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Constitutional Posture of Canine Sniffs

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INTRODUCTION

Article I, section 12 of the New York State Constitution¹ ech-

1. N.Y. CONST. art. I, § 12. The section provides in pertinent part: "The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . ." *Id.*

oes the Fourth Amendment of the United States Constitution² regarding the proscription against unreasonable searches and seizures. Although identity of language may sometimes support a policy of uniformity in both state and federal courts,³ the United States Supreme Court has repeatedly maintained that the Federal Constitution establishes only a minimum level of protection for individual rights⁴ and that a state is free, as a matter of its own law, to impose greater restrictions on police activity so as to increase individual autonomy.⁵ Therefore, states are free to grant additional protections to their citizens and the citizens are free to use these enhanced rights to seek vindication.⁶

In the realm of searches, inherent in a state's authority to ex-

2. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

3. *See* *People v. Belton*, 55 N.Y.2d 49, 57, 432 N.E.2d 745, 749, 447 N.Y.S.2d 873, 877 (1982) (Gabrielli, J., concurring) (pointing to identity of language related to searches and seizures found in New York and Federal Constitutions and state court precedents, stated that any divergence from Federal Constitution should come from legislation and not court system). A unanimous court in *People v. Ponder*, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737, 445 N.Y.S.2d 57, 59 (1981), recently stated: "section 12 of Article I of the New York Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both state and federal courts."

4. *See* *California v. Ramos*, 463 U.S. 992, 1013-14 (1983); *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

5. *See* *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Sibron v. New York*, 392 U.S. 40, 60-61 (1967); *Cooper v. California*, 386 U.S. 58, 62 (1967); *see also generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

6. As long as the overall freedom of the individual is either paralleled or enlarged, the states are free to enact legislation which grants its people broader rights than does the Federal Constitution. *See Belton*, 55 N.Y.2d at 56, 432 N.E.2d at 749, 447 N.Y.S.2d at 877 (Gabrielli, J., concurring). Where a state creates a constitutional right broader than the Federal Constitution, that right is also enforceable under the Federal Constitution's Due Process Clause. *See Mills*, 457 U.S. at 300.

tend the rights offered to individuals is a state's privilege to adopt independent standards that promote its own purpose and extend the protections of individual rights.⁷ In safeguarding the privacy and security of its citizens from the potential of illegal searches, the New York Court of Appeals has been particularly willing, in recent years, to effectuate more stringent standards than those promulgated by the Supreme Court.⁸

7. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986), *cert. denied*, 479 U.S. 1091 (1987), *on remand from* 475 U.S. 868 (1986).

8. *See, e.g.*, *People v. Scott*, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328 (1992) (rejecting Supreme Court's rule set forth in *Oliver v. United States*, 466 U.S. 170 (1984), which afforded no Fourth Amendment protection to "open fields" outside the curtilage of home); *People v. Keta*, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328 (1992) (refusing to apply Supreme Court's rule from *New York v. Burger*, 482 U.S. 691 (1987), permitting warrantless administrative searches of vehicle dismantling operations even though inspections were aimed at discovering criminal activity); *P.J. Video*, 68 N.Y.2d at 305-06, 501 N.E.2d at 562-63, 508 N.Y.S.2d at 913-14 (applying "rigorous, fact specific standard of review" to see if every element of crime is sufficiently substantiated instead of Supreme Court's "totality of the circumstances" test for determining probable cause); *People v. Class*, 67 N.Y.2d 431, 432-33, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314, *on remand from* 475 U.S. 106 (1986) (police officer's act of extending his hand into vehicle at traffic stop to expose vehicle identification number violates New York Constitution, even though it does not violate the Federal Constitution); *People v. Gokey*, 60 N.Y.2d 309, 312-14, 457 N.E.2d 723, 724-25, 469 N.Y.S.2d 618, 619-20 (1983) (in police search incident to arrest, court refused to follow standard espoused in *New York v. Belton*, 453 U.S. 454 (1980), of allowing police to search all areas within the immediate control of arrestee; court required showing, before police could search bag, of reasonable belief that suspect could gain possession of weapon or destroy evidence); *People v. Bigelow*, 66 N.Y.2d 417, 427, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 637 (1985) (rejecting proposition of *United States v. Leon*, 468 U.S. 897 (1984), that if police act in "good faith" in relying on a warrant later invalidated for lack of probable cause, evidence produced therefrom is not excluded); *People v. Johnson*, 66 N.Y.2d 398, 405-07, 488 N.E.2d 439, 444-45, 497 N.Y.S.2d 618, 623-24 (1983) (in warrantless arrests, refusing to apply *Illinois v. Gates*, 462 U.S. 213 (1983), "totality of the circumstances" test for finding probable cause based on informant's information; instead court required satisfaction of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), test of proving that informant had some basis for his knowledge and

For example, the United States Supreme Court has broadly construed the exceptions to the general warrant requirement for searches.⁹ As a result, citizens have had to seek the more expansive protections afforded by their state constitutions in the area of searches and seizures.¹⁰

This Comment examines residential "canine sniffs"¹¹ under the Fourth Amendment of the United States Constitution and under article I, section 12 of the New York State Constitution. Whether the use of narcotics detecting dogs constitutes a search under either constitution must first be assessed because the protections embodied in the Fourth Amendment and its corresponding state constitutional counterpart would not extend at all if the activity in question did not amount to a search.¹²

Notwithstanding the fact that article I, section 12 is modeled after the Fourth Amendment, it is important to recognize that New York has given its constitutional provision independent interpretation when it has deemed it necessary.¹³ Therefore, this Comment analyzes the constitutionality of canine sniffs under

that informant is reliable).

9. See *New York v. Harris*, 495 U.S. 14, 18 (1990) (even though police violated rule against entering home to effectuate arrest without first getting warrant, any subsequent statements which arrestee made outside home were not "fruit of the poisonous tree" and therefore not subject to exclusion).

10. See *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991), *on remand from* 495 U.S. 14, 18 (1990). The New York Court of Appeals disagreed with the Supreme Court and held that when police unlawfully enter a home to effectuate a warrantless arrest, statements of the arrestee subsequently obtained outside the home are subject to the exclusionary rule unless there is a showing that the taint of the police misconduct was attenuated. *Id.* at 437, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04; see also *P.J. Video*, 68 N.Y.2d at 302, 501 N.E.2d at 560, 508 N.Y.S.2d at 911 (in issuing warrants, magistrates are required to find that every element of a crime is sufficiently substantiated, instead of merely applying the Supreme Court's "totality of the circumstances" test). For a detailed analysis of the *Harris* decision, see *New York State Constitutional Decisions: 1991 Compilation*, 8 TOURO L. REV. 1002 (1992).

11. A canine sniff as used herein may be characterized as an olfactory investigation of an object or premises in an effort to detect the presence or absence of narcotics, or contraband.

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

13. See *supra* note 8.

both federal and New York State law.¹⁴ This Comment discusses how New York law has often provided broader protections to defendants' privacy rights.¹⁵ Furthermore, there is currently a similar desire on the parts of some federal courts, chiefly, the United States Court of Appeals for the Second Circuit, to expand Fourth Amendment protections to criminal defendants so as to insulate those rights more vigorously.¹⁶

Part I of this Comment generally traces the historical evolution of the search doctrine in both federal¹⁷ and state courts.¹⁸ Parts II, III, and IV explore the current status of federal and state law on canine sniffs conducted in the public arena as well as outside residences.¹⁹ This Comment concludes that a canine sniff is not a Fourth Amendment search, because the investigative procedure does not invade any area which is not already exposed to the general public and therefore cannot be claimed to invade any reasonable expectation of privacy. Moreover, the canine sniff only discloses the presence or absence of illegal narcotics and nothing else. Consequently, no search occurs when a dog's olfactory senses are used to detect narcotics and the police need not have any suspicions before conducting the procedure. This Comment suggests that if citizens are uncomfortable with permitting police to randomly conduct dogs in an effort to detect narcotics, they should petition their legislators to create a statute making random canine sniffs illegal.

14. See *infra* notes 169-236 and accompanying text for the federal law analysis, and *infra* notes 242-94 and accompanying text for the New York State analysis.

15. See *infra* notes 242-94 and accompanying text. The New York Court of Appeals has tended to limit the allowable scope of searches and has been willing to grant defendants relief even when a substantial government interest is at issue.

16. See *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985).

17. See *infra* notes 20-103 and accompanying text.

18. See *infra* notes 104-68 and accompanying text.

19. See *infra* notes 169-286 and accompanying text.

I. HISTORICAL EVOLUTION OF SEARCHES

A. Federal Courts

The constitutional provisions of the Fourth Amendment do not proscribe all searches and seizures, only those that are unreasonable.²⁰ Precisely what constitutes unreasonable searches and seizures must be determined by a particular court based on the facts and circumstances surrounding the specific case.²¹

The foremost purpose of the Fourth Amendment is to ensure the privacy and security of all citizens by protecting them from arbitrary invasions by government representatives.²² This right is protected by the basic tenet of the search and seizure doctrine, which provides that searches undertaken without a warrant are *per se* unreasonable absent the satisfaction of an exception.²³ Furthermore, a judge or magistrate may not issue a valid arrest warrant or a valid search warrant absent proof of probable cause.²⁴ In determining whether probable cause exists, a judge or magistrate must determine that:

[F]acts and circumstances within an officer's knowledge and of which she has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that: (1) in the case of an arrest, an offense has been committed and the person to be arrested committed it; and (2) in the case of a search, seizable evidence will be found in the place to be searched.²⁵

Because an evaluation of probable cause requires an objective determination, a police officer's sincerest belief or perception that she has sufficient cause to execute an arrest or conduct a search,

20. See *United States v. Place*, 462 U.S. 696, 706-07 (1983).

21. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

22. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

23. *Katz v. United States*, 389 U.S. 347, 357 (1967).

24. U.S. CONST. amend. IV.

25. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 83 (1991); see also *Carroll v. United States*, 267 U.S. 132, 162 (1925).

cannot in itself, constitute probable cause.²⁶

The methodology adopted in determining whether probable cause exists is employed in both the issuance of arrest and search warrants.²⁷ Both types of warrants can only be issued by an impartial and detached justice or magistrate.²⁸ A police officer must normally prepare a written affidavit to accompany the application for the warrant.²⁹ This affidavit must contain evidence amounting to probable cause.³⁰ In determining whether the affidavit contains sufficient evidence of probable cause, the judge or magistrate must address two relevant inquiries: 1) whether the information tendered is sufficiently trustworthy to merit consideration; and 2) whether the quantum of evidence proffered sufficiently constitutes probable cause.³¹

26. DRESSLER, *supra* note 25, at 84. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). In *Beck*, the Court found that although defendant was a known gambler, a search of his personal belongings, revealing several clearing house slips, was not supported by probable cause and was therefore unconstitutional. *Id.*

27. DRESSLER, *supra* note 25, at 84.

28. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.4, at 156 (2d ed. 1992) [hereinafter LAFAVE]. To issue a warrant, prosecutors and police officers may never possess the requisite neutrality with regard to their own investigations, however:

The courts are not in agreement as to whether this *per se* rule also applies when the person issuing the warrant had law enforcement responsibilities which did not or could not extend to the case for which the warrant was sought, but there is much to be said for the proposition that any effort to assess the neutrality of a law enforcement official in such instances on a case-by-case basis would involve the lower courts in a complicated fact-finding process which is better avoided by a prophylactic rule.

Id. See also *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (magistrate who accompanies police to the scene and participates in the search is not neutral and detached); *Connally v. Georgia*, 429 U.S. 245 (1977) (magistrate who receives a fee only for warrants issued and not warrant applications rejected is not neutral); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (state Attorney General is not neutral and detached and cannot issue warrants).

29. DRESSLER, *supra* note 25, at 90.

30. LAFAVE, *supra* note 28, § 3.3, at 138.

31. DRESSLER, *supra* note 25, at 90.

Generally, the affidavit may contain two types of information: 1) direct information, which constitutes evidence a police officer obtained through personal observation; and 2) hearsay information, which constitutes evidence an officer received from an alternate source, typically referred to as a police informant.³² Direct evidence in and of itself does not always support a finding of probable cause, and must often be considered in conjunction with available hearsay information.³³ However, an informant's trustworthiness, including the informant's credibility and the reliability of his information, often presents a problem.

Therefore, the threshold question is: under what circumstances is information obtained from an informant sufficiently trustworthy to justify consideration on the question of probable cause? Initially, in *Aguilar v. Texas*³⁴ and *Spinelli v. United States*,³⁵ the Supreme Court announced a two-tier test.

In *Aguilar*, the validity of a search warrant was at issue.³⁶ In articulating the original two-pronged test, the Court stated:

Although an affidavit may be based on hearsay information [rather than] . . . reflect the direct personal observations of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information

32. *Id.*

33. See Charles E. Moylan, Jr., *Illinois v. Gates: What It Did and What It Did Not Do*, 20 CRM. L. BULL. 93, 101 (1984). Additionally, if direct evidence alone supports a finding of probable cause, hearsay information is "redundant and can simply be factored out." *Id.*

34. 378 U.S. 108 (1964).

35. 393 U.S. 410 (1969).

36. *Aguilar*, 378 U.S. at 109. In *Aguilar*, two officers requested a search warrant from a local justice of the peace to search petitioner's premises. *Id.* The officers presented the justice of the peace with information from an informant that narcotics and drug paraphernalia were kept at the petitioner's premises. *Id.* Consequently, the warrant was issued, but the Court held that the seized evidence was inadmissible because the affidavit for the warrant did not sufficiently support a finding of probable cause. *Id.* at 115.

"reliable."³⁷

Under the first prong of the *Aguilar* test, known as the "basis of knowledge" prong, the affidavit must have contained facts that permitted the judge or magistrate to determine whether the informant had a basis for his allegations that a certain person had been or would be involved in a particular crime, or that evidence of a specific crime would be discovered at a particular locale.³⁸ Under the second prong of the *Aguilar* test, known as the "veracity" prong, sufficient facts must have also been brought to the judge or magistrate's attention to have made it possible to evaluate the credibility of the informant on the particular occasion in question.³⁹ Only where both prongs of the test were satisfied could the informant's statements be deemed sufficiently trustworthy for consideration on the question of probable cause.⁴⁰

In *Illinois v. Gates*,⁴¹ the Supreme Court chose to abandon the test established in *Aguilar* and *Spinelli v. United States*.⁴² Under the *Gates* test, a judge or magistrate may issue a valid warrant by considering "the totality of the circumstances" set forth in the af-

37. *Id.* at 114.

38. LAFAVE, *supra* note 28, § 3.3, at 143.

39. *Id.*

40. DRESSLER, *supra* note 25, at 92-93.

41. 462 U.S. 213, 230-32 (1983). In *Gates*, Illinois police received an anonymous letter which accused a married couple of selling drugs from a particular address. *Id.* at 225-26. The letter anticipated that the wife would drive her car to Florida on a specific date where it would be loaded with drugs, and that the husband would fly down thereafter to drive the car back. *Id.* The letter was corroborated by the following police observations which became the basis for the issuance of a search warrant: that the husband made a reservation and later boarded a flight to Palm Beach, where he stopped in a hotel, and later drove northbound with a woman, on an interstate highway frequently used by travelers to the Chicago area. *Id.* at 226. The Court upheld the validity of the warrant. *Id.* However the Court rejected its *Aguilar* formulation, reasoning that it overly restricted effective law enforcement. *Id.* at 232, 234, 237. Instead, the Court held that in "the totality of the circumstances," the informant's letter sufficiently supported a finding of probable cause. *Id.* at 234, 244.

42. 393 U.S. 410 (1969). *Spinelli* is a frequently cited case applying the *Aguilar* formulation.

fidavit.⁴³ Where a warrant is later challenged, the reviewing court must merely “ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.”⁴⁴ Under the *Gates* standard, evidence of an informant’s knowledge and reliability need not be directly substantiated before a finding of probable cause, but is simply a relevant determination.⁴⁵

The constitutional requirement that a search warrant, particularly describing the place to be searched and the articles to be seized, be obtained prior to a search may only be bypassed under specific exceptions.⁴⁶ Additionally, the burden of proving the necessity of an exemption from this requirement falls upon the party who seeks it.⁴⁷

1. Plain View Doctrine

The plain view doctrine may justify a warrantless search where an officer detects evidence of a crime through his own senses without physically intruding into a constitutionally protected area.⁴⁸ This doctrine authorizes a warrantless seizure of an illegal or evidentiary item only if the officer’s “access to the object” itself has a Fourth Amendment justification.⁴⁹

Police officers seizing an object may invoke the plain view

43. *Gates*, 462 U.S. 213, 230-32.

44. *Id.* at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

45. *Id.* at 230.

46. See *infra* notes 48-168 and accompanying text for a discussion of the exceptions to the general warrant requirement.

47. “The police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.” *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).

48. See *Harris v. United States*, 390 U.S. 234, 236 (1968); 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT* 242 (1978) [hereinafter LAFAVE, *SEARCHES AND SEIZURES*].

49. *Texas v. Brown*, 460 U.S. 730 (1983) (at traffic stop, officer’s observation of balloon, which he correctly believed contained narcotics, was in plain view even though officer used flashlight and stood in an unusual position to make observation). The plain view doctrine is not an exception to the warrant requirement and therefore some other justification for police access to the object is required. *Id.* at 738-39.

doctrine where they properly see an item and it is readily recognized as either evidence of a crime or contraband.⁵⁰ Furthermore, the Supreme Court has held there is no requirement that the object be viewed "inadvertently" by the police; the doctrine applies even if the officers were specifically looking for incriminating evidence when they made the observation.⁵¹

2. Exigent Circumstance Exception

The exigent circumstance exception, in justifying a warrantless arrest or search, "refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search, or seizure, for which probable cause exists, unless they act swiftly and without seeking prior judicial authorization."⁵² This exception to the general warrant requirement requires the presence of exigent or emergency-like circumstances as, for example, when police have probable cause to believe a motor vehicle stopped on a highway contains illegal contraband.⁵³ It is reasoned that where there are exigent circumstances in which police action literally must be "now or never" to pre-

50. See *Arizona v. Hicks*, 480 U.S. 321 (1987) (incriminating nature of a object must be immediately apparent; because officer had to pick up stereo to determine that it was stolen property the incriminating nature of the stereo was not seen in plain view).

51. *Horton v. California*, 496 U.S. 128 (1990) (officers who were looking for both a gun used in a robbery and proceeds of that robbery, but that only had a warrant to search for the proceeds, were justified under the plain view doctrine in seizing gun found during the search).

52. See *United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978) (warrantless entry into home to effectuate arrest permitted by existence of exigent circumstances of risk of intended arrestee's flight and destruction of evidence).

53. See *Carroll v. United States*, 267 U.S. 132 (1925) The *Carroll* doctrine established an "automobile exception" to the warrant requirement because the mobile nature of an automobile creates the exigent circumstance of significant risk of loss of evidence. *Id.* at 151. The doctrine permits police to stop and search vehicles whenever they have probable cause to believe the vehicle contains evidence of criminal activity. *Id.* at 155-56. For a discussion of other automobile exceptions to the warrant requirement see *infra* notes 99-103 and accompanying text.

serve the evidence of the crime, it is reasonable to permit action without the usual judicial evaluation.⁵⁴

The exigent circumstance exception also provides that "police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance."⁵⁵ It is reasoned that where a police officer acts to help an individual in distress, rather than to disclose evidence of criminal conduct, evidence of criminal conduct may be properly seized without a warrant.⁵⁶

3. Search Incident to Lawful Arrest

*Chimel v. California*⁵⁷ represents a severe limitation of the, until then, highly exploratory nature or scope of searches that was developing in the area of searches incident to lawful arrests.⁵⁸ The majority in *Chimel* based its decision on the concept

54. See *Cupp v. Murphy*, 412 U.S. 291 (1973) (police permitted to take fingernail scrapings involuntarily from a suspect even without warrant because evidence otherwise would have easily been destroyed if suspect washed his hands); see also generally Melinda Roberts, Note, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 FORDHAM L. REV. 571 (1975) [hereinafter Roberts].

55. *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971) (once the person in need of assistance is removed from the premises the exigency ends and police are not permitted to thereafter enter without a warrant).

56. See, e.g., *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (man thought to be in insulin shock); *People v. Roberts*, 303 P.2d 721 (Cal. 1956) (moaning sounds coming from within an apartment).

57. 395 U.S. 752 (1969).

58. The evolution of the warrantless search, justified as incidental to a lawful arrest, originated as dictum in the 1914 Supreme Court decision of *Weeks v. United States*, 232 U.S. 383 (1914). *Weeks* was one of the first cases to explore the issue of whether the use of evidence acquired through means that were not constitutionally prescribed were permissible. 232 U.S. at 398. The Court stated that allowing the admission into evidence of material seized improperly from a residence was tantamount to endorsement of the search. *Id.* at 394. The Court in *Weeks* stated that the government has a right to search an arrestee after a legal arrest, in order "to discover and seize the fruits or evidence of crime." *Id.* at 392.

Weeks laid the groundwork for *Agnello v. United States*, 260 U.S. 20

(1925), wherein the Court articulated two points: 1) law enforcement officers had a right to conduct warrantless searches of persons lawfully arrested while committing a crime; and 2) they could search the place where the arrest is made in order to find and seize items related to the offense in question. *Id.* at 30.

Furthermore, in 1927, the Court in *Marron v. United States*, 275 U.S. 192 (1927), emphasized that during an arrest, officers had the right to contemporaneously search the premises without a warrant "in order to find and seize the things used to carry on a criminal enterprise." *Id.* at 199. However, the Court retreated slightly in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932), where it held that even if the defendants' arrests were lawful, a general exploratory search, which was unlimited and involved ransacking various parts of the premises, represented an unjustifiable invasion of the premises. *Go-Bart Importing Co.*, 282 U.S. at 358; *Lefkowitz*, 285 U.S. at 465, 467.

Although in *Harris v. United States*, 331 U.S. 145 (1947), *overruled by*, *Chimel v. California*, 395 U.S. 752 (1969), an extensive five hour search of an entire apartment was upheld as incident to a lawful arrest, *id.* at 155, the Court, in *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled by*, *United States v. Rabinowitz*, 339 U.S. 55 (1950), asserted that despite the validity of an arrest, the failure of the officials to procure a search warrant, when they had ample opportunity to do so, rendered the search invalid. *Id.* at 710. Further, the Court asserted that search warrants should be acquired whenever it is reasonably practicable so as to guard against unreasonable intrusions into the private lives of citizens. *Id.* at 705. The *Trupiano* Court stated that the right to execute a warrantless search or seizure incident to a lawful arrest should be strictly construed and utilized only in situations of inherent necessity. *Id.* at 708.

Briefly after the *Trupiano* decision, however, the Court approved of an expansive ninety minute warrantless search of a one-room office as incident to a lawful arrest. *United States v. Rabinowitz*, 339 U.S. 56 (1950), *overruled by*, *Chimel v. California*, 395 U.S. 752 (1969). In *Rabinowitz*, the Court opined that the search of the defendant's office, mainly his desk, safe, and file cabinet, was reasonable and was justified as incident to a lawful arrest. *Id.* at 58-59, 64. The Court's reasoning was based upon the *Harris* decision that provided that law enforcement officers have an inherent right to search the premises where an arrest is conducted in order to discover and seize items connected with the offense charged. 339 U.S. at 61. The *Rabinowitz* opinion also renounced and overruled the *Trupiano* rule that had required law enforcement authorities to secure a search warrant when practical. *Id.* at 66.

In *Rabinowitz*, the majority opinion emphasized that the central concern in any Fourth Amendment inquiry is the reasonableness of the search in the "total atmosphere of the case," and the failure to serve a warrant would not invalidate an otherwise permissible search. *Id.* An additional consideration in

of "control."⁵⁹ However, the *Chimel* Court defined "scope" narrowly. The Court opined that in the absence of a search warrant, for a search of a premises to be reasonable incident to a lawful in-home arrest, it must be limited in scope to "the arrestee's person"⁶⁰ and the area "within his immediate control."⁶¹ The zone encompassed by the words "immediate control" is that area from within which the arrestee might gain possession of a weapon or destructible evidence.⁶² In relegating the scope of allowable searches, the Court ruled out routinely searching rooms other than those in which an arrest occurs.⁶³

assessing the reasonableness of a search is its scope or extent. See Note, *Search and Seizure since Chimel v. California*, 55 MINN. L. REV. 1011, 1012 (1971). At the time the *Harris* and *Rabinowitz* opinions were rendered the scope of a search incident to an arrest was governed by a:

[T]raditional concept of "control." In *Harris*, the Court construed "control" to include areas that were not necessarily under the defendant's "physical control" but were deemed to be within his or her "constructive possession." The *Rabinowitz* Court incorporated the *Harris* standards of "possession" and "control," and made the reasonableness of the search the crucial factor.

Id.

59. *Chimel*, 395 U.S. at 763.

60. *Id.*

61. *Id.* The petitioner in *Chimel* was arrested within the confines of his home for burglarizing a coin shop. *Id.* at 754. The search of the petitioner's entire three bedroom house, including the attic, garage, and a small workshop was conducted in an effort to locate items that were displaced as a result of the burglary. *Id.* The search was conducted pursuant to notification of the petitioner that the police officers had a warrant for his arrest. However, no search warrant was sought at anytime. Although in some rooms the search was quite cursory, in others, the officers directed the petitioner's wife to open drawers and move their contents around. The search revealed the presence of numerous coins, medals, etc. from the burglary. The duration of the search was approximately forty-five minutes. *Id.*

62. *Id.*

63. *Id.* See also *Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale*, police officers lawfully arrested the defendant on the front steps of his home and then proceeded to search his home. *Id.* at 31-33. The Supreme Court found the evidence did not support the immediacy of this search since there was no threat to existing evidence or to the safety of the officers, nor were there any other exigent circumstances justifying a warrantless search. *Id.* at 35. For a discussion of the exigent circumstances exception to the general warrant

Although *Chimel* established that a search incident to a lawful arrest may not stray beyond the area within the immediate control of the arrestee,⁶⁴ the United States Supreme Court failed to formulate a workable definition for the zone falling within the immediate control of the arrestee. Since the Court neglected to provide a practical framework or any guidance, lower courts were left with the burden of interpreting the area into which an arrestee might reach in order to grab a weapon or piece of evidence.⁶⁵

Subsequently, the United States Supreme Court, in *New York v. Belton*,⁶⁶ concluded that items within the "narrow compass of the passenger compartment of an automobile" fall within the zone in the arrestee's immediate control.⁶⁷ In *Belton*, a police officer stopped the defendant and three companions for speeding.⁶⁸ Upon discovering that none of the men owned the vehicle, the officer became suspicious. He further noticed the scent of marijuana emanating from the car as well as an envelope marked "supergold" that he believed to contain marijuana on the car floor.⁶⁹ The officer arrested the men, brought the men out of their vehicle, separated them from each other, and then searched the passenger compartment of their car, where he found a jacket with cocaine in one of its pockets.⁷⁰ In concluding that the jacket was properly searched, the Court reasoned that *as a general matter*, the passenger compartment is an area within "the immediate control" of the arrestee which can be searched incident to arrest.⁷¹ For the sake of establishing a "bright line" rule, the Supreme Court forgave the fact that in this particular case, the arrestees were not within the "grabbable" area of the vehicle

requirement, *see supra* notes 52-56 and accompanying text.

64. *Chimel*, 395 U.S. at 763.

65. *See New York v. Belton*, 453 U.S. 454, 459 (1981) (citing lower court decisions which have disagreed as to extent of permissible interior automobile search incident to arrest).

66. *Id.*

67. *Id.* at 460.

68. *Id.* at 455.

69. *Id.* at 455-56.

70. *Id.* at 456.

71. *Id.* at 462-63.

searched.⁷² As a general proposition, the Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may contemporaneously search the passenger compartment of that automobile.⁷³ Additionally, the Court held that the police may examine the contents of any open or closed container found within the passenger compartment if the passenger compartment is within the arrestee's reach.⁷⁴

4. Stop and Frisk

*Terry v. Ohio*⁷⁵ was a forerunner in the modern era of search and seizure law. It provided that when a police officer observes a person and has a reasonable suspicion based on objective articulable facts that "criminal activity may be afoot," the officer is justified in stopping that person to secure an explanation.⁷⁶ If the officer then has reason to fear that the person stopped may be armed and dangerous, the officer is entitled to conduct a limited pat-down search of the individual's outer clothing.⁷⁷ The purpose of such a superficial search can only be to disclose weapons that may threaten the officer and others in the area.⁷⁸ This type of search is only justified if the stop was aimed at making reasonable inquiries to investigate the matter which raised the officer's suspicions.⁷⁹

72. *Id.* at 463 (Brennan, J., dissenting). See *Chimel v. California*, 395 U.S. 752, 763 (1969) ("the area into which an arrestee might reach in order to grab a weapon or evidentiary item" governed by warrant exception of searches incident to arrest).

73. *Belton*, 453 U.S. at 460.

74. *Id.*

75. 392 U.S. 1 (1968).

76. *Id.* at 30. In assessing the reasonableness of the police officer's conclusion, the officer's experience is taken into consideration. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* *Terry* involved a police officer's observations of two men who repeatedly examined a store window, conferred with each other, and further re-examined the window. *Id.* at 6. Believing that an armed robbery was imminent, the officer detained Terry for a brief interrogation and frisked him for weapons. *Id.* at 6-7. Upon patting down Terry's outer clothing the officer discovered a pistol which he proceeded to disarm. *Id.* at 7. Subsequently,

In *Terry*, the Court concluded that the police officer's precautionary measures were justified under those particular circumstances.⁸⁰ Espousing the proposition of *Elkins v. United States*,⁸¹ that it is not all searches and seizures which the Constitution forbids, but merely those that are unreasonable,⁸² the *Terry* Court applied a two-pronged analysis for determining the reasonableness of various searches.⁸³ The Court stated that a search is reasonable, and therefore does not violate the Fourth Amendment, if first, it "was justified at its inception,"⁸⁴ and second, if the search "was reasonably related in scope to the circumstances which justified the interference in the first place."⁸⁵ Thus, there must exist a fairly tight fit between the objective of the investigative stop and extent or degree of personal interference of the stop/seizure and frisk/search.⁸⁶ In making such a determination, it is necessary to balance the government interest against the individual's freedoms.⁸⁷ The governmental interests that are implicated include: crime detection, prevention, and the enhancement of public safety.⁸⁸ The individual rights infringed upon are per-

Terry was arrested and formally charged with carrying concealed weapons. *Id.*

80. For a recent application of the *Terry* standard see *People v. Lipscomb*, 179 A.D.2d 1043, 579 N.Y.S.2d 302 (4th Dep't 1992). In *Lipscomb*, the trial court refused to suppress incriminating evidence found within the pockets of the defendant after his arrest for possession of drugs and driving while intoxicated. *Id.* at 1043-44, 579 N.Y.S.2d at 303. In reversing defendant's conviction, the fourth department stated that:

[T]he law enforcement officers failed to provide a justification for the frisk of defendant. The officers did not observe defendant engage in criminal behavior, nor did they observe any unexplained bulges in defendant's clothing . . . Defendant did not act in a furtive manner and the officers did not have any information that defendant might be armed. Moreover, none of the officers indicated that he thought that defendant might be armed and a threat to his safety.

Id. (citations omitted).

81. 364 U.S. 206 (1960).

82. *Id.* at 222.

83. *Terry*, 392 U.S. at 19-20.

84. *Id.*

85. *Id.* at 20.

86. *Id.* at 21.

87. *Id.* at 20-21.

88. *Id.* at 22, 29.

sonal security and privacy.⁸⁹ This Fourth Amendment reasonableness test requires the police officer to provide specific and articulable facts, which taken together with their rational inferences, "reasonably warrant that intrusion."⁹⁰ Only upon such a showing can a stop and frisk be justified.⁹¹

In *Terry*, the Court first decided that some intrusion was reasonable because the specific facts of the case created reasonable suspicion that the men searched were armed and dangerous.⁹² Next, the Court inquired as to whether the scope of the actual search was properly limited to the initial justification which permitted the search.⁹³ The search consisted of a pat-down or frisk of the suspect's outer clothing, with a further intrusion only after an object, possibly a weapon, had been felt.⁹⁴ Such a search was found to be reasonable because it was no broader than necessary to meet the search's legitimate objectives.⁹⁵ The Court in *Terry* used the standard of reasonable suspicion,⁹⁶ as opposed to the higher standard of probable cause,⁹⁷ in evaluating whether

89. *Id.* at 24-25.

90. *Id.* at 21.

91. *Id.* at 22. The Court noted that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches" *Id.*

92. *Id.* at 28.

93. *Id.* at 29.

94. *Id.* at 29-30.

95. *Id.* at 30. The Court noted that the policeman "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." *Id.*

96. *Id.* at 21-22. The relevant inquiry with respect to the reasonable suspicion standard is: "[W]ould the facts available to the officer at the moment of the seizure 'warrant a man of reasonable caution in the belief' criminal activity is afoot." *Id.* (citation omitted). An alternative description of the test is whether there is a "quantum of knowledge sufficient to induce an ordinarily prudent and cautious man to believe criminal activity is at hand." *People v. Johnson*, 56 A.D.2d 766, 766, 392 N.Y.S.2d 294, 295 (1st Dep't 1977).

97. With respect to the probable cause standard, the relevant inquiry is whether an apparent state of facts exists which would induce a reasonably intelligent and prudent man to believe that the accused committed the crime charged. *Cook v. Singer Sewing Machine Co.*, 32 P.2d 430, 431 (Cal. Ct. App. 1934) (reversing judgment against police officer for false imprisonment; court found facts and circumstances of case supported officer's reasonable

the facts and surrounding circumstances would, at the time of the search, have led a reasonably prudent man or woman to believe that the course of action taken was appropriate to ensure his or her safety as well as that of others.⁹⁸

5. Automobile Search

In *Michigan v. Long*⁹⁹ the Supreme Court held,

that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.¹⁰⁰

In concluding that a police officer is justified in conducting an area search of a passenger compartment to uncover weapons, as long as he or she possesses an articulable and objectively reasonable belief that the suspect is potentially dangerous, the Court relied on the Fourth Amendment "reasonableness under the circumstances" test applied in *Terry*.¹⁰¹ The Court found that the search instituted was initially justified, and the extent or scope of the search was proportionate to its objective — the discovery of weapons.¹⁰² Further, the Court asserted that since the officer had

belief that plaintiff had stolen sewing machine).

98. *Terry*, 392 U.S. at 22.

99. 463 U.S. 1032 (1983).

100. *Id.* at 1049 (quoting *Terry*, 392 U.S. at 21). In *Long*, a suspect who was observed to be traveling erratically and at excessive speeds was stopped and questioned by a police officer. *Id.* at 1035. The suspect failed to respond to the officer's verbal inquiries, and appeared to be under the influence of some intoxicant. *Id.* at 1036. Upon observing that a large knife was present on the driver's side of the auto's interior, the officer subjected the suspect to a protective pat-down, seeking to uncover the existence of any weapons. *Id.* The officer proceeded to shine his flashlight into the interior of the vehicle and as a result found a pouch containing marijuana on the front seat. *Id.* Further, opening the trunk revealed the presence of more marijuana. *Id.*

101. *Id.* at 1051.

102. *Id.*

a sufficient quantum of knowledge, namely reasonable suspicion to believe that the person stopped posed a safety threat in light of the circumstances, he acted appropriately.¹⁰³

B. The New York State Courts

Searches and seizures under New York law are governed by article I, section 12 of the New York State Constitution,¹⁰⁴ in addition to the Fourth Amendment. In *People v. Johnson*,¹⁰⁵ the New York Court of Appeals refused to apply the "totality of the circumstances" test for determining whether probable cause existed to make a lawful warrantless arrest.¹⁰⁶ The court held that an informant's statements, which were used as a basis for the defendant's warrantless arrest, were not sufficiently reliable so as to satisfy the second prong of the *Aguilar* test for probable cause.¹⁰⁷ In applying the *Aguilar-Spinelli* analysis, the court of appeals stated that although the identity of language between article I, section 12 of the New York State Constitution and the Fourth Amendment supports a policy of uniformity, "the practical considerations upon which uniformity rests must yield, however, to a predictable, structured analysis of the quality of evidence necessary to support intrusive searches and seizures."¹⁰⁸ Thus, the court refused to adopt the Supreme Court's current "totality of the circumstances" test enunciated in *Gates*,¹⁰⁹ reasoning that a totality of circumstances standard would not serve to protect individual rights to the degree and extent that the New York Court of Appeals has chosen.¹¹⁰ Therefore, a totality of

103. *Id.*

104. N.Y. CONST. art. I, § 12.

105. 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

106. *Id.* at 405-06, 488 N.E.2d at 445, 497 N.Y.S.2d at 623.

107. *Id.* at 400, 488 N.E.2d at 441, 497 N.Y.S.2d at 620. *See* notes 36-40 and accompanying text (discussing *Aguilar*).

108. *Johnson*, 66 N.Y.2d at 406-07, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.

109. *Illinois v. Gates*, 462 U.S. 213 (1983). *See* notes 41-45 and accompanying text (discussing *Gates*).

110. *Johnson*, 66 N.Y.2d at 405-06, 488 N.E.2d at 445, 497 N.Y.S.2d at 623.

circumstances approach will not be applied to warrantless searches and arrests in determining the existence of probable cause as a matter of state constitutional law.

In 1986, the New York Court of Appeals decided *People v. P.J. Video, Inc.*¹¹¹ In that case, the court of appeals reiterated the point that although state courts are bound by the decisions of the Supreme Court when reviewing federal statutes or applying the Federal Constitution, states are free to independently interpret state statutes or their state constitution so long as rights guaranteed by the Federal Constitution are expanded and not constricted.¹¹² Thus, the court refused to apply the more lenient "totality of circumstances" test for probable cause even to search warrant applications.¹¹³ The court expressed a concern "that the Fourth Amendment rules governing police conduct have been muddled, and judicial supervision of the warrant process diluted," to such an extreme that there exists a heightened "danger that our citizens' rights against unreasonable police intrusions might be violated."¹¹⁴

1. Plain View Doctrine

New York courts treat the plain view doctrine in much the same way that federal courts do. However, it is not altogether clear whether the New York Court of Appeals has given up the inadvertence requirement.

By way of background, in *People v. Spinelli*,¹¹⁵ the court of appeals stated that a person who leaves an article in plain view has no legitimate expectation of privacy with respect to that item, and a limited search of that item may be conducted as long as the two requirements articulated in *Coolidge v. New Hampshire*¹¹⁶

111. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987).

112. *Id.* at 302, 501 N.E.2d at 559-60, 508 N.Y.S.2d at 911.

113. *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

114. *Id.*

115. 35 N.Y.2d 77, 80, 315 N.E.2d 792, 794, 358 N.Y.S.2d 743, 746-47 (1974).

116. 403 U.S. 443 (1971).

are met. First, the court noted that plain view alone is never sufficient to justify a warrantless search and seizure, and further, the object must have come into plain view inadvertently.¹¹⁷ Thus the court held, "if the 'discovery is anticipated,'" the warrantless search is not justified.¹¹⁸ Therefore, under this second requirement, law enforcement officials are precluded from executing a search without obtaining a search warrant when sufficient probable cause exists.¹¹⁹ However, subsequent to the court of appeals' *Spinelli* decision, the United States Supreme Court, in *Horton v. California*,¹²⁰ held that there is no inadvertence requirement for plain view searches.

The court of appeals has not yet had occasion to deal with *Horton* but lower New York courts have. These courts have uniformly followed *Horton*, and have not applied the inadvertence requirement when deciding a case on state grounds.¹²¹

2. Exigent Circumstance Exception

In determining whether a warrantless search of a restaurant and the resulting seizure of eight guns violated the New York State Constitution, the New York Court of Appeals, in *People v. Vaccaro*,¹²² considered limited circumstances that would justify searches absent a warrant.¹²³ One of these "exceptional circumstances" arises when an exigency has made time of the essence because "evidence or contraband [is] threatened with removal or

117. *Spinelli*, 35 N.Y.2d at 80, 315 N.E.2d at 794, 358 N.Y.S.2d at 746-47.

118. *Id.* (quoting *Coolidge*, 403 U.S. at 470).

119. *Id.*; see also *People v. Jackson*, 41 N.Y.2d 146, 391 N.Y.S.2d 82, 359 N.E.2d 677 (1976).

120. 496 U.S. 128, 129 (1990).

121. See *People v. Manganaro*, 176 A.D.2d 354, 574 N.Y.S.2d 587 (2d Dep't 1991), *appeal denied*, 79 N.Y.2d 860, 580 N.Y.S.2d 732, 588 N.E.2d 767 (1992) (applies *Horton* in not requiring inadvertent plain view); *People v. Aaron*, 172 A.D.2d 842, 569 N.Y.S.2d 206 (2d Dept. 1991) (citing *Horton* with approval).

122. 39 N.Y.2d 468, 348 N.E.2d 886, 384 N.Y.S.2d 411 (1976).

123. *Id.* at 472, 348 N.E.2d at 889, 384 N.Y.S.2d at 414.

destruction.”¹²⁴ In *Vaccaro*, an immediate warrantless search of the restaurant was justified because the guns being sold in the restaurant were under threat of being destroyed or removed and therefore, it was not unreasonable for the police to regard the circumstances as exigent and to act quickly.¹²⁵

3. Search Incident to Lawful Arrest

In the realm of searches conducted incident to lawful arrests, the rules formulated by the New York Court of Appeals have been somewhat consistent with those of the United States Supreme Court.¹²⁶ However, the court of appeals has resisted some of the Supreme Court's efforts to lessen the degree of protection afforded to citizens by the *Chimel v. California* Court. On remand from the United States Supreme Court, the court of appeals, in *People v. Belton*,¹²⁷ analyzed why the Supreme Court was wrong in its “search incident to lawful arrest” analysis without explicitly rejecting that analysis. However, in a later case,

124. *Id.* (quoting *Chapman v. United States*, 365 U.S. 610, 615 (1961) (evidence seized in search of defendant's rented premises, without presence of defendant, but with landlord's consent, was inadmissible absent exceptional circumstances necessary to justify warrantless search)).

125. *Id.* at 472-74, 348 N.E.2d at 889-91, 384 N.Y.S.2d at 414-15.

126. *People v. Knapp*, 52 N.Y.2d 689, 692, 422 N.E.2d 531, 532, 439 N.Y.S.2d 871, 873 (1981) (search of defendants bedroom and basement forty-five minutes after arrest was not incident thereto); *People v. Fields*, 45 N.Y.2d 986, 988-89, 385 N.E.2d 1040, 1040-41, 413 N.Y.S.2d 112, 112-13 (1978) (after arresting defendant in hallway, police not permitted to enter home and search incident to arrest); *People v. Clements*, 37 N.Y.2d 675, 676, 339 N.E.2d 170, 171, 376 N.Y.S.2d 480, 481 (1975) (search of dresser drawer with defendant in another room permitted when exigent circumstance of likelihood of destruction of evidence existed and search was based on informant information that contraband was in drawer), *cert. denied*, 425 U.S. 911 (1976); *People v. Fitzpatrick*, 32 N.Y.2d 499, 509, 300 N.E.2d 139, 143, 346 N.Y.S.2d 793, 799 (police search of room where search occurred valid even though defendant handcuffed), *cert. denied*, 414 U.S. 1050 (1973). See *supra* notes 57-74 and accompanying text (discussing Supreme Court decisions in this area).

127. 55 N.Y.2d 49, 55, 432 N.E.2d 745, 748, 447 N.Y.S.2d 873, 876 (1982), *on remand from*, 45 U.S. 454 (1980). *People v. Belton* is discussed *infra* at note 163-68 and accompanying text, under automobile searches.

People v. Torres,¹²⁸ the court interpreted its *Belton* decision as rejecting the Supreme Court's *New York v. Belton* analysis.¹²⁹ The New York Court of Appeals disagreed with the Supreme Court's application of the *Chimel* "immediate control" requirement to the facts of *Belton*.¹³⁰ The court noted that in *Belton*, the closed container searched was neither on the arrestee's person nor within his reach,¹³¹ and therefore such an application departed from the rationale on which the *Chimel* decision was built.¹³² Thus, even where automobiles are concerned, the New York Court of Appeals advocates a narrower reading of *Chimel*'s "immediate control" requirement.¹³³

The *Torres* court held that officers, after having conducted a pat-down of the defendant outside the defendant's vehicle and assuring themselves that there was no immediate threat to their safety, were unjustified in reaching into that vehicle and removing a shoulder bag which was subsequently found to contain a weapon.¹³⁴ In reaching this conclusion, the court utilized the *Terry* two-prong reasonableness test,¹³⁵ ultimately finding that the intrusion was not reasonably related to the need to protect the officer's safety.¹³⁶ The court decided that under the circumstances, this search was prohibited by the more protective state constitutional provisions.¹³⁷ It concluded that at most, the offi-

128. 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).

129. *Id.* at 228, 543 N.E.2d at 64, 544 N.Y.S.2d at 799.

130. *Id.* at 229, 543 N.E.2d at 64, 544 N.Y.S.2d at 799.

131. *Id.* See also *Belton*, 55 N.Y.2d at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875.

132. *Torres*, 74 N.Y.2d at 229, 543 N.E.2d at 64, 544 N.Y.S.2d at 799. *Chimel v. California*, 395 U.S. 752 (1969), provided that as an incident to a lawful arrest, a warrantless search of the arrestee's person or area within his immediate control could be conducted if there was a threat of destruction or removal of evidence, or if the arrestee might have access to a weapon. *Id.* at 763. See *supra* notes 57-65 and accompanying text. (discussing the *Chimel* decision).

133. *Torres*, 74 N.Y.2d at 229, 543 N.E.2d at 64, 544 N.Y.S.2d at 799.

134. *Id.* at 231, 543 N.E.2d at 65-66, 544 N.Y.S.2d at 801.

135. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1976).

136. *Torres*, 74 N.Y.2d at 231, 543 N.E.2d at 65-66, 544 N.Y.S.2d at 801.

137. *Id.* at 228, 543 N.E.2d at 63-64, 544 N.Y.S.2d at 798-99.

cers had a reasonable suspicion for suspecting the presence of a gun, but that they lacked probable cause. Under the circumstances, the *Torres* court decided that the *Terry* standard could not be applied to justify the search, stating that such an interpretation would be overly expansive and inconsistent with the privacy rights guaranteed by the New York State Constitution.¹³⁸

Another aspect of *New York v. Belton* was rejected by the New York Court of Appeals in *People v. Gokey*.¹³⁹ The Supreme Court held in *Belton* that any closed container within an arrestee's immediate control can be searched incident to the arrest.¹⁴⁰ New York's highest court disagreed on state constitutional grounds.¹⁴¹ *Gokey* involved a police search incident to arrest of a duffel bag which the arrestee was carrying.¹⁴² The court of appeals held that such searches are not *per se* valid.¹⁴³ They are only valid if there exists some exigency necessitating the search.¹⁴⁴ The court required that a police search of a closed container in an arrestee's possession be prompted by a reasonable fear for the officer's personal safety or the safety of others, or a reasonable fear that evidence will be destroyed.¹⁴⁵ On the facts of *Gokey*, where the defendant was arrested for a non-violent crime and the prosecution admitted that the officers did not fear for their safety, the court held that no exigency existed and that the bag was therefore illegally searched.¹⁴⁶

4. Stop and Frisk

The New York Court of Appeals radically departed from the Supreme Court in analyzing police initiated encounters. Instead of treating a *Terry*-stop as the minimal police intrusion subject to

138. *Id.* at 227-28, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

139. 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

140. *New York v. Belton*, 453 U.S. 454, 461 (1980).

141. 60 N.Y.2d at 311, 457 N.E.2d at 724, 469 N.Y.S.2d at 619.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 312, 457 N.E.2d at 725, 469 N.Y.S.2d at 619.

146. *Id.* at 314, 457 N.E.2d at 725, 469 N.Y.S.2d at 620.

judicial scrutiny, the court in *People v. De Bour*¹⁴⁷ articulated two additional levels of police intrusion which although do not amount to a search or seizure, and consequently do not implicate the New York or Federal Constitutions, are subject to common law restrictions.

The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the (common-law) right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure.¹⁴⁸

Subsequent to *De Bour*, the New York Court of Appeals drew a subtle distinction between a request for information and a common law inquiry.¹⁴⁹ In *People v. Hollman*,¹⁵⁰ the court explained that a request for information is a general, non-threatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area.¹⁵¹ "[O]nce the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached," the officer's inquiry no longer amounts to a simple request for information.¹⁵² If the individual being questioned would reasonably believe, based on the substance or content of the officer's questions, that he is suspected of wrongdoing, the officer is no longer merely asking for information.¹⁵³ In such circumstances, the encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is

147. 40 N.Y.2d 210, 221, 352 N.E.2d 562, 571, 386 N.Y.S.2d 375, 384 (1976).

148. *Id.* at 223, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384-85.

149. *People v. Hollman*, 79 N.Y.2d 181, 191-92, 590 N.E.2d 204, 209-10, 581 N.Y.S.2d 619, 624-25 (1992).

150. 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992).

151. *Id.* at 191, 590 N.E.2d at 209, 581 N.Y.S.2d at 624.

152. *Id.* at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

153. *Id.*

afoot.¹⁵⁴ Therefore, "the distinction rests on the content of the questions, the number of questions asked, and the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one."¹⁵⁵ The court of appeals, however, did not set forth a bright line test for distinguishing between a request for information and a common law inquiry, rather, it stated that this determination must be made on a case by case basis.¹⁵⁶

In one of the police initiated encounters discussed in *Hollman*, the court held that the officer did not have a sufficient basis to make a common law inquiry.¹⁵⁷ Consequently, the officer's mere act of asking the suspect to consent to allow a search of his bag was illegal.¹⁵⁸ The narcotics found inside the bag were therefore excluded even though there was no question as to whether the defendant's subsequent consent to the search was voluntary.¹⁵⁹

With regard to full stops and frisks, which do implicate the New York and Federal Constitutions, the New York Court of Appeals employs a standard similar to the federal standard set forth in *Terry*. In *People v. Cantor*,¹⁶⁰ the court stated that before police officers may conduct a frisk, they must have an objective, credible reason, such as a reasonable belief that the suspect is about to commit a crime.¹⁶¹ In doing so, the *Cantor* court assessed the police action by considering the *Terry* formulation.¹⁶²

5. Automobile Search

Warrantless searches concerning automobiles and other moving

154. *Id.*

155. *Id.* at 192, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

156. *Id.*

157. *Id.* at 194, 590 N.E.2d at 211, 581 N.Y.S.2d at 626.

158. *Id.*

159. *Id.* For a more in depth analysis of *People v. Hollman* see New York State Constitutional Decisions: 1992 Compilation, 9 TOURO L. REV. 1008 (1993).

160. 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975).

161. *Id.* at 112-13, 324 N.E.2d at 877, 365 N.Y.S.2d at 516.

162. *Id.* at 110-11, 324 N.E.2d at 875-76, 365 N.Y.S.2d at 514.

vehicles are treated distinctly. After the Supreme Court decided *New York v. Belton*,¹⁶³ the case was remanded back to the New York Court of Appeals. On remand,¹⁶⁴ the New York Court of Appeals found it unnecessary to decide whether a search of a vehicle's passenger compartment, after its occupants are placed under arrest and moved away from the vehicle, was justified as a search incident to arrest.¹⁶⁵ Instead, the court held the search was valid pursuant to an automobile exception to the warrant requirement.¹⁶⁶

The court in *Belton* held that:

where police officers have validly arrested an occupant of an automobile, and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested, or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein.¹⁶⁷

The New York Court of Appeals based its rationale on the reduced expectation of privacy that is associated with automobiles and on the inherent mobility of such vehicles.¹⁶⁸

163. 453 U.S. 454 (1981). *See supra* notes 66-74.

164. 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982).

165. *Id.* at 52, 432 N.E.2d at 746, 447 N.Y.S.2d at 874.

166. *Id.*

167. *Id.* at 55, 432 N.E.2d at 748, 447 N.Y.S.2d at 876.

168. *Id.* at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875. It is reasoned that individuals have reduced expectations of privacy in their vehicles "because its function is transportation and it seldom serves as one's residence or as the repository of personal effects It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

The mobility of automobiles often makes it impracticable to obtain a search warrant before the search. *Belton*, 55 N.Y.2d at 53, 432 N.E.2d at 747, 447 N.Y.S.2d at 875. This rationale implicates the emergency doctrine exception, otherwise known as the exigent circumstance exception, discussed *supra* at notes 52-56 and 122-25. *See also Roberts, supra* note 54, at 581.

II. FEDERAL COURTS AND CANINE SNIFFS IN THE PUBLIC ARENA

A canine sniff consists of the use of the olfactory senses of a trained dog to sniff an object or premises for the purpose of disclosing the presence or absence of contraband.¹⁶⁹ The intrusion occasioned by the dog sniff is minimal in that it reveals only certain types of contraband and not personal belongings.¹⁷⁰ Thus, the specificity of information detected is of an extremely limited nature. Furthermore, this investigative tool is generally restricted in its duration to only a few seconds. It must be noted that even a constitutionally valid canine sniff which results in a positive response does not by itself give the officers the right to conduct a search of the item sniffed. The positive response from the dog can only contribute to probable cause, which is necessary to make an arrest or secure a search warrant.¹⁷¹

A. *Canine Sniffs of Airport Luggage* — *United States v. Place*

The extent of the Supreme Court's holding in *United States v. Place*¹⁷² has become a matter of much controversy among lower courts. Some courts have interpreted the decision as establishing a clear and absolute rule that canine sniffs, in and of themselves, do not constitute a search for Fourth Amendment purposes. These courts evidently hold that the canine detects the presence of narcotics in "plain odor," a concept analogous to the plain view doctrine.¹⁷³ Other courts have limited *Place* to its facts, and have interpreted the decision as resting primarily on the basis that luggage at an airport was involved. It is unreasonable, these courts

169. See generally, William F. Timmons, *Re-examining the Use of Drug Detecting Dogs Without Probable Cause*, 71 GEO. L.J. 1233 (1983).

170. *Id.* at 1243.

171. See LAFAYE, SEARCH AND SEIZURES *supra* note 48, at 267.

172. 462 U.S. 696 (1983).

173. See *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 477 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir.), *cert. denied*, 450 U.S. 923 (1980).

reason, to have a heightened expectation of privacy in the contents of luggage that is surrendered to the custody of a common carrier.¹⁷⁴ However, these courts explain, when a canine sniff is directed toward an object for which people possess a higher expectation of privacy, these courts hold, a search may indeed occur.¹⁷⁵ However, when airport luggage is involved, the circuit courts are in agreement that *Place* establishes that these sniffs are not searches within the meaning of the Fourth Amendment.¹⁷⁶

In *Place*, Drug Enforcement Agency (DEA) officials at New York's LaGuardia Airport were informed by other agents in Miami International Airport that Mr. Place had sufficiently attracted the agents' attention to prompt them to question Place and request to examine his driver's license and airline ticket.¹⁷⁷ Place acquiesced to the officers' request for consent to have his luggage searched. However, the Miami officers refrained from searching the baggage so that Place would not miss his flight.¹⁷⁸ The New York officials were reasonably suspicious upon Place's arrival at LaGuardia Airport, and consequently approached him to secure

174. *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985).

175. *Id.* See also *United States v. Beale*, 731 F.2d 590 (9th Cir. 1983), *rehearing granted, en banc*, 728 F.2d 411, *on rehearing*, 736 F.2d 1289, *cert. denied*, 469 U.S. 1072 (1984).

176. See *United States v. Daniel*, 982 F.2d 146 (5th Cir. 1993); *United States v. England*, 971 F.2d 419 (9th Cir. 1992); *United States v. Harvey*, 961 F.2d 1361 (8th Cir.), *cert. denied*, 113 S. Ct. 238 (1992); *United States v. Lyons*, 957 F.2d 615 (8th Cir. 1992); *United States v. Colyer*, 878 F.2d 469, (D.C. Cir. 1989); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989); *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988); *United States v. Garcia*, 849 F.2d 917 (5th Cir. 1988); *United States v. Attardi*, 796 F.2d 257 (9th Cir. 1986); *United States v. Lewis*, 708 F.2d 1078 (6th Cir. 1983); *United States v. McCranie*, 703 F.2d 1213 (10th Cir.), *cert. denied*, 464 U.S. 992 (1983).

177. *Place*, 462 U.S. at 698.

178. Upon Place's departure, the two agents recognized that Mr. Place's two pieces of baggage bore distinct addresses and that the airline had been given a third address. *Id.* It was upon the agents' accumulated suspicion from surrounding circumstances that they decided to telephone the New York officials and alert them of their concerns. *Id.*

his approval to search his luggage.¹⁷⁹ When Mr. Place failed to comply with the request to search his luggage, one of the officials replied that they were going to take the luggage to a federal judge in order to procure a search warrant.¹⁸⁰ At that point, the officials took the luggage to Kennedy Airport, where the sniff of a trained narcotics canine indicated that one of the suitcases contained contraband.¹⁸¹ Place did not accompany the officers.¹⁸²

In total, the luggage was detained and remained within the government agents' possession for a duration of ninety minutes before it was actually subjected to the sniff.¹⁸³ The "alert" reaction of the dog gave rise to probable cause to believe that the baggage contained drugs, which is a sufficient justification for a more prolonged seizure.¹⁸⁴ With this information in hand, the agents secured a search warrant and a subsequent search revealed that one suitcase did indeed contain narcotics.¹⁸⁵ The United States Supreme Court held that the narcotics should have been excluded not because the canine sniff was an illegal search, but because the luggage was unreasonably *seized* for ninety minutes without sufficient basis.¹⁸⁶ The Court opined that this particular seizure, due to its duration, exceeded the allowable scope of a seizure based on reasonable suspicion and therefore precluded any conclusion of reasonableness.¹⁸⁷

In evaluating the ninety minute seizure of the luggage which preceded the canine sniff, the Supreme Court in *Place* relied on the degree of certainty or knowledge standard, that of reasonable suspicion, that criminal activity is afoot, as articulated in *Terry v.*

179. When the New York officials introduced themselves to Place as narcotics agents, he stated that he knew they were government officials and had spotted them immediately upon exiting the plane. *Id.* at 698-99. The events, taken together, led the officials to reasonably believe that Mr. Place had contraband within his possession. *Id.*

180. *Id.* at 699.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 710.

187. *Id.*

Ohio.¹⁸⁸ The Court therefore analyzed the seizure under the brief investigative detention standard of *Terry*.¹⁸⁹ In so doing, the court in *Place* held that the defendant's Fourth Amendment right to be free from an unreasonable seizure was violated when the agents acted on less than probable cause in detaining the luggage.¹⁹⁰ Further, the intrusion "was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting the luggage, of the length of time he might be dispossessed, and of what arrangements would be made for [the] return of the luggage if the investigation dispelled the suspicion."¹⁹¹ Thus, although the *Place* Court acknowledged that the government does have a substantial interest in "enhanc[ing] the likelihood that police will be able to prevent the flow of narcotics into distribution channels,"¹⁹² and the sniff at issue did not constitute a minimally intrusive "search" within the meaning of Fourth Amendment, the seizure's scope, in terms of duration, so exceeded allowable limits that the detention was deemed unreasonable.¹⁹³

In arriving at the conclusion that no seizure occurred, however, the Supreme Court reasoned that canine sniffs are unintrusive and

188. *Id.* at 708 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

189. *Id.* at 706. As was previously discussed, the *Terry* court held that an officer may stop a person and conduct a limited search of the outer clothing of that individual if he can articulate facts upon which "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others [is] in danger." 392 U.S. 1, 27. *Terry* was the first case to sanction an intrusion on a Fourth Amendment interest based on a degree of certainty less than probable cause. Curtis Ray Shelton, *Seizures of Personal Property Supported By Reasonable Suspicion: United States v. Place*, 44 LA. L. REV. 1149, 1151 (1984). In finding reasonable suspicion to be an adequate level of knowledge or certainty, the *Terry* Court balanced the government's interest in protecting the safety of its officers while pursuing government duties and the individual's interest in privacy. *Terry*, 392 U.S. at 21. The Court determined that the government's interest outweighs that of the private individual, at least to the extent that the minimally-intrusive stop and limited pat-down are reasonable. *Id.*

190. *Place*, 462 U.S. at 710.

191. *Id.*

192. *Id.* at 704.

193. *Id.* at 704-710.

"limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."¹⁹⁴ The sniff, the Court articulated, discloses only the presence or absence of narcotics and causes little inconvenience or embarrassment.¹⁹⁵

The Supreme Court reiterated the rule that one cannot have a reasonable expectation of privacy in illegal activity in *United States v. Jacobson*.¹⁹⁶ In explaining *Place* the Court stated: "[T]he reason this did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items."¹⁹⁷

B. Residential Canine Sniffs — United States v. Thomas

Although *Place* arguably proposes that a canine sniff capable of identifying solely the presence or absence of contraband is not a search within the meaning of the Fourth Amendment, this interpretation of *Place* has been rejected by *United States v. Thomas*.¹⁹⁸ In *Thomas*, the United States Court of Appeals for the Second Circuit reasoned that the canine sniff effected outside of the defendant's dwelling constituted a search within the meaning of the Fourth Amendment.¹⁹⁹ Since the officer who conducted the sniff had no search warrant, the intrusion was deemed violative of the Fourth Amendment.²⁰⁰

The search at issue in *Thomas* was that of the co-defendant Wheelings' apartment.²⁰¹ The apartment was searched pursuant to a warrant issued on the basis of probable cause. Probable cause was found to exist based on an affidavit submitted by the DEA agents supported by an allegedly positive "alert" of a canine.²⁰² The warrant authorized the agents to search the premises chiefly

194. *Id.* at 707.

195. *Id.*

196. 466 U.S. 109 (1984) (yes/no chemical test for narcotics not a search).

197. *Id.* at 124.

198. 757 F.2d 1359 (2d Cir.) *cert. denied*, 474 U.S. 819 (1985).

199. *Id.* at 1367.

200. *Id.*

201. *Id.* at 1365.

202. *Id.* at 1366.

for controlled substances.²⁰³ The underlying affidavit stated that Wheelings had been identified as a drug dealer and a processor of narcotics, and when arrested the previous day, he had abruptly closed his apartment door in a suspicious manner so as to lead the officers to believe that contraband was present on the premises.²⁰⁴ Yet, the search of the defendant's apartment, yielded no such substances.²⁰⁵ The defendant purported that one of the reasons that the magistrate found probable cause to exist was on the basis of the canine sniff which was conducted outside of the defendant's apartment.²⁰⁶ The defendant reasoned that there was no independent ground from which to conclude that probable cause existed.²⁰⁷

The *Thomas* court interpreted the Supreme Court decision to mean simply that people have a lower expectation of privacy in airport luggage.²⁰⁸ In making the threshold inquiry of whether or not the act in question could be construed as a search, the *Thomas* court distinguished the canine sniff conducted in *United States v. Place*.²⁰⁹ The Second Circuit reasoned that the canine sniff involved in *Place* was not a search solely because it involved airport luggage. Where a canine sniff is directed towards something in which one would have a higher expectation of privacy, such as a dwelling, the sniff may indeed be a search implicating the Constitution, the court held.²¹⁰ The court of appeals recognized that canine sniffs are discriminating and less intrusive than other types of searches directed at the detection of contraband. However, the *Thomas* court explained, the sniff remains a means by which to manifest the contents of a private, enclosed space.²¹¹ The court acknowledged that one does have a *general* expectation of privacy in the contents of his or her own personal

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1367.

209. *Id.*

210. *Id.*

211. *Id.*

baggage, yet such an expectation is greatly diminished when the luggage is placed into the custody of a common carrier.²¹² In contrast, a citizen has a greatly heightened expectation of privacy in his or her dwelling.²¹³ Therefore, the Second Circuit held, a sniff of the area directly outside a dwelling is indeed a Fourth Amendment search. Thus, the fact that one canine sniff was deemed a search within the ambit of the Fourth Amendment and the other was not is due, primarily, to the subject and situs of the particular canine sniff.²¹⁴ Thus, the court articulated that although the practice of canine sniffs is minimally intrusive in a public airport,²¹⁵ because an individual surrenders his privacy expectations or interests to a large extent when he places his luggage within the custody of a common carrier, the identical sniff is more intrusive when employed at the door of an individual's home.²¹⁶

C. Random Canine Sniffs

It is conceivable that a police officer may decide to go from door to door with a canine by his side to detect the presence of narcotics in homes not previously suspected of any wrongdoing. Some courts in another context, canine sniffs of persons, have suggested the sniffs, whether amounting to a search or not, cannot be permitted without an individualized suspicion that the item being sniffed contains narcotics. These courts worry that a police "dragnet" unconstitutionally intrudes on personal freedoms. A Ninth Circuit panel raised this concern in *United States v. Beale*.

212. *Id.*

213. The Second Circuit Court of Appeals has recognized that an individual possesses a heightened expectation of privacy in his or her dwelling. For example, in *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980), the court found that police use of a telescope to identify objects or activities unable to be identified without it, constituted a "search" and further, that the ends, which were the observations, could not justify the means employed, searching, absent a valid search warrant. The observations could not, the court reasoned, form the basis for the issuance of a search warrant. *Id.* at 139, 140.

214. *Thomas*, 757 F.2d at 1366.

215. *Id.*

216. *Id.*

(*Beale II*)²¹⁷ and concluded that an officer must have reasonable suspicions before conducting the sniff.²¹⁸ Although the panel's opinion was subsequently replaced by an *en banc* decision of the Ninth Circuit, which required no such suspicion,²¹⁹ the opinion merits some discussion since it raises significant issues.

The *Beale II* court held that individualized suspicions must be present before a canine sniff is conducted.²²⁰ The court explained "no federal court has yet upheld a canine investigation in the face of a record demonstrating a lack of prior individualized suspicion."²²¹ The *Beale II* court interpreted the Supreme Court's conclusion in *Place* that a canine sniff does not constitute a "search" to be a direct result of the Court's assumption that reasonable suspicions already exist. However, where reasonable suspicion is not found to exist, the court explained, the Supreme Court would deem the sniff to be a "search."²²²

The individualized suspicion requirement, the court explained, is not a requisite of either search or seizure analysis, but is part of the Fourth Amendment generally.²²³ "The crucial inquiry is whether the investigative activity is the kind of intrusion a free society is willing to tolerate if unregulated by constitutional constraints."²²⁴ The *Beale II* court noted as persuasive authority

217. 731 F.2d 590 (9th Cir. 1983), rehearing granted, *en banc*, 728 F.2d 411, on rehearing, 736 F.2d 1289, cert. denied, 469 U.S. 1072 (1984). The Ninth Circuit first decided on the *Beale* case (*Beale I*) prior to the time that the Supreme Court issued its *Place* opinion. 674 F.2d 1327 (9th Cir. 1982). After the *Place* opinion was issued the Supreme Court vacated *Beale I* and remanded the case back to the Ninth Circuit. 463 U.S. 1202 (1983). The Ninth Circuit in *Beale II* then reaffirmed its prior decision. Thereafter, in an *en banc* hearing, the Ninth Circuit replaced the *Beale II* decision with *Beale III*. 736 F.2d 1289 (9th Cir. 1984).

218. *Beale II*, 731 F.2d at 595.

219. *Beale III*, 736 F.2d 1289 (9th Cir. 1984).

220. *Beale II*, 731 F.2d 590, 595.

221. *Id.* at 594 (citing *United States v. Odland*, 502 F.2d 148, 151 (7th Cir.), cert. denied, 419 U.S. 1088 (1974); *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973); and distinguishing *United States v. Race*, 529 F.2d 12, 14 (1st Cir. 1976)).

222. *Id.* at 593.

223. *Id.*

224. *Id.* (citing Anthony G. Amsterdam, *Perspectives on the Fourth*

for its decision a Fifth Circuit case of *Horton v. Goose Creek Independent School District*.²²⁵

Horton, which involved canine sniffs of students and their school lockers and cars,²²⁶ was decided before the *Place* decision. The Fifth Circuit held that the sniff of the students themselves did constitute a search, but that the sniff of the lockers and cars did not constitute a search.²²⁷ As far as the lockers and cars were concerned, the Fifth Circuit permitted a dragnet approach because the school administration's generalized suspicion that drug activity was taking place in the school was enough of a justification in those circumstances.²²⁸ However, when it came to the dog sniff of the students, the court required particularized suspicions because of the higher expectation of privacy in one's person.²²⁹

The *Horton* case disagreed with a Seventh Circuit case, *Doe v. Renfrow*,²³⁰ which permitted a dragnet-type canine sniff of students. The opinion rested on the school's *in loco parentis* authority.²³¹ The United States Supreme Court declined to grant certiorari,²³² which prompted a very strong dissent from Justice Brennan. Justice Brennan stated that once school officials elicit the aid of local police, they are no longer acting under their *in loco parentis* powers.²³³ Moreover, Justice Brennan stated:

This Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches. See, e.g., *Ybarra v. Illinois*²³⁴ (mass investigatory detention, interrogation, and search

Amendment, 58 MINN. L. REV. 349, 403 (1974); *United States v. Solis*, 536 F.2d 880, 881 (9th Cir. 1976)).

225. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

226. *Id.* at 474.

227. *Id.* at 473.

228. *Id.* at 482.

229. *Id.*

230. 631 F.2d 91 (7th Cir. 1980), *adopting as modified*, 475 F. Supp. 1012 (N.D. Ind. 1979), *cert. denied*, 451 U.S. 1022 (1981).

231. 631 F.2d 91 (7th Cir. 1980), *adopting as modified*, 475 F. Supp. at 1019.

232. 451 U.S. 1022 (1981).

233. *Id.* at 1026 (Brennan, J., dissenting).

234. 444 U.S. 85 (1979).

of bar patrons); *Davis v. Mississippi*²³⁵ (mass detention and fingerprinting of black men fitting description of perpetrator of crime). But that is precisely the type of search the [] officials conducted.²³⁶

III. THE NEW YORK COURT OF APPEALS

In determining whether a search which implicates New York State Constitutional protections has occurred, New York courts focus on the expectation of privacy one possesses in the item sniffed. The New York Court of Appeals first dealt with canine sniffs in a case involving airport luggage.²³⁷ In that case, the court did not address whether under the New York Constitution a canine sniff can constitute a search, and limited its analysis to the Federal Constitution. The court found that the reduced expectation of privacy one has in luggage surrendered to a common carrier, combined with the limited intrusion of only sniffing the air surrounding the baggage, prevented the canine sniff from being classified as a Fourth Amendment search.²³⁸ In a later decision by the court of appeals, written after the Supreme Court handed down *Place*, the court held on state constitutional grounds that the increased expectation of privacy in the contents of one's home made a canine sniff of a door to a residence a search.²³⁹ The court however only required that the officer have reasonable

235. 394 U.S. 721 (1969).

236. 451 U.S. at 1027 (Brennan, J., dissenting). *See also* *United States v. Whitehead*, 849 F.2d at 857 (4th Cir. 1988) (court acknowledged that sniff of luggage is not search but also agreed with district court that police needed reasonable suspicion before dog sniff could be conducted inside defendant's train roomette); *United States v. Solis*, 536 F.2d 880, 883 (9th Cir. 1976) (court never explicitly decided whether sniff of defendant's semi-trailer at gas station was a search, but held that the sniff "was not unreasonable under the circumstances").

237. *People v. Price*, 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981).

238. *Id.* at 562, 431 N.E.2d at 267, 446 N.Y.S.2d at 906.

239. *People v. Dunn*, 77 N.Y.2d 19, 25, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

suspicious before the sniff search is conducted.²⁴⁰ It is not clear how much of an expectation of privacy the court of appeals requires before it will determine that a search has occurred. The court has been faced with the issue of canine sniffs a third time, but found it unnecessary in that case to determine whether a search had occurred when a delivery package was sniffed.²⁴¹

A. Canine Sniffs of Airport Luggage — People v. Price

Analogous to *Place*, *People v. Price*²⁴² involved the exposure of a private individual's luggage located at an airport to a trained canine's nose.²⁴³ Police officers observed the defendants, Price and Parsons, in Los Angeles Airport.²⁴⁴ They appeared to be nervous and were sweating exorbitantly as they purchased airline tickets.²⁴⁵ Further, the defendants made all their purchases in cash which indicated they were carrying large sums of money.²⁴⁶ This suspicious behavior prompted an officer to conduct a general "canine sniff" of the airline's entire baggage area.²⁴⁷ The trained dog reacted positively to the defendants' luggage and such information was relayed to New York State Police so as to enable them to secure a search warrant.²⁴⁸ When the defendants arrived in New York, both their baggage and persons were searched pursuant to the warrant.²⁴⁹

The New York Court of Appeals in *Price*, rejected the proposition that the canine sniff constituted a search for purposes of the Fourth Amendment. The court focused on the reduced expectation of privacy that a person possesses when he or she surrenders

240. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

241. *People v. Offen*, 78 N.Y.2d 1089, 585 N.E.2d 370, 578 N.Y.S.2d 121 (1991).

242. 54 N.Y.2d 557, 431 N.E.2d 267, 446 N.Y.S.2d 906 (1981).

243. *Id.* at 560, 431 N.E.2d at 268, 446 N.Y.S.2d at 907.

244. *Id.*

245. *Id.* at 559, 431 N.E.2d at 268, 446 N.Y.S.2d at 907.

246. *Id.* at 559-60, 431 N.E.2d at 268, 446 N.Y.S.2d at 907.

247. *Id.* at 560, 431 N.E.2d at 268, 446 N.Y.S.2d at 907.

248. *Id.*

249. *Id.*

baggage to the custody of a common carrier.²⁵⁰ The court asserted that the defendant did have a reasonable expectation of privacy in his personal baggage, which was however diminished, because he surrendered his luggage to the possession of a common carrier. Moreover, since the activity consisted merely of the sniffing of air surrounding the luggage, there was no intrusion or search of the baggage,²⁵¹ and, therefore, the activity did not implicate federal constitutional limitations.²⁵²

The *Price* decision was a bit unclear as to the doctrinal basis on which it found no search to have taken place. In one portion of the decision, the court explained that a canine sniff is akin to a plain view observation made by an officer, and that the observation is merely aided by an enhancing device, the dog.²⁵³ Taking that analysis to its logical conclusion, one would think that all odors sniffed without physically invading the item being smelled, do not constitute a search. However, the *Price* court added additional expectation of privacy analysis.²⁵⁴ Expectation of privacy analysis looks to the inner contents of the item smelled; indicating that if the item is one for which there is a heightened expectation of privacy, a search may be effectuated. This is inconsistent with the court's plain view discussion which made only the outer area of import.

A concurring opinion by Judge Meyer disagreed with the majority insofar as its decision rested on the enhanced device rationale. Judge Meyer stated: "Use of such a dog does not enhance any of the handler's five senses in the same way that a search light or binoculars directly enhances the vision of the human user."²⁵⁵ A canine sniff, the concurrence asserted, is more like a magnetometer used in airports, which have been found to constitute searches.²⁵⁶ Judge Meyer asserted that a canine sniff is

250. *Id.* at 562, 731 N.E.2d at 269, 446 N.Y.S.2d at 908.

251. *Id.* at 561-62, 731 N.E.2d at 269, 446 N.Y.S.2d at 908.

252. *Id.* at 562, 731 N.E.2d at 269, 446 N.Y.S.2d at 908.

253. *Id.* at 563, 731 N.E.2d at 270, 446 N.Y.S.2d at 909.

254. *Id.*

255. *Id.* at 565, 731 N.E.2d at 271, 446 N.Y.S.2d at 910 (Meyer, J., concurring).

256. *Id.* (Meyer, J., concurring) (citing *People v. Kuhn*, 33 N.Y.2d 203,

indeed a search, but since it is minimally intrusive, it need only be supported by reasonable suspicions.²⁵⁷

B. Residential Canine Sniffs — People v. Dunn

In *People v. Dunn*,²⁵⁸ the New York Court of Appeals addressed a threshold consideration; whether the use of the canine sniff to detect the presence of controlled substances in an individual's dwelling constitutes a search within the meaning of the Federal Constitution or article I, section 12, of the New York State Constitution, and, therefore, is subject to constitutional strictures.²⁵⁹

The New York Court of Appeals emerged with a two-pronged holding. The court first found that the use of a trained canine for drug-detection purposes does not implicate the protections of the Fourth Amendment. However, the court went on to find, the New York State Constitution is indeed implicated and thus requires that a law enforcement officer have "at least a reasonable suspicion" that a residence contained narcotics before such an investigative technique could be justifiably employed.²⁶⁰

In *Dunn*, the positive "alert" reaction of a trained narcotics detection dog in the common hallway, outside of the defendant's apartment, gave rise to a search warrant authorizing a search of the defendant's apartment.²⁶¹ This search disclosed the existence of a large quantity of narcotics.²⁶² The majority relied on the *Place* rationale²⁶³ in resolving the threshold issue, whether the

306 N.E.2d 777, 351 N.Y.S.2d 649 (1973)).

257. *Id.* (Meyer, J., concurring).

258. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

259. *Id.* at 21, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389.

260. *Id.*

261. *Id.*

262. *Id.* at 21-22, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389.

263. *Id.* at 22-23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

A "canine sniff" by a well trained narcotics detection dog . . . does not require the opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view Thus, the manner in which information is obtained through this investigative

canine sniff effected outside of a residence constituted a search so as to fall within the ambit of the Fourth Amendment.²⁶⁴ The *Dunn* court reiterated that this procedure is limited in the information it elicits since the canine "sniff discloses only the presence or absence" of contraband, and thus, the sniff does not constitute a search within the Fourth Amendment context.²⁶⁵

In light of the rationale supporting the majority opinion in *Place*, the defendant's contention in *Dunn*, that his Federal Constitutional rights were violated by the canine sniff conducted outside of his apartment, was rejected by the *Dunn* majority.²⁶⁶ The court was unpersuaded by the *Thomas* court's attempt to distinguish *Place*.²⁶⁷ *Thomas*, the New York Court of Appeals stated, relied primarily on the heightened expectation of privacy an individual possesses in his or her residence²⁶⁸ which, the court explained, does not alter the fact that a "canine sniff" reveals only evidence of criminality."²⁶⁹ And thus, the court of appeals concluded that since it was the discriminate nature of the sniff that was dispositive in *Place*, it is controlling in *Dunn* as well, at least for purposes of Federal Constitutional analysis, whether the sniff was conducted at an airport or a residence.

The New York Court of Appeals, in evaluating the canine sniff at issue with respect to the New York State Constitution, somewhat oddly diverged from the reasoning which supported *Place*

technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

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

264. *Dunn*, 77 N.Y.2d at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

265. *Id.*

266. *Id.*

267. *Id.* at 23, 564 N.E.2d at 1056-57, 563 N.Y.S.2d at 390-91. See United States v. *Thomas*, 757 F.2d 1359, 1367 (2d Cir.), cert. denied, 474 U.S. 819 (1985).

268. *Dunn*, 77 N.Y.2d at 23, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391; see *Thomas*, 757 F.2d at 1367.

269. *Dunn*, 77 N.Y.2d at 23, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

and its evaluation of canine sniffs under the Fourth Amendment. The court asserted that the non-intrusive and discriminate character of an investigative method which was the basis for the Supreme Court's conclusion in *Place* that the sniff was not a search, should not bear upon the threshold issue of whether or not the particular technique constituted a search.²⁷⁰ This is because the method "remains a [manner of exposing] the contents of a private place."²⁷¹ But rather, the narrow scope of the canine sniff is a relevant consideration in determining the appropriate standard of certainty required to justify it. Thus, the court reasoned, that the significant inquiry in assessing whether the method is a search is whether a private individual would harbor a legitimate expectation of privacy in the area where the investigation occurred.²⁷² Hence, the court in *Dunn* relied on the *Katz v. United States*²⁷³ interpretation of when an invasion of a Fourth Amendment right

270. *Id.* at 24-25, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

271. *Id.* at 25, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

272. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

273. 389 U.S. 347 (1967). *Katz v. United States* revolutionized Fourth Amendment analysis when it declared that "[i]n the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" 389 U.S. at 350. The Court further elaborated that "the Fourth Amendment protects people, not places." *Id.* at 351. In *Katz*, the Court ruled upon the police's warrantless recording of Katz' telephone conversation by microphones placed on top of the telephone booths used by Katz in his bookmaking operation. H. Paul Honsinger, *Katz and Dogs: Canine Sniff Inspections and the Fourth Amendment*, 44 LA. L. REV. 1093, 1101 (1984) (citing *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967)). The Supreme Court repudiated the analysis of *Olmstead v. United States*, 277 U.S. 438 (1928), which held that, "absent a physical penetration of a constitutionally protected area, no search takes place." Honsinger, *supra* at 1101 (citing *Olmstead*, 277 U.S. at 457, 464, 466).

The crux of *Katz* at its seminal contribution to modern fourth amendment analysis is its abandonment of *Olmstead's* emphasis on physical intrusion and trespass in favor of the test embodied in the concurring opinion of Justice Harlan that for an intrusion to be a search "a person [must] have exhibited an actual (subjective) expectation of privacy and . . . the expectation of privacy [must] be one that society is prepared to recognize as reasonable."

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

occurs.²⁷⁴

In *Katz*, Justice Harlan set forth a test gathered from previous decisions; in order to establish a constitutionally legitimate expectation of privacy, a defendant must demonstrate: (1) that the defendant "exhibited an actual (subjective) expectation of privacy;"²⁷⁵ and (2) that the expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"²⁷⁶

Therefore, in light of *Katz*, the majority in *Dunn* concluded that since one's home "has traditionally been accorded a heightened expectation of privacy,"²⁷⁷ one is reasonable in demanding such privacy and the use of a trained canine in the area surrounding the defendant's apartment indeed constituted a search within the meaning of article I, section 12, of New York State's Constitution.²⁷⁸

The court in *Dunn* briefly noted a second rationale that perhaps justified the United States Supreme Court's conclusion in *Place* that a canine sniff is not a search at all.²⁷⁹ It is the proposition that a sniff of the air surrounding an area which is deemed private is by no means an invasion of that private area in and of itself.²⁸⁰ The area sniffed was already accessible to the public and, therefore, one's hallway does not engender a reasonable expectation of privacy.²⁸¹ However, the court noted that such a rationale is not dispositive of the canine sniff employed in *Dunn*.²⁸²

Yet, another justification for the New York Court of Appeals finding that the sniff in *Dunn* fell within the protections of the

274. See *Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

275. *Katz*, 389 U.S. 347, 361 (Harlan, J., concurring).

276. *Id.*

277. *Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

278. *Id.*

279. *Id.*

280. See, e.g., *United States v. Lewis*, 708 F.2d 1078, 1080 (6th Cir. 1983) (odor in air is accessible to the public, even if emanating from private, closed object or area); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), cert. denied, 452 U.S. 962 (1981) (same); *United States v. Venema*, 563 F.2d 1003, 1006 (10th Cir. 1977) (same).

281. See generally *supra* note 280.

282. *Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

New York State Constitution was a policy consideration. The court suggested that allowing canine sniffs to be rendered too easily would open the door allowing police officers to indiscriminately roam through hallways of public housing utilizing this investigative technique to detect the presence of controlled substances.²⁸³ Additionally, the court acknowledged the significant utility of canine sniffs in the war against drug trafficking.²⁸⁴ The court reasoned that “[g]iven the uniquely discriminate and non-intrusive nature of such an investigative device,”²⁸⁵ canine sniffs may be employed with less than probable cause or a search warrant, “provided that the police have a reasonable suspicion that a residence contains illicit contraband.”²⁸⁶ Thus, in the canine sniff at issue, since the law enforcement officers did indeed have a reasonable suspicion that the defendant’s apartment contained contraband, the defendant’s privacy interests under article I, section 12 of the New York State Constitution were not infringed upon.²⁸⁷

The *Dunn* court’s reasoning tracks that of the *Thomas* court in that both courts classified the investigative method in question as a search based on the fact that the situs sniffed has traditionally been accorded a heightened expectation of privacy.²⁸⁸ However, *Dunn* merely requires that the police have a reasonable suspicion that a residence contains illicit contraband before the investigative technique can be employed,²⁸⁹ whereas *Thomas* seems to demand that probable cause be met and a search warrant secured prior to the institution of this technique.²⁹⁰

283. *Id.*

284. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d 392.

285. *Id.*

286. *Id.*

287. *Id.*, 564 N.E.2d 1054, 1059, 563 N.Y.S.2d 388, 293-393.

288. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392; *Thomas*, 757 F.2d at 1366-67.

289. *Dunn*, 77 N.Y.2d at 21, 564 N.E.2d at 1055, 563 N.Y.S.2d at 389.

290. *Thomas*, 757 F.2d at 1366-67.

C. Other Sniffs — *People v. Offen*

The defendant in *People v. Offen*²⁹¹ appealed his conviction of criminal possession of a controlled substance on the ground that the canine sniff and x-ray of defendant's package constituted an unreasonable search and seizure²⁹² under both the federal and state constitutions.

In affirming the conviction, the New York Court of Appeals deferred the determination of the issue whether the canine sniff of the defendant's package constituted a search within the purview of the New York State Constitution.²⁹³ The court reasoned that even if it was to conclude that the sniff constituted a search, it would have been a justifiable search nonetheless because "the sheriffs had sufficient information to support a reasonable suspicion that the package contained contraband."²⁹⁴

IV. OTHER STATE PERSPECTIVES ON CANINE SNIFFS

Many highest state courts have not explicitly resolved the issue of whether a residential canine sniff constitutes a search within the meaning of the Fourth Amendment of the Federal Constitution, and if so, what standard of knowledge or suspicion is required to justify it. However, many highest state or appellate courts have dealt with canine sniffs of other objects and areas.

291. 78 N.Y.2d 1089, 585 N.E.2d 370, 578 N.Y.S.2d 121 (1991).

292. *Id.* at 1090, 585 N.E.2d at 371, 578 N.Y.S.2d at 122. The package was detained and sniffed by a Custom's Service dog trained to "alert" on the detection of marijuana, cocaine and heroin. *Id.* The canine was employed pursuant to confidential information conveyed to the Livingston County Sheriff's Department that the defendant was receiving cocaine shipments from Florida. *Id.* When the canine responded positively to the package, a search warrant was secured and the defendant's residence and automobile were subsequently searched. *Id.* Upon the disclosure of contraband and firearms on the premises, the defendant was arrested for possession of controlled substances. *Id.*

293. *Id.* at 1091, 585 N.E.2d at 372, 578 N.Y.S.2d at 123.

294. *Id.*

The trend is to find canine sniffs constitutionally permissible because either: 1) they are not considered searches since solely contraband items are revealed; or 2) a police officer's reasonable suspicion is an exacting enough standard to allow the sniff given the minimal intrusion occasioned by this investigative technique. It is probable that courts applying the later analysis would find residential canine sniffs more intrusive and therefore subject to greater constitutional constraint.

In *People v. Mayberry*,²⁹⁵ the Supreme Court of California held that the limited and non-intrusive olfactory investigation of the defendants' luggage did not constitute a "search" so as to invoke the limitations imposed by the federal and state constitutions.²⁹⁶ Such a proposition was based on the conclusion that one does not have a reasonable expectation of privacy extending to the airspace surrounding one's luggage or to the odors emanating from one's concealed contraband.²⁹⁷ The court balanced the need to control the rise in illegal drug trafficking against the need to preserve an airline passenger's reasonable expectation of privacy.²⁹⁸ The majority further focused on the discriminate nature of the sniff in that the dog's nose "react[s] only to contraband"²⁹⁹ and the fact that the odor could be detected by the nose in "the airspace surrounding that luggage."³⁰⁰

Since the Supreme Court of California did not decide the status of residential canine sniffs, the appellate court in *People v. Arno*,³⁰¹ interpreted canine sniffs similarly to the police use of binoculars to observe the interior of a home which the California Supreme Court has deemed to be a search.³⁰² Thus, the appellate

295. 644 P.2d 810 (Cal. 1982).

296. *Id.* at 811.

297. *Id.* at 814.

298. *Id.*

299. *Id.* at 813.

300. *Id.* at 819.

301. 153 Cal. Rptr. 624 (Cal. Ct. App. 1979).

302. *Id.* at 624. The *Arno* court asserted that "if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion" for purposes of the California State Constitution. *Id.* at 625. However, the court continued, "if the purpose of the optical aid is

court theorized, a canine sniff conducted immediately outside or even inside a residence would constitute a search within the meaning of the Fourth Amendment since society recognizes that an individual has a heightened expectation of privacy in the contents of his or her home.³⁰³

In a case similar to the *United States v. Place*, the Court of Appeals of Ohio, in *State v. McFarland*,³⁰⁴ declared that the exposure of the defendant's brown satchel bag to a trained canine was not a search for purposes of the Fourth Amendment.³⁰⁵ However, the court proceeded to deem the seizure unreasonable since the defendant had to wait until the next morning to retrieve the bag.³⁰⁶ Thus, the intrusion on the defendant's possessory rights was substantial.³⁰⁷

In *People v. Campbell*,³⁰⁸ the Supreme Court of Illinois did not resolve the question of whether the canine sniff of luggage did or did not constitute a search.³⁰⁹ Rather, the court stated that such a determination was immaterial and the reasonableness of the conduct was the relevant inquiry.³¹⁰ Upon consideration of the minimally intrusive and unoffensive nature of the canine sniff, the court concluded the conduct was reasonable.³¹¹

The Supreme Court of Pennsylvania, in *Commonwealth v. Johnson*³¹² found that the sniff of the exterior of a warehouse locker for the detection of contraband did constitute a search.³¹³ However, since the search was of an inherently less intrusive nature than traditional searches,³¹⁴ likely to intrude only marginally

to view that which could not be seen without it, there is." *Id.*

303. *Id.*

304. No. 82AP-683, 1983 WL 3717 (Ohio Ct. App. Oct. 4, 1983).

305. *Id.* at *3.

306. *Id.*

307. *Id.* at *7.

308. 367 N.E.2d 949 (Ill. 1977), *cert. denied*, 435 U.S. 942 (1978).

309. *Id.* at 952.

310. *Id.*

311. *Id.* at 954.

312. 530 A.2d 74 (Pa. 1987).

313. *Id.* at 79.

314. *Id.*

upon innocent persons,³¹⁵ and it was based on reasonable articulable suspicion that illegal narcotics were stored in the building,³¹⁶ it was deemed reasonable.

The court of appeals of Alaska, in *Wright v. State*³¹⁷ and *McGahan v. State*,³¹⁸ determined that the exposure of the defendant's suitcase³¹⁹ and of a building³²⁰ respectively to a canine constituted justifiable and minimally intrusive searches since they were each supported by a police officer's reasonable suspicion. The warehouse in the latter case was distinguished from the sniff of the residential entrance in *United States v. Thomas* in that the building in question was not characterized as a residence³²¹ so as to demand a heightened degree of privacy.

The Supreme Court of New Hampshire in *State v. Pellicci*³²² held on state constitutional grounds that individualized suspicions are required before a canine sniff can be executed.³²³ Additionally, the state supreme court discussed federal circuit court decisions and stated that the need for individualized suspicions even under the Fourth Amendment is far from settled.³²⁴

V. DOCTRINAL ANALYSIS

Over the years, the Supreme Court has manifested a strong desire to expand the authority of law enforcement officers by providing them with more latitude to conduct searches.³²⁵

In *United States v. Place*,³²⁶ the Supreme Court was confronted with two significant issues. First, whether the seizure and deten-

315. *Id.*

316. *Id.* at 80.

317. 795 P.2d 812 (Alaska Ct. App. 1990).

318. 807 P.2d 506 (Alaska Ct. App. 1991).

319. *Wright*, 795 P.2d at 815.

320. *McGahan*, 807 P.2d at 510.

321. *Id.*

322. 580 A.2d 710 (N.H. 1990).

323. *Id.* at 718.

324. *Id.* (discussing *United States v. Beale (Beale II)*, 731 F.2d 590 (1983)).

325. See *supra* notes 169-236 and accompanying text.

326. 462 U.S. 696 (1983).

tion of a traveler's luggage, in the hands of a common carrier, may be effected with less than probable cause, and to what degree are the seizure and detention restricted by the Fourth Amendment.³²⁷ In resolving these matters, the Court used the *Terry* rationale.³²⁸ It weighed the governmental interest in deterring narcotic transportation against the extent of intrusion caused by the limited detention of the luggage.³²⁹ The Court held that when an officer is reasonably led to believe that a traveler is carrying luggage that contains contraband, the officer is permitted to detain the luggage briefly to investigate the circumstances that aroused his suspicions, provided that the investigative detention is properly limited in scope.³³⁰

Thus, the principle one takes from *Place* is that any sniff of luggage at an airport is permissible if the detention of the luggage to effectuate the sniff was supported by articulable, founded suspicions that criminality is afoot and the detention's scope was reasonable in terms of its extent and duration. The performance of the canine sniff itself requires no suspicions. This is because the exposure of one's luggage to a trained canine does not constitute a "search" within the meaning of the Fourth Amendment.³³¹

A plain reading of *Place* is that canine sniffs are not searches no matter where and on what basis they are conducted. As the New York Court of Appeals stated in *People v. Dunn*:³³² "Whether or not there exists a heightened expectation of privacy, . . . a 'canine sniff' reveals only evidence of criminality."³³³ The court of appeals in *Dunn* was correct in disregarding the Second Circuit's attempt in *United States v. Thomas*³³⁴ to interpret *Place* as resting mainly on the reduced expectation of

327. *Id.* at 697-98.

328. *Id.* at 702-06; *Terry v. Ohio*, 392 U.S. 1, 19-20 (1976).

329. *Place*, 462 U.S. at 703-06.

330. *Id.* at 706.

331. *Id.* at 707.

332. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

333. *Id.* at 23, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

334. 757 F.2d 1359 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985).

privacy of airport luggage.³³⁵ The *Thomas* court was wrong in holding that canine sniffs of areas for which the public possesses a heightened expectation of privacy are searches under the Federal Constitution. One does not have a legally protected expectation of privacy in illegal narcotics no matter where the narcotics happen to be located.³³⁶

Courts have raised two principle objections to this view, both of which do not stand muster. The first objection is that a canine sniff intrudes into a private area which is constitutionally protected.³³⁷ This objection fails because no physical intrusion is perpetrated and no constitutionally protected information or item is disclosed. Although the Supreme Court, in *Katz v. United States*,³³⁸ rejected the proposition that only physical invasions can constitute a search, a canine sniff has the added element of only disclosing the presence or absence of narcotics. It is true that "[t]he Fourth Amendment protects people not places,"³³⁹ but when none of the person's constitutionally protected information is uncovered, no event implicating the Fourth Amendment has occurred. The second objection is that a canine sniff is not a "plain smell" which is merely aided by an enhancing device, because it is not the officer who is doing the smelling. Therefore, they assert, a canine sniff is more like a beeper³⁴⁰ or a microphone,³⁴¹ which have been held to constitute searches.³⁴² How-

335. *Dunn*, 77 N.Y.2d at 23, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

336. *See United States v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989) (rejecting *Thomas*' reduced expectation of privacy analysis).

337. *Thomas*, 757 F.2d at 1367.

338. 389 U.S. 347, 352-53 (1967).

339. *Id.* at 351.

340. *See United States v. Karo*, 468 U.S. 705 (1984) (beeper on container is search once container brought into residence).

341. *See Katz v. United States*, 389 U.S. 347, 352-53 (1967) (microphone on phone booth held to be search).

342. *See People v. Price*, 54 N.Y.2d 557, 565, 731 N.E.2d 267, 271, 446 N.Y.S.2d 906, 910 (1981) (Meyer, J., concurring). *See also United States v. Place*, 462 U.S. 696, 719-20 (1983) (Brennan, J., concurring) "[A] dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy." *Id.*

ever, these devices are different from canine sniffs in that they reveal more than illegality. A beeper inside a home has been held to be a search only because it discloses the location of the item attached to the beeper, thereby revealing protected information within the confines of a home.³⁴³ Moreover, although a microphone has been classified as a search³⁴⁴ that must be understood as resting only on the fact that microphones are not selective and are capable of revealing protected conversations. The Supreme Court has established that an individual does not have any legally recognizable expectation of privacy in illegality.³⁴⁵ The New York Court of Appeals in *People v. Dunn* maintained that the fact that an investigative procedure only uncovers illegal activity is only relevant to reducing the expectation of privacy, and therefore, its discriminate nature only works to lower the quantum of suspicion required for the sniff.³⁴⁶ This is not consistent with the cases that have held that there is *no* expectation of privacy in illegal activity and that therefore, *no* search is committed.

As a natural consequence of choosing not to classify a sniff as a search, constitutional limitations are not implicated. Thus, by definition, no prior showing of individualized suspicion would be required before such an investigative method is instituted. If the thought of such a reality frightens the public, legislatures may be induced to enact laws which mandate that some form of certainty exist, perhaps reasonable or articulable suspicion that the premises or object being sniffed contains illicit substances, prior to the employment of such a method. Constitutional protections against unreasonable searches should not be the basis for such requirements.

Moreover, as the Supreme Court's *Place* decision exemplifies, citizens are not left without Fourth Amendment rights when a sniff is conducted. Although a canine sniff should not be considered a search, authorities conducting the sniff must be careful not to simultaneously effectuate a seizure. If luggage is to be sniffed,

343. See *United States v. Karo*, 468 U.S. 705, 717 (1984).

344. See *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

345. *United States v. Jacobson*, 466 U.S. 109 (1984).

346. *People v. Dunn*, 77 N.Y.2d 19, 25, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990), *cert. denied*, 111 S. Ct. 2830 (1991).

care must be taken not to interfere with the owner's possessory interest in his luggage. If the luggage needs to be momentarily stopped to allow the sniff, the officer must have reasonable suspicions. If a door of a residence is to be sniffed without particularized suspicions, care must be taken to ensure that the occupants of the residence are free to leave.

CONCLUSION

A canine sniff, whether conducted in the airport when luggage has been surrendered to a common carrier, at the entrance of a residence, outside of a locker, or on a person passing in the street, should not be viewed as a search within the meaning of either the Fourth Amendment or article I, section 12. This conclusion is supported by the fact that dogs sniff only the airspace surrounding an item, in which there is no reasonable expectation of privacy. This method merely identifies as contraband that which is already publicly exposed. It would be unreasonable for one to hold any expectation of privacy in his or her door, car exterior, locker exterior, or shoe. These are all surfaces which are independently exposed to the public's attention. There is no difference legally between an officer's detection of "plain smell" and a dog's detection of the escaping odor of contraband.

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