

Defending the Dog

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INTRODUCTION

Narcotics dogs generate a good deal of controversy, confusion, and ire. The sniff of a dog, directed by a police officer to detect drugs inside a car or home, is not a Fourth Amendment search¹—a sharp reminder that the Supreme Court’s interpretation of that word has parted ways with common usage. On the other hand, if the dog alerts, indicating it detects drugs, the alert alone is sufficient to establish probable cause and justify a full-blown search.²

This result seems patently unfair to many scholars.³ After all, dogs are often wrong, alerting where no drugs can be found.⁴ Thus, the

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¹ *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

² Police may search a car immediately after a dog’s alert under the motor vehicle warrant exception. *Id.*

³ See, e.g., Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735 (2007); Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 22 (2006); Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990) (criticizing dog sniff tracking as evidence at trial). *But see* James B. Johnston, *Drugs, Dogs, and the Fourth Amendment: An Analysis of Justice Stevens’ Opinion in Illinois v. Caballes*, 24 QUINNIPIAC L. REV. 659 (2006).

⁴ Worse yet, dogs can be biased, picking up on subtle cues from their handlers. These problems are discussed fully in Part II.

innocent can be subjected to intrusive searches on the basis of a mistake even though law enforcers had no suspicion whatsoever before the false alert.⁵

Yet these same deficiencies are much less troubling when a dog is used to detect evidence of more serious crimes, like murder. Our collective instincts about dogs in particular, and the Fourth Amendment in general, are unwittingly influenced by our attitudes about the underlying substantive criminal law.

This short Article makes the uneasy case for the narcotics dog. Those in favor of U.S. drug enforcement presumably need no convincing, but this Article intends to address the concerns of skeptics who worry about unjust drug enforcement, or who believe that criminalization is just plain bad policy. Dogs are just the first generation of a new set of law enforcement tools that can help us divorce criminal investigation from the bias and discretion that comes with traditional policing.

Part I presents the results of new survey research showing that Americans are much more likely to believe police dogs violate the right to privacy when they are used to detect drugs than when they are used to detect dead bodies. Parts II and III make two counterintuitive arguments in defense of the narcotics dog: (1) in criminal investigations, random error is more equitable than human error; and (2) we should *increase* the detection and enforcement of crimes that may be over-penalized in order to draw public attention to arbitrary punishment. Those opposed to the criminalization of drugs rely at their peril on the Fourth Amendment to fix a problem embedded in substance rather than the investigation process. The Article concludes with some thoughts about the features of an ideal narcotics dog program.

I

AMERICAN PRIVACY INSTINCTS

I surveyed a random sample of Americans about their reactions to contraband-sniffing dogs through Amazon's Mechanical Turk task

⁵ Use of narcotics dogs on the front door of a home seems especially problematic since the dog can detect through-the-wall information that ordinary human senses cannot. For a thorough and thoughtful critique of dog sniffs at the front door, see generally Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829 (2009) (arguing that canine home-sniffs should be unconstitutional).

distribution website.⁶ Not surprisingly, the respondents believed the accuracy of the dog—that is, the likelihood that a positive alert would result in the discovery of contraband—was an important factor in determining whether the sniff was an invasion of privacy.

TABLE 1. Proportion of respondents believing a dog sniff is a violation of privacy

Perfect Dog	43.5%
1% Alerts are False	47.8%
10% Alerts are False	58.0%

Note: N= 69. Respondents were asked whether use of police dogs violates privacy rights.

Many respondents found these fictional dogs to be privacy-invasive even though they were very reliable—much more accurate than real police dogs.

However, unbeknownst to the subjects, half of the surveys described a scenario involving a drug-sniffing dog while the other half described a cadaver-sniffing dog. The respondents' reactions varied greatly based on the type of crime the dogs were used to investigate.⁷ Privacy instincts are highly sensitive to the underlying criminal law, and drug enforcement is evidently a lower priority.

TABLE 2. Proportion of respondents believing a dog sniff is a violation of privacy

	Bodies	Drugs	Difference
Perfect Dog	26.5%	60.0%	+33.5**
1% Alerts are False	32.4%	62.9%	+30.5*
10% Alerts are False	44.1%	71.4%	+27.3*

Note: Statistical significance: *p<0.05 **p<0.01

⁶ See AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> (last visited Mar. 3, 2013). The results reported here are consistent with the results of a very similar survey I previously administered to law students. The goal of this research was to see if lay respondents had the same privacy instincts as those trained in law. For the most part, they do. See Jane Yakowitz Bambauer, *How the War on Drugs Distorts Privacy Law*, 64 STAN. L. REV. ONLINE 131 (2012).

⁷ The reactions of college-educated respondents were even more divergent than those without a college degree. Among college-educated respondents, the reactions to drug-sniffing and body-sniffing dogs differed by thirty to forty percentage points.

The aversion to narcotics dogs is undeserved for reasons explored in the next two parts of this essay.

II

THE COUNTERPRODUCTIVE PREFERENCE FOR HUMAN ERROR

Criminal procedure scholars are eager to find fault with the narcotics dog, and the most obvious criticism is the one that Justice Souter supplied in his *Caballes* dissent: dogs are often wrong.⁸

But probable cause has never required conclusive, or even more-likely-than-not proof of criminal conduct, and traditional police processes, based on human observations and inferences, are often wrong, too. Critics who point to the fallibility of dogs unconsciously endorse a preference for human error over dog error, even though traditional police work has a track record no better, and possibly worse, than dogs. When police use typical investigatory practices to build probable cause for a drug crime, their execution of a search warrant results in the seizure of narcotics thirty-eight to sixty-one percent of the time.⁹ This puts the lowest estimates of dog reliability—forty-four percent from a *Chicago Tribune* study¹⁰—within the same range as police success. The fifty-eight to eighty percent reliability of canine alerts cited in *United States v. Ludwig* is downright impressive when compared to overall search warrant success.¹¹

Courts have resisted defining probable cause in statistical terms, and scholars have cautioned against a rule that would allow probable cause to be established on purely probabilistic evidence.¹² But

⁸ *Illinois v. Caballes*, 543 U.S. 405, 411-12 (2005) (Souter, J., dissenting). Some of the assertions put forward by Justice Souter and other critics are theories without substantiation in dog efficacy studies. The assertions include that dogs may alert to traces of drugs found on U.S. currency or to other over-the-counter consumer items that share some chemicals in common with cocaine. KENNETH FURTON ET AL., THE SCIENTIFIC WORKING GROUP ON DOG AND ORTHOGONAL DETECTOR GUIDELINES 11 (2010).

⁹ Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 101, 104 (2002).

¹⁰ Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog (but note the journalists also uncovered evidence of biased handling—the rate for Hispanic drivers was much lower).

¹¹ *United States v. Ludwig*, 641 F.3d 1243, 1252 n.5 (10th Cir. 2011).

¹² See, e.g., Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in THE POLITICAL HEART OF CRIMINAL PROCEDURE 131 (Michael Klarman et al. eds., 2012).

traditional police work, building probable cause through a mosaic of evidence, is equally probabilistic. Consider an affidavit submitted in a warrant application that states, among other things, that the target of the investigation was pacing nervously and had bloodshot eyes. One can quantify the suspicion that these facts contribute to probable cause just as easily as one can quantify the error of a dog sniff: Of all the people who pace nervously while having bloodshot eyes, some percentage are engaged in criminal activity. The rest are not. All probable cause is probabilistic.

The important differences between the dog nose and traditional police work is not error (they both have it), but how the error is distributed across society. When it comes to intrusive searches based on mistaken probable cause, random error is much more just than human error. Humans, after all, are susceptible to bias and self-interest.¹³ Surely some police officers' decisions to target a particular suspicious subject are the products of well-honed skills, but the decisions are opaque and discretionary nonetheless. The costs of error from suspicion-driven probable cause will always fall on the subpopulation that seems suspicious. The costs from the false alerts of narcotics dogs, in contrast, are refreshingly democratic. If police departments use drug-sniffing dogs evenly across the population in a way that minimizes the discretion of individual officers, the risk of detection and the costs of fruitless searches can be spread more equitably. These are real virtues, despite the less-than-perfect dog sniff.

Of course, this theory ignores the possibility of handler bias. If narcotics dogs pick up the cues and expectations of the police officers working with them, as some experiments have suggested,¹⁴ then the dogs' alerts are not independent from the human hunches and bias that ought to be avoided. This line of research may in time uncover unacceptable levels of handler bias that warrant the wholesale dismantling of canine programs. But for the purposes of this Article, the issue will not be discussed in depth. The factual record for handler cuing in the field is not well developed, and in any case, the ideas

(though Kerr shows that the danger resides in innumeracy, or in police discretion and misdirection; he does not make a direct critique of statistical evidence).

¹³ Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002). *But see* GREG RIDGEWAY, RAND CORP., CINCINNATI POLICE DEPARTMENT TRAFFIC STOPS 40-47 (2009) (finding no evidence of racial profiling or biasing after controlling for situational factors).

¹⁴ M.K., *Clever Hounds*, ECONOMIST (Feb. 15, 2011, 9:05 AM), http://www.economist.com/blogs/babbage/2011/02/animal_behaviour (describing the work of Lisa Lit).

explored here—promoting increased detection and decreased discretion—will apply just as well to other law enforcement technologies that do not have the eager-to-please quality of dogs.

III

THE COUNTERPRODUCTIVE PREFERENCE FOR NONDETECTION

A sizable group of scholars, public health researchers, and other individuals believe criminalizing drug use is bad policy for a variety of reasons—unintended consequences to health and safety, racially disparate enforcement, irrational motivations at inception. Some critics of drug criminalization instinctively may look to the Fourth Amendment to frustrate detection.¹⁵ If drugs are harder to detect, then drugs can be decriminalized de facto. This Part quickly sketches two significant problems that arise when privacy is used to manipulate the substantive criminal law.

First, Fourth Amendment rules developed in reaction to the War on Drugs ratchet up the investigation standards for other, more serious crimes. This has consequences that courts and criminal procedure scholars have not fully thought through.

When state and federal courts pronounce new individual rights under the Fourth Amendment, the facts before the court often involve drug enforcement.¹⁶ For example, the Montana Supreme Court interpreted its state constitution to reject federal precedent by not allowing law enforcement officers to record a telephone conversation without a warrant, even if they had the consent of one of the participants in the conversation.¹⁷ The case involved a scuffle in connection with a drug deal.¹⁸ But two years later, the court was forced to apply the same rule to grizzly facts in which the police had recorded a conversation between a young victim of incest and her father at the request of the victim.¹⁹ The result—suppression of the recording—may be the right one, but it is hard to be confident that the

¹⁵ The American Civil Liberties Union's (ACLU) statements in opposition to drug criminalization have made this move by criticizing wiretapping, random testing, and other investigative practices. *Against Drug Prohibition*, ACLU (Jan. 6, 1995), <http://www.aclu.org/drug-law-reform/against-drug-prohibition>.

¹⁶ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001); *State v. Gunwall*, 106 Wash. 2d 54 (Wash. 1986); *People v. Bigelow*, 66 N.Y.2d 417 (N.Y. 1985).

¹⁷ *State v. Allen*, 2010 MT 214, ¶¶ 34–35, 357 Mont. 495, 241 P.3d 1045.

¹⁸ The recording between the defendant and the police informant confirmed that the defendant intended to attack a man who owed the defendant drugs or money. *Id.* ¶ 7.

¹⁹ See *State v. Stewart*, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

drug context hadn't influenced the court's initial decision to adopt the rule in the first place, especially in light of the survey research described in Part I.

Heightened investigation standards may also have paradoxical results for those who disfavor drug criminalization. Ironically, police departments may rely more heavily on drug laws since other crimes can be more difficult to investigate, and since drug charges can be leveraged in plea bargain negotiations for individuals that the police department suspects have committed a more serious offense.²⁰ The result is a vicious cycle. Courts, unsympathetic to drug enforcement, increase criminal procedure protections to make investigations more difficult. In response, law enforcement increasingly relies on drug indictments since other crimes are more difficult to detect. This leads courts to again increase the criminal procedure protections, and the cycle repeats.

The second problem with under-detection of drugs is its effect on political behavior. If criminal penalties lack proportionality to the gravity of the crime, we should increase enforcement so that public outrage is brought to bear on the political system. Substantial revision of criminal laws is unlikely to take place without the force of public outcry. Heavy enforcement ensures that the penalties of drug laws are obvious, and are borne by otherwise law-abiding people. The upper-middle-class, recreational drug user will need to face a realistic chance of prosecution before advocates of drug legalization have a prayer of overcoming political inertia.

The private enforcement of copyright laws is a useful case study. In 2004 and 2005, the Recording Industry Association of America (RIAA) filed lawsuits against tens of thousands of Americans who appeared to be downloading music in violation of federal copyright law.²¹ But the lawsuits quickly drew public attention and criticism as college students and other ordinary people were pressured into expensive settlements. One woman, who chose instead to fight her lawsuit, was saddled with over \$200,000 in damages for sharing twenty-nine songs on a peer-to-peer network.²² These cases drew

²⁰ For evidence that drug offenses are used in this way, see K. JACK RILEY ET AL., RAND CORP., *JUST CAUSE OR JUST BECAUSE?: PROSECUTION AND PLEA-BARGAINING RESULTING IN PRISON SENTENCES ON LOW-LEVEL DRUG CHARGES IN CALIFORNIA AND ARIZONA* (2005).

²¹ Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES (Oct. 5, 2007), http://www.nytimes.com/2007/10/05/business/media/05music.html?_r=0.

²² *Id.*

public attention and criticism to the copyright law debate in a way that no previous advocacy initiative had been able to do. As a result of the public relations disaster, the RIAA abandoned its mass lawsuit techniques.²³

The RIAA's methods to detect file-sharing have some key similarities to the use of narcotics dogs. In both contexts, the enforcers cannot control which subpopulations of Americans wind up being detected. College kids and secretaries and other people that do not fit the criminal stereotype end up in the crosshairs. Their prosecutions raise eyebrows, and force the public to reconsider whether they are prepared to stomach the enforcement of their criminal laws.

Conversely, using the Fourth Amendment to decrease the detection of drugs provides only a temporary, superficial relief from the substantive problems, and tends to exacerbate the disparities in enforcement across class and race.

IV

A HIGH LEGITIMACY CANINE PROGRAM

Knowing the public's divided sentiments about the criminalization of drugs, a narcotics canine unit should voluntarily assume some constraints on its program. When dogs are used to sniff the cars and other belongings of people who are not the targets of a criminal investigation,²⁴ law enforcers should be cautious in the design of their suspicionless sniff programs. A highly legitimate dog program will be evenhanded, transparent, and restrained.

An evenhanded program is one in which the enforcement department deploys dogs such that, at least in the beginning, it is equally likely the dogs will sniff any given driver. Once the program has built a track record, the department can alter deployment to roughly match the frequency of successful searches in the given subdistrict.²⁵ Moreover, the enforcement should be standardized: all sniff searches resulting in the discovery of a given quantity of drugs

²³ Mike Masnick, *RIAA Abandoning Mass Lawsuits in Favor of Backroom 3 Strikes Policy*, TECHDIRT (Dec. 19, 2008, 2:50 AM), <http://www.techdirt.com/articles/20081219/0225073172.shtml>.

²⁴ A targeted sniff should be based, at the very least, on the "reasonable suspicion" Terry standard. *See Terry v. Ohio*, 392 U.S. 1, 17–18 n.15, 27 (1968).

²⁵ I do not advise using existing statistics from the department because the detection of small amounts of controlled substances is traditionally within the discretion of law enforcement.

should result in identical processing—a citation or custodial arrest, for example.

A transparent program will maintain records on the use and alerts of each dog. The records should report the locations of any dog sniff, include the result of every positive alert, and should be made publicly available. At the very least, they should be discoverable to anybody whose car was searched following an alert from a narcotics dog.

A restrained program ensures that the use of narcotics dogs does not significantly increase the number of searches of innocent people. A narcotics dog—even a dog whose alerts are almost always correct—has the potential to increase the number of fruitless searches because they work so quickly. While the traditional style of policing accumulates evidence of probable cause slowly, a dog can alert several times a day, potentially increasing both the detection of drugs as well as the number of fruitless searches. A law enforcement department should determine in advance some maximum number for additional fruitless searches. Once a department has set the threshold, it should cap the use of narcotics dogs so that the expected number of fruitless searches falls below the threshold. Here, a department will benefit significantly from having a better-trained canine team and a more accurate dog.

Working together, commitments to evenhandedness, transparency, and restraint can help usher in a new and more equitable form of drug enforcement that is less reliant on human intuition and discretion. With equitable enforcement, society can better understand and reassess the true costs of its drug laws.

CONCLUSION

In short, the narcotics dog doesn't deserve the bad reputation it has received among scholars. The dog is the first generation of police tools that can usher a dramatic shift away from human criminal investigation and the attendant biases and conflicts of interests. Moreover, the reaction to the narcotics dog, as compared to the cadaver-sniffing dog, reveals an unsettling tendency to exploit criminal procedure when we are not enthusiastic about the underlying substantive criminal law. The natural instinct to do so may be counterproductive because drug enforcement will persist, with uneven results, and without a critical mass of public outrage.

