

BARKING BAD: HOW THE “INSTINCTIVE EXCEPTION” TO NARCOTIC CANINE CONDUCT AT TRAFFIC STOPS CONFLICTS WITH STATE RESPONSIBILITY AND THE FOURTH AMENDMENT

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ABSTRACT

In previous cases concerning the use of drug-detection dogs and their entanglement with the Fourth Amendment, the Supreme Court

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has implicitly held that the actions of a narcotics dog may be imputed to the state. This precedent has resulted in some courts adopting a particular exception to Fourth Amendment protections, created by the Tenth Circuit Court of Appeals in *United States v. Stone*: dogs that physically intrude into a vehicle at a traffic stop without officer facilitation are acting by canine “instinct,” not by state direction. Consequently, their “instinctual” behavior does not create an illegal government search. This exception has bled into the case law of various states, prompting questions regarding the constitutionality of a dog sniff and government responsibility for law enforcement tools. This note describes the dilution of privacy protections and faulty federal jurisprudence, and determines that the government should not be absolved of responsibility because of the alleged instinct of a trained narcotics dog.

INTRODUCTION

While running a driver’s license at a traffic stop, an officer notices that the stopped driver has been previously arrested for trafficking cocaine. Suspecting that the driver may now be carrying cocaine, he unholsters a new tool from his belt: a drone-like device that automatically detects the presence of cocaine from a certain distance. Programmed to locate the source of narcotics, the device flits through the open driver’s window by itself and beeps, alerting the officer to the presence of cocaine inside the vehicle. The officers manually search the car, where they uncover a few grams of cocaine. At trial, the driver’s motion to suppress the discovery of cocaine inside the vehicle is denied, because the cocaine-detecting device’s alert served as probable cause for the officer to enter and search the vehicle. The driver is subsequently sentenced for drug possession.

If the officer opens the car door for the device to enter the vehicle, that is plainly an affirmative act by law enforcement to introduce a tool into a space where individuals have an expectation of privacy to obtain information, and is unconstitutional without a warrant, consent, or probable cause.¹ But what if the tool enters the vehicle by itself?

The above hypothetical constitutes an illegal search, occurring the instant that the device, a police tool, transgresses the threshold of the vehicle.² This is a violation of the Fourth Amendment’s protection

1. See generally *United States v. Jones*, 565 U.S. 400 (2012) (holding that a governmental physical intrusion into a constitutionally protected area to obtain information constitutes a “search” within the meaning of the Fourth Amendment).

2. See *United States v. Balsys*, 524 U.S. 666, 692 (1998).

against unreasonable searches and seizures.³ Yet if the cocaine-detecting device is replaced by a narcotics dog, a very real law enforcement instrument that is trained by police to detect the presence of drugs through odor, then this would be considered legal behavior in multiple jurisdictions.

Previous legal scholars have written about the use of narcotics dogs primarily in discussing whether a dog sniff should amount to a search under the Fourth Amendment,⁴ or in reconciling the conflict in various Supreme Court decisions involving drug-detection dogs.⁵ Others examine the statistical accuracy of canine “alerts” (a trained behavior by the narcotics dog, like a sit or scratch, that indicates to the officer that the dog has detected the odor of drugs).⁶ This body of work assumes that a narcotics dog acts on behalf of the state, and therefore, that a dog sniff itself can be unconstitutional. Few have referenced the Tenth Circuit Court of Appeals’ rule which exempts some canine conduct on the grounds that police dogs do not act on behalf of the state when they behave “instinctively.”⁷

This note rejects the line of reasoning behind *United States v. Stone*, which held that when a police dog behaves “instinctively” by entering a vehicle on its own, its actions cannot be imputed to the state in the context of Fourth Amendment protections against unreasonable searches and seizures.⁸ Since its publication in 1989, *Stone* has become a persuasive authority in several federal and state jurisdictions and a binding authority in others, which has resulted in detrimental consequences to public policy and government responsibility for tools utilized in law enforcement.

3. See U.S. CONST. amend. IV.

4. See 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, 791 (2007); Matthew Slaughter, *Supreme Court’s Treatment of Drug Detection Dogs Doesn’t Pass the Sniff Test*, 19 NEW CRIM. L. REV. 279, 309 (2016).

5. See Lindsay N. Zanello, *To Sniff or Not to Sniff: Making Sense of Past and Recent State and Federal Decisions in Connection with Drug-Detection Dogs - Where Do We Go from Here?*, 78 ALB. L. REV. 1569, 1600–02 (2014/2015); Brian L. Owsley, *The Supreme Court Goes to the Dogs: Reconciling Florida v. Harris and Florida v. Jardines*, 77 ALB. L. REV. 349, 374–76 (2013/2014).

6. Nathaniel J. Hall & Clive D.L. Wynne, *infra* note 79, at 124; Video Interview with Deputy Kaleigh Churchill, K9 handler with Onondaga County Sheriff’s Office (Nov. 19, 2023) [hereinafter Video Interview with Deputy Kaleigh Churchill]; see Joseph L. Gastwirth, *The Need to Carefully Interpret the Statistics Reporting the Accuracy of a Narcotics Detection Dog: Application to South Dakota v. Nguyen, State of Florida v. Harris and Similar Cases*, 53 JURIMETRICS J. 415, 417, 425 (2013).

7. See *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).

8. See *id.*

Make no mistake, there exist procedural and substantive issues with dog sniffs as a narcotics detection method. One such issue includes a dog's reliability, which required clarification by the Supreme Court stating that a dog's certification testing and training provide a satisfactory foundation to presume a dog's alert is reliable enough to establish probable cause.⁹ Training on a threshold amount that is inconsistent with what the canine will encounter while deployed in the field also presents an issue regarding the dog's ability to detect differing amounts of drugs.¹⁰ Additionally, law enforcement "handlers" (or "K9 Officers," human police officers with whom the narcotics dog trains, works, and resides)¹¹ interpreting canine alerts can misinterpret a dog's alert, just as they can misinterpret the results of any other tool.

But the convenience of dog sniffs led by seasoned handlers and the speed at which they can be conducted make dog sniffs a valuable tool for law enforcement and the control of drug trafficking.¹² Canine officers and their narcotics dogs can quickly search for the scent of narcotics at border crossings, traffic stops, and airports,¹³ saving an immense amount of government manpower and greatly reducing the need for more intrusive search practices. This Note distinguishes truly instinctive actions from behaviors that law enforcement instills in canines and focuses on methods by which dogs are trained to distinguish narcotics. This Note ultimately posits that the "instinctive" exception coined in *Stone* is irreconcilable with Fourth Amendment protections. This Note discusses training methods by which a state can utilize police dogs while remaining ultimately responsible for their use.

This Note begins by outlining Fourth Amendment jurisprudence surrounding narcotics dogs, discussing relevant Supreme Court decisions about dog sniffs and constitutionality, and explains the ways in which some states have adopted more stringent protections for their

9. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013) ("If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.").

10. Steve A. Sloan, *Narco Dogs: Understanding How They Do Their Job Can Make Your Job Easier*, 30 LAW ENF'T Q. 13, 14 (2001).

11. See Interview with Deputy Kaleigh Churchill, *supra* note 6.

12. Leslie A. Shoebottom, *Canine Drug Detection Evidence: Admissibility, Canine Qualifications, and Investigative Practices*, in CANINE OLFACTION SCIENCE AND LAW: ADVANCES IN FORENSIC SCIENCE, MEDICINE, CONSERVATION, AND ENVIRONMENT REMEDIATION 217, 218 (Tadeusz Jezierski, John Ensminger, & L.E. Papet eds. 2016).

13. See generally *United States v. Place*, 462 U.S. 696 (1983) (explaining the timeline of a search involving a trained narcotics dog).

citizens against dog sniffs. Part II refutes the basis of the “instinctive exception” to canine conduct created in 1989 by *United States v. Stone*. This section discusses the ironic use of the term “instinctive,” what behavior is truly instinctive to canines, and the methods by which law enforcement trains dogs to identify and alert to the odor of narcotics. Part III argues that the instinctive exception has led to a decline in state accountability for law enforcement tools and undermines the basis of Constitutional protections against unreasonable searches and seizures. It further outlines possible solutions via the very process that narcotics dogs are able to participate in law enforcement: training.

I. THE CURRENT FEDERAL LEGAL LANDSCAPE

The Fourth Amendment protects individuals from unreasonable searches and seizures,¹⁴ and courts are responsible for ensuring that individuals’ privacy rights under the Fourth Amendment are protected.¹⁵ Individuals have a legitimate expectation of privacy if they have a subjective expectation of privacy that society also recognizes as reasonable.¹⁶ To claim a violation of the Fourth Amendment as grounds for suppressing evidence, the inquiry turns on whether an individual’s expectation of privacy is infringed upon by the government.¹⁷ “[B]reaches of privacy are complete at the moment of illicit intrusion”¹⁸

A “search” within the original meaning of the Fourth Amendment occurs when “the Government obtains information by physically intruding on a constitutionally protected area.”¹⁹ Without a warrant, consent, or probable cause and exigent circumstances (such as a suspect’s imminent flight or imminent destruction of evidence), a government search of the home is presumptively unreasonable.²⁰ Probable cause must be established for a warrant to be issued, or there must exist probable cause in addition to exigent circumstances for an officer to conduct a warrantless search of a home for weapons or contraband.²¹

14. U.S. CONST. amend. IV.

15. See *United States v. Black*, 707 F.3d 531, 541–42 (2013).

16. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This two-part test was created by Justice Harlan in a concurring opinion, not in the majority opinion, but has since become the main takeaway of the case.

17. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); see *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

18. *United States v. Balsys*, 524 U.S. 666, 692 (1998).

19. *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012).

20. See *Payton v. New York*, 445 U.S. 573, 586–88 (1980).

21. See *id.* at 584, 587–88.

Probable cause asks whether there is “a fair probability that contraband or evidence of a crime will be found in a particular place;” in other words, law enforcement must possess a reasonable ground for belief of guilt particularized to the person to be searched.²² Evidence recovered during an unreasonable search should be excluded from court.²³

Automobiles have “less rigorous warrant requirements” because the expectation of privacy in one’s automobile is “significantly less” than in one’s home.²⁴ At traffic stops, an officer may search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime or contraband.²⁵ There need not be exigent circumstances in addition to probable cause for an officer to conduct a warrantless search of a vehicle because of the vehicle’s readily mobile character.²⁶ Absent probable cause, an officer must instead obtain consent from the driver to search the vehicle for a search to be reasonable.²⁷

A. *Dog Acts on Behalf of the State*

The Supreme Court controls federal law and the minimum protections that the Constitution affords. When it comes to dog sniffs, all states must ultimately abide by the floor set by federal law. States may adopt a broader view on what canine behavior amounts to a search through their case law, statutes, or state constitutions.²⁸

1. *Supreme Court Jurisprudence*

In 1983, the Supreme Court issued its first opinion regarding the constitutionality of a warrantless dog sniff in *United States v. Place*.²⁹ There, the defendant’s luggage was seized at an airport and subjected to a dog sniff to scan for narcotics.³⁰ In dicta, the Court held that a dog sniff by a well-trained narcotics dog is not a search within the meaning

22. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

23. *Mapp v. Ohio*, 347 U.S. 643, 648, 655 (1961).

24. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

25. *See Carroll v. United States*, 267 U.S. 132, 149 (1925) (creating the “automobile exception” to the Fourth Amendment’s warrant requirement).

26. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996); *see also Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

27. *See Labron*, 518 U.S. at 940; *see also Dyson*, 527 U.S. at 467; *Schneekloth v. Bustamonte*, 412 U.S. 218, 227–28 (1973).

28. *See generally Michigan v. Long*, 463 U.S. 1032 (1983) (discussing the importance of allowing states to develop their own jurisprudence).

29. *United States v. Place*, 462 U.S. 696, 706–07 (1983).

30. *Id.* at 699.

of the Fourth Amendment because of its minimally intrusive nature: a sniff does not require opening the luggage, and the information obtained is limited to only the “presence or absence of narcotics.”³¹ A year later, *United States v. Jacobsen* held that since contraband is illegal, an individual lacks a legitimate expectation of privacy in possessing it.³² Following *Place*, lower courts struggled with determining whether a dog sniff “could ever constitute a Fourth Amendment search.”³³

Despite federal challenges to the accuracy of narcotics dog sniffs,³⁴ the Court went on to examine cases regarding dog sniffs on vehicles. “[T]he *circumstances* of the contraband’s possession,” such as its location in a vehicle, became the critical question in determining whether a dog sniff required a warrant.³⁵ *Illinois v. Caballes* held that a dog sniff conducted during a “lawful traffic stop that reveals no information other than the location of [an illegal] substance” did not violate the Fourth Amendment, following *Jacobsen*’s rule that an individual has no privacy interest in possessing contraband.³⁶ Moreover, the *Caballes* court found that a canine alert on a stopped vehicle, standing alone from any other suspicion or inference made by an officer, provided probable cause for officers to search the vehicle.³⁷ *Rodriguez v. United States* bolstered the rule that an officer does not need reasonable suspicion to conduct a dog sniff during a traffic stop.³⁸

Dog sniffs may not be employed without limit, however. In deciding that a dog sniff on the exterior of a lawfully stopped vehicle is not a search, even where the officers lacked reasonable suspicion that a vehicle contained drugs,³⁹ the *Caballes* Court commented that a dog sniff itself has the capacity to infringe on a defendant’s

31. *Id.* at 707 (deeming a dog sniff “sui generis,” or “unique”).

32. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *see also Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005).

33. Brian R. Gallini, *Suspects, Cars & Police Dogs: A Complicated Relationship*, 95 WASH. L. REV. 1725, 1737 (2020).

34. *See Caballes*, 543 U.S. at 411–12 (Souter, J., dissenting).

35. Shoebottom, *supra* note 12, at 218.

36. *Caballes*, 543 U.S. at 410; *see Jacobsen*, 466 U.S. at 123.

37. *Caballes*, 543 U.S. at 407.

38. *See generally Rodriguez v. United States*, 575 U.S. 348 (2015) (ruling in favor of the defendant because the dog sniff was conducted an unreasonably long time after the attending officer had written the ticket, and so the traffic stop had been extended past the scope of a usual traffic stop without reasonable suspicion, which was impermissible).

39. *See Caballes*, 543 U.S. at 407, 409.

constitutionally protected interest in privacy.⁴⁰ Critically, *Florida v. Jardines* characterized a particular dog sniff as a search, disallowing a dog sniff of a homeowner's porch because law enforcement had entered the property to gather evidence without permission or a warrant.⁴¹ The issue in *Jardines* turned on *where* the dog was legally allowed to be *physically located* when conducting the sniff.

2. Implied Holdings

Conducting a dog sniff improperly may violate the Fourth Amendment. Whether the action at issue is characterized as the dog sniffing (a police tool operating) or as an officer deploying a dog for a sniff (an officer operating a police tool), implicit in this federal precedent is the message that the conduct of a narcotics dog may be imputed to the state. As *Caballes* and *Jardines* respectively illustrate, a dog sniff can infringe on privacy protections, and a dog must be constitutionally permitted in the area where the dog sniff is performed. Therefore, an improper dog sniff can violate a defendant's Fourth Amendment's protections against unreasonable searches and seizures.⁴²

B. The Instinctual Exception to State Responsibility for Canine Conduct

If conducted in an impermissible location, a dog sniff can transform into an illegal search.⁴³ Absent an exception to the Fourth Amendment's warrant requirement, the Fourth Amendment is violated if a narcotics dog physically enters a vehicle while conducting a sniff at a traffic stop. Yet in 1989, the Tenth Circuit Court of Appeals provided a notable exception to this rule, successfully circumventing Fourth Amendment protections.⁴⁴

In *United States v. Stone*, an officer pulled the defendant over for a traffic citation.⁴⁵ The defendant's criminal history and nervous

40. *Id.* at 408.

41. *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013). There exists a distinction between sniffs on vehicles that are parked on defendant's property on their curtilage, and sniffs on vehicles at traffic stops. The former has a heightened expectation of privacy due to its location on defendant's private property, and the latter has a lesser expectation of privacy in part due to its location on public roadways. *See id.* at 9.

42. *See id.* at 11–12. A dog may act improperly by being in an impermissible location. Therefore, when the dog sniffs for narcotics on private property absent a warrant, consent, or probable cause and exigent circumstances, the state violates the Fourth Amendment.

43. *See id.* at 9.

44. *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).

45. *Id.* at 360.

disposition provided the officer with reasonable suspicion that there were drugs inside the vehicle.⁴⁶ The defendant exited the car and opened the hatchback of his vehicle to retrieve a previous traffic citation and did not close the trunk.⁴⁷ Another officer arrived at the scene with a narcotics dog to conduct a sniff.⁴⁸ On its own, the dog jumped into the open hatchback and alerted on a duffel bag.⁴⁹ The bag contained over 30,000 methaqualone tablets.⁵⁰

The defendant was tried and convicted for possession with intent to distribute narcotics, and sought to suppress the discovery of the narcotics on the grounds that the officers had conducted a warrantless search by allowing the narcotics dog to enter his vehicle to sniff.⁵¹ The lower court found that the dog's entrance into the hatchback did not violate the Fourth Amendment because the dog had done it without direction or facilitation by the handler, and so the dog's alert on the duffel bag gave the police probable cause to search the vehicle and recover the methaqualone.⁵²

When the dog entered the hatchback of the defendant's vehicle, the police only possessed reasonable suspicion to believe the vehicle contained narcotics.⁵³ It was only after the dog jumped into the hatchback and subsequently alerted to the duffel bag that the police had probable cause to search the vehicle and discover the narcotics.⁵⁴ By jumping into the hatchback prior to the establishment of probable cause, the dog engaged in conduct that would otherwise violate the defendant's search and seizure rights. The trial court held that the dog acted on "instinct," not at the direction of the handler, and therefore did not violate the Fourth Amendment.⁵⁵ The trial court concluded that the government had not violated the defendant's search and seizure rights through the mechanism of the narcotics dog.⁵⁶

46. *Id.* at 360.

47. *Id.* at 361.

48. *Id.*

49. *Stone*, 866 F.2d at 361.

50. *Id.*

51. *Id.*

52. *Id.* at 361–62. Individuals have a reasonable expectation of privacy in their vehicles, and "police may not search an automobile unless they have probable cause that it contains contraband." *Id.* at 363 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause for the search.")).

53. *Id.* at 364.

54. *Stone*, 866 F.2d at 364.

55. *Id.*

56. *Id.*

The Tenth Circuit Court of Appeals affirmed the lower court's denial of the defendant's motion to suppress the discovery of the narcotics.⁵⁷ In just a few scant paragraphs, *Stone* effectively established the "instinctive" entry rule for canine conduct and shifted the landscape of courtrooms considering the constitutionality of a dog sniff.

Though not referred to as an "exception" in *Stone* or the cases that follow it, it is here referred to as such. Canine behavior that might otherwise constitute an illegal search (the State physically occupying a vehicle without a warrant, consent, or probable cause) is not considered to violate the Fourth Amendment, so long as the handler does not facilitate the dog's entry into the vehicle.⁵⁸ As long as the dog enters the vehicle of its own volition, without officer encouragement, no illegal search has occurred in jurisdictions following *Stone*—the dog's instinctive conduct is exempted from considerations of unconstitutionality.⁵⁹

1. Authority

Circuit courts are divided in deciding whether an unconstitutional search has occurred if a narcotics dog enters a vehicle without officer facilitation and subsequently alerts to the presence of narcotics. Three other federal circuits have clearly adopted *Stone*'s "instinctive" entry rule, while another has considered an argument under the rule without expressly adopting it.⁶⁰ The Tenth Circuit Court of Appeals affirmed this rule as recently as 2009 in *United States v. Vazquez*.⁶¹ The Supreme Court denied certiorari of *Vazquez*,⁶² which could indicate approval of *Stone*'s rule—or a full docket.

57. *Id.*

58. *See id.* at 364.

59. *See, e.g.,* *United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012); *United States v. Pierce*, 622 F.3d 209, 214–15 (3d Cir. 2010); *United States v. Lyons*, 486 F.3d 367, 373 (8th Cir. 2007).

60. *See Sharp*, 689 F.3d at 620; *Pierce*, 622 F.3d at 215; *Lyons*, 486 F.3d at 373; *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016).

61. *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009) ("[W]e have upheld the legality of such a sniff during a lawful detention when, as here, (1) the dog's leap into the car was instinctual rather than orchestrated and (2) the officers did not ask the driver to open the point of entry, such as a hatchback or a window, used by the dog.").

62. *Id.* at 930 (holding that a dog jumping through a car window did not violate the Fourth Amendment because there was no evidence that law enforcement had trained the dog to do so or done something to encourage or facilitate the jump) (cert denied, 558 U.S. 903 (2012)).

2. *State Following*

States have developed their own case law or provisions in their constitutions that dictate under what circumstances an otherwise permissible canine sniff is transformed into an unconstitutional search. Some states go one step further and reject the Supreme Court's basic rule in *Place* that a dog sniff is not a search. For example, Pennsylvania's Supreme Court held plainly that a dog sniff itself constitutes a search, reasoning that "a free society will not remain free" if law enforcement can utilize a "crime detection device, at random and without reason."⁶³ The court has explained that law enforcement must be able to articulate "reasonable grounds" for their belief that contraband may be present in the place where the sniff is conducted, and must be "lawfully present in the place where the . . . sniff is conducted."⁶⁴ Pennsylvania courts have gone to affirm cases involving a dog's spontaneous entry into a vehicle during a dog sniff, though some justices on the state's supreme court disapprove of *Stone*'s base reasoning,⁶⁵ and despite the state's recognition of the fact that a dog sniff is itself a search, and that a dog must be lawfully permitted in the area of the dog sniff.⁶⁶ Pennsylvania's adoption of *Stone*'s rule explicitly illustrates *Stone*'s pervasive reach even into states that acknowledge the nature of a dog sniff as a crime detection tool.

Other states follow the reasoning of the Supreme Court more closely. New York agrees with the Supreme Court's reasoning in *Place* and *Jacobsen* that an individual has no privacy interest in contraband.⁶⁷ The New York Court of Appeals recently decided that the use of a narcotics dog to sniff a defendant's person qualifies as a search, contrasting it with a sniff on an inanimate object such as an automobile, which presents less of an intrusion on personal privacy.⁶⁸ Despite this adherence to the Supreme Court's interpretation of the "uniquely discriminate" nature of a dog sniff,⁶⁹ New York has not adopted *Stone*'s instinctive entry rule, and New York defendants thus are afforded better protection against bounding hounds and leaping labradors at traffic stops.

63. *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987); *see also Commonwealth v. Rogers*, 849 A.2d 1185, 1192 (Pa. 2004).

64. *Johnston*, 530 A.2d at 79.

65. *See Rogers*, 849 A.2d at 1192 (Castille, J., concurring).

66. *See Johnston*, 530 A.2d at 82.

67. *People v. Dunn*, 564 N.E.2d 1054, 1056 (N.Y. 1990).

68. *People v. Butler*, 231 N.E.3d 1021, 1027–28 (N.Y. 2023).

69. *Dunn*, 564 N.E.2d at 1058.

Several states have explicitly discussed the instinctive exception and chosen to adopt it or canine-entry rules that mirror *Stone*'s reasoning, including Missouri, California, Arkansas, Maryland, Iowa, Pennsylvania, and North Carolina.⁷⁰ These jurisdictions may overrule their previous acceptance of the instinctive exception in the interest of state responsibility and individual protections. After following the instinctive entry rule for years, the Idaho Supreme Court expressly denounced the instinctive exception in 2021, correctly declaring that the rule cannot be reconciled with the Fourth Amendment.⁷¹ The rule "removes the focus from where it must be—the circumstances known to an officer at the time of a search—and focuses on what motivated the behavior of the [narcotics dog]."⁷² Similarly, members of Pennsylvania's Supreme Court have toyed with the idea of discarding their adoption of the instinctive entry rule, but not *sua sponte*, and so await a case in which to do so.⁷³

II. CANINE POLICING IS NEVER TRULY INSTINCTUAL

A. *What Is Instinct?*

Instinct is commonly regarded as innate, fixed animal behavior in response to certain stimuli.⁷⁴ It is telling of the deliberately obfuscatory nature of *Stone*'s rule that the term "instinctive" has not been interpreted literally by the courts that adhere to *Stone*. After all, a dog has no animal instincts to seek out the scent of narcotics.⁷⁵

B. *Courts Interpreting "Instinctual"*

"Instinctive" as termed in *Stone* does not literally reference a dog's animal instincts. Instead, "instinctive" merely "implies the dog

70. See *State v. Logan*, 914 S.W.2d 806, 810 (Mo. Ct. App. 1995); *People v. Stillwell*, 129 Cal. Rptr. 3d 233, 241 (Cal. Ct. App. 2011); *Omar v. State*, 262 S.W.3d 195, 202 (Ark. Ct. App. 2007); *Cruz v. State*, 895 A.2d 1076, 1084–85 (Md. Ct. Spec. App. 2006); *State v. George*, 889 N.W.2d 244, at *11 (Iowa Ct. App. 2016); *Commonwealth v. Rogers*, 849 A.2d 1185, 1192 (Pa. 2004); *State v. Miller*, 766 S.E.2d 289, 290 (N.C. 2014) (similar conduct of "nudging" a bag to reveal drugs admitted as trial evidence instead of jumping into a car, using the same instinctive entry rule).

71. *State v. Randall*, 496 P.3d 844, 853 (Idaho 2021).

72. *Id.* at 854.

73. See *Commonwealth v. Rogers*, 849 A.2d 1185, 1200 (Pa. 2004) (Castille, J., concurring).

74. *Instinct*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

75. *Randall*, 496 P.3d at 854 ("[W]e note that . . . description of the dog's behavior as 'instinctive' is inapt because there is nothing innate about a dog seeking out narcotics. But the flaws in the instinctive entry rule go beyond semantics.").

enters the car without assistance, facilitation, or other intentional action by its handler.”⁷⁶ Facilitation could take the form of an officer opening a car door, encouraging their dog up into the vehicle; or an officer telling a defendant to roll down their window; or preventing them from rolling it up.⁷⁷ So long as officers employ a paws-off approach, a dog’s entry into the vehicle is deemed “instinctive,” and does not transform the dog sniff into a search, thus making it permissible under the Fourth Amendment.⁷⁸ If an officer otherwise facilitates their dog’s entry into a vehicle without probable cause, then the dog’s entry into the vehicle is an unreasonable search. Any alert the dog makes from inside the vehicle is then unable to be used as probable cause necessary for the search of the vehicle by law enforcement, and recovered evidence should be excluded from the courtroom.⁷⁹ Note that the dog’s behavior has not changed between these scenarios; only the handler’s behavior has changed. “Instinctive,” then, is a legal term of art, and pertains more so to the actions of a dog’s handler.

C. Law Enforcement Canine Training Methodologies

Law enforcement canine training makes use of a dog’s instincts. In this way, trained behavior and instinct are innately intertwined, because it is the dog’s instinct to seek rewards (in the form of food and/or play) that allow for its behaviors to be manipulated into a desired result. The fundamentals of classical (Pavlovian) conditioning⁸⁰ methods recognize that a dog performs behaviors to meet an end, and that

76. *United States v. Pierce*, 622 F.3d 209, 214 (3d Cir. 2010).

77. *See Randall*, 496 P.3d at 862 (Bevan., J, dissenting).

78. *See United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).

79. *Pierce*, 622 F.3d at 214 (“Where decisions have held that an interior sniff was unconstitutional, the courts have concluded that the officer ‘facilitated or encouraged’ the dog’s entry into the car. *See e.g.*, *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998) (suppressing drugs found following an interior sniff where the officers lacked any reasonable suspicion that the van contained drugs; and where they opened the door, allowed the door to remain open while waiting for the drug dog to arrive; and where the dog’s handler unleashed the dog as they approached the van); *State v. Freel*, 32 P.3d 1219, 1225 (Kan. Ct. App. 2001) (finding the interior sniff to be a search, because the officer ‘encouraged the dog to enter into the car when it had not alerted on the exterior’); *State v. Warsaw*, 956 P.2d 139, 143 (N.M. Ct. App. 1997) (distinguishing *Stone*, stating that the officer “reached into the trunk to remove the glass-laden carpet because he expected the narcotics dog to jump in there”)).

80. *See Nathaniel J. Hall & Clive D.L. Wynne, Canine Olfactory Learning and Behavior*, in *CANINE OLFACTION SCIENCE AND LAW: ADVANCES IN FORENSIC SCIENCE, MEDICINE, CONSERVATION, AND ENVIRONMENTAL REMEDIATION* 123, 123–26 (Tadeusz Jezierski et al. eds., 2016).

individual dogs are able to change and learn.⁸¹ Dogs have volition in that they desire to do things—eat, sleep, remain safe, socialize, move from point A to point B—and training capitalizes on these desires. Even early manuals on police dog training stressed that trainers “needed to work with canine characteristics in a thorough and logical way.”⁸²

Similar to other forms of dog training, police training involves suppressing some instincts and nurturing others.⁸³ Narcotics detection specifically utilizes a dog’s incredibly keen sense of smell to induce a dog to perform a specific behavior for a reward of play. Dogs scent for food, people, and objects constantly. Left to their own devices, a dog has no desire to locate narcotics; a dog is not born knowing how to specifically sniff out narcotics. Like Pavlov’s first bell without a presentation of food,⁸⁴ the scent of drugs has no meaning for a dog. It is a neutral stimulus.⁸⁵ Narcotics dogs are trained through repetition to associate the scent of a narcotic and a training toy which serves as their reward (or “reinforcer”).⁸⁶ Once the association between the reinforcer and the scent has been made, a handler can train in an alert behavior, such as a sit or down posture, a bark, or scratching.⁸⁷ Alerts to an odor must be continually reinforced in order to maintain a response to that odor.⁸⁸ The frequency of canine training programs, as police departments require a certain amount of training hours to be completed every year, reflects this need.⁸⁹ Courts may review the frequency of training and recertification sessions as factors when considering whether a particular dog is reliable enough for their alerts to serve as probable cause when challenged by defense counsel.⁹⁰

81. Chris Pearson, *Dogs, History, and Agency*, 52 HIST. & THEORY (THEME ISSUE) 128, 136 (2013).

82. Chris Pearson, *Between Instinct and Intelligence: Harnessing Police Dog Agency in Early Twentieth-Century Paris*, 58 COMPAR. STUD. IN SOC’Y & HIST. 463, 478 (2016).

83. *Id.* at 466.

84. Hall & Wynne, *supra* note 80, at 123.

85. *Id.*

86. Sloan, *supra* note 10, at 13–14.

87. Hall & Wynne, *supra* note 80, at 124.

88. *Id.* at 128.

89. See Video Interview with Deputy Kaleigh Churchill, *supra* note 6.

90. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013) (“If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search.”).

Even though the dog does not understand that what it is scenting is narcotics, they understand that they are seeking out the specific scent. Dogs seek out the scent of narcotics and perform an alert because they are searching for their reward, not because they recognize that they are seeking narcotics themselves.⁹¹ A reward for completing their task, the alert, results in a repeat of the behavior when cued, out of a desire to achieve the reward again. “When the dog smells the odor of the designated narcotics, it believes it has found its [training] toy . . . Dogs do not know they are smelling narcotics and not the [training toy itself].”⁹² In the field, this has the desired result of a dog smelling the odor of drugs and following the scent, searching for their reward—even if that means jumping into a car after it.

Defendants have raised other issues regarding canine drug detection in court. However, these issues do not defeat the Supreme Court’s presumption that a narcotics dog’s alert establishes probable cause without a showing by the defendant of a particular dog’s unreliability. For example, a narcotics dog may alert inside a car and law enforcement may recover nothing, but that does not mean that the dog was inaccurate. As an odor-detector, a dog may be scenting narcotics that were once inside the vehicle that are no longer present.⁹³ Likewise, if narcotics are vacuum-sealed in such a way that no odor escapes, a dog may not pick up on a scent at all despite their presence, or may otherwise smell residual odors of narcotics previously in the vehicle or on the driver’s person.⁹⁴ There also remains the possibility that a narcotics dog may respond to subtle, unconscious cues by a handler who believes narcotics to be in a vehicle, and may alert on those cues, ignoring the absence of true olfactory input.⁹⁵ For example, a handler may peer under a tire with heightened interest, and the dog may respond with an alert at that tire because it believes its handler to be signaling that the target source of the odor is present.

Discrepancies in the field may arise because of the way in which a dog was trained. Dogs may be trained on synthetic or genuine scents

91. Sloan, *supra* note 10, at 13; see 3DK9 LLC, *How are Drug Sniffing Dogs Trained to Find Narcotics* (Apr. 26, 2021), <https://www.3dk9detection.com/news/how-are-drug-sniffing-dogs-trained-to-find-narcotics> (“The dog seeks the illegal substance in hopes of getting a reward.”).

92. Sloan, *supra* note 10, at 13.

93. See Harris, 568 U.S. at 245–46; Shoebottom, *supra* note 12, at 224.

94. Sloan, *supra* note 10, at 15; Harris, 568 U.S. at 245–46.

95. See Hall & Wynne, *supra* note 80, at 132; Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 387, 392 (2011) (discussing in part the “Clever Hans effect”).

of methamphetamine, cocaine, and heroin.⁹⁶ If a dog was trained on synthetic scents, so as to limit accidental human/animal exposure to actual narcotics or due to bureaucratic red tape, it may not recognize the scent of genuine drugs while sniffing in the field, or may not recognize them consistently.⁹⁷ Similarly, if a dog is trained only on a very small amount of drugs, it may learn only to detect very small amounts of drugs, and can become confused and refuse to alert when it encounters large volumes of drugs in the field.⁹⁸ This issue can be remedied by training the dog on larger amounts of narcotics, raising the threshold of what amount they can accurately discern.⁹⁹

Of chief importance to this Note is the fact that narcotics dogs are trained to follow the scent of narcotics to their source, where the odor is strongest.¹⁰⁰ As such, a dog searches for where the scent of narcotics emanates from, which could be wafting from the vehicle's interior, prompting the dog to poke its head through the open window,¹⁰¹ or enter the vehicle via an open door or hatchback,¹⁰² or jump onto the bed of a pickup truck.¹⁰³

III. IMPLICATIONS OF THE INSTINCTUAL EXCEPTION

A. *Government Responsibility*

If a jurisdiction uses narcotics dogs as tools to indict and prosecute defendants, then such a jurisdiction must be responsible for the way in which that tool functions. The problem is not merely that a narcotics dog entered the vehicle. Rather, the problem is that alerts from a dog improperly located inside the vehicle continue to carry the force of law by serving as probable cause for law enforcement to search the vehicle. This entry causes a temporal disconnect between when a tool of law enforcement may enter a protected space and when probable cause, constitutionally necessary to permit that entry, is established. Something which has no consequences to law enforcement

96. See Alison Simon et al., *A Review of the Types of Training Aids Used for Canine Detection Training*, 7 FRONTIERS IN VETERINARY SCI. 1, 2 (2020).

97. See *id.* at 3.

98. See Sloan, *supra* note 10, at 14.

99. See *id.*

100. See Interview with Deputy Kaleigh Churchill, *supra* note 6; Simon et al., *supra* note 96, at 2 ("For solid and liquid true materials, canines generally locate the source of the odor, whereas for gaseous true materials, they may simply be identifying the presence or absence of the odor/scent.").

101. See, e.g., *Omar v. State*, 262 S.W.3d 195, 202 (Ark. Ct. App. 2007).

102. See, e.g., *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989).

103. See, e.g., *Commonwealth v. Rogers*, 849 A.2d 1185, 1188 (Pa. 2004).

can continue to hold consequences for a defendant—a tool that can misfire, but misfire in such a way as to discover evidence that may be lawfully admitted against a defendant in court—is definitively against the spirit of the Fourth Amendment.¹⁰⁴

A narcotics dog may do what the officer may not in jurisdictions that have adopted the instinctive exception. There is no question that a human officer may not enter a stopped vehicle absent a warrant, probable cause, or consent, to search for and uncover drugs inside the vehicle which may then be admitted in court against a defendant. Much like the officer performing their duties at a traffic stop by running a license, a dog is likewise operating under the color of law when it is sniffing a vehicle at a traffic stop. A dog does not suddenly stop sniffing with state authority the instant that it crosses the threshold into the vehicle, in the same way that a human officer does not cease operating in his official capacity when he transgresses privacy protections by installing a GPS device on an individual's vehicle.¹⁰⁵ Both agents, officer and dog, are acting in official capacities, but only the officer's improper conduct has the potential to "count against" the government in jurisdictions adopting the instinctive exception.

When evaluating whether privacy protections have been violated, one consideration is whether "[t]he Government physically occupie[s] private property for the purpose of obtaining information."¹⁰⁶ It matters not whether it is the officer himself physically occupying private property or whether he does so through the use of an investigatory tool, such as a GPS device or a narcotics dog. The interior of a vehicle is private property, which is why courts have held that Fourth Amendment protections extend to require a warrant, probable cause, or consent when law enforcement seeks to gain access to it.¹⁰⁷ The narcotics dog is an investigatory tool of the police, trained to gather information (detect and alert to the presence of drugs). By all accounts, this police tool should thus be disallowed from physically occupying the interior of a vehicle. Yet the instinctive exception continues to allow for circumvention of Fourth Amendment safeguards, explicitly permitting a

104. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness . . .'").

105. See generally *United States v. Jones*, 565 U.S. 400 (2012) (holding that the government's warrantless installation and use of a GPS device on the respondent's vehicle constituted a search under the Fourth Amendment because attaching the GPS to the defendant's car physically trespassed on the defendant's effects).

106. *Id.* at 405 (emphasis added).

107. *Stone*, 866 F.2d at 363 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 269–70 (1973)).

police tool to physically enter and occupy a vehicle for the purpose of detecting narcotics without a warrant, consent, or probable cause.

Similar to early Supreme Court jurisprudence, which assumed that improper dog sniffs could be imputed to the state as violations of the Fourth Amendment, there lies a hidden assumption in *Stone*. Implicit in *Stone* is the notion that a dog does not act on behalf of the state when it acts instinctively; it acts only on its own animal tendencies. However, as discussed, these are not true instinctive behaviors at all because a dog does not innately search for drugs. A dog is born knowing how to smell and utilize that sense to fulfill its needs and desires, and the narcotics dog seeks the odor of drugs to engage in play with its handler, to earn a reward. At a base level, due to its training, a narcotics dog seeking drugs is *already* behaving in a manner that has been facilitated by a human handler, even *prior* to entering a vehicle on its own, just by the very fact that it is searching for the odor of drugs at all. Thus, the assumption underlying the reasoning in *Stone* is incorrect: a narcotics dog does not act on its animal instincts when it jumps into a stopped vehicle on its own, and therefore the state should remain responsible for its actions.

By allowing the alert of a narcotics dog located inside a vehicle without consent to establish probable cause for a search, the protections of the Fourth Amendment are annihilated. Narcotics dogs are trained by police to locate sources of drugs and alert to their presence. They are utilized by police departments across the United States to do so—this is a government function, and the narcotics dogs thus perform a state action when sniffing for drugs. When defendants encounter these dog sniffs at traffic stops, there may be variable expectations of privacy depending on jurisdiction, but ultimately defendants are facing state action in the form of this dog sniff, and should remain as protected under the Fourth Amendment from canine conduct as they are from identical conduct by a human officer. In this situation, the proper inquiry is not whether the dog entered the vehicle because it had scented narcotics (thereby questioning the motivation of the dog), but whether the officer had probable cause to search the vehicle before the dog entered it.

B. Training Solutions

In jurisdictions that follow the instinctive exception, law enforcement are not only unaffected when their narcotics dog jumps into a vehicle and alerts, but this behavior is in fact *helpful* to them. An “instinctive” entry by a narcotics dog allows law enforcement to bypass

the Fourth Amendment's warrant requirement yet still collect that trigger that establishes probable cause.

As living creatures, dogs are intelligent yet fallible animals, and errors may occur. For this reason, the Supreme Court allows defendants to raise the issue of a particular dog's reliability when seeking to suppress evidence,¹⁰⁸ takes into account training and certification programs,¹⁰⁹ and places unique faith in a dog's ability to sniff without revealing law-abiding activity.¹¹⁰ But defendants should not bear the weight of training errors. At its heart, this is what the instinctive exception is borne out of: the defendant shouldering the legal cost of a narcotics dog that is not trained to keep out of stopped vehicles.

Instead of arguing to suppress the recovered evidence on the simpler basis of the dog's physical occupation of the vehicle prior to its alert, a defendant must instead attack the reliability of individual dogs. This is a more complex and costly challenge, involving the totality of the circumstances.¹¹¹ The defendant must request a probable-cause hearing and rebut the presumption that a particular dog's alert is sufficient to establish probable cause for a search.¹¹² To challenge the reliability of a dog is to argue that its alert did not serve as probable cause because the dog often produces false alerts, and that therefore the subsequent recovery of evidence in the search by officers was illegal because it was performed absent probable cause. This is demonstrated via the dog's rate of success in training and certification programs, field performances, and the total circumstances surrounding the particular alert.¹¹³ This forces an entire inquiry into the particular dog's success rate, which is time-consuming, document-heavy, and costly to the defendant (and to the state that funds defense attorneys for indigent defendants).

The ultimate solution for the problem created by the instinctive exception comes in the form of the very aspect of canine psychology that allows narcotics dogs to exist: training. A fully trained narcotics dog can indeed learn new tricks, though unlearning them proves difficult. For example, as the landscape surrounding state legalization of marijuana has shifted, many police departments must reckon with

108. *See Florida v. Harris*, 568 U.S. 237, 247–48 (2013).

109. *See id.* at 246–47.

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

111. *See Harris*, 568 U.S. at 244–45.

112. *Id.* at 246–47 (“If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search.”).

113. *See id.* at 247.

retraining their dogs to ignore the scent of marijuana (titled “extinction” training) or retiring those dogs that alert to marijuana.¹¹⁴ Extinction training involves teaching a dog that responds to the scent of marijuana with an alert to no longer do so.¹¹⁵ It may be attempted through withholding a reward when a dog alerts to the scent of marijuana or through negative reinforcement. It is extremely difficult to achieve and confuses a dog, which negatively affects its reliability,¹¹⁶ since the dog does not differentiate between substances and, after attempted extinction training, could result in the dog refusing to alert to a different substance such as cocaine.

Adding a command to the repertoire of a narcotics dog that cues a dog to wait for a signal before entering a vehicle is a simple fix to a potential problem for law enforcement. Though they are trained to regularly hop up into patrol cars for police transport, the dogs are not trained to jump into *any* vehicle they sniff, barring nefarious intentions of law enforcement in jurisdictions that follow *Stone* and wish to capitalize on the instinctive exception. Therefore, training in this command is *adding* another cue to the arsenal of a trained canine, not forcing it to discard one, as extinction training illustrates is much more difficult. Adding a command is simple, and a command such as the one here suggested is similar to a “wait” or “stay” command, which cues the dog to hold a position until a handler cues the next command. Dogs loading up into their patrol cars can be cued identically as dogs commanded to enter a vehicle to conduct a sniff. Though the dog may not discern an unfamiliar patrol car from a defendant’s vehicle, it nevertheless has the capacity to learn to wait before entering all vehicles, which stops the problem that the instinctive exception has allowed to proliferate.

Ultimately, a narcotics dog entering a vehicle without probable cause and subsequently alerting to the presence of drugs presents a privacy violation. A defendant’s privacy has been invaded by a tool of the state to obtain information from the interior of their vehicle, a space wherein they have an expectation of privacy (enough to warrant a requirement of probable cause before entry). To remedy this violation, law enforcement in jurisdictions that follow *Stone* must prevent their dogs from entering vehicles as such—even in the face of relinquishing a method by which officers recover admissible narcotic evidence.

114. Shoebottom, *supra* note 12, at 229.

115. *See id.*

116. *Id.*

One way this change may occur is through voluntary participation. Police departments in jurisdictions that have not adopted the instinctive exception are incentivized to ensure that their narcotics dogs adhere to the law that applies to police tools. If they allow their dogs to enter vehicles without probable cause, they risk suppression of recovered narcotic evidence. If they wait for a canine alert or other probable cause to arise, however, then an introduction of the dog into the vehicle is permissible. The desire to admit all evidence that can be used to convict a defendant for drug charges is a powerful force that can push these departments to improve their training.

Alternatively, as stated, police departments in jurisdictions that adhere to the instinctive exception may experience hesitation, and may be encouraged to continue to allow their dogs to enter vehicles without probable cause. After all, the evidence uncovered by a narcotics dog that is located inside a vehicle, even prior to the establishment of probable cause, will be admissible in jurisdictions that follow *Stone*. Without voluntary participation from departments and their narcotic dog handlers, courts may instead regard this Note's suggestion and impose it when cases regarding an "instinctive" canine entry into a stopped vehicle arise in their jurisdiction. This disregard of *Stone*'s rule by jurisdictions that previously followed it will drive police departments to ensure their narcotics dogs do not enter vehicles before probable cause has been established—in other words, before a cue from the handler.

CONCLUSION

Narcotics dogs provide an invaluable service to law enforcement agencies, and there is no doubt that every working dog earns her badge and vest. Nevertheless, courts should not remain ignorant of the fact that narcotics dogs operate as police investigatory tools whilst on the job. The notion that a tool of law enforcement may enter a vehicle improperly,¹¹⁷ and that its discoveries inside serve as probable cause for a subsequent warrant or search by law enforcement, is in fundamental conflict with the basic principles of the Fourth Amendment. Despite narcotics dogs' unique attributes as drug-locators, courts should hold that their actions are to be imputed to the state, and that they are thus subject to Fourth Amendment restrictions on unreasonable searches and seizures—regardless of any alleged instinct to seek narcotics.

117. Improperly meaning absent a warrant, consent, or probable cause.