CONCEPTIONS OF PRIVACY: A COMMENT ON *R. V. KANG-BROWN* AND *R. V. A.M.*

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I. INTRODUCTION

That privacy is an evanescent concept is one of the truest of truisms. Efforts to define it are probably destined to be (at best) less than wholly satisfying. There remains a need, however, to better understand how it is (and should be) used in particular legal contexts. One such context is search and seizure law, and in particular the interpretation of s. 8 of the *Canadian Charter of Rights and Freedoms*.[1] Section 8 states that "[e]veryone has the right to be secure against unreasonable search or seizure." As Dickson J. (as he then was) declared in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam*,[2] s. 8's primary (though perhaps not sole) purpose is to protect privacy. Defining the meaning(s) of privacy is thus vital to both descriptive and normative accounts of s. 8 jurisprudence.

This is no easy task. While the Court has made occasional attempts to categorize different concepts of privacy,[3] there has been no thoroughgoing or sustained effort to map its myriad meanings. Nor has it developed any guidelines to help decide whether, in what circumstances, and to what degree it should defer to legislative determinations of the optimal accommodation of privacy and law enforcement interests. As a consequence, s. 8 jurisprudence is less consistent, sensible, transparent, and democratic than it could be.

These deficiencies were on full display in the Supreme Court of Canada's latest foray into s. 8 interpretation, the jointly released decisions in *R. v. Kang-Brown*[4] and *R. v. A.M.*[5] In each case, the Court divided into four blocs, none comprising a majority. Two key majority holdings, however, emerged from this division: (1) using dogs to detect the odour of concealed illegal drugs constitutes a "search" within the meaning of s. 8; and (2) police have a warrantless, common law power to do so on the basis of reasonable suspicion.

In commenting on these cases, I set out a taxonomy of the concepts of privacy relevant to s. 8.[6] The taxonomy's organizing principle is simple: privacy is described in relation to the discrete interests that it protects. It is most helpful, in my view, to define these interests in

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8 [*Charter*].

2 [1984] 2 S.C.R. 145 at 159-60 [*Hunter*].

3 See e.g. *R. v. Dyment*, [1988] 2 S.C.R. 417 at 428-30, La Forest J. [*Dyment*], discussing privacy in relation to bodily integrity, territoriality, and information.

4 2008 SCC 18, 373 N.R. 67 [*Kang-Brown*].

5 2008 SCC 19, 373 N.R. 198 [*A.M.*].

6 For an ambitious attempt to set out a similar, interest-based taxonomy of privacy interests relevant to a broad array of legal contexts, see Daniel J. Solove, *Understanding Privacy* (Cambridge, Mass.: Harvard University Press, 2008).

economic terms,[7] but it is also possible to describe them in moral language. Regardless of one's partiality to economics or moral philosophy, the key point is that s. 8 doctrine can be improved simply by being more explicit about what we are talking about when we talk about privacy. Not surprisingly, this may not tell us precisely how those interests should be balanced against countervailing concerns, such as the detection and deterrence of crime, but it should help us to achieve a more optimal accommodation between them. This endeavour would be further advanced if the Court prodded Parliament to take a more active role in regulating police powers. By recognizing both a very broad expectation of privacy and a generic common law power to invade it, the majority in *Kang-Brown* and *A.M.* likely foreclosed the possibility that Parliament might devise a more detailed, nuanced, and flexible regulatory regime.

The remainder of this comment proceeds as follows. Part II briefly reviews the facts, judicial history, and reasons for decision in *Kang-Brown* and *A.M.* Part III outlines the conceptual framework of s. 8 doctrine. Part IV sets out a taxonomy of the interests or "harms" implicated by governmental intrusions on privacy, distinguishing especially between those relating to the disclosure of information and those relating to abusive treatment. Part V discusses how, and in what circumstances, these harms can arise in the context of sniff searches. Part VI applies this framework to the Court's findings in *Kang-Brown* and *A.M.* Part VII concludes.

II. THE DECISIONS

A. *R. v. KANG-BROWN*

The sniff in *Kang-Brown* occurred in the context of the RCMP's "Operation Jetway" program.[8] The aim of this program was to intercept drug couriers in transit through intercity bus terminals and other public transportation hubs. While monitoring a Calgary bus depot, an undercover RCMP officer observed Mr. Kang-Brown as he disembarked from a bus originating in Vancouver. The officer's suspicions were aroused by Kang-Brown's unusual movements, the protective way that he carried his bag, and the manner in which he made eye contact with the officer. The officer approached Kang-Brown, introduced himself as a police officer, told him that he was free to go at any time, asked to see his bus ticket and identification, and asked how long he was staying in Calgary. Noting that Kang-Brown was becoming increasingly anxious, the officer asked him if he was carrying any drugs. After Kang-Brown said "no," the officer asked if he could look inside the bag.[9] Kang-Brown began to open it, but the officer intervened, explaining that for safety reasons he wished to search the bag himself. Kang-Brown became "agitated," asked what the officer was doing, and pulled the bag away. The officer then signalled another officer to bring over a sniffer dog. The dog signalled the presence of drugs in the bag, the defendant was arrested, and drugs

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7 See Steven Penney, "Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach" (2007) 97 J. Crim. L. & Criminology 477.

8 The facts and judicial history of the case are outlined in *Kang-Brown*, *supra* note 4 at paras. 27-34, 81-91, Binnie J.; 109-25, 187, Deschamps J., dissenting; 217-18, Bastarache J., dissenting.

9 The officer acknowledged that "his objective from the outset was to obtain the appellant's consent to search the bag": *Kang-Brown*, *ibid.* at para. 86.

were found. The trial judge convicted, finding no constitutional violations.[10] A majority of the Court of Appeal agreed and dismissed his appeal.[11]

By a 6-3 majority, the Supreme Court of Canada allowed the appeal and set aside the conviction. As noted, there were no majority reasons. Writing for himself and McLachlin C.J.C., Binnie J. held that the sniff was a s. 8 search. No warrant was obtained and no statute specifically authorized sniff searches. He nonetheless recognized a common law power to use sniffer dogs without a warrant on the basis of reasonable suspicion.[12] He concluded, however, that the officer lacked such suspicion. Section 8 was accordingly violated, the drug evidence should have been excluded from the trial under s. 24(2) of the *Charter*, and the appellant's conviction was set aside.

Writing for herself and Rothstein J. in dissent, Deschamps J. agreed that the sniff constituted a s. 8 search in the circumstances of this case. She also agreed that police have a common law power to use sniffer dogs on reasonable suspicion. She concluded, however, that the officer's suspicions were reasonable and thus found no constitutional violation. She would have accordingly dismissed the appeal.

Writing only for himself in dissent, Bastarache J. largely agreed with Deschamps J.'s reasoning and conclusion. However, in addition to permitting sniffs when there is a reasonable suspicion that a particular person or thing is concealing drugs, he would also have allowed them when there is a generalized, reasonable suspicion that there are drugs at a particular location or event, such as a border crossing or transportation hub.[13]

Writing for himself and Fish, Abella, and Charron, JJ., LeBel J. agreed that sniffs are searches. He disagreed with the view expressed in each of the other judgments, however, that there is a warrantless, common law power to sniff on reasonable suspicion. Accordingly, he concluded that the search was not authorized by law and was thus unreasonable under s. 8. He agreed with Binnie J. that the evidence should have been excluded under s. 24(2) of the *Charter*, allowed the appeal, and overturned the conviction.

To summarize, all nine judges agreed that the sniff conducted in this case was a s. 8 search.[14] A majority of five (Binnie, McLachlin, Deschamps, Rothstein, and Bastarache JJ.)

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10 *R. v. Kang-Brown*, 2005 ABQB 608, 386 A.R. 48.

11 *R. v. Kang-Brown*, 2006 ABCA 199, 391 A.R. 218.

12 In determining whether a police power exists at common law, Canadian courts apply the so-called *Waterfield* or "ancillary powers" doctrine. This first requires the Crown demonstrate that the police acted in the course of lawful duty. Where such a duty has been established, the court must determine whether the intrusion into the suspect's liberty was "reasonable," taking into consideration the nature of the liberty interfered with and the public purpose of the interference. See *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.); *R. v. Dedman*, [1985] 2 S.C.R. 2; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 [*Mann*]; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725.

13 *Kang-Brown*, *supra* note 4 at paras. 228-31, Bastarache J., dissenting: stating that the diminished expectation of privacy attaching to transportation hubs relates to both security and general crime control. Justice Binnie, in contrast, distinguished between searches at transportation hubs at border crossings and those in the purely domestic context, with only the former triggering a diminished expectation of privacy (at paras. 69-72).

14 The situation might be different, Binnie J. suggested, if the sniffs had been directed at "explosives, guns or other public safety concerns": *Kang-Brown*, *ibid.* at para. 18.

held that there is a common law power, consistent with s. 8, to conduct warrantless sniff searches on (individual) reasonable suspicion. Four (LeBel, Fish, Abella, and Charron JJ.) denied the existence of such a power, and one (Bastarache J.) would have extended its scope to include searches justified by a general, reasonable suspicion.

B. *R. v. A.M.*

In *A.M.*, members of the Ontario Provincial Police conducted a sweep of a Sarnia high school with a drug-sniffing dog at the request of the school's principal, who had extended to them a "standing invitation" to do so.[15] The school had adopted and publicized a "zero tolerance" policy regarding the possession of illegal drugs. Students and their parents were also informed that drug-detection dogs could be used to enforce the policy. While the principal was told that students at the school were using drugs, he had no particular reason to believe that drugs were present at the time the sweep was conducted. When the police arrived, the principal ordered students to remain in their classrooms until the sweep was completed. At the principal's suggestion, the police brought the dog to the gymnasium. The dog alerted to an unattended backpack, the pack was opened, and drugs were found. The pack contained *A.M.*'s identification and he was subsequently charged. The youth court judge held that the sniff constituted an unreasonable search, excluded the drugs under s. 24(2) of the *Charter*, and acquitted.[16] The Court of Appeal agreed with both conclusions and dismissed the Crown's appeal.[17]

The Supreme Court of Canada dismissed the appeal by a 6-3 majority. Its members divided into the same four blocs present in *Kang-Brown*. As in *Kang-Brown*, Binnie J. found that the sniff was a search and that the police did not have the required reasonable suspicion. He accordingly held that s. 8 was violated. Finding no reason to interfere with the youth court judge's decision to exclude the evidence, he dismissed the appeal.

Unlike in *Kang-Brown*, Deschamps J. concluded in her dissenting reasons that the dog's sniff was not a s. 8 search; there was consequently no s. 8 violation. She would therefore have allowed the appeal and ordered a new trial.

Justice Bastarache also dissented, but on the basis that the youth court judge should not have excluded the evidence under s. 24(2). Like Deschamps J., he would have allowed the appeal and ordered a new trial. He agreed with Binnie J., however, that the sniff constituted a search and that before conducting it, the police lacked reasonable suspicion to believe that drugs were present in the backpack. Reiterating his approach in *Kang-Brown*, he asserted that sniff searches should be permitted in schools on the basis of a general, reasonable suspicion. He found, however, that police did not have a current, reasonable suspicion that drugs were present at the school, and thus found a s. 8 infringement.

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[15] The facts and judicial history of the case are outlined in *A.M.*, *supra* note 5 at paras. 17-32, Binnie J.; paras. 103-112, Deschamps J., dissenting; paras. 154-55, Bastarache J., dissenting.

[16] *R. v. M.(A.)*, 2004 ONCJ 98, 120 C.R.R. (2d) 181.

[17] *R. v. A.M.* (2006), 79 O.R. (3d) 481 (C.A.).

As in *Kang-Brown*, LeBel J. held that the sniff was a search, such searches must be authorized by statute, s. 8 was thus violated, and the evidence was properly excluded under s. 24(2) of the *Charter*. He accordingly dismissed the appeal.

Thus, the key statements of law in *A.M.* were the same as those in *Kang-Brown*, with the exception of two justices (Deschamps and Rothstein) who found that the sniff did not amount to a search under s. 8.[18]

III. SECTION EIGHT DOCTRINE: THE CONCEPTUAL FRAMEWORK

The Supreme Court of Canada's s. 8 jurisprudence is lengthy and complex. The basic conceptual structure, however, is straightforward. State intrusions into privacy must be "reasonable," that is, an individual's privacy interest must be outweighed by the state's interest in law enforcement.[19] Broadly speaking, there are three variables in this calculus:

(1) the strength of the privacy interest(s);

(2) the strength of the law enforcement interest(s); and

(3) the procedural hurdles that the state must clear to justify the intrusion.

Points (1) and (2) are the independent variables, (3) is the dependent variable. The stronger (1) is in relation to (2), the higher the justifying hurdles will be.

In the paradigm case, where (1) is strong in relation to (2), the "full panoply" of procedural protections set out in *Hunter* will be required; namely, the acquisition of a warrant from a neutral arbiter on the basis of reasonable and probable grounds to believe that the search will uncover evidence of a crime.[20] These are the protections accompanying most of the search and seizure powers set out in the *Criminal Code*.

Where (1) is only modestly strong in relation to (2), one or more of those protections may be minimized or eliminated. In most of these cases, no warrant will be required and the standard of suspicion may be lowered to "reasonable suspicion" or something less. As in *Kang-Brown* and *A.M.*, the Court typically declares in such cases that the applicant had a diminished expectation of privacy.[21]

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18 As in *Kang-Brown*, Binnie J. noted that this conclusion may not apply to searches relating to "explosives, guns or other public safety issues": *A.M.*, *supra* note 5 at para. 3.

19 See generally *Hunter*, *supra* note 2 at 159-60: explaining that in s. 8 decisions "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

20 *Hunter*, *ibid.* at 160, 166. In rare instances, s. 8 may require even greater procedural protections. See e.g. *Lavallee, Rackel & Heintz v. Canada (A.G.)*; *White, Ottenheimer & Baker v. Canada (A.G.)*; *R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209 (searches of lawyers' offices require, *inter alia*, a showing of investigative necessity); *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 at para. 26, suggesting without deciding that investigative necessity is also constitutionally required for the interception of electronic communications under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46.

21 See e.g. *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393 at para. 33; *R. v. Wise*, [1992] 1 S.C.R. 527 at 533 [*Wise*].

Lastly, if (1) is sufficiently weak compared to (2), no procedural protections will be granted at all. In such cases, the Court will usually conclude that the individual had no reasonable expectation of privacy.[22] If so, then by definition the intrusion was not a "search or seizure" and s. 8 was not violated. Barring any other constitutional or statutory restriction, police are free to commit similar intrusions in the future at their discretion. In *Tessling*, for example, the Supreme Court held that the use of an infrared camera to detect emanations of heat typical of indoor marijuana grow-ops did not invade the defendant's reasonable expectation of privacy.[23] Police may thus use such devices without either obtaining a warrant or demonstrating any degree of individualized suspicion.

The focus of this comment is on the first variable: how the courts have, and should, go about defining and measuring the strength of the applicant's privacy interest. As the Supreme Court has recognized, there are actually many different privacy interests, including "personal privacy, territorial privacy and informational privacy."[24] As I suggest immediately below, this conceptual framework can be advanced by delineating the specific private and social "harms" generated by the different kinds of governmental intrusions that we perceive as violations of privacy. Building on La Forest J.'s insight in *Dyment*, it is helpful to begin by drawing a categorical distinction between informational and non-informational privacy interests.[25]

IV. INFORMATIONAL AND NON-INFORMATIONAL PRIVACY INTERESTS

Though privacy is often viewed as relating to the secrecy or confidentiality of information, the concept is also invoked to describe other interests, including freedom from arbitrary, abusive, or discriminatory treatment by state authorities. This conception of privacy implicates a number of related concerns. One is the simple disruption and inconvenience arising from encounters with law enforcement (*disruption harm*). These disturbances may be exacerbated when they are accompanied by a significant intrusion into our personal space or bodily integrity (*bodily integrity harm*). Most people experience such intrusions as psychologically harmful to at least some degree, even when they do not threaten to reveal any embarrassing or stigmatizing information. Further harm may arise from the fear that the authorities (or their dogs) will mistreat us; that is, that they will inflict physical or psychological harm that goes beyond what is necessary to execute the intrusion (*mistreatment harm*).

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[22] See e.g. *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 [*Tessling*]; *R. v. Plant*, [1993] 3 S.C.R. 281 [*Plant*]. There are cases, however, where the Court has found that there was a reasonable expectation of privacy, but that it was so weak in relation to the state's interest that no procedural protections were warranted. Such cases have typically arisen in the non-criminal, regulatory sphere. See e.g. *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757.

[23] *Tessling*, *ibid.* at para. 63.

[24] *Ibid.* at para. 20. See also *Dyment*, *supra* note 3 at 428.

[25] Privacy is also sometimes used, especially in American jurisprudence, to describe the interest in being free to make fundamental personal decisions without state interference. See e.g. *Roe v. Wade*, 410 U.S. 113 (1973). This conception of privacy lies outside the realm of constitutional protections from unreasonable search and seizure.

We are often willing to tolerate these harms, however, if the intrusions producing them serve important social interests *and* are applied in an even-handed fashion. We are more likely to object, however, if we feel that we are being singled out. This may occasion three types of harm. We may fear that others will (erroneously) view us as wrongdoers (*stigma harm*). We may also feel that we have been arbitrarily selected for scrutiny and disruption, while others have not (*arbitrary selection harm*). Anyone can feel this sense of unfairness, but the harm will usually be greater when experienced by a member of a disfavoured minority who believes that he or she has been targeted by an official influenced by animus or a discriminatory stereotype (*profiling harm*).[26]

None of these interests is particularly controversial. We may argue about precisely how to define or measure them, and we are certain to disagree about how to go about balancing them against countervailing interests, like the detection and deterrence of crime. But most would agree that, all other things being equal, we should attempt to minimize disruption, bodily integrity, mistreatment, stigma, arbitrary selection, and profiling harms.

Such a consensus does not exist with respect to informational privacy interests, that is, the suite of concerns relating to the state's acquisition and use of personal information. We can classify these concerns into two types. The first is our interest in concealing or controlling discreditable (but non-criminal) personal information. By this I mean any information that reveals behaviours or characteristics that we do not wish others to know about, may be used to our detriment, but do not disclose criminal activity.

Like the non-informational privacy harms discussed above, this type of informational privacy is in principle unproblematic. All other things being equal, people should be able to control this kind of information, and non-consensual disclosures or uses of it are often considered moral harms to dignity.[27] From an economic perspective, protecting this form of privacy through law may minimize avoidance costs (such as foregoing socially productive communications or activities) and defensive costs (such as wasteful expenditures on non-legal ways to protect privacy).[28] For convenience I refer to these harms collectively as *non-criminal informational harm*.

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26 See generally David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*," in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 367; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L. Rev. 935; Kent Roach, "Making Progress on Understanding and Remedying Racial Profiling" (2004) 41 Alta. L. Rev. 895; Benjamin L. Berger, "Race and Erasure in *R. v. Mann*" [2004] 21 C.R. (6th) 58. Canadian courts have increasingly recognized both the phenomenon of discriminatory profiling and the importance of instituting *ex ante* and *ex post* checks on police discretion in combating it. See e.g. *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679 at para. 85; *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.); *R. v. Harris*, 2007 ONCA 574, 87 O.R. (3d) 214 at para. 63; *R. v. Samuels*, 2008 ONCJ 85, 168 C.R.R. (2d) 98 at para. 90; *R. v. Landry*, [1986] 1 S.C.R. 145 at 186, La Forest J., dissenting; *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269 at para. 94; *R. v. Khan* (2004), 244 D.L.R. (4th) 443 at paras. 48-69 (Ont. Sup. Ct. J.).

27 See *Dyment*, *supra* note 3 at 429.

28 Penney, *supra* note 7 at 491-500.

The second type of informational privacy interest relates to the concealing of information about criminal activity. For obvious reasons, it is not self-evident that this interest deserves any protection. All other things being equal, we want investigators to uncover such information as readily as possible. Of course, we may wish to limit this capacity to mitigate the other privacy harms that we have been discussing, but we do not ordinarily believe that it is either morally correct or economically efficient to "count" criminals' interest in avoiding detection and punishment as a benefit of privacy.

An argument can be made, however, that in certain extraordinary circumstances we should do precisely this. That is, it may be desirable to use privacy laws to weaken the state's ability to enforce criminal prohibitions that are morally or economically suspect, including many consensual transactions that are (or have in the past been) subject to criminal sanctions, such as drug trafficking and consumption, prostitution, gambling, and interracial or intra-gender sex.[29] The law's traditionally robust protection of residential and documentary privacy, for instance, may be designed in part to curtail the enforcement of bad laws.[30] It may be preferable to simply repeal or strike down these prohibitions, but if this is not feasible, then limiting enforcement through privacy may be justified. I will refer to this interest as avoiding *bad law harm*.

V. PRIVACY HARMS AND CANINE SNIFFS

Canine sniff searches have the potential to cause each of the harms identified above. Consider first the non-informational harms, which are the most straightforward. An innocent person approached by a police dog and its handler, and whose person or belongings are sniffed, may feel inconvenienced, fearful, intimidated, embarrassed, and unfairly treated.[31] Many of these feelings may be characterized, in moral terms, as harms to dignity.[32] In economic terms, these feelings may also generate significant private and social costs, including the opportunity costs associated with delays and disruptions, the avoidance costs arising when people forgo socially productive activities to avoid privacy intrusions, and the various costs associated with discriminatory profiling.[33]

In many cases, however, these harms may be minimal or absent. Kang-Brown was confronted and questioned by a police officer and subjected to a sniff of a bag that he was carrying. He may thus have suffered each of the non-informational harms.[34] But as A.M. was not present for the sniff, few of these harms could have arisen. Like other students, he was

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29 See Penney, *ibid.* at 495.

30 Not coincidentally, many of the earliest cases restricting the state's ability to search residences involved investigations of political and religious crimes. See e.g. *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807 (C.P.); *Wilkes v. Wood* (1763) 1 Lofft. 1, 98 E.R. 489 (C.P.). See also William J. Stuntz, "The Substantive Origins of Criminal Procedure" (1995) 105 Yale L.J. 393.

31 See *R. v. Donovan*, [1992] N.W.T.R. 75 (S.C.).

32 See *Dyment*, *supra* note 3 at 428-29.

33 See Penney, *supra* note 7 at 491-500; Tracey Maclin, "'Black and Blue Encounters' — Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?" (1991) 26 Val. U. L. Rev. 243; Ontario Human Rights Commission (OHRC), *Inquiry Report: Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003), online: OHRC <http://www. ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN/pdf>.

34 The facts and judicial history of the case are outlined in *Kang-Brown*, *supra* note 4 at paras. 27-34, 81-91, Binnie J.; 109-25, 187, Deschamps J., dissenting; 217-18, Bastarache J., dissenting.

undoubtedly inconvenienced by the search, and his educational experience would have been disrupted to some degree. But given the separation of the students from the police and dog,[35] it is difficult to see how any (innocent) student could have felt fearful, intimidated, or unfairly targeted. The bags and lockers subject to the search, moreover, could not readily have been associated with any particular student, or members of any racial or ethnic group. The non-informational privacy harms caused by sniffs, then, flow largely from confrontations between police, their dogs, and targeted suspects. When suspects are removed from the equation, most of these harms disappear.

Now consider informational privacy interests. The magnitude of non-criminal informational harm depends on the probability that a dog's indication will not lead to the discovery of contraband. This is commonly referred to as the "false positive" rate. False positives may arise in a number of circumstances.[36] The most frequent is a dog who indicates (or is perceived by its handler to have indicated) when there is no substance present. They may also be caused by the accurate indication of a substance that is conditionally legal (such as licensed medical marijuana) or is present in only trace quantities.[37]

As discussed in *A.M.*, there is jurisprudential and empirical debate on the frequency of false positives in canine sniff searches.[38] However, with good record keeping and adherence to rigorous protocols, police should be able to establish that the false positive rate for a particular dog (or dog-handler combination) is very low. In such cases, the rate would likely be similar to that for search warrants justified by reasonable and probable grounds.[39] Properly conducted sniffs thus present a low risk of non-criminal informational harm.

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35 None of the judgments at trial or on appeal indicate that there was no contact between students and the dog. Binnie J. notes that "[t]he police inquiry began with a relatively unobtrusive examination by dogs of odours emanating from three classrooms": *A.M.*, *supra* note 5 at para. 56. As suggested in the text above, any substantial degree of contact between the police and/or their dog and students would potentially cause non-informational harm.

36 See Richard E. Myers II, "Detector Dogs and Probable Cause" (2006) 14 Geo. Mason L. Rev. 1 at 12-16.

37 See *Kang-Brown*, *supra* note 4 at para. 101, Binnie J.; 175, Deschamps J., dissenting; Sherri Davis-Barron, "The Lawful Use of Drug Detector Dogs" (2007) 52 Crim. L.Q. 345 at 383.

38 *A.M.*, *supra* note 5 at paras. 72, 84-89.

39 See *Illinois v. Caballes*, 543 U.S. 405 at 409 (2005) [*Caballes*]; *R. v. Hoffart*, [2001] A.J. No. 1605 at paras. 22-24 (Q.B.) (QL). "Reasonable and probable grounds" means the same thing as "reasonable grounds," "probable grounds," "reasonable and probable cause," and "probable cause." See generally *Hunter*, *supra* note 2 at 167: "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion"; *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166; *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51; *Baron v. Canada*, [1993] 1 S.C.R. 416 at 448; *Kang-Brown*, *supra* note 4 at paras. 10, 13, LeBel J.; paras. 24, 75, Binnie J. Courts have not consistently articulated a precise or quantifiable definition of the standard. Some courts have treated it as equivalent to "more likely than not," but others have suggested that it signifies a lesser degree of probability. See R.E. Salhany, *Canadian Criminal Procedure*, 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2005) at 3-36.2, 3-36.3, s. 3.1140. While there have been no studies of search warrant success rates in Canada, studies in the U.S. suggest that it is much higher than 50 percent. See Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, *The Search Warrant Process: Preconceptions, Perceptions, Practices* (Williasmburg, Va.: National Center for State Courts, 1985) at 38, Table 21; Craig D. Uchida & Timothy S. Bynum, "Search Warrants, Motions to Suppress and 'Lost Cases': The Effects of the Exclusionary Rule in Seven Jurisdictions" (1991) 81 J. Crim. L. & Criminology 1034 at 1052; Laurence A. Benner & Charles T. Samarkos, "Searching for Narcotics in San Diego: Preliminary Findings From The San Diego Search Warrant Project" (1999) 36 Cal. W.L. Rev. 221 at 250.

Precisely because such sniffs are so accurate, however, the risk of bad law harm is potentially substantial. Unfortunately, for several reasons, assessing the magnitude of this risk is exceptionally difficult. First, the questions of what constitutes a bad law, and whether the courts should second-guess legislative choices in this regard, are highly contentious.[40] Second, even if we agree that a prohibition is undesirable, it does not necessarily follow that we should use privacy laws to limit its enforcement. As I have argued elsewhere, for example, the chief effects of limiting the use of infrared cameras to detect marijuana grow-ops would be to enrich and embolden criminal organizations and exacerbate violent, black market competition.[41] If a prohibition is truly undesirable, legislative and judicial tools are available to abolish it.[42] Third, limiting enforcement through s. 8 discriminates against those (chiefly youth and those living in poverty) with below average access to private refuges.[43] Fourth, restricting the use of remote, broad-based, anonymous surveillance tools like infrared cameras may force police to use more dangerous, targeted, and potentially discriminatory information gathering techniques, like surreptitious visual surveillance, undercover operations, and the cultivation of informants. Finally, even if judges could correctly determine the optimality of both the prohibition itself and the use of privacy law to limit its enforcement, there is no doctrinal tool available to express this candidly and transparently. It is doubtful that judges would be willing to say, in effect, "though we are not willing (or have not been asked) to strike down this suboptimal prohibition, s. 8 of the *Charter* gives us the authority to limit the state's ability to enforce it by erecting procedural barriers that greatly lower the risk of detection for violators operating in private space." Subterranean judicial policy-making is inconsistent with the rule of law.

VI. APPLYING THE FRAMEWORK TO *KANG-BROWN* AND *A.M.*

What does all of this tell us, then, about the way that the Supreme Court should have decided *Kang-Brown* and *A.M.*? As mentioned, the threshold issue in every s. 8 case is whether the state invaded the defendant's reasonable expectation of privacy. In *Kang-Brown*, all nine judges agreed that it did; in *A.M.*, two asserted that it did not. In both cases, the LeBel bloc concluded, without engaging in any reasonable expectation of privacy analysis, that the sniffs were searches.[44] The other reasons addressed the issue, but in haphazard and confusing ways. As I elaborate below, the decision to recognize a reasonable expectation of privacy in *Kang-Brown* was correct. Though open to reasonable debate, in my view the decision to do so in *A.M.* was incorrect. The pathway to these conclusions is illuminated by an examination of the non-informational and informational privacy interests at stake.

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40 *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [*Malmo-Levine*].

41 Penney, *supra* note 7 at 510-11. See also *Kang-Brown*, *supra* note 4 at para. 184, Deschamps J., dissenting: noting that "[d]rug trafficking leads to other crimes" and that drug use "not only fuels organized crime, but can also destroy lives."

42 Penney, *ibid.*

43 See Elizabeth MacFarlane, "No Lock on the Door: Privacy and Social Assistance Recipients" (1995) 1 Appeal 1.

44 *Kang-Brown*, *supra* note 4 at para. 1; *A.M.*, *supra* note 5 at para. 2.

A. NON-INFORMATIONAL PRIVACY INTERESTS

Curiously, none of the reasons thoroughly addressed the non-informational privacy harms caused by sniffs. As discussed, these include disruption, bodily integrity, mistreatment, stigma, arbitrary selection, and profiling harms. In *A.M.*, Binnie J. stated that sniffs, like other forms of "intrusive police attention," may cause "disruption, inconvenience and potential embarrassment for innocent individuals."[45] These harms, coupled with the prospect of discriminatory profiling,[46] are more than sufficient to justify the recognition of a reasonable expectation of privacy when a person is confronted by a sniffer dog. Justice Binnie rightly concluded, therefore, that the sniff in *Kang-Brown* was a search under s. 8 of the *Charter*.

He failed to recognize, however, that the risk and magnitude of non-informational harm in *A.M.* was markedly lower. Apart from being confined to their classrooms for "one and a half to two hours"[47] (a standard incident of the secondary school experience), there is no evidence that any innocent student was inconvenienced, violated, mistreated, stigmatized, arbitrarily targeted, or profiled.[48] Indeed, in concluding that the police did not invade A.M.'s reasonable expectation of privacy, Deschamps J. emphasized that he was not present or wearing or carrying the backpack at the time of the sniff.[49]

B. INFORMATIONAL PRIVACY INTERESTS

In finding that both Kang-Brown and A.M. had a reasonable expectation of privacy, many of the justices relied on the fact that the sniffs reveal precise and reliable information about the interior contents of personal belongings.[50] None carefully distinguished between criminal and non-criminal information, however. Justice Binnie observed in *A.M.*, for example, that such belongings often contain intimate items.[51] If the dog is accurate, however, such items will only be revealed if the belongings contain contraband.[52] As Binnie J. concluded, it

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45 *A.M.*, *ibid.* at para. 36. See also *Kang-Brown*, *ibid.* at para. 176, Deschamps J., dissenting: noting that the accused "owned and used the bag, he was present at the time of the search, the bag was one that could be carried close to the body, and he did not abandon it or leave it unattended."

46 See Tanovich, *supra* note 26 at 91-94, discussing evidence of racial profiling by the RCMP in its use of drug-sniffing dogs at transportation hubs.

47 *A.M.*, *supra* note 5 at para. 31, Binnie J.

48 Profiling could conceivably occur if police were more likely to use dogs at schools with higher than average proportions of minority students. This concern could be at least partially addressed, however, by keeping records of all sniff searches. The unjustified, disproportionate use of sniffer dogs at minority-heavy schools could be subject to an equality challenge under s. 15 of the *Charter*.

49 *A.M. supra* note 5 at paras. 121, 137. See also *R. v. Gosse*, 2005 NBQB 293, 292 N.B.R. (2d) 254 at paras. 25, 39 [*Gosse*] (noting, in deciding that his reasonable expectation of privacy was not violated, that the defendant was not present when the sniff occurred); *R. v. Naglingniq*, 2006 NUCJ 3, 139 C.R.R. (2d) 311 at para. 35 [footnotes omitted]: "There is a significant distinction to be made in searching people … with a dog, where there is no physical contact or manipulation as part of the dog's investigation for location of drugs."

50 *Kang-Brown*, *supra* note 4 at paras. 58, Binnie J.; para. 175, Deschamps J., dissenting; para. 227, Bastarache J., dissenting; *A.M.*, *ibid.* at paras. 38, 66-76, Binnie J.; paras. 157-58, Bastarache J., dissenting.

51 *A.M.*, *ibid.* at paras. 62, 72.

52 See Davis-Barron, *supra* note 37 at 366. Since it is surely vastly outweighed by society's law enforcement interests, the guilty person's interest in avoiding the disclosure of embarrassing information can be safely ignored.

should be up to the prosecution to provide evidence of the dog's (or the dog's and handler's) training, testing, and field accuracy record.[53] But if this evidence is persuasive, the risk of non-criminal informational harm does not warrant the recognition of a reasonable expectation of privacy.

It is curious then, that Binnie J. found such an expectation despite acknowledging that the dog used in *A.M.* had "an enviable record of accuracy."[54] Why? Both Binnie and Deschamps JJ. intimated that some kind of informational harm is generated even by accurate sniffs. The fact that reliable dogs indicate (and police subsequently search) only when they smell contraband, in their view, does not detract from the reasonableness of the suspect's privacy expectation.[55] Even information that reveals only criminal behaviour, in other words, may form part of the "biographical core" of information protected by s. 8, that is, information relating to the "intimate details" of a person's "lifestyle and personal choices."[56]

The reasoning behind this conclusion is difficult to tease out. One purported rationale, invoked by Binnie J., is the well-known principle that finding contraband does retrospectively justify a search that was unreasonable *ex ante*.[57] This principle does not support the conclusion that s. 8 protects privacy in contraband, however.[58] It merely recognizes that it is rarely certain that an investigative intrusion will uncover evidence of crime. The reasonable expectation of privacy inquiry must thus be approached in "broad and neutral terms," assuming that people enjoying privacy in a particular realm may be innocent.[59] That said, if a search technique detects *only* evidence of crime, then by definition it cannot harm the innocent.

Justice Binnie also suggested, however, that s. 8 does protect the interests of the guilty. Though A.M. would not likely "have cared if the police had found a polished apple for the teacher in his backpack," he wrote, he "would very much care about discovery of illicit drugs."[60] Similarly, in listing the "relevant elements of informational privacy" implicated by dog sniffs, Deschamps J. did not distinguish between criminal and non-criminal explanations for coming into contact with a controlled substance.[61] In each situation, she explained, the information revealed should be considered "very personal" and count towards finding an "objectively reasonable expectation of privacy."[62]

It is hard to know what to make of this. One possibility is that it is mere rhetoric; in other words, that the Court wished to recognize a reasonable expectation of privacy for other reasons (such as the prevention of non-informational and non-criminal informational harms) and felt it rhetorically necessary to counter the argument that there is a privacy interest in

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53 *A.M.*, *supra* note 5 at para. 84. See also Myers II, *supra* note 36 at 18-20.

54 *A.M.*, *ibid.*

55 *Kang-Brown*, *supra* note 4 at para. 175; *A.M.*, *ibid.* at paras. 69-73, Binnie J.

56 *Kang-Brown*, *ibid.* at para. 227, Bastarache J., dissenting, citing *Plant*, *supra* note 22 at 293.

57 *A.M.*, *supra* note 5 at paras. 72-73.

58 See *R. v. McLay*, 2006 NBPC 6, 299 N.B.R. (2d) 207 at paras. 36-37 [*McLay*].

59 *A.M.*, *supra* note 5 at para. 70; *R. v. Wong*, [1990] 3 S.C.R. 36 at 50 [*Wong*].

60 *A.M.*, *ibid.* at para. 73. See also *A.M.* at para. 38: "The information is highly meaningful.… The dogs pointed the police to the sniffer dog's equivalent of a smoking gun."

61 *Kang-Brown*, *supra* note 4 at para. 175, Deschamps J., dissenting.

62 *Ibid.* at paras. 175-76.

contraband per se.[63] Another possibility is that the Court thinks that drug prohibitions are bad laws and wished to frustrate their enforcement. This is not implausible. The argument that drug laws are inefficient and ineffective is both well-known and strong.[64] We also know from their decisions in *Malmo-Levine* that two members of the *Kang-Brown* and *A.M.* Court believe that criminal prohibition on possessing marijuana is so unwise that they would have struck it down under s. 7 of the *Charter*.[65] And there is evidence that at least some of the majority judges in *Malmo-Levine* may also have been skeptical of the law, though they were not prepared to overturn Parliament's decision to let it stand.[66] A concern for bad law harm may also underlie the majority's assessment of the importance of the state interest in drug detection in *A.M.* While none of the judges claimed that this interest was illegitimate, Binnie J. did opine that it paled in comparison to the interest in detecting guns and explosives:

> [T]he public interest in dealing quickly and efficiently with such a threat to public safety, even if speculative, would have been greater and more urgent than routine crime prevention. Generally speaking, the legal balance would have come down on the side of the use of sniffer dogs to get to the bottom of a possible threat to the lives or immediate safety and well-being of the students and staff.[67]

In contrast, in concluding that *A.M.* had no reasonable expectation of privacy, Deschamps J. emphasized the destructive effect of drugs in schools, the school's advertised "zero-tolerance" drug policy, and the "tightly controlled" nature of the school environment.[68]

Bad law concerns may also help to distinguish *A.M.* from *Tessling*. Unlike infrared cameras, which detect only producers of cannabis, dogs can detect mere users (as well as producers and distributers). The *A.M.* Court may have been discomfited by the prospect of a search technique that can efficiently detect large numbers of drug users, even if that technique is used in a manner that greatly minimizes non-informational and non-criminal informational harms. Imagine, for example, a technology sensitive enough to reliably detect the presence of a small (but not minuscule) quantity of an illegal drug in a residence from a distance. Imagine as well that this technology could and would scan *every* residence (or a random subset of residences) in a large metropolitan area, so as to eliminate the possibility of arbitrary selection and profiling. If this scenario does give us pause, it can only be because

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63 The Crown's argument derives from American jurisprudence. See *United States v. Place*, 462 U.S. 696 at 707 (1983) (dog sniffs detect only the presence or absence of contraband and are thus not searches under the Fourth Amendment); *Caballes*, *supra* note 39. See also *Gosse*, *supra* note 49 at para. 38: "An intention or desire to secrete … contraband in a suitcase does not equate with a 'reasonable expectation of privacy' to the contents of the suitcase, or more precisely, to what is emanating from the suitcase"; *R. v. Nguyen*, 2006 MBQB 120, 204 Man. R. (2d) 54 at para. 37 [*Nguyen*]: "All the dog could do was provide … information as to whether there was an odour of illicit drugs in the vicinity of the vehicle.… Beyond this, the drug sniff did not and could not reveal anything of Mr. Nguyen's biographical core of personal information and it did not affect his 'dignity, integrity or autonomy'"; *McLay*, *supra* note 58; *R. v. McCarthy*, 2005 NSPC 49, 239 N.S.R. (2d) 23 at para. 33: "Unless illegal possession of narcotics is to be considered a legitimate privacy interest, there was no information gathered that would fall into the category of protected information as set out … in R. v. Plant"; *R. v. Taylor*, 2006 NLCA 41, 257 Nfld. & P.E.I.R. 238 (no reasonable expectation of privacy in presence of contraband).

64 See Andrew F. Sunter, "The Harm of Drug Trafficking: Is There Room for Serious Debate?" (2007) 32 Man. L.J. 174; Penney, *supra* note 7 at 495.

65 *Malmo-Levine*, *supra* note 40.

66 See *ibid.* at paras. 5, 23, 43.

67 *A.M.*, *supra* note 5 at para. 37.

68 *Ibid.* at paras. 129-40.

we do not want drug possession laws to be fully enforced. No other privacy interest is implicated.

Such a technology does not yet exist, however. And while it is tempting to regulate sniff searches to limit the enforcement of drug laws, for the reasons articulated above, we are better served by attacking these laws directly. If society is ill-served by charging teenagers with possessing and trafficking small quantities of "soft" drugs, or if the entire "war on drugs" is wasteful and pointless, then we should seek to repeal the prohibitions themselves. If police cannot use dogs for broad-based, anonymous detection of illegal drugs, they are more likely to rely on more dangerous, intrusive, and targeted (and thus potentially discriminatory) methods, such as undercover operations, visual surveillance, informants, and stings.

As a consequence, the Court should not have recognized a reasonable expectation of privacy in *A.M.* As long as students are not personally confronted by the police or their dogs, and any disruption of their learning environment is no more than modest, police should be able to use dogs to sniff lockers and common areas without warrants or particularized suspicion.

C. REASONABLENESS AND THE ANCILLARY POWERS DOCTRINE

If a sniff constitutes a search under s. 8 of the *Charter*, the next question is whether it was reasonable. The answer will be "yes" only if: (1) the search or seizure was "authorized by law"; (2) "the law itself is reasonable"; and (3) "the manner in which the search was carried out is reasonable."[69] The first of these conditions exposed the deepest fault lines in *Kang-Brown* and *A.M.* The authority to intrude onto a reasonable expectation of privacy may stem from statute or common law.[70] There being no statute permitting sniffs without warrants or probable cause, the question was whether such a power exists at common law. As discussed, four of the nine judges concluded that it does not. It was not "an appropriate exercise of judicial power," LeBel J. reasoned, to give police an intrusive new search power to be used without probable cause.[71] The evidentiary record, moreover, was bereft of concrete information on the accuracy of sniffer dogs or the various circumstances in which they are used; the Court did not have "the full benefit of the dialogue and discussion that would have taken place had Parliament acted and been required to justify its action."[72]

The majority, in contrast, did not hesitate to recognize a new common law sniff power. In a passage destined for frequent quotation, Binnie J. declared that the Court had already "crossed the Rubicon" on the ancillary powers issue.[73] He thus proceeded to apply the *Waterfield* test (in light of s. 8) and conclude that a warrantless power to search on

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69 *R. v. Collins*, [1987] 1 S.C.R. 265 at 278. See also *Mann*, *supra* note 12 at para. 36; *R. v. Caslake*, [1998] 1 S.C.R. 51 at paras. 10-12.

70 See *R. v. Wiley*, [1993] 3 S.C.R. 263 at 273.

71 *Kang-Brown*, *supra* note 4 at para. 11, LeBel J.

72 *Ibid.* at paras. 14-16.

73 *Ibid.* at para. 22. See also *ibid.* at para. 51: "the Court should proceed incrementally with the *Waterfield/Dedman* analysis of common law police powers rather than try to re-cross the Rubicon to retrieve the fallen flag of the *Dedman* dissent."

reasonable suspicion was justified by the "minimal intrusion, contraband-specific nature and pinpoint accuracy of a sniff executed by a trained and well-handled dog."[74]

Much has been written (much of it critical) about the Court's recent embrace of common law police powers.[75] I do not intend to wade into this debate in a thoroughgoing way. However, the majority's approach in *Kang-Brown* and *A.M.*, in my view, does little to bolster the claim that this embrace is healthy. To flesh out this point, assume that my approach to the reasonable expectation of privacy question is correct; that is, that there is no "search or seizure" where a demonstrably reliable dog sniffs anonymous, personal property without any form of contact or interference with the owner of that property. Assume as well (at least for the moment) that the critics of the ancillary powers doctrine are correct, and that the Court should not have recognized a common law power to sniff when there is a reasonable expectation of privacy, that is, when the sniff is conducted in relation to an identifiable person. Lastly, assume that the Court did not specify in *Kang-Brown* or *A.M.* (since it was not necessary to do so) the procedural protections required by s. 8 for any statutory sniff power Parliament might decide to create.

What, then, would be Parliament's response? The first option would be to do nothing. Police would then be forbidden from using sniffer dogs in a suspect's presence without probable cause.[76] In practice, however, there would be little reason to sniff in these circumstances, since probable cause justifies a physical search.[77]

Parliament would be unlikely to remain silent, however. Police are a powerful interest group, and giving them enhanced investigative powers is usually seen as politically advantageous.[78] Parliament has frequently enacted search powers in response to judicial

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74 *Ibid.* at para. 58.

75 See e.g. James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1 [Stribopoulos, "In Search of Dialogue"]; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335; Tim Quigley, "*Mann*, It's a Disappointing Decision" [2004] 21 C.R. (6th) 41.

76 See *Kang-Brown*, *supra* note 4 at paras. 13, 17. In concluding that the sniffs in *Kang-Brown* and *A.M.* were not authorized by law, LeBel J. stated that he "would not attempt to create or discover a common law police power to use sniffer dogs in investigating potential lawbreakers" (at para. 17). Without referring to any specific statutory provisions, however, he suggested that police could use sniffer dogs with probable cause and either a warrant or exigent circumstances. A warrant to sniff could in all probability be obtained pursuant to one or more statutory provisions. See e.g. *Criminal Code*, *supra* note 20, ss. 487-487.01; *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 11 as am. by S.C. 2005, c. 44 [*CDSA*]. See also *R. v. Harrison*, [2005] O.J. No. 4707 (Sup. Ct. J.) (QL); *R. v. Lam*, 2003 ABCA 201, 330 A.R. 63 [*Lam*]. Note, however, that if any other federal search warrant provision can be interpreted to authorize sniff searches, then such searches cannot be obtained pursuant to the general warrant power in s. 487.01 of the *Criminal Code*. See *Criminal Code*, s. 487.01(1)(c). Note as well that several of these provisions permit warrantless searches in exigent circumstances. See e.g. *Criminal Code*, s. 487.11; *CDSA*, s. 11(7). Lastly, it is arguable that a sniff search could be conducted pursuant to the common law power to search as an incident to arrest. See *Lam* at para. 50.

77 Such a search could be conducted under the authority of either a statutory search power (as Binnie J. noted in *Kang-Brown*, *supra* note 4 at para. 21) or, more likely, the common law power to search incident to arrest.

78 See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 69-84.

decisions invalidating investigative techniques under s. 8.[79] In all likelihood, Parliament would do the same for sniff searches. There is no guarantee, of course, that it would solicit the views of citizens and experts, carefully consider the alternatives, and settle on a reasoned and reasonable accommodation of the conflicting interests at stake. This would be a naïve view (to say the least) of the democratic process, especially in the realm of criminal law.[80] It would be equally naïve, however, to assume that Parliament's response would necessarily pander only to reflexive public fears and law enforcement interests.[81] Investigative techniques threatening the interests of broad or politically powerful segments of society often impel legislatures to enact robust and privacy-protective regulatory regimes.[82] If most people believed that sniffs of unattended personal property should be regulated, for example, Parliament could be convinced to do so, even if the Court had held that such sniffs are not constitutionally protected.[83] Parliament has in several instances enacted privacy-protective legislation after courts had ruled that intrusive investigative techniques were not subject to constitutional[84] or statutory[85] regulation.

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[79] See e.g. *Criminal Code*, *supra* note 20, s. 487.01 (warrant to conduct video surveillance enacted in response to *Wong*, *supra* note 59); s. 492.1 (tracking warrant provision enacted in response to *Wise*, *supra* note 21); s. 492.2 (telephone number recorder warrant provision enacted in response to, *inter alia*, *R. v. Griffith* (1988), 44 C.C.C. (3d) 63 (Ont. Dist. Ct.); *R. v. Mikituk* (1992), 101 Sask. R. 286 (Q.B.); *R. v. Khiamal* (1990), 106 A.R. 246 (Q.B.)); ss. 184.1-184.2 (consent surveillance warrant provisions enacted in response to *R. v. Duarte*, [1990] 1 S.C.R. 30); s. 487.05 (DNA sampling warrant provisions enacted in response to *R. v. Borden*, [1994] 3 S.C.R. 145). See also Roach, *ibid.*

[80] See William J. Stuntz, "The Pathological Politics of Criminal Law" (2001) 100 Mich. L. Rev. 505; Donald A. Dripps, "Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?" (1993) 44 Syracuse L. Rev. 1079; Richard C. Worf, "The Case for Rational Basis Review of General Suspicionless Searches and Seizures" (2007) 23 Touro L. Rev. 93 at 138-58.

[81] See Orin S. Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" (2004) 102 Mich. L. Rev. 801 at 839-58 (noting that Congress, and not the courts, has taken the lead in providing privacy in the face of novel search technologies); Ronald F. Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory" (2004) 90 Iowa L. Rev. 219 at 255-60 (arguing that legislators can sometimes be motivated to enact criminal defendant-friendly legislation); Stribopoulos, "In Search of Dialogue," *supra* note 75 at 47-48.

[82] See Penney, *supra* note 7 at 503-505; William J. Stuntz, "Accountable Policing" *Harvard Public Law Working Paper No. 130* (21 February 2006), online: Social Science Research Network (SSRN) <http://ssrn.com/abstract= 886170> at 19, 53.

[83] See generally Davis-Barron, *supra* note 37 at 350.

[84] In *R. v. Sampson* (1983), 45 Nlfd. & P.E.I.R. 32 (C.A.); *R. v. Fegan* (1993), 13 O.R. (3d) 88 (C.A.), it was held that the interception of incoming and outgoing telephone numbers did not invade a reasonable expectation of privacy under s. 8 of the *Charter*. Parliament responded by authorizing the issuance of "number recorder" warrants on the basis of reasonable suspicion. See *Criminal Code*, *supra* note 20, s. 492.2.

[85] In *R. v. Solomon* (1992), 77 C.C.C. (3d) 264 (Que. Mun. Ct.) the court held that police were not required to obtain a warrant to intercept a wireless telephone communication as the communication did not constitute a "private communication" within the meaning of Part VI of the *Criminal Code*, *ibid.* Parliament responded with legislation clarifying that intercepts of most wireless calls do require warrants. See *Criminal Code*, s. 183 (specifying that any radio-based telephone communication that "is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it" is a "private communication" subject to the same protections as land line telephone communications).

In this hypothetical scenario, Parliament would also be in a better position than the Court to impose the best set of procedural protections for the sniffs that it decides to regulate.[86] Recall that the majority in *Kang-Brown* and *A.M.* held that sniffs may be conducted on reasonable suspicion without a warrant. It is difficult to take issue with the choice of the reasonable suspicion standard. As discussed, a probable cause requirement would virtually eliminate the use of drug-sniffing dogs.[87] They are highly effective, and when properly trained and handled, cause only a moderate degree of disruption, bodily integrity, mistreatment, and stigma harm, even when conducted in a suspect's presence.[88] A de facto prohibition on their use would not be desirable.

Standing alone, however, the reasonable suspicion standard may not do enough to mitigate arbitrary selection and profiling harm. As I have written elsewhere, for moderate privacy intrusions, the use of reasonable suspicion with a warrant requirement goes a long way to prevent discriminatory profiling.[89] Warrants ensure that the person authorizing the intrusion is independent of law enforcement, and even more importantly, discourage police from making weak (and stereotype-influenced) applications (which might be rejected and thus waste valuable resources).[90] Without a warrant requirement, however, reasonable suspicion may be too subjective and malleable. Though the courts have articulated the standard as requiring concrete, objective, grounds for suspicion,[91] there is reason to think that in practice it leaves too much room for the exercise of subjective discretion, including the deployment of (conscious and unconscious) stereotypes.[92]

The pliability of the standard is illustrated by the division of opinion in applying it to the facts of *Kang-Brown*. Two of the five Supreme Court Justices who considered the question found that the officer did not have a reasonable suspicion; in their view there was very little

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86 Parliament would also have the opportunity to craft regulations setting out minimum standards for the training, accreditation, documentation, testing, and use of sniffer dogs. Some police forces have developed these standards internally. See *Rosario v. Canada (Royal Canadian Mounted Police)*, 2000 BCSC 214, [2000] B.C.J. No. 242 (QL) at paras. 16-17; Samuel G. Chapman, *Police Dogs in North America* (Springfield, Ill.: Charles C. Thomas, 1990) at 194. But as Myers II suggests, *supra* note 36 at 27-28, these standards are likely to be shaped by the needs of law enforcement and may not adequately satisfy the public's interest in maximizing the accuracy of sniff searches.

87 This point was made by Binnie J., who noted that if "police have lawful authority to use sniffer dogs only when they already have reasonable grounds to believe contraband is present, sniffer dogs would be superfluous and unnecessary": *Kang-Brown*, *supra* note 4 at para. 21.

88 See *Kang-Brown*, *ibid.* at paras. 234-42, Bastarache J., dissenting (but not on this issue).

89 See Penney, *supra* note 7 at 526-27.

90 See Donald Dripps, "Living with *Leon*" (1986) 95 Yale L.J. 906 at 929: "the costs of the warrant process, independent of the final judicial check, minimize the likelihood that a purely speculative search warrant application will reach the judges at all"; Max Minzner & Christopher M. Anderson, "Do Warrants Matter?" *Cardozo Legal Studies Research Paper No. 212* (14 December 2007), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1073142> (finding that budget constraints likely cause law enforcement to pursue only wiretaps with a very high probability of success).

91 See *Kang-Brown*, *supra* note 4 at paras. 75-79, Binnie J.

92 This conclusion is buttressed by studies in the U.S. suggesting that, even using the higher probable cause standard, warrantless searches are far less likely to uncover evidence than searches performed under the authority of a warrant. See Max Minzner, "Putting Probability Back Into Probable Cause," *Cardozo Legal Studies Research Paper No. 240* (9 July 2008), online: SSRN <http://ssrn.com/abstract=1157111> at 13-14 (summarizing data from various sources indicating that success rates for warrantless searches are typically well below 50 percent).

beyond the suspect's apparent nervousness to justify the sniff.[93] The other three concluded, in contrast, that there was no reason to disturb the trial judge's determination that the suspect's behaviour amply justified the officer's suspicion.[94] I do not intend to either dissect that determination or suggest how much deference it should have received on appeal. But it is fair to say that in interpreting the suspect's ambiguous conduct, the trial judge, as well as Deschamps and Bastarache JJ., placed considerable weight on the officer's experience, training, and judgment. As much empirical scholarship suggests, in exercising broad, discretionary powers, police rely as much on occupational culture and other informal norms as on formal legal rules.[95] This does not inspire confidence that a warrantless power to search on reasonable suspicion will be effective in combating discriminatory profiling.[96]

Consider the following scenario, not dissimilar to the facts of *Kang-Brown*. A police officer observes suspicious behaviour by a member of a racial minority perceived to be disproportionately involved in drug trafficking.[97] Assume that there are legitimate *indicia* of suspicion, but that at least some judges would retrospectively find that it did not quite reach the level of reasonable suspicion. What is to dissuade the officer from conducting the search — the possibility that a judge *may* find that reasonable suspicion was lacking *and* that the officer's misconduct was sufficiently serious to warrant exclusion under s. 24(2) of the *Charter*? As not searching would allow a suspected drug trafficker to go free, most police would likely conduct the search.[98]

Of course, it may often be infeasible to obtain a conventional warrant before sniffing. Recognizing this, Parliament could respond in a number of ways. Like it has for many other search powers, it could institute an expedited "tele-warrant" process.[99] Where circumstances render even this procedure infeasible, it could recognize an "exigency" exception.[100] Alternatively, it could require sniffs to be authorized (on reasonable suspicion) by a designated senior officer, who would be required to record and report on (in a form available to the public) pertinent details of the search, including the suspect's apparent race or

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93 *Kang-Brown*, *supra* note 4 at paras. 80-97.

94 *Ibid*. at paras. 205, Deschamps J., dissenting (noting that Binnie J.'s application of the standard set the bar so high as to make it "equivalent to that of reasonable grounds to believe"); paras. 249-50, Bastarache J., dissenting.

95 See Richard V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982); Debra Livingston, "Gang Loitering, the Court, and Some Realism About Police Patrol," [1999] Sup. Ct. Rev. 141; Stephanos Bibas, "The Real-World Shift In Criminal Procedure" Book Review of *Comprehensive Criminal Procedure* by Ronald Jay Allen *et al.*, and *Criminal Procedures: Cases, Statutes, and Executive Materials* by Marc L. Miller & Ronald F. Wright, (2003) 93 J. Crim. L. & Criminology 789.

96 See Tanovich, *supra* note 26 at 135-37.

97 Note that Mr. Kang-Brown was an "East Indian male": *Kang-Brown*, *supra* note 4 at para. 84.

98 See Stribopoulos, "In Search of Dialogue," *supra* note 75 at 52-54.

99 See e.g. *Criminal Code*, *supra* note 20, ss. 487.1, 487.01(7), 487.05(3), 487.092(4); *CDSA*, *supra* note 79, s. 11(2).

100 See e.g. *Criminal Code*, *ibid.*, ss. 117.02, 184.4, 487.11; *CDSA*, *ibid.*, s. 11(7). The Supreme Court has indicated that such circumstances "will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed" in order to obtain a warrant: *R. v. Grant*, [1993] 3 S.C.R. 223 at 243.

ethnicity.[101] Though not equivalent to prior authorization by a neutral arbiter, such a process would be a significant check on discriminatory profiling.[102]

The regulatory options proposed above aim to enhance the procedural protection provided in *Kang-Brown* and *A.M.*, but Parliament might also wish to mark out a limited set of circumstances in which non-anonymous sniffs could occur without reasonable suspicion. As Bastarache J. suggested in *Kang-Brown*, after giving reasonable notice to the public, it may be sensible to permit suspicionless sniffs at transportation hubs and other gathering places where drug trafficking is prevalent.[103] Such searches, he noted, could serve as a powerful deterrent.[104] To minimize profiling and arbitrary selection harms, however, investigators should be required to prove that the selection process was truly random and non-discriminatory.[105]

A similar case could be made for allowing brief, random sniffs of the exterior of otherwise lawfully detained vehicles.[106] In *Caballes*, the U.S. Supreme Court ruled that such searches do not require warrants or reasonable suspicion.[107] Given the risk that such a rule would exacerbate stigma, arbitrary selection, and (especially) profiling harm, I would not recommend its adoption in Canada.[108] A purely discretionary decision to "call in the dogs" is too easily influenced by subtle (and often subconscious) discriminatory biases.[109] It might be acceptable, however, for Parliament to sanction such searches when conducted in a statistically random and non-discriminatory fashion. In such cases, the physical barrier imposed by the vehicle would minimize bodily integrity and mistreatment harm; and randomness would minimize stigma, arbitrary selection, and profiling harm.

Of course, *Kang-Brown* and *A.M.* do not preclude legislative action. Parliament could still decide to bolster the protection offered by the Court, for example by requiring (in addition to reasonable suspicion) one or more of the authorization procedures delineated above. It could also attempt to diminish the Court's protections, for example by authorizing and regulating random searches in specialized circumstances, as suggested above. Though such an attempt would inevitably be challenged as violating s. 8, the Court has in recent years

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[101] See Stribopoulos, "In Search of Dialogue," *supra* note 75 at 48, 72.

[102] See Deborah Ramirez, Jack McDevitt & Amy Farrell, "A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned" in Stephen J. Muffler, ed., *Racial Profiling: Issues, Data and Analysis* (New York: Nova Science, 2006) 57.

[103] *Kang-Brown*, *supra* note 4 at paras. 245-53, Bastarache J., dissenting. This idea was borrowed from legislation in Australia. See *Police Powers and Responsibilities Act 2000* (Qld.), ss. 34-36.

[104] *Kang-Brown*, *ibid.* at paras. 214, 246, 252.

[105] *Ibid.* at paras. 214, 246.

[106] Police may stop drivers without suspicion for the purposes of any driving offence related investigation. This power does not extend to the investigation of drug trafficking or any other type of offence. See *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

[107] *Supra* note 39.

[108] For Canadian cases adopting the *Caballes* approach, see *R. v. Davis*, 2005 BCPC 11, [2005] B.C.J. No. 90 (QL); *Nguyen*, *supra* note 63.

[109] See Christopher M. Pardo, "Driving Off The Face of the Fourth Amendment: Weighing *Caballes* Under The Proposed 'Vehicular Frisk' Standard" Val. U. L. Rev. [forthcoming in 2008], online: SSRN <http://ssrn.com/abstract=1142524>. See also Jerry Kang, "Trojan Horses of Race" (2005) 118 Harv. L. Rev. 1489 at 1498-1519, reviewing experimental psychological and other empirical evidence of the subtlety and pervasiveness of racial stereotyping.

countenanced (via its "dialogue" doctrine) legislative deviations from *Charter* standards previously imposed on common law and statutory criminal procedural rules.[110]

The problem with decisions like *Kang-Brown* and *A.M.*, however, is twofold. First, by recognizing new common law police powers, they take away much of the incentive to legislate. As discussed, political points can be won by legislating in the realm of criminal procedure, but they can also be lost. Governments and parliamentarians may be happy to let the courts "take the heat" for regulating and elect to do nothing. With the Court's imprimateur stamped on warrantless sniffs on reasonable suspicion, Parliament is unlikely to impose any of the additional protections suggested above.

Second, even if Parliament is moved to act, its options are constrained (to at least some degree), by the inflexible rules set down by the Court. "Democratic dialogue" notwithstanding, in light of *Kang-Brown* and *A.M.*, it would take a bold legislature to authorize the use of drug-sniffing dogs without reasonable suspicion, either in relation to anonymous property or in the presence of people in the limited circumstances described above.

Ultimately, there is much to be gained, and little to be lost, by maximizing Parliament's capacity to regulate sniff searches. The legislative process is far from perfect, but Parliament is in a better position than the courts to gauge public preferences, canvass expert opinion, and institute a detailed (and context specific) regulatory scheme. The courts would still be there, of course, to resolve any interpretive ambiguities and determine compliance with the *Charter*.[111] In fulfilling the latter task, they should be especially vigilant in ensuring that the scheme does not unfairly discount the interests of vulnerable minorities with little influence on the legislative process.

VII. CONCLUSION

The sniffer dog cases, then, expose two key flaws in the Supreme Court's approach to the interpretation of s. 8 of the *Charter*. First, it has failed to develop a sophisticated understanding of the different interests that privacy is designed to protect. This led it to set out procedural rules that both over- and under-protect the privacy interests implicated by canine sniffs. By requiring reasonable suspicion before using dogs to detect drugs concealed in anonymous containers, the Court severely restricted the ability of police to investigate

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110 See *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309. See also Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481; David Schneiderman, Book Review of *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* by Kent Roach, (2002) 21 Windsor Y.B. Access Just. 633; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; Madame Justice B.M. McLachlin, "The *Charter*: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540; F.L. Morton, "Dialogue or Monologue" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2001) 111; Stribopoulos, "In Search of Dialogue," *supra* note 75 at 62-73.

111 See Stribopoulos, "In Search of Dialogue," *ibid.* at 71.

drug crime in a context where the risk and magnitude of non-informational and non-criminal informational harm is low. This rule can only be justified as an effort to mitigate the enforcement of bad laws; but as discussed, this rationale is highly problematic. The Court's approach is under-protective, in contrast, in relation to non-anonymous sniffs. In the absence of *ex ante* checks on the discretion of front-line investigators, the reasonable suspicion standard provides insufficient protection against the harms of arbitrary selection and discriminatory profiling.

The second flaw is the Court's failure to foster a more dynamic, co-operative, and modest relationship with Parliament in regulating investigative powers. In interpreting both the common law and s. 8, the Court could easily have taken a more minimalist approach. What harm would come from finding that anonymous sniffs attract no reasonable expectation of privacy? If people believed that such sniffs should be regulated, they could lobby their elected representatives to do so. Similarly, had the majority found no common law power to conduct non-anonymous sniffs without warrants or reasonable suspicion, Parliament would likely have been moved to act. In so doing, it may very well have crafted a more detailed, nuanced, and protective regulatory regime than the one imposed by the Court.