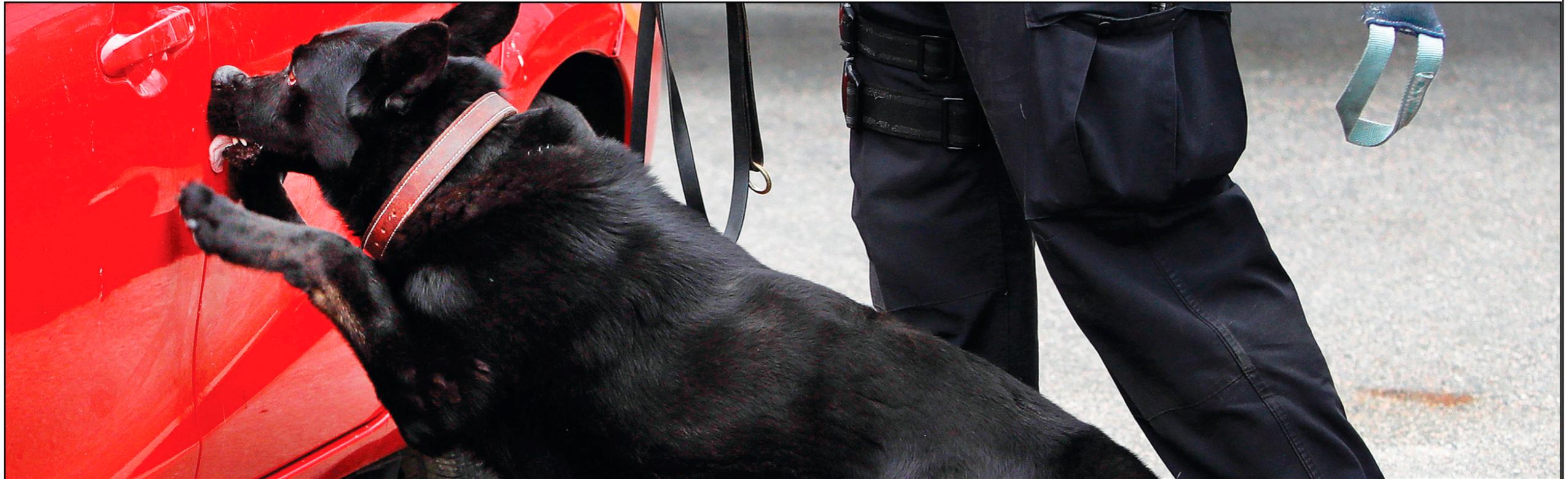


# Privacy Has Gone to the Dogs



## **PRIVACY HAS GONE TO THE DOGS**

**By: R. Randy Lee, Esq.**

### **The Transition from Stop and Frisk to Stop and Sniff**

Anyone who has watched an episode of Law & Order knows that a police officer cannot just stop anyone they want on a hunch. Thanks to the Fourth Amendment to the United States Constitution and the U.S. Supreme Court's 1968 decision in *Terry v. Ohio*, the officer needs reasonable suspicion of some

criminal activity to stop you and pat you down. This is what they are talking about, when you hear the term “stop and frisk”.

Surprisingly, despite a wide body of law in this area, the U.S. Supreme Court has held that a trained dog accompanied by a police officer can indiscriminately sniff people walking around in public for drugs or other contraband. If the animal suspects something and sits down to alert the officer of the unusual scent, you can be constitutionally detained. This can

be termed “stop and sniff”. I don’t recall ever seeing that on Law & Order.

### **The Inherent Flaw of Stop and Sniff Practices**

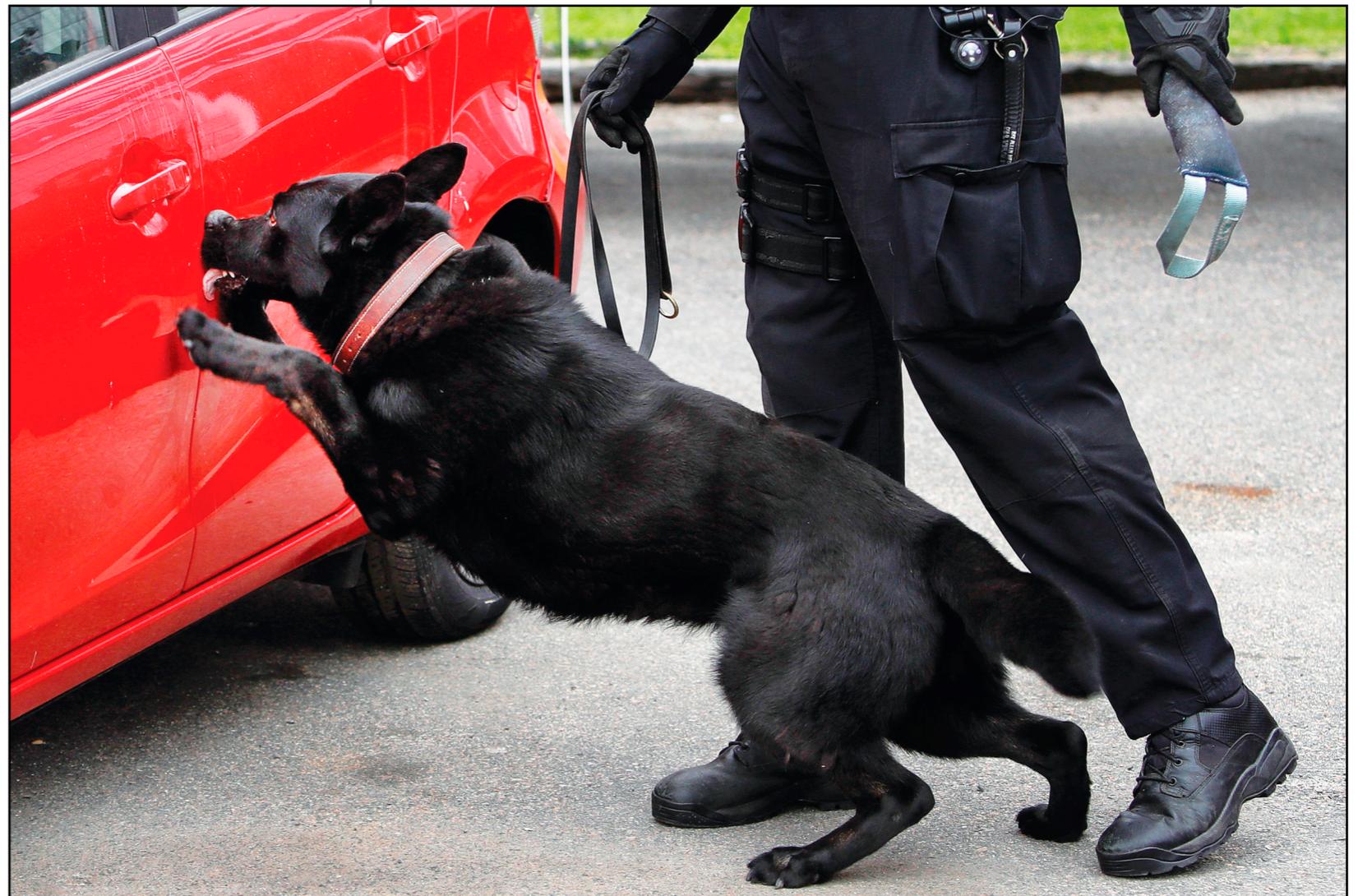
While the constitutional right to privacy is often balanced against the need to safeguard the public, it seems obviously unreasonable that despite generations of jurisprudence, one’s freedom could hinge on the olfactory sensibilities of a dog. This is especially disturbing given the extensive research showing training flaws, scent distractions, or handler misdirection can trigger these false alarms.

While any number of mistakes can instantly result in voiding individual privacy rights without any repercussions to the officer, the dog’s actions either provide or expand the power of the handling law enforcement official where none existed before. Since this is a flawed yet unsettled area of the law, pedestrians should enjoy greater protection on the street.

### **Creating Parity in Privacy Protection**

The foundation of one’s constitutional

right to privacy is in the home. As you travel further from your residence or other personal space, such as a vehicle, protection levels drop. Regardless, even a person minding his own business on a random sidewalk has a reasonable expectation of some privacy, albeit less than if he were on his couch at home (possibly watching a certain legal TV show that seems to be on all the time).



Every armchair lawyer knows that the police need probable cause to secure a warrant to enter one's home. They generally cannot even use technology to conduct a warrantless search from outside, as the Court ruled in the case of law enforcement using thermal imaging to detect cannabis growing operations. In *Florida v. Jardines*, the Supreme Court held that a dog sniff on a homeowner's front lawn is unconstitutional without first obtaining his or her permission or a warrant.

On the opposite end of that spectrum is an airport, where given the unique security situation, you enjoy the lowest expectation of privacy because you essentially trade your rights for access to the facility and air travel.

### **Why Pedestrians Are Entitled to Privacy from Pooches**

Unlike at home, where a warrantless dog sniff is like the prohibited use of technology, smelling the exterior of a vehicle is not considered a search and is permissible, but only after an officer legitimately stops the car. The U.S. Supreme Court recently held in *Rodriguez v. United States* that it is unconstitutional for an officer to extend an already completed traffic stop to permit a dog to sniff a vehicle for drugs. This is the same standard that should apply to pedestrians.

While privacy rights vary depending on the location in which one asserts them, individuals alone have independent protections, which should exist in the presence of a canine exercising its sniffing prowess. Unlike a home or a vehicle, which require a warrant or reasonable suspicion to search, respec-

tively, the law does not limit the use of canine sniffing to establish the basis for stopping an individual.

Despite police considerations and governmental interests, at a minimum, the privacy afforded to drivers should be the same as those given to pedestrians when dog sniffing is at issue since the inherent flaws of the actions are the same. There already exist laws to regulate public conduct and safety and given the expectation of security in items on an individual's person, e.g. a wallet in a pocket or a phone in a purse, it is essential to grant the same minimum rights regardless of location.

### **Strategies to Avoid the Dangers of Stopping and Sniffing**

While the premise of a stop and sniff is that dogs can only identify contraband, the prospect of a law enforcement official subtly influencing the dog is an important consideration. Given the animal's inability to communicate and use discretion, it gives the officer an opportunity to cross a line that would otherwise be unconstitutional. The dog may even identify a suspect simply to please the handler, with the canine expectation that a pat on the head or yummy "treat" will follow a job well done.

Research supports the conclusion that stops triggered by a dog sniff are inherently unreliable. As such, it is critical that the government place limitations on its use. In order to create parity for the privacy rights of pedestrians, the government should

acknowledge a pedestrian's heightened reasonable expectation of privacy, implement a temporary presumption against sniffs that are not supported by prior reasonable suspicion, eliminate subconscious cues through standardized training, and minimize conscious cues through uniformed protocols.

After all, unregulated dog sniffing poses a greater threat to the privacy rights of more pedestrians than the prospect of far fewer individuals with contraband. While public safety is an important mission, the government can achieve both objectives by recognizing the inherent inconsistencies of its stop and sniff practices by improving officer training and setting stronger standards.

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