against unreasonable searches.¹²⁸ Indeed, as the court noted, "[t]he times they are a-changin'," signaling the recognition that evolving marijuana laws call for reexamining investigative procedures and their constitutionality.¹²⁹

Even Texas, a state with some of the most rigorous marijuana laws, has faced difficulties prosecuting marijuana possession offenses, despite marijuana remaining illegal.¹³⁰ Specifically, in 2019 Texas lawmakers changed the definition of marijuana to allow legal hemp.¹³¹ Legal hemp is marijuana with less than .3 percent of THC, the psychoactive ingredient.¹³² While lawmakers contend they have not decriminalized marijuana in the state of Texas, the legislation has made it nearly impossible for the state to prosecute marijuana possession offenses.¹³³ Crime labs in the state cannot currently detect THC concentrations at this minimum threshold.¹³⁴ Likewise, drug detection dogs cannot differentiate between legal hemp—marijuana with less than .3 percent THC—and marijuana with higher concentrations of THC.¹³⁵

Since hemp is now legal in Texas, the Austin Police Department and the Travis County Sheriff's Office have reportedly directed officers to

125. *Id.*

126. *Id.* at 508.

127. *Id.* at 517–18.

128. *See id.* at 508.

129. *See id.* (quoting BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN'* (Columbia Records 1964)).

130. Barajas, *supra* note 118.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Mark D. Wilson, *Law and Odor: Police Hazy on How to Use Drug-Sniffing Dogs Under Texas Hemp Law*, STATESMAN (Jul. 12, 2019), <https://www.statesman.com/news/20190712/law-and-odor-police-hazy-on-how-to-use-drug-sniffing-dogs-under-texas-hemp-law> [https://perma.cc/9C8J-GWNX].

use a drug dog's positive signal as just one piece in establishing probable cause; previously, officers could use an alert as standalone grounds to search a vehicle.¹³⁶ Both Austin police officers and Travis County sheriff's deputies have indicated that they might be heading in the direction of Colorado after *McKnight*, leading authorities to "roll back the role of dogs in drug cases."¹³⁷ Even though the hemp law did not legalize marijuana, the law has created challenges for officers in the use of drug detection dogs. The Texas Court of Criminal Appeals may ultimately be faced with a challenge on Fourth Amendment grounds in the near future.

Thus, it is clear that law enforcement officers are facing difficulties applying the Fourth Amendment's protections in states where marijuana laws are evolving. These difficulties have arisen following not only the deliberate decriminalization of marijuana by state legislatures but also the legalization of hemp. The marijuana-trained drug detection dog has no way of distinguishing between an ounce of marijuana, a trace of marijuana, or even a trace of hemp. Where marijuana is legal in some form, or in varied amounts, marijuana is only contraband when possessed in excess of the legal amount. In states where marijuana has been decriminalized, it is unclear whether the scent of marijuana can serve as grounds for establishing probable cause. Even in states like Texas, where it is a criminal offense to possess marijuana in any form, law enforcement must grapple with how the legalization of small amounts of hemp may impact their use of marijuana-trained drug detection dogs.

Ultimately, the Supreme Court will need to address these issues, but until then, it seems that in states that continue to employ the dog sniff where marijuana is legal or decriminalized, or where hemp is legal, officers may be violating the Fourth Amendment by deploying a drug dog trained to detect lawful activity. Further, it seems critical that these questions regarding the validity of the use of drug detection dogs be resolved as the marijuana initiative will continue to stimulate changes to state and maybe even federal law.

IV. PUTTING THE LEASH ON DRUG DETECTION DOGS

President Richard Nixon's declaration of the War on Drugs in 1969 spurred the rampant use of drug detection dogs to aid law enforcement in the prosecution of drug-related crimes that the administration felt was America's number one enemy.¹³⁸ Just as curiously as drug dogs scampered onto the scene, however, the Supreme Court loosened the leash on Fourth Amendment protections.¹³⁹ The privacy rights of citizens and the government's interest in drug control efforts undoubtedly must strike a balance. While the Court has attempted to balance these interests in the context of drug detection dogs, "it has been found necessary from time to

136. *Id.*

137. *See id.*

138. Kreit, *supra* note 2, 744–45.

139. *Id.* at 744.

time to define anew the exact nature and extent of such protection[s].”¹⁴⁰ The individual’s right to privacy is a principle as old as common law and must “grow[] to meet the new demands of society,” especially when “[p]olitical, social, and economic changes entail the recognition of new rights.”¹⁴¹ The question today is whether the use of drug detection dogs is an invasion of privacy now that some states have legalized marijuana in varying amounts and contexts.

This Section will argue that the Supreme Court must reexamine its treatment of drug detection dogs under the Fourth Amendment regardless of the recent changes in state marijuana laws. Despite some evidence that the Court may be shifting its views on the use of drug detection dogs, it remains to be seen whether the pendulum is swinging back toward more Fourth Amendment protection for citizens against these intrusive searches. While the contraband-only doctrine may still hold up under federal law, it is clearly unadaptable when applied to certain state laws, and it may soon create problems at the federal level. This Section will argue that the legalization of marijuana has created a legitimate expectation of privacy in certain states and thus, affords citizens a greater degree of protection from suspicionless drug dog searches.

A. THE DRUG DETECTION DOG SHOULD NOT ESCAPE FOURTH AMENDMENT SCRUTINY

The Supreme Court’s drug detection dog jurisprudence has not escaped criticism in the years since *Place* was decided. As Justice Blackmun’s dissent in *Place* wisely warned, the majority was “in no position to address all the ramifications of this important issue” because the issue raised more complex constitutional questions than the Court was ready to address.¹⁴² What has evolved today is a doctrine that allows for the proliferation of the use of drug dogs in all kinds of contexts without scrutiny under the Fourth Amendment. Thus, irrespective of state legalization of marijuana, the Supreme Court’s contraband-only doctrine needs to be reexamined.

The drug detection dog was a powerful tool utilized by law enforcement in combating the War on Drugs.¹⁴³ Unlike other crimes, which generally begin with a report to the police following an incident, drug possession is discreet, unreported, and without incident.¹⁴⁴ The illegal sale of drugs usually results in a private, consensual transaction which is also discreet and unreported.¹⁴⁵ It follows then, that officers struggle to find a basis for probable cause for such inconspicuous crimes. Thus, enter the drug dog, whose nose can uncover the crime of drug possession even

140. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

141. *Id.*

142. *United States v. Place*, 462 U.S. 696, 723–24 (1983).

143. *See* Kreit, *supra* note 2, at 743–44.

144. *Id.* at 745–46.

145. *Id.*

when the drugs are hidden in a perpetrator's glove box or luggage.¹⁴⁶

While drug dogs should remain a valuable tool in law enforcement's arsenal, the Supreme Court's dog-sniff jurisprudence has gone too far and arguably did not serve to further drug control initiatives. The Fourth Amendment applies to searches and seizures.¹⁴⁷ As Supreme Court precedent stands today, the dog sniff generally does not fall within either category and thus, law enforcement officers may employ the drug detection dog without a warrant and without probable cause.¹⁴⁸ Not only that, the investigative technique is justified by the drug dog's unique ability to only detect contraband items, regardless of the context in which the technique is employed.¹⁴⁹ While the Court in *Jardines* regarded the home as a particular context in which the use of a drug detection dog's sense of smell was considered a Fourth Amendment search requiring probable cause, it seems that in most other contexts, the technique evades constitutional scrutiny completely.¹⁵⁰ *Jardines'* reasoning, however, undermines the justifications used in *Place* and its progeny because contraband is still contraband whether within the home, a vehicle, or any other location. Yet after *Jardines*, the use of a drug detection dog outside of a home is a search, whereas the same technique employed outside of an automobile is not.¹⁵¹

With the exception of the home, law enforcement officers' use of drug detection dogs has been justified as not violating the Fourth Amendment in a variety of other contexts.¹⁵² For example, federal courts have upheld the constitutionality of the use of drug detection dogs to reveal illegal drugs hidden within public school students' lockers without requiring a warrant or probable cause.¹⁵³ Likewise, courts have found dog sniffs of hotel rooms¹⁵⁴ and railroad sleeper compartments¹⁵⁵ outside the scope of the Fourth Amendment search and thus, immune from its warrant and probable cause requirements.

Under *Caballes*, officers may pull over a vehicle for a minor traffic violation and employ a drug dog without suspicion that the driver could be

146. *Id.*

147. U.S. CONST. amend. IV.

148. See discussion *supra* Part II.

149. See discussion *supra* Part II.

150. See *Florida v. Jardines*, 569 U.S. 1, 14 (2013).

151. Compare *Jardines*, 569 U.S. at 14 (holding that officers' use of a drug detection dog on the front porch of a citizen's home must be constitutionally justified), with *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding that a dog sniff of a vehicle at a routine traffic stop did not require constitutional justification).

152. See, e.g., *United States v. Ibarra*, 493 F.3d 526, 531 (5th Cir. 2007) (holding that a dog sniff of the exterior of trailer facilities where a tractor was receiving repairs was not a search within the meaning of the Fourth Amendment); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997) (holding that a dog sniff of a hotel room door was not a search within the meaning of the Fourth Amendment); see also *United States v. Colyer*, 878 F.2d 469, 477 (D.C. Cir. 1989); *Horton v. Goose Creek Indep. Sch. Dist.* 690 F.2d 470, 488 (5th Cir. 1982); *United States v. Marlar*, 828 F. Supp. 415, 420 (N.D. Miss. 1993).

153. *Horton*, 690 F.2d at 488.

154. *Marlar*, 828 F. Supp. at 420.

155. *Colyer*, 878 F.2d at 477.

in possession of illegal drugs.¹⁵⁶ Allowing officers to perform this type of procedure, without cause to suspect contraband, “clears the way for suspicionless, dog-accompanied drug sweeps.”¹⁵⁷ Innocent citizens who are subjected to these intrusive public search tactics for no justifiable reason will certainly feel their privacy has been intruded upon. Drug detection dogs, unlike household pets, are intimidating animals and if they are allowed to become part of routine police procedure, it may change the nature of encounters between law enforcement officers and citizens—especially when innocent, law-abiding citizens are the subject of the search.¹⁵⁸ The unjustified use of drug dogs is a public search that presumes the guilt, rather than the innocence, of an ordinary citizen and thus should require a showing a probable cause.

In 2015, the Supreme Court reaffirmed *Caballes* but seemed to take a step in the right direction toward prohibiting the unrestrained use of drug detection dogs in *Rodriguez v. United States*.¹⁵⁹ The Court reaffirmed that the “Fourth Amendment tolerate[s] certain unrelated investigations that d[o] not lengthen the roadside detention,” but limited the scope of the unrelated investigation to the time frame reasonably necessary to write a ticket and perform the necessary procedures of the routine traffic stop.¹⁶⁰ Thus, the Court held that a traffic stop, delayed by nearly thirty minutes to employ a drug detection dog to sniff the vehicle, was unreasonably prolonged and thus, a violation of the Fourth Amendment absent reasonable suspicion of criminal activity.¹⁶¹

In *Rodriguez*, the constitutional violation was not the officer’s use of the drug dog to perform an unrelated search, but rather the officer’s unreasonable extension of the routine traffic stop to conduct the dog sniff.¹⁶² Thus, employing a drug dog without suspicion of a criminal drug offense at a routine traffic stop remains outside the scope of Fourth Amendment search doctrine so long as the traffic stop is not prolonged so much as to constitute an unreasonable seizure.¹⁶³ This limitation on the Court’s holding in *Caballes* was a step in the right direction. However, officers are still at liberty to use a drug detection dog without a showing of reasonable suspicion of illegal drug possession so long as they are on a time crunch.¹⁶⁴

While it seems the Supreme Court limited the broad authority of officers to conduct unrelated dog sniffs, it remains to be seen how the Court will deal with balancing the privacy rights of citizens with the government’s interests, at least as they relate to society’s recent perceptions on

156. *See Caballes*, 543 U.S. at 409.

157. *Id.* at 422 (Ginsburg, J., dissenting).

158. *Id.*

159. 575 U.S. 348 (2015).

160. *Id.* at 354.

161. *Id.* at 358.

162. *Id.* at 357.

163. *See id.*

164. *See id.*

Drug War initiatives.¹⁶⁵ And while it seems the Court is reconsidering its precedent regarding the drug detection dog, law enforcement officers are still permitted to stop a vehicle for a minor traffic violation and turn the encounter into a full-blown drug investigation without scrutiny under the Fourth Amendment.¹⁶⁶ While the scales may have tipped heavily towards enabling the War on Drugs at the time *Place* was decided, it is imperative that the reasoning and justifications for *Place* and its progeny be reexamined in light of the nation's changing perceptions of marijuana and the significantly reduced threat of drug crime within the United States.

B. LAWFUL MARIJUANA USERS HAVE A LEGITIMATE EXPECTATION OF PRIVACY

The Supreme Court's contraband-only reasoning causes further confusion when applied in the context of state law enforcement officers' use of drug detection dogs in states where marijuana is legal. In those states, marijuana is no longer contraband. Under the Supreme Court's precedent, it would seem that because marijuana is lawful to possess at the state level, citizens would be afforded a reasonable and legitimate expectation of privacy in that lawful possession.¹⁶⁷ Further, it would seem that law enforcement's warrantless use of a marijuana-trained drug detection dog would be a violation of the Fourth Amendment within a state where marijuana is no longer contraband.¹⁶⁸ Drug detection dogs cannot distinguish between the scent of marijuana and other substances they are trained to detect, nor can they signal to their handler whether a person is in possession of a legal amount of marijuana or an amount in excess of the legal limit.¹⁶⁹ This poses difficulties for state law enforcement officers who have a duty to continue to uphold the Fourth Amendment's protections.

State marijuana laws are everchanging and far from clear cut, increasing the possibility that officers may violate citizens' privacy interests. However, it is clear that the American perception on marijuana use is changing and these issues are not disappearing any time soon. Thus, while some states like Colorado have effectively retired the marijuana-trained drug detection dog, other states have continued to allow the use of drug detection dogs even where marijuana is legal.¹⁷⁰ In this everchanging legal landscape, a citizen's privacy protections must "grow[] to meet the demands of society."¹⁷¹

165. Yentes, *supra* note 4, at 483–84.

166. *Id.*

167. See discussion *supra* Part II.

168. See discussion *supra* Part II.

169. See Yentes, *supra* note 4, at 487.

170. Stacy Cowley, *Marijuana Legalization Threatens These Dogs' Collars*, N.Y. TIMES (Nov. 24, 2018), <https://www.nytimes.com/2018/11/24/business/marijuana-legalization-police-dogs.html> [<https://perma.cc/S6AQ-8JCO>].

171. Warren & Brandeis, *supra* note 140, at 193.

Perhaps state law enforcement officers may justify the continued use of drug detection dogs without change if they are trained to detect substances other than marijuana, such as cocaine and methamphetamines. The result may be that many state trained police drug dogs will be forced to retire.¹⁷² However, this does not answer the question of whether federal officers are still constitutionally justified in using drug detection dogs to search a state citizen's automobile or luggage. If states recognize an expectation of privacy in the possession of marijuana while the federal prohibition remains in place—like Colorado in *McKnight*¹⁷³—it may be difficult for citizens to determine when and where they are afforded protection from an unwanted dog-assisted drug investigation.

Law enforcement and citizens need to be clear on when and where marijuana possession is legal.¹⁷⁴ If marijuana is no longer seen as a threat to society, the government's interest in marijuana control weakens, diminishing the need for drug detection dogs. These issues will only be exacerbated in the years to come as more and more Americans begin to support the legalization and decriminalization of marijuana.¹⁷⁵ With an increasing number of states legalizing marijuana, it may not be long before federal law changes as well.¹⁷⁶ Notably, the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act) was introduced to Congress on July 23, 2019.¹⁷⁷ In November of 2019, the House Judiciary Committee voted 24–10 to advance the bill that would decriminalize and deschedule marijuana at the federal level and provide reinvestment in persons adversely impacted by the War on Drugs.¹⁷⁸ The MORE Act is the most comprehensive marijuana reform bill in history.¹⁷⁹ While states have already taken steps towards marijuana law reform, “the Judiciary Committee has taken long-overdue steps to address the devastating injustices caused by the War on Drugs and to finally decriminalize marijuana at the federal level.”¹⁸⁰ This momentum toward decriminalization makes it especially imperative that the use of drug detection dogs is properly justified under the Fourth Amendment. Marijuana may soon be decriminalized at the federal level, demanding the legal recognition of

172. Jon Campbell, *Drug Dogs Face an Uncertain Fate if Marijuana is Legalized in New York*, USA TODAY (May 23, 2019, 7:10 PM), <https://www.usatoday.com/story/news/nation/2019/05/22/why-drug-dogs-new-york-face-uncertainty-if-marijuana-legalized/3768232002/> [<https://perma.cc/R22X-D6Z4>].

173. *People v. McKnight*, 446 P.3d 397 (Colo. 2019).

174. Kruger, *supra* note 9, at 7.

175. Berke & Gould, *supra* note 87.

176. Kyle Jaeger, *Lawmakers and Advocates React to Historic Passage of Bill to End Federal Marijuana Prohibition*, MARIJUANA MOMENTS (Nov. 20, 2019), <https://www.marijuanamoment.net/lawmakers-and-advocates-react-to-historic-passage-of-bill-to-end-federal-marijuana-prohibition/> [<https://perma.cc/45BG-QYRH>].

177. S. 2227, 116th Cong. § 2 (2019).

178. Jaeger, *supra* note 176.

179. *Id.*

180. Press Release, H. Comm. on the Judiciary, House Judiciary Passes MORE Act to Decriminalize Marijuana at the Federal Level (Nov. 20, 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2157> [<https://perma.cc/3TVA-FR4C>].

citizens' expectation of privacy and elimination of the government's interest in marijuana control efforts.

Drug detection dogs may still be a valuable tool for officers under the right circumstances. Marijuana-legal states may even be able to put criminal justice resources, like the drug dog, that were previously devoted to marijuana prosecution cases to different uses.¹⁸¹ A large majority of drug arrests are for possession of small amounts of marijuana as opposed to heroin or cocaine.¹⁸² The War on Drugs has been highly criticized over the last three decades due to the rise in federal drug imprisonment rates, which yield high costs without reducing recidivism.¹⁸³ It is questionable whether making criminals out of drug abusers accomplishes one of the key justifications for criminal sentencing—deterrence.¹⁸⁴

Eliminating police resources dedicated to training and employing these drug detection canines may provide an opportunity for implementing a more preventative strategy to national drug control initiatives. As the Pew Research Center suggests, the most effective response to drug misuse seems to be: (1) the diversion of non-violent drug offenders from costly imprisonment to treatment and dependency centers, and (2) the prevention of newly emerging drug markets as opposed to widespread prosecution for drug possession.¹⁸⁵ Drug dogs still remain valuable investigatory tools for taking down large narcotics rings, however, with public opinion shifting in favor of marijuana legalization, the need for investigatory tactics devoted to the prosecution of marijuana-related offenses will continue to decline.

Arguably, law enforcement's use of such invasive Drug War investigative tactics has failed to adequately combat the War on Drugs and is ultimately whittling away Americans' Fourth Amendment rights.¹⁸⁶ Although drug dogs were initially employed for aiding the War on Drugs, they may not even be making an impact in the grand scheme of things. Begging the question, was bending the Fourth Amendment's protections to allow the free use of drug detection dogs in law enforcement's drug investigations worth it?

The War on Drugs has been likened to the conditions of alcohol prohibition during the 1920s.¹⁸⁷ Like alcohol prohibition, drug prohibition has spurred a culture of organized crime and violence.¹⁸⁸ In addition, similar

181. Kreit, *supra* note 2, at 743.

182. Susan Stellin, *Is the 'War on Drugs' Over? Arrest Statistics Say No*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html> [<https://perma.cc/96NL-7BLF>].

183. *More Imprisonment Does Not Reduce State Drug Problems*, PEW RES. CTR. (March 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems> [<https://perma.cc/V7FX-5WFZ>].

184. See VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010).

185. See *More Imprisonment Does Not Reduce State Drug Problems*, *supra* note 183.

186. *Against Drug Prohibition*, AM. C.L. UNION, <https://www.aclu.org/other/against-drug-prohibition> [<https://perma.cc/5LBE-YTEP>].

187. *Id.*

188. *Id.*

to the 1920s, drug prohibition has led to invasive policing tactics that run afoul of the Fourth Amendment's protections.¹⁸⁹ Drug dogs may lead to more arrests, but drug use, despite prohibition, has not ceased.¹⁹⁰ Moreover, with growing support for marijuana decriminalization and the declining confidence in the War on Drugs, it seems to be the perfect time for the Court to reexamine how drug dog tactics are treated under the Constitution.

Further, the Supreme Court's contraband-only doctrine may allow a wide variety of other investigatory technologies to escape scrutiny under the Fourth Amendment and thus, potentially infringe on individuals' reasonable expectations of privacy.¹⁹¹ When *Place* was decided three decades ago, the Court failed to consider how its contraband-only reasoning may ultimately allow future technological advances to extend law enforcement's power to conduct indiscriminate searches. A plethora of devices such as electronic sniffers and remote gun detectors, purport only to detect contraband and could potentially fall under the contraband-only doctrine's reasoning.¹⁹² Not only that, but contraband has proved difficult to define—especially when it comes to marijuana.

Moreover, the Fourth Amendment should be implicated in the use of drug detection dogs because citizens do have a reasonable expectation of privacy in the lawful possession of marijuana in some—and perhaps soon, all—circumstances. In light of modern perceptions of marijuana, the Court's contraband-only reasoning will not withstand the test of time as state, and possibly even federal, law continues to change. While drug detection dogs played a crucial role in Drug War era prosecutions, they no longer serve as valuable a role, especially if they continue to infringe upon citizens' Fourth Amendment protections against unreasonable, warrantless searches.

V. CONCLUSION

Privacy is a fundamental concept of the American way of life and should not be threatened by government intrusion: "That the individual shall have full protection in person and property is a principle as old as the common law; but has found necessary from time to time to define anew the exact nature and extent of such protection."¹⁹³ The Fourth Amendment exists to protect those interests and guard citizens against unreasonable searches. The Supreme Court must balance the private citizen's interests with the government's interests in defining what investigatory tactics may be considered a search under the Fourth Amendment.

189. *Id.*

190. *Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TR. (Aug. 27, 2015), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return> [https://perma.cc/EU2A-NXLJ].

191. Ben Adams, *supra* note 25, at 1140.

192. *Id.* at 1140–41.

193. Warren & Brandeis, *supra* note 140, at 193.

With changing political and social demands comes a need to reexamine the citizen's sacred right to privacy in an everchanging legal landscape to avoid running afoul of the Constitution.

For three decades, the Court has exempted the use of drug detection dogs from nearly all of the Fourth Amendment's requirements. A search conducted by a drug dog is no minor intrusion, however, and should properly be regarded as an invasion of privacy absent constitutional justifications. Drug War era police tactics have not served to diminish drug abuse but have rather provided an immense amount of leeway for officers to utilize these intimidating canines without reasonable suspicion of criminal activity. Thus, the doctrine set forth in *Place* should be reexamined in light of the fact that a drug-dog sniff is actually a search under the Fourth Amendment.

Further, everchanging state marijuana laws have made the Court's approach to drug detection dogs an anachronism, thus calling for a reexamination and reevaluation of the doctrine. Marijuana legalization is widely supported by the American public. Thus, the drug control interests that the government may have had three decades ago no longer exist. In order to preserve the privacy interests of citizens in this everchanging legal climate, the contraband-only doctrine should be replaced by a doctrine that properly balances the government's interest in drug control and the private citizen's interest against unreasonably intrusive searches conducted by a nosy drug dog.

