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The Constitutionality of the Canine Sniff Search: From Katz to Dogs

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COMMENTS

THE CONSTITUTIONALITY OF THE CANINE SNIFF SEARCH: FROM *KATZ* TO DOGS

I. INTRODUCTION

It was Justice Frankfurter who observed that "[t]he course of true law pertaining to searches and seizures . . . has not . . . run smooth,"[1] and indeed it has not. One particular source of confusion in fourth amendment[2] analysis is the endless innovation in police surveillance techniques. The technological revolution of recent decades has spawned more than computer gadgetry and military wonders; it has also equipped law enforcement agencies with ever more effective investigative tools.[3]

The fourth amendment has as its purpose the protection of the inviolability of the individual from unreasonable governmental intrusion. The amendment is thus a "profoundly anti-government document,"[4] as it limits the right of the state to intervene in one's life. Fourth amendment analysis is complicated, then, because precisely that which the amendment purports to oversee — governmental investigation — is constantly being modernized in ways the founders could never have imagined.

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1. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

2. The fourth amendment provides:

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

U.S. CONST. amend. IV.

3. *See generally* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE §§ 1.01-1.03 (1977); S. DASH, THE EAVESDROPPERS (1959); C. FISHMAN, WIRETAPPING AND EAVESDROPPING (1978 & Supp. 1983); M. PAULSEN, THE PROBLEMS OF ELECTRONIC EAVESDROPPING (1977). *See also* Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L.F. 1167 (1977).

4. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).

This Comment considers one such investigative tool which has come into common usage only in the past decade: the drug-detecting dog.[5] It will be seen that, with rare exception, this nation's courts have been quite receptive to the use of these dogs in crime detection.[6] Although their analyses may differ, these courts reach essentially the same conclusion: the "sniff search" is not violative of the fourth amendment. This Comment will trace the development of the law of canine sniff searches.[7] It will then critique the various analyses the courts offer in establishing the legitimacy of the procedure.[8] Finally, it will propose an alternative approach which better accounts for established fourth amendment thinking.[9]

II. THE FOURTH AMENDMENT AND THE NONTRESPASSORY INTRUSION

A. A Consideration of Katz

The use of canines in detecting contraband poses a unique problem to fourth amendment analysis. A canine "sniff search"[10] involves a nontrespassory, nonintrusive search and seizure of intangible matter. As such, the sniff search closely resembles the magnetometer,[11] wiretap,[12] and

5. Although canines are trained to detect contraband other than drugs, the vast majority of cases involve the detection of illegal drugs. *But see* State v. Quatsling, 24 Ariz. App. 105, 536 P.2d 226 (1975) (dogs used to detect contraband explosives), *cert. denied*, 424 U.S. 945 (1976).

6. *See infra* part III.

7. *Id.*

8. *See infra* part IV.

9. *See infra* part V.

10. "Sniff search" is probably the most illustrative and appropriate term to label this investigative procedure. Typically, the dog, trained to respond to certain scents, is presented with a subject to smell. If, upon smelling the airspace surrounding the target, the dog detects the scent of the particular contraband, it communicates a positive reaction to its master. *See* Comment, United States v. Solis: *Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 414-18 (1976) (discussing training method for drug detection dogs).

11. A magnetometer is an instrument which detects the presence of metal by responding to shifting magnetic fields. Courts have consistently held that the use of the magnetometer constitutes a search. *See, e.g.*, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Bell, 464 F.2d 666 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

12. Wiretapping and bugging capabilities are truly remarkable with today's tech-

electronic tracking device,[13] all devices which effectively "search" without a physical trespass. Because of its lack of apparent intrusiveness, the nontrespassory search conflicts with many persons' common-sense notion of what constitutes a search.[14] Thus, constitutional analysis is rendered more difficult.

An inquiry into the constitutionality of canine sniff searches should properly begin, then, with an examination of the development of the law regarding such nontrespassory searches. Considering that such intrusions were only made possible with modern advances in technology, this development has been of a recent and rapid nature. The initial formulation of the law arose in *Olmstead v. United States*,[15] a 1928 case. The United States Supreme Court there considered the constitutionality of the warrantless use of telephonic eavesdropping devices,[16] which were employed to secure incriminating evidence against defendants.[17] In strictly interpreting the prohibitions of the fourth amendment, the Court declared that "[t]he Amendment does not forbid what was done here. There was no searching. There was no seizure . . . . There was no entry of the houses or offices of the

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nology. Unfortunately, it is far beyond the scope of this Comment to consider the array of eavesdropping equipment now available. For a fine study of such equipment, see J. CARR, *supra* note 3, §§ 1.01-1.03.

13. The electronic tracking device, or "beeper," is a device which emits periodic signals which can be picked up on a radio frequency, thus monitoring the approximate location of the object to which it is attached. Beepers are frequently attached to vehicles, enabling authorities to track suspects without maintaining visual contact. *See* Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions*, 67 KY. L.J. 987 (1979).

14. It also may conflict with the historical view of what constitutes a search. *See* Olmstead v. United States, 277 U.S. 438, 463 (1928) (observing that the well-known historical purpose of amendment was to prevent governmental force to search one's house, person, papers, or effects). It was later determined that the "trespass" doctrine enunciated in *Olmstead* could no longer be regarded as controlling. Katz v. United States, 389 U.S. 347, 353 (1967). *See also* Amsterdam, *supra* note 4, at 381-82.

15. 277 U.S. 438 (1928).

16. "Small wires were inserted along the ordinary telephone wires. . . . The insertions were made without trespass upon any property of the defendants." *Id.* at 456-57.

17. Olmstead headed a covert operation which imported and distributed contraband alcohol in violation of the Prohibition Act. Olmstead's involvement was revealed by the conversations intercepted by the wiretaps. *Id.* at 457.

defendants."[18] Thus, the *Olmstead* decision established that in order to find a search under the fourth amendment, there must occur both a trespassory intrusion[19] and the seizure of tangible matter.[20]

For the most part, the rule from *Olmstead* was maintained steadfastly through three decades.[21] It was only with the startling advances in electronic surveillance technology[22] that the *Olmstead* trespass doctrine was found to be inadequate. Such technology, and the promise of further sophistication in the future,[23] mandated that its property-based analysis be discarded.

And so, in 1967, the trespass doctrine was discarded in *Katz v. United States*,[24] considered to be the most significant fourth amendment case of our century.[25] The *Katz* decision overruled *Olmstead* and replaced its "talismanic"[26] trespass doctrine with a subjective test which looked to the searchee's expectation of privacy. As was his forbear, Katz was convicted of a federal offense, largely upon evidence secured by an eavesdropping device.[27] In declaring that the use of such surveillance equipment constituted a search, the Court commented:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment

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18. *Id.* at 464.

19. *Id. See also* Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973, 974 (1975-76).

20. *Olmstead*, 277 U.S. at 466. *See also* Note, *supra* note 19, at 974.

21. The rule was partially weakened by Silverman v. United States, 365 U.S. 505 (1961). There, the Court found a fourth amendment violation where there was a physical trespass — the insertion of a spike-mike into defendant's home — but no seizure of tangible matter. *Id.* at 509-12.

22. *See* J. CARR, *supra* note 3, §§ 1.01-1.03.

23. Justice Brandeis' 1928 *Olmstead* dissent recognized this threat of future sophistication. *See Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

24. 389 U.S. 347 (1967).

25. *See* Amsterdam, *supra* note 4, at 382 (commenting that *Katz* "marks a watershed in fourth amendment jurisprudence").

26. *Katz*, 389 U.S. at 351 n.9.

27. Katz was convicted of transmitting betting information across state lines in violation of federal law. FBI agents secured incriminating evidence of Katz' involvement in this activity by attaching an electronic listening and recording device to the public telephone booth from which Katz habitually disseminated the betting information. *Id.* at 348.

> protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[28]

This formulation of the scope of the fourth amendment promised greater protection from governmental intrusion.[29] Rather than measure the reach of the amendment by the mere "presence or absence of a physical intrusion into any given enclosure,"[30] the Court made possible an inquiry into whether an alleged intrusion "violated the privacy upon which [the searchee] justifiably relied."[31] Such an inquiry redirects the focus of fourth amendment protection from mere property rights to fundamental privacy interests.[32]

It is commonly recited that the *Katz* decision established the inviolability of that which one regards with a "reasonable expectation of privacy"[33] — a standard derived from Justice Harlan's concurrence. Frequently, lower courts refer only to Justice Harlan's opinion in establishing the parameters of fourth amendment protection, explicitly or implicitly adopting his two-pronged test, which requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[34]

Regarding this second factor, reasonableness, the Government in *Katz* argued in the alternative that even if a search of the petitioner had occurred, the search was reason-

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28. *Id.* at 351-52.

29. *See* Amsterdam, *supra* note 4, at 382. *But see* United States v. Wright, 449 F.2d 1355, 1363-64 (D.C. Cir. 1971) (relying upon fact that the *Katz* decision overruled trespass requirement for conclusion that mere trespass by itself does not constitute fourth amendment invasion), *cert. denied*, 405 U.S. 947 (1972).

30. *Katz*, 389 U.S. at 353.

31. *Id.*

32. This conclusion follows despite the Court's own admission that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " *Id.* at 350.

33. This phrase, now a cliche, never actually appeared in any of the three opinions of the *Katz* decision.

34. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The test is most commonly employed implicitly, as the courts frequently abbreviate it as the "reasonable expectation of privacy" test. The United States Supreme Court even appears to have adopted this approach. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 8 (1973); United States v. White, 401 U.S. 745, 751-52 (1971); Terry v. Ohio, 392 U.S. 1, 9 (1968). *See generally* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 GA. L. REV. 75, 79-83 (1976-77).

able and therefore not proscribed by the Constitution.[35] Significantly, the Court rejected this argument,[36] holding instead that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[37] As no such exception was applicable in the tapping of Katz' calls, the intrusion was unreasonble and proscribed by the Constitution.

The *Katz* decision, then, apparently mandates a two-part inquiry in fourth amendment analysis. First, one must determine whether a given intrusion constitutes a fourth amendment search.[38] According to Justice Harlan's concurrence, an intrusion is a search if it encroaches upon the searchee's reasonable expectation of privacy.[39] If it is determined that a search has occurred, it must then be determined whether the search was reasonable.[40] The *Katz* majority mandates that a search is unreasonable unless it is supported by prior judicial approval or falls within one of the limited exceptions.[41]

This deceptively simple analysis has experienced some deterioration in recent years. The courts today are reluctant to apply it to canine sniff searches, thus opposing the mandate of *Katz*. In rejecting the *Katz* analysis, these courts subscribe to the unenlightened thinking of *Olmstead* and its progeny. This is a regrettable trend which must be opposed. It is the thesis of this Comment that, should the *Katz* analysis apply at all, it should apply to all fourth amendment intrusions in an undiluted form.

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35. *See Katz*, 389 U.S. at 356-57.

36. The significance of this is that, in rejecting the Government's argument, the Court tied the warrant clause to the reasonableness requirement of the fourth amendment. Peebles, *supra* note 34, at 80-81.

37. *Katz*, 389 U.S. at 357 (footnotes omitted). For a list of these exceptions, see *infra* note 241.

38. *See Katz*, 389 U.S. at 352-53.

39. *See id.* at 361 (Harlan, J., concurring). *See also* United States v. White, 401 U.S. 745, 751-52 (1971).

40. *See Katz*, 389 U.S. at 354-57.

41. *See id.* at 357.

B. A Brief Digression: Plain View

Among the "specifically established and well-delineated"[42] exceptions to the fourth amendment warrant requirement is that of plain view. The plain view doctrine provides that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence."[43] The justification for this exception is the notion that an officer who merely observes something while on duty is not engaged in a search; therefore, no search warrant is necessary.[44] The *Katz* Court alluded to this in commenting that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[45]

The plain view doctrine[46] frequently collides with *Katz*' "reasonable expectation of privacy" formulation; there is an inherent tension between the two concepts which is not capable of simple reconciliation. This tension is readily recognized when one considers the qualifiers which describe the respective doctrines: *plain* view and *reasonable expectation* of privacy. The difficulty lies in defining the border between that which one may expect will be honored with privacy and that which is nonetheless in plain view. The conflict is particularly evident in cases involving nontrespassory intrusions, such as electronic tracking devices[47] and canine sniff

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42. *Id.*

43. Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). The plain view doctrine was more clearly elucidated in Coolidge v. New Hampshire, 403 U.S. 443, 464-74 (1971). *See* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 (1975) (discussing *Coolidge* limitations on plain view).

44. Under the plain view exception to the warrant requirement, no search is deemed to have occurred in the first instance. In this regard, the plain view exception is unlike the other warrant requirement exceptions. See *infra* note 241 for a list of these exceptions.

45. *Katz*, 389 U.S. at 351.

46. The doctrine is not limited to the sense of sight. *See, e.g.*, United States v. Jackson, 588 F.2d 1046 (5th Cir.) (plain hearing), *cert. denied*, 442 U.S. 941 (1979); United States v. Muckenthaler, 584 F.2d 240 (8th Cir. 1978) (plain hearing); United States v. Johnston, 497 F.2d 397 (9th Cir. 1974) (plain smell).

47. *See, e.g.*, United States v. Knotts, 103 S. Ct. 1081 (1983) (permitting use of electronic tracking device); United States v. Michael, 622 F.2d 744 (5th Cir.) (permitting use of electronic tracking device), *cert. denied*, 454 U.S. 950 (1980); United States v. Holmes, 521 F.2d 859 (5th Cir. 1975) (disallowing use of electronic tracking device), *aff'd en banc*, 537 F.2d 227 (5th Cir. 1976).

searches.[48] One must inquire whether that which an officer detects with the aid of a nontrespassory investigative tool is really in plain view, considering that it could not have been detected without the use of such a tool. Conversely, does a person have a reasonable expectation of privacy regarding an item which is only "exposed" to the public to the degree that it is detectable by highly sophisticated equipment? The development of electronic surveillance technology raises the issue of how far the plain view doctrine may be extended before it swallows up the privacy protections afforded by the *Katz* decision.

It will be seen that a number of state and federal courts apply a variant of the plain view doctrine to justify the propriety of sniff searches.[49] This invocation of the doctrine is improper and symptomatic of the difficulty courts have experienced in dealing with the issue.

III. THE CANINE SNIFF SEARCH CASES: DEVELOPMENT OF THE LAW

A. The Early Years

It was not until the mid-1970s that the courts first began considering the constitutionality of canine sniff searches.[50] The first federal circuit court to pass on the issue did so in a cursory, conclusive manner.[51] In response to the defendant's constitutional challenge, the court noted sharply: "We think the argument is frivolous."[52] Inexplicably, the court saw no reason to further articulate its reasoning.[53]

The federal district court which decided *United States v. Solis*[54] employed a more extensive analysis in reaching an

48. *See infra* part III.

49. *See, e.g.*, United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). *See also infra* notes 89-104 and accompanying text.

50. The use of drug detecting dogs did not become prevalent until the early 1970s. *See* Comment, *supra* note 10, at 414-15 n.22 (detector dogs introduced in 1970 in response to increasing drug traffic).

51. *See* United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (per curiam).

52. *Id.* at 749.

53. This failure seems particularly delinquent in light of the fact that there was substantial precedent in California courts which held oppositely. *See infra* notes 135-39 and accompanying text.

54. 393 F. Supp. 325 (C.D. Cal. 1975), *rev'd*, 536 F.2d 880 (9th Cir. 1976).

opposite conclusion. There, the court dealt with a case in which trained dogs were dispatched to search the defendant's parked semi-trailer in response to a tip from an anonymous informer.[55] In assessing the constitutionality of the sniff search, the court resorted immediately to a consideration of *Katz v. United States*,[56] observing that "*Katz* involved the uninvited electronic ear, whereas this case involves the uninvited canine nose."[57] To determine whether a search occurred, the court went on to question "whether Solis had a . . . reasonable expectation that the interior of his closed trailer . . . would be treated as a private place and [as such] would not be subject to the olfactory intrusion by trained Government dogs in the absence of a search warrant issued upon probable cause."[58]

The court concluded that Solis did have such an expectation regarding the privacy of his closed trailer, and therefore, "the use of the dogs constituted a search *per se* under the Fourth Amendment."[59] In reaching this conclusion, the court relied heavily upon the fact that Solis had completely enclosed his trailer, thus keeping its contents from public view.[60] It seems also that the court just naturally recoiled at the thought of pervasive electronic and canine monitoring of persons — a reaction exhibited by few other courts.[61]

Before being overruled, the *Solis* decision was soon followed by *United States v. Bronstein*,[62] probably the most frequently cited sniff-search case. The *Bronstein* case involved a scenario typical of airport luggage search incidents: Acting

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55. *Solis*, 393 F. Supp. at 325-26. The informant reported to a DEA agent that defendant's semi-trailer contained 2,000 pounds of marijuana. *Id.*

56. 389 U.S. 347 (1967).

57. *Solis*, 393 F. Supp. at 327.

58. *Id.*

59. *Id.*

60. *Id.* The court also observed that the smell of marijuana which the dogs detected was likewise concealed from public view or smell. *But see* United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975) (odor which is detectable by dog is exposed to public), *cert. denied*, 424 U.S. 918 (1976).

61. *But see* Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of certiorari); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

62. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

on a tip from a reliable informant,[63] DEA agents met the defendants' suspect luggage at its destination-airport with Meiska, a "canine cannabis connoisseur."[64] Upon sniffing the luggage, the dog exhibited a positive reaction, leading to the apprehension of the defendants and a search of their luggage, in which contraband was discovered.[65] In approving of Meiska's sniff search, the Second Circuit Court of Appeals proposed a plain smell rationale to justify the procedure. The court reasoned that because there would have been no search had the agents themselves smelled the odor of marijuana, the detection of it by the trained dogs was likewise proper.[66] The court rejected the contention that "the police are limited to the resources of their physical senses and that the use of scientific, or, in this case, canine assistance . . . is impermissible."[67] Rather, the court felt that the "law is settled contrariwise,"[68] making the use of sense-enhancing devices permissible in criminal investigation.[69]

The *Bronstein* court also strongly emphasized the nonintrusive nature of the sniff search. Because the dog reacted only to contraband — and thus did not disclose the complete contents of the suspects' luggage,[70] but only the presence or absence of contraband — the court distinguished the sniffing

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63. *Id.* at 460. The informant was an airline ticket agent who observed defendants exhibiting suspicious behavior: "Each carried two large new suitcases all of about the same size, shape and weight and all equipped with combination locks. Although they did not purchase their tickets together and appeared to act as strangers to each other, [they] were later seen . . . to be talking together like old friends." *Id.*

64. *Id.* The phrase was original to this court. *See also* State v. Morrow, 128 Ariz. 309, __, 625 P.2d 898, 902 (1981); People v. Price, 54 N.Y.2d 557, 562, 431 N.E.2d 267, 269, 446 N.Y.S.2d 906, 908 (1981).

65. *Bronstein*, 521 F.2d at 460.

66. *See id.* at 461. "We fail to understand how the detection of the odoriferous drug by the . . . canine senses here employed alters the situation and renders the police procedure constitutionally suspect." *Id.*

67. *Id.* at 462.

68. *Id.*

69. *But see infra* text accompanying notes 191-95 (distinction between devices which truly enhance the senses and those which replace the senses).

70. *Bronstein*, 521 F.2d at 463. The court specifically noted that "the intrusion . . . was aimed not at the person." *Id. Cf.* Horton v. Goose Creek Consol. Indep. School Dist., 690 F.2d 470 (5th Cir. 1982) (sniff search of persons), *cert. denied*, 103 S. Ct. 3536 (1983); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (same), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980) (same).

from other less discriminate investigatory tools.[71] Finally, the court noted in approval that the powers of the dog were employed only after a showing of reasonable suspicion.[72] Regarding this point, the court distinguished the *Solis* decision on the grounds that that case involved "a tip from an informer of *unproven* reliability."[73]

Less than one year after the *Bronstein* case was decided, the Ninth Circuit Court of Appeals reversed the district court's holding in *United States v. Solis*.[74] In what can best be termed a disjointed opinion, the court advanced a potpourri of justifications for sanctioning sniff searches. The plain smell theory from the *Bronstein* decision was repeated: "[E]vidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under [the plain view exception]. . . . Odors so detected may furnish evidence of probable cause of 'most persuasive character.' "[75] Also influential in the court's decision was the prior founded suspicion of the presence of contraband;[76] the nonintrusiveness of the search;[77] the discriminate nature of the search;[78] and its relative inoffensiveness.[79] These factors combined to convince the court that "the use of the dogs was not unreasonable under the circumstances and therefore was not a prohibited search under the fourth amendment."[80]

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71. *See Bronstein*, 521 F.2d 462-63.

72. *See id.* at 463.

73. *Id.* at 461 n.2 (emphasis added).

74. 536 F.2d 880 (9th Cir. 1976). For the factual background of this case, see *supra* notes 54-61 and accompanying text.

75. *Solis*, 536 F.2d at 881. The court inexplicably failed to continue with this thought and articulate a complete plain smell standard.

76. *See id.* at 882. This suspicion was "based on the partial corroboration of the informant's statements by confirming the location of the trailer, the license described and the presence of the talc, known to be associated with the masking of marijuana odor." *Id.*

77. *See id.* The court was apparently impressed that there was no physical trespass upon the trailer.

78. *See id.* at 883.

79. *See id.* Regarding this, the court observed that there was "no embarrassment to or search of the person." *Id.*

80. *Id.* This language implies that the court deemed the intrusion a search, but a reasonable one not proscribed by the fourth amendment. Such a conclusion conflicts with the court's own statement: "We do not agree that the use of the dogs here constituted a search but rather a monitoring of the air . . . ." *Id.* at 881. This inconsis-

The second *Solis* decision is most disappointing for its utter disregard of the *Katz* standard. Although it was early noted that *Katz*' " 'reasonable expectation of privacy' [is what] . . . we take to be the test, to be applied to the circumstances of each case,"[81] the test was never really considered. The court simply failed to inquire whether the defendant had an expectation of privacy regarding his semi-trailer; instead, the circumstances and alleged reasonableness of the sniff search were examined and approved.

This error was repeated by the Tenth Circuit Court of Appeals in *United States v. Venema*.[82] That case dealt with the warrantless sniff search of defendant's rented locker facility.[83] In considering defendant's constitutional challenge, the court inquired whether he had a justifiable expectation of privacy in the areaway outside his locker door, that being the airspace which the dog actually "searched."[84] In concluding that there was no such expectation of privacy, the court observed that defendant was warned by the manager that from time to time "she allowed the police on the premises . . . to use their dogs for the purpose of detecting marijuana . . . . In view of such warning . . . defendant is in a poor position to assert that he had a justifiable expectation to privacy in the areaway outside the locker door."[85]

The fallacy in this reasoning seems clear. The mere announcement that constitutional rights will be violated cannot justify their subsequent violation. Were it otherwise, all fourth amendment protection could be suspended with an announcement to that effect. But more fundamentally, the *Venema* court erred in failing to address the proper inquiry in the first instance, that being, did defendant have a reason-

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tency was purportedly resolved later in United States v. Beale, 674 F.2d 1327 (9th Cir. 1982) (interpreting *Solis* as allowing sniff search only upon reasonable suspicion), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

81. *Solis*, 536 F.2d at 882.

82. 563 F.2d 1003 (10th Cir. 1977).

83. *Id.* at 1004. Narcotics agents had observed suspicious deliveries and dispatches from the locker. With permission of the owner of the locker facility, the agents brought a detector dog to sniff the outside area of defendant's locker. The dog reacted positively; upon the issuance of a warrant, the locker was searched, and agents found LSD, marijuana, and hashish. *Id.* at 1004-05.

84. *Id.* at 1006.

85. *Id.*

able expectation of privacy regarding the *interior* of his locker? The court mistakenly focused on the areaway immediately outside the locker door, presumably in consideration of the fact that the actual matter that the canine sniffed was located there. But merely because the evidence is secured from without the enclosed area in question does not require a shift of the focus of inquiry. Were this the case, the tapping of Katz would have been permissible in that it "searched" the area outside of the confines of the telephone booth for the minute sound vibrations that evidenced the conversation occurring therein.[86] In erring as it did, the *Venema* court effectively ignored the *Katz* standard, thus allowing its conclusion that "the act of [the dog] sniffing the air outside the defendant's locker did not constitute a search."[87]

B. The Trend Continues

The precedent established by the federal circuit courts in the 1970s has been faithfully adhered to in this decade. The most common rationale offered in support of the constitutionality of canine sniff searches continues to be the plain smell doctrine. Few courts approving the use of detector dogs fail to mention plain smell in establishing the procedure's legitimacy;[88] no such court has refuted it. In *United States v. Burns*,[89] the Tenth Circuit Court of Appeals quoted extensively from *United States v. Bronstein*,[90] apparently

86. Similarly, a magnetometer "searches" the area outside one's pockets in order to detect the fluctuating magnetic fields which reveal the pockets' contents.

87. *Venema*, 563 F.2d at 1007. The court apparently held, then, that there was no search in the first instance. Other early cases which dealt with the canine sniff search include: United States v. Meyer, 536 F.2d 963 (1st Cir. 1976) (sniff is a search, but is reasonable); State v. Martinez, 26 Ariz. App. 210, 547 P.2d 62 (sniff of a car is not a search), *aff'd*, 113 Ariz. 345, 554 P.2d 1272 (1976); State v. Quatsling, 24 Ariz. App. 105, 536 P.2d 226 (1975) (challenge to sniff search is frivolous), *cert. denied*, 424 U.S. 945 (1976); and People v. Campbell, 67 Ill. 2d 308, 367 N.E.2d 949 (1977) (sniff is not a search), *cert. denied*, 435 U.S. 942 (1978).

88. A notable exception is United States v. Place, 103 S. Ct. 2637 (1983), which fails to mention the plain smell doctrine. *See also* Mata v. State, 380 So. 2d 1157 (Fla. Dist. Ct. App. 1980).

89. 624 F.2d 95 (10th Cir.), *cert. denied* 449 U.S. 954 (1980).

90. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). *See supra* notes 62-73 and accompanying text.

adopting that court's plain smell standard.[91] The Fourth Circuit reached a similar result with *United States v. Sullivan*,[92] when it observed: "It cannot be questioned that an odor . . . if detected by the sensory organs of man would not constitute a search . . . . We find the assistance provided by [the detector dogs] to be reasonable."[93]

State courts have also applied the plain smell doctrine in sniff search cases. In *State v. Morrow*,[94] the Arizona Supreme Court depended heavily on the doctrine in approving a canine search. That court noted that "[w]hat emits from a bag, including . . . an odor, [is] exposed to the public and [is] not . . . protected by the Fourth Amendment. . . . That [which] the dog smells is in the area surrounding the bag . . . itself."[95] Curiously, in reaching this conclusion,[96] the court looked only to the plain smell doctrine, virtually ignoring other persuasive arguments in its favor.[97]

The California Supreme Court reached a similar decision in *People v. Mayberry*.[98] The court there likened the "escaping smell of contraband from luggage"[99] to the "emanation of a fluid leaking from a container. The odor is detectable by the nose, as the leak is visible to the eye . . . . Our conclusion is not altered by the fact that it [was the

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91. *See Burns*, 624 F.2d at 101. In so doing, the court observed: "As of the time of their arrest, appellants' legitimate expectations with regard to the locked briefcase were that it would remain unopened absent warrant authorization. The dog's mere sniffing of such did not offend constitutional guarantees." *Id.* Thus, the court effectively ignored the ruling in *Katz*. See also United States v. Venema, 563 F.2d 1003 (10th Cir. 1977), discussed *supra* notes 82-87 and accompanying text.

92. 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

93. *Id.* at 13 (citations omitted). *See also* United States v. Goldstein, 635 F.2d 356, 361 (5th Cir.) (equating dog's smelling odor with officer's smelling it), *cert. denied*, 452 U.S. 962 (1981).

94. 128 Ariz. 309, 625 P.2d 898 (1981).

95. *Id.* at ___, 625 P.2d at 901-02. This comment suggests a return to the property-oriented approach of Olmstead v. United States, 277 U.S. 438 (1928). *See supra* notes 15-23 and accompanying text.

96. Interestingly, the court's conclusion was that "[t]he sniffing of the dog was not a search." *Morrow*, 128 Ariz. at ___, 625 P.2d at 902. Actually, no one sniffed the dog; rather the court merely confused its grammer as it did its reasoning.

97. The only credible argument which supports the constitutionality of canine sniff searches is that which establishes the accuracy, discrimination, and nonintrusiveness of the procedure. *See infra* notes 202-17 and accompanying text.

98. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

99. *Id.* at 343, 644 P.2d at 814, 182 Cal. Rptr. at 621.

dog's] nose and not [the] handler's which detected the odor."[100] Thus the court held that there was no fourth amendment search in the first instance when a trained canine sniffed airport luggage.[101]

Likewise, the Hawaii Supreme Court adopted this rationale[102] in holding that "[j]ust as there is no reasonable expectation of privacy in items left in the plain view of an officer lawfully in the position from which he observes [them], there can be no reasonable expectation that plainly noticeable odors will remain private."[103] And similarly, the Washington Court of Appeals declared in conclusory terms that canine sniff searches "properly . . . come within the 'plain smell' doctrine adopted by the majority of jurisdictions which have considered the question."[104]

Regardless of the courts' various justifications for permitting the use of detector dogs, it is significant that the early courts that dealt with the issue almost unanimously disapproved of their use in a dragnet, exploratory fashion. Even *United States v. Bronstein*,[105] so adamant in its approval of the sniff search, pointedly noted that the dog there "was not employed in a dragnet operation directed against all flight passengers but rather on the basis of reliable information that reasonably triggered the surveillance employed there."[106] This reservation, however, seems to be eroding rapidly, as many courts this decade have explicitly approved of dragnet operations.[107]

The Seventh Circuit Court of Appeals at one point evinced an intention to avoid this trend. In *United States v. Klein*,[108] that court approved the use of canines in drug detection; however, it was particularly noted that "[t]his is not a case in which we need to confront the thorny problem of an indiscriminate, dragnet-type sniffing expedition. Rather,

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100. *Id.*
101. *Id.*
102. State v. Groves, 65 Hawaii 104, 649 P.2d 366 (1982).
103. *Id.* at __, 649 P.2d at 372.
104. State v. Wolohan, 23 Wash. App. 813, __, 598 P.2d 421, 425 (1979).
105. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).
106. *Id.* at 463.
107. *See infra* notes 112-31 and accompanying text.
108. 626 F.2d 22 (7th Cir. 1980).

this is a case in which authorities already had a reasonable suspicion to believe that the luggage contained contraband."[109]

The Hawaii Supreme Court was more adamant in its rejection of dragnet sniff searches. That court declared in unambiguous language: "[We] will not condone the use of these dogs in general exploratory searches or for indiscriminate dragnet-type searches."[110] Similarly, a federal district court, in striking down as unconstitutional the wholesale, indiscriminate sniff search of an entire student body, identified as the principal factor in reaching its decision the "sweeping, undifferentiated, and indiscriminate scope" of the search.[111]

However, most courts in recent years have been more accepting of dragnet sniffs. A Washington appellate court in *State v. Wolohan*[112] felt no inhibition in allowing an indiscriminate, exploratory sniff search of a bus packaging area.[113] The court reasoned that because the defendant's parcel exuded odorous molecules into the range of the detector dog's smell, defendant could have no reasonable expectation of privacy.[114] Thus, there was no search, and the general rule prohibiting exploratory searches was therefore inapplicable.[115]

State v. Morrow[116] is in accord. In response to defendant's indication that in previous cases which permitted the sniff search "there was reason to suspect the presence of contraband before the dogs were called,"[117] the Arizona Supreme Court maintained that the presence or absence of suspicion was unimportant. "If a dog's sniff is not a search, then it is immaterial whether there was pre-sniff knowl-

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109. *Id.* at 27. *But see* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) (approving of generalized dragnet search), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

110. State v. Groves, 65 Hawaii 104, ___, 649 P.2d 366, 373 (1982).

111. Jones v. Latexo Indep. School Dist., 499 F. Supp.. 223, 234 (E.D. Tex. 1980). *See infra* notes 158-66 and accompanying text.

112. 23 Wash. App. 813, 598 P.2d 421 (1979).

113. *See id.* at ___, 598 P.2d at 425. Agents had customarily led their detector dog through the area, allowing it to sniff all parcels. *Id.* at ___, 598 P.2d at 422.

114. *See id.* at ___, 598 P.2d at 424.

115. *See id.* at ___, 598 P.2d at 424-25.

116. 128 Ariz. 309, 625 P.2d 898 (1981).

117. *Id.* at ___, 625 P.2d at 902.

edge."[118] Similarly, the California Supreme Court approved of the San Diego Police Department's practice of conducting routine exploratory sniffing expeditions in the baggage area of the San Diego International Airport.[119]

The Fifth Circuit Court of Appeals suggested such an approach in *United States v. Goldstein.*[120] There, defendants were observed to exhibit suspicious behavior matching that described in the drug courier profile.[121] Defendants contended that reference to the drug courier profile did not supply the reasonable and articulable suspicion necessary to justify the detention of their luggage. The court rejected this argument, observing that "[i]t is because [the dog's] sniff did not constitute a search within the meaning of the Fourth Amendment that we hold that reasonable and articulable suspicion is not required before a [dog may be used] to sniff luggage in the custody of a common carrier."[122]

In *Doe v. Renfrow,*[123] possibly the most disconcerting of all canine sniff search cases, the Seventh Circuit Court of Appeals approved of the dragnet sniff search of an entire student body.[124] In response to what was perceived as a growing drug problem, school officials in Highland, Indiana, arranged for an exploratory sniff search of each junior and

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118. *Id.*

119. People v. Mayberry, 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982). A Narcotics Task Force officer customarily conducted such an exploratory search with full permission of airport authorities. He concentrated the search on particular inbound flights originating in Florida. The asserted basis for this procedure was the prediction that there would be "a three-quarters of one percent chance that *someone's* checked luggage would contain contraband." *Id.* at 353, 644 P.2d at 821, 182 Cal. Rptr. at 628 (Bird, J., dissenting) (emphasis in original). Actually, the likelihood was even less. *Id.* at 354 n.12, 644 P.2d at 821 n.12, 182 Cal. Rptr. at 628 n.12.

120. 635 F.2d 356 (5th Cir.), *cert. denied,* 452 U.S. 962 (1981).

121. *Id.* at 360. Such suspicious behavior included the fact that defendants took an early morning flight from a drug source city (Orlando, Florida); that they wore beards, dungarees, and boots; that they exhibited a seemingly false act of being strangers to each other; that their tickets and luggage bore inconsistent names; and that they paid for their unreserved tickets in cash. *Id.* at 358.

122. *Id.* at 361-62.

123. 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part,* 631 F.2d 91 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981). Unlike most of the cases considered in this Comment, the *Doe* decision was a civil rights action and not a criminal case.

124. The 2,780 students of Highland High School, including the junior high school students, were sniff searched. *Doe,* 631 F.2d at 92.

senior high school class.[125] During the two and one-half hour investigation, the dogs reacted positively to a total of fifty students.[126] Thirteen year old Doe was among the fifty. Even after emptying her pockets, the dogs exhibited a positive reaction upon sniffing her;[127] thereupon, she was removed to a nurse's station, where a nude body search was conducted. Again, no contraband was found. It was ultimately discovered that the plaintiff had played with her pet dog the morning of the sniff search. The pet was in heat, and apparently the lingering odors which the child exuded elicited the erroneous positive reactions from the detector dogs.[128] The United States District Court for the Northern District of Indiana nonetheless held that "the sniffing of a trained narcotic detecting canine is not a search."[129] Conceding that other federal courts had suggested the requirement that "the law enforcement officers [have] previous independent information or 'tips' concerning the whereabouts of the drugs" that are subsequently detected by the dogs,[130] the court concluded that such founded suspicion existed in this instance, in that there was "outside independent evidence indicating drug abuse within the school."[131]

The *Doe* case is most significant in that it indicates the fallibility of trained detector dogs. It is commonly recounted that the canine sniff is highly discriminate in that it reacts only to contraband, thus exposing nothing to the authorities except the presence or absence of contraband. As was made evident in *Doe*, this is not true; the trained dog reacts to be-

125. *Doe*, 475 F. Supp. at 1016. The Seventh Circuit Court of Appeals adopted the district court's opinion as its own. *See Doe*, 631 F.2d at 92.

126. *Doe*, 475 F. Supp. at 1017.

127. *Id.*

128. *Id.*

129. *Id.* at 1019.

130. *Id.* at 1021.

131. *Id.* The issue of the rights of public school students, which is intimately involved in cases which involve sniff searchs in schools, is vastly beyond the scope of this Comment. For a discussion of this topic, see Gardner, *Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. LAW & CRIMINOLOGY 39 (1980); Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119 (1979).

guiling scents other than contraband.[132] Therefore, the sniff search has the potential for being terribly indiscriminate. It is important to observe that Doe was not the only victim of error; rather, the dogs there reacted to a total of fifty subjects, only seventeen of which were found to possess contraband.[133] Two other federal courts have rejected the *Doe* analysis, holding instead that an exploratory sniff search in a school constitutes a prohibited fourth amendment search.[134]

C. The Dissenting Courts

While the majority of courts have held that the canine sniff search was not a fourth amendment intrusion in the first instance, and was therefore not affected by that amendment's strictures, a few courts have held otherwise, contending that the sniff is a search. As shall be seen, however, these same courts nonetheless approve of the use of the procedure.

The California Court of Appeal early recognized that a sniffing investigation constitutes a fourth amendment search. As early as 1973 the California courts established the necessity for probable cause prior to conducting sniff searches.[135] This provided the basis for later state courts to heartily disapprove of exploratory sniffing expeditions.[136] In *People v. Evans*[137] the court concluded that the use of a trained dog without prior knowledge or information regarding the presence of contraband "was . . . a violation of [defendant's] Fourth Amendment rights against unreasonable search and seizure,"[138] as it constituted an "impermissible invasion of

132. In Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 228 n.2 (E.D. Tex. 1980), the court noted that dogs have been known to respond to such substances as tobacoo, lighter fluid, nonprescription drugs, and the odors of other animals.

133. *See Doe*, 451 U.S. 1022, 1024 (1981) (Brennan, J., dissenting from denial of certiorari). This represents only a 34% accuracy rate.

134. Horton v. Goose Creek Consol. Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

135. *See, e.g.*, People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973).

136. *See, e.g.*, People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975); People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977) (discussed *infra* notes 137-39 and accompanying text).

137. 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977).

138. *Id.* at 937, 134 Cal. Rptr. at 443.

[the defendant's] reasonable expectations of privacy."[139]

An Ohio court followed California's lead in *State v. Elkins*.[140] Strictly applying the two-pronged analysis of *Katz v. United States*,[141] the court there inquired whether the sniff amounted to a search, and, if a search, whether it was reasonable.[142] Regarding the first inquiry, the court resolved that "it must be answered in the affirmative. By the use of a sophisticated device, albeit flesh and blood, the user perceived something entirely hidden from human senses, enhanced or unenhanced."[143] However, the court went on to conclude that this intrusion "did not constitute an unreasonable search . . . ." and was therefore not in violation of the fourth amendment.[144]

The Ninth Circuit Court of Appeals employed a similar analysis in holding that a canine sniff search constitutes a fourth amendment intrusion. In so holding the Ninth Circuit, in *United States v. Beale*,[145] chose to make a distinct split from precedent.[146] The case involved the search and apprehension of a suspected drug courier.[147] Rather than treat the issue in "absolute terms,"[148] the court declared that "the use of a canine's keen senses of smell to detect the pres-

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139. *Id.* at 934, 134 Cal. Rptr. at 441. *See also* People v. Denman, 112 Cal. App. 3d 1003, 169 Cal. Rptr. 742 (1980); People v. Nagdeman, 110 Cal. App. 3d 404, 168 Cal. Rptr. 16 (1980); People v. Lester, 101 Cal. App. 3d 613, 161 Cal. Rptr. 703 (1980). These cases have been overruled by People v. Mayberry, 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982) (holding that a nonintrusive olfactory investigation was not a search).

140. 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976).

141. 389 U.S. 347 (1967).

142. *See Elkins*, 47 Ohio App. 2d at __, 354 N.E.2d at 717.

143. *Id.* at __, 354 N.E.2d at 718. The court equated the use of the drug sniffing dog with wiretapping: "[This] case is comparable to . . . *Katz* where the electronic device attached to the outside of the enclosed telephone booth constituted a search even though there was no physical intrusion into the enclosure." *Id. Cf.* United States v. Burns, 624 F.2d 95, 101 (10th Cir.) (emphasizing lack of intrusion in support of legitimacy of sniff search), *cert. denied*, 449 U.S. 954 (1980); United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977) (same).

144. *Elkins*, 47 Ohio App. 2d at __, 354 N.E.2d at 719.

145. 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

146. *See supra* part III A & B.

147. Beale and his accomplice matched certain traits from the drug courier profile. Their luggage was exposed to a detector dog, and upon the dog's positive reaction, defendant was apprehended. *Beale*, 674 F.2d at 1328.

148. *Id.* at 1330.

ence of contraband within . . . luggage *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and may be based on an officer's 'founded' or 'articulable' suspicion, rather than probable cause."[149]

In reaching this conclusion, the court rejected the plain smell doctrine as being entirely inapplicable,[150] and stressed the reasonable expectation of privacy persons have regarding their luggage.[151] In noting the similarity between the *Katz* case and the case before the court, in that the former involved the intruding human ear while the latter involved the intruding canine nose,[152] the court seemingly began to draw an analogy between electronic surveillance and sniff searches.[153] But the court went on to resist the full implications of such an analogy by distinguishing between indiscriminate electronic "searches" and the discriminating nose of the trained dog.[154] Thus, apparently ignoring its own strenuous argument in favor of the inviolability of one's luggage,[155] the court then heartily approved of such an effective but subtle investigative tool.[156]

A federal district court similarly considered the propriety of an exploratory sniff search of a student body, not unlike

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149. *Id.* at 1335 (emphasis in original). The court maintained that such a holding was "consistent with the unarticulated reasoning of *United States v. Solis*; . . . *United States v. Bronstein*; and *United States v. Fulero*." *Id.* (footnotes omitted). A more accurate assessment would be that the *Beale* decision was consistent with the practical result of each of these cases. *See infra* text accompanying notes 218-22.

150. *See Beale*, 674 F.2d at 1333. For a discussion of the merits of the plain smell doctrine as applied to canine sniff search cases, see *infra* notes 188-201 and accompanying text.

151. *See* 674 F.2d at 1331-32.

152. *Id.* at 1334.

153. "To paraphrase *Katz*, what Beale sought to exclude when he locked his suitcase was not only the intruding human eye — it was also the intruding canine nose." *Id.*

154. *See id.*

155. The court stated: "One who reposes his personal effects, including contraband, in a locked suitcase, is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities." *Id.*

156. *Id.* The court emphasized the accuracy and reliability of the dogs, which ensure a discriminate and nonintrusive search. *Id.* The court then, however, declared that a dragnet search would be "totally unpalatable," apparently contradicting its own confidence in the nonintrusiveness of the procedure. *Id.* at 1335-36 n.20.

that which was under review in *Doe v. Renfrow*.[157] Unlike its federal circuit court counterpart, the court in *Jones v. Latexo Independent School District*[158] struck down the procedure as unconstitutional. Employing the two-pronged *Katz* test,[159] the court held that "[t]he use of the 'sniffer dog' . . . was a search under the fourth amendment."[160] Further, the search "exceeded the bounds of reasonableness," and was therefore disallowed.[161] In assessing the reasonableness of the search, the court conceded both that "the degree of intrusion committed by [the sniffing dog] is somewhat less extensive than that stemming from a physical search,"[162] and that because the dog "only signalled his trainer if contraband was detected" the intrusion was of a highly discriminate nature.[163] Nonetheless, it was noted that the use of an animal such as there involved — a large German Shepard trained as an attack dog — to sniff the persons of the students, some kindergarten-aged, "may offend the sensibilities" of the searchee more than the use of an electronic eavesdropping gadget.[164] This factor is not present in the common airport drug courier sniff search, in which the subject of the search is an inanimate object such as a suitcase. Only the most sensitive among us would recoil at the thought of one's luggage being nosed by a dog; many persons, however, would protest such an inspection of one's body.

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157. 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

158. 499 F. Supp. 223 (E.D. Tex. 1980). As noted previously, the topic of students' constitutional rights is beyond the scope of this Comment. *See supra* note 131. In *Jones*, the dogs were permitted to sniff the students and the students' automobiles. A dog reacted positively upon sniffing plaintiff, but a subsequent search revealed only a cigarette lighter, a hairclip, and nasal spray. 499 F. Supp. at 228. It was conceded that the dogs were known to positively respond to such noncontraband scents as tobacco, lighter fluid, nonprescription drugs, and other animals' odors. *Id.* at 228 n.2.

159. "First, it must be determined whether a search of constitutional dimension actually occurred. If it is found that a search occurred, the second issue is whether or not the search was reasonable." *Jones*, 499 F. Supp. at 231.

160. *Id.* at 233.

161. *Id.* at 235.

162. *Id.* at 233.

163. *Id.*

164. *Id.* at 233-34. The court noted that, in the process of sniffing the subjects, the dogs frequently touched them; at least one child was reportedly "slobbered on" in the course of being examined. *Id.*

The dog in *Jones* was also employed to sniff the students' automobiles, a scenario more in accord with the typical sniff search case. The court again expressed little tolerance for such an investigation, lamenting that "[t]he search was conducted in a blanket, indiscriminate manner without individualized suspicion of any kind."[165] Presumably, the court would have been more accepting of a canine search based on reasonable suspicion, as it commented that "the state must have a basis for subjecting a particular person to search before intruding upon his privacy."[166]

The court in *Horton v. Goose Creek Consolidated Independent School District*,[167] a case which involved a factual scenario identical to that in *Jones* in all important respects, arrived at a different conclusion. As did the *Jones* court, the court in *Horton* considered both the use of the dogs in searching the students and their use in searching the students' automobiles. Regarding the latter, the court adhered to its earlier decision, *United States v. Goldstein*,[168] in approving of such use. In so doing, the court repeated its adherence to the plain smell rationale.[169] From there, however, the court went on to consider the legitimacy of the sniff searches of the students' persons. In consideration of the personal intrusiveness and offensiveness of being subjected to scrutinization by an animal,[170] it was held that such sniffing constituted an unreasonable search.[171]

The *Horton* decision is logically inconsistent. In approving of the sniff search of inanimate subjects, the court relied on the plain smell theory with little thought; indeed, the court actually allowed that "[an] aroma emanating from *the . . . person* is considered exposed to public 'view' and, therefore, unprotected."[172] No mention of the doctrine is made,

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165. *Id.* at 235.

166. *Id.* at 234.

167. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

168. 635 F.2d 356 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981). *See also* United States v. Viera, 644 F.2d 509 (5th Cir.) (case from same circuit approving sniff search of luggage), *cert. denied*, 454 U.S. 867 (1981).

169. *See Horton*, 690 F.2d at 477.

170. The dogs reportedly touched the students quite frequently while performing the sniff searches. *Id.* at 479.

171. *See id.* at 481-82.

172. *Id.* at 477 (emphasis added).

however, in the court's consideration of the personal sniff search. Apparently, the court overlooked this blatant analytical blunder. The result is an amazingly poorly reasoned opinion.

D. United States v. Place

The United States Supreme Court recently considered the constitutionality of the canine sniff search for the first time. In *United States v. Place*,[173] a 1983 case, the defendant, a suspected drug courier, had his bags detained for ninety minutes while they were being transported to another location to be examined by a detector dog.[174] In considering this detention, the Court held that "the principles of *Terry* and its progeny . . . permit [an] officer to detain . . . luggage briefly to investigate the circumstances that [arouse] his suspicion, provided that [such detention] is properly limited in scope."[175] However, the reversal of defendant's conviction was affirmed because "[the] length of the detention of [his] luggage . . . [precluded] the conclusion that the seizure was reasonable . . . ."[176]

The Court also considered the propriety of conducting a sniff search of defendant's luggage. In approving of the procedure, the Court looked to the discriminate nature and the nonintrusive character of the sniff search; most significant was the fact that "the information obtained is limited. This limited disclosure ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative

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173. 103 S. Ct. 2637 (1983).

174. Defendant flew from Miami to New York's LaGuardia Airport. He was initially detained in Miami International Airport, but no search was conducted. Officials at LaGuardia, however, decided to further investigate, and detained defendant's luggage. The luggage was transported to New York's Kennedy Airport, where there was a trained detector dog. Ninety minutes elapsed between the time the bags were seized and the time the dog sniffed them and exhibited a positive reaction. *Id.* at 2639-40.

175. *Id.* at 2644. Terry v. Ohio, 392 U.S. 1 (1968), established the authority of police officers to make a limited intrusion on less than probable cause. *See generally* Wiseman, *The "Reasonableness" of the Investigative Detention: An "Ad Hoc" Constitutional Test*, 67 MARQ. L. REV. 641 (1984).

176. *Place*, 103 S. Ct. at 2645.

methods."[177] The Court made no mention of the plain smell doctrine, making no attempt to apply it to the case before it.

The deficiency of the *Place* decision is not so much how the issue was decided, but that it was decided at all. The concurring justices properly chided the majority for reaching the issue, charging that "an answer to the question is not necessary to the decision."[178] Justice Brennan particularly regretted that the majority reached the matter, observing that it was not discussed before either the district court or the court of appeals, and was neither briefed nor argued before the Supreme Court.[179]

It is significant to note the narrowness with which the Court worded its conclusion: "[T]he particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a 'search' within the meaning the Fourth Amendment."[180] The decision said nothing of personal searches. Considering the factual scenario with which the Court dealt, it may be reasonable to conclude that the Court meant only to sanction the conventional airport drug courier sniff search.

E. 1984: The Status of the Law

United States v. Place[181] represents the culmination of an overwhelming trend among the courts. Effectively overruling *United States v. Beale*,[182] the *Place* decision has established that, in federal courts, the sniff search of an inanimate object does not constitute a fourth amendment intrusion in the first instance. The sniff search of a person is an issue which is less conclusively settled. Although one federal cir-

177. *Id.* at 2644.

178. *Id.* at 2653 (Blackmun, J., concurring). The issue need not have been considered because the Court had held that the dispossession of respondent's luggage was excessively long, thus deciding the case.

179. *See id.* at 2651 (Brennan, J., concurring). Justice Blackmun indicated that the complexity of the issue rendered an uninformed decision especially unwise. *Id.* at 2653 (Blackmun, J., concurring).

180. *Id.* at 2644-45.

181. 103 S. Ct. 2637 (1983).

182. 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

cuit court has approved of the procedure,[183] that holding has been panned by commentators[184] and rejected by subsequent courts.[185] The Supreme Court has avoided the issue,[186] but at least one member of the Court has expressed his revulsion for the personal search.[187]

It does not seem logical that the sniff search of luggage should be permitted while the sniff search of one's person should be disallowed. It appears clear that such a result is based not on constitutional principles but on a natural distaste for having one's body examined by a dog. However, the validity or invalidity of such a search should not turn upon one's aversion to animals. Rather, both procedures should survive or fall together. It is proper, then, to examine the various justifications for permitting sniff searches, and consider the soundness of the reasoning.

IV. AN ASSESSMENT OF THE LOGIC

A. Plain Smell

Most courts which sanction the use of dogs for criminal investigation depend upon the plain smell doctrine to justify their position.[188] As has been suggested previously, however, plain smell has absolutely no application in the dog sniff cases.

It is commonly repeated that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[189] But to contend that the undetectable odor of a contraband substance is "knowingly exposed to the public" is absurd. An odor which cannot be detected by even the keenest human nose is not exposed to the public —

183. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

184. *See, e.g.*, Gardner, *supra* note 131; Note, *supra* note 131.

185. Horton v. Goose Creek Consol. Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980).

186. *See* Horton v. Goose Creek Consol. Indep. School Dist., 103 S. Ct. 3536 (1983) (denial of certiorari); Doe v. Renfrow, 451 U.S. 1022 (1981) (same).

187. *See* Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of certiorari).

188. *See supra* notes 88-104 and accompanying text.

189. Katz v. United States, 389 U.S. 347, 351 (1967).

unless we mean to include trained canines in our assessment of the "public." At the heart of the plain view — or plain smell — doctrine is the requirement that the matter detected be *openly* exposed. Matter which is utterly undetectable except by a specially trained animal with superhuman olfactory nerves is not so exposed.[190]

The court in *United States v. Bronstein*[191] saw no error in equating the detection of odoriferous marijuana by the sniffing dog with its detection by a sniffing police officer.[192] But the court failed to recognize the obvious fact that the police officer there *could not* smell the drug. As the *Bronstein* concurrence noted, the invocation of plain smell is therefore rendered improper.[193] Nor is it correct to equate the dog with a sense-enhancing device such as a flashlight. The dog is not a sense-enhancer; rather, the dog's nose effectively replaces that of its master. In exploring about with a detector dog, the police officer does not suddenly become able to detect previously undetectable odors; the officer never actually smells anything, but instead relies entirely upon the behavior of the dog. It thus seems proper to equate the trained dog with a wiretap or magnetometer. Each is a non-human method of "detecting the contents of a closed area without physically entering it."[194] While neither is particularly offensive, "each detects without actual entry and without the enhancement of human senses."[195]

The dissenting opinion in *People v. Mayberry*[196] wisely observed the inapplicability of the plain smell doctrine. The justice there, noting that plain view mandates a "knowing" exposure of contraband to the public, observed that "[it cannot] be said that appellant 'knowingly' exposed the contraband to the public, since he, not being a . . . trained dog himself, would not have known that any aroma was escaping

190. The olfactory powers of a dog are said to be eight times that of a human's. *See* United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975), *rev'd*, 536 F.2d 880 (9th Cir. 1976).

191. 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

192. *See id.* at 461.

193. *See id.* at 464 (Mansfield, J., concurring).

194. *Id.*

195. *Id.*

196. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

from his luggage."[197]

Because the sniffing dog constitutes an independent detection device, some courts have appropriately equated its use with the use of electronic surveillance equipment.[198] The molecules of marijuana that unavoidably escape the confines of their housing, and are subsequently sniffed by the canine and elicit its positive reaction, are not unlike the sound waves that are harnassed by a wiretap, or the shifting magnetic fields that are registered by the magnetometer. Each originates "from inside a private area and travel[s] beyond its perimeters,"[199] unexposed to those among us who are not equipped with supersensitive detection devices. Just as "no real distinction can be drawn between the use of specially trained dogs with superior olfactory powers and the use of an electronic instrument which registers a smell which a human cannot perceive,"[200] no distinction can be drawn between the former and an electronic instrument which registers a *sound* which a human cannot perceive.

It appears that the court that would permit canine sniff searches by reasoning that the detection of the odor by the dog is equivalent to its detection by the police officer would likewise be compelled to permit warrantless wiretapping. For is not the detection of the minute sound vibrations by the tap equivalent to the police officer hearing them personally, unaided? As Professor LaFave has responded, "this simply is not so."[201] Considering that there is no logical basis for the application of a plain view variation in dog sniff cases, it is genuinely curious that so many courts have adopted such reasoning.

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197. *Id.* at 350, 644 P.2d at 818, 182 Cal. Rptr. at 625 (Bird, J., dissenting).

198. *See, e.g.*, United States v. Bronstein, 521 F.2d 459, 464 (2d Cir. 1975) (Mansfield, J., concurring); Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233 (E.D. Tex. 1980); People v. Price, 54 N.Y.2d 557, 566, 431 N.E.2d 267, 271, 446 N.Y.S.2d 906, 910 (1981). *But see* United States v. Beale, 674 F.2d 1327, 1334 (9th Cir. 1982) (distinguishing sniffing dog from electronic surveillance equipment), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

199. People v. Price, 54 N.Y.2d 557, 566, 431 N.E.2d 267, 271, 446 N.Y.S.2d 906, 910 (1981) (Meyer, J., concurring).

200. State v. Elkins, 47 Ohio App. 2d 307, __, 354 N.E.2d 716, 718 (1976).

201. W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(f), at 283 (1978).

B. A Discriminate and Nonintrusive Search

Alternatively or in conjunction with the plain smell doctrine, courts frequently justify their approval of sniff searches by pointing to the discriminate and nonintrusive nature of the procedure.[202] Unlike such indiscriminate surveillance tools as wiretaps and magnetometers, the sniff search ideally reveals only the presence or absence of contraband. Thus, noncontraband items remain hidden and inviolable. Similarly, unlike intrusive methods of searching, as when luggage is opened and sorted through, the sniff search is exceedingly nonintrusive and convenient. In the context of an airport baggage sniff search, most people are commonly left unaware that their possessions have ever been examined.[203]

However, it must be remembered that the essence of a fourth amendment intrusion is that an area which one rightly reserves as private is encroached upon.[204] Although the sniff search of an object "constitutes [not] a particularly offensive intrusion,"[205] still, such an examination detects hidden objects that the searchee regards as private. A magnetometer, though similarly nonintrusive, is not rendered any less a search by virtue of its nonintrusiveness.[206] "The important factor is not the relative accuracy of the sensing device but the fact of an intrusion into a close[d] area otherwise hidden from human view, the hallmark of any search."[207]

The essence of surveillance technology is the accurate detection of secreted matter in a nonintrusive manner. Thus, in *Katz v. United States*,[208] the defendant's conversations were overheard in the most nonintrusive way that science

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202. *See, e.g.*, United States v. Place, 103 S. Ct. 2637, 2644 (1983); United States v. Goldstein, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); People v. Mayberry, 31 Cal. 3d 335, 342, 644 P.2d 810, 813, 182 Cal. Rptr. 617, 620 (1982).

203. *See, e.g.*, United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975) (dogs responded to contraband at distance of 25 feet; need not have touched the target at all), *rev'd*, 536 F.2d 880 (9th Cir. 1976).

204. *See* United States v. Bronstein, 521 F.2d 459, 464 (2d Cir. 1976) (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918 (1976).

205. *Id.*

206. *See supra* note 11.

207. United States v. Bronstein, 521 F.2d 459, 464 (2d Cir. 1976) (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918 (1976).

208. 389 U.S. 347 (1967).

allowed. Still, though, this invasion was disallowed because it intruded upon the defendant's reasonable expectation of privacy. Surely, then, "the determination of whether the fourth amendment applies to a particular government activity depends very little on the type of activity itself. . . . The primary focus is upon the interest to be protected rather than the means of violating it."[209]

It is commonly argued that the sniff search is somehow legitimized because its nature is such that only those who possess contraband are inconvenienced, while persons free of contraband endure little or no inconvenience. Implicit in this reasoning is the presumption that "guilty" people have less right to inviolability from unlawful searches and seizures than do "innocent" people. This is incorrect. The *Katz* decision did not suggest that a person's reasonable expectation of privacy evaporates when contraband rather than noncontraband is secreted. Indeed, the exclusionary rule itself would seem to suggest an opposite conclusion, as its purpose is to ensure that fourth amendment protections "[reach] all alike, whether accused of crime or not . . . ."[210]

The argument that sniff searches are permissible because of their lack of intrusion and high degree of accuracy may be reduced to the contention that the limited nature of the invasion justifies a minimal abrogation of fourth amendment rights. The *Katz* Court rejected such a contention. The Court there declared that a search will not be allowed "upon the sole grounds that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."[211] The *Katz* decision was significant in that it refused to sanction a fourth amendment violation merely because of its lack of intrusion; the sniff search cases reject the *Katz* standard by approving of a search *precisely* because of its nonintrusiveness.

It has been proposed that a perfectly accurate and completely nonintrusive detector of contraband — a "divining

209. People v. Mayberry, 31 Cal. 3d 346, 348, 644 P.2d 810, 817, 182 Cal. Rptr. 617, 624 (1982) (Bird, J., dissenting).

210. Weeks v. United States, 232 U.S. 383, 392 (1914).

211. *Katz*, 389 U.S. at 356-57.

rod" of crime — would pose no fourth amendment violation.[212] Be that as it may, the very author of this proposition allows that it does not mandate the carte blanche use of marijuana-sniffing dogs: "To the extent that the dog is less than perfectly accurate, innocent people run the risk of being searched. Additionally, the very act of being subjected to a body sniff by a German Shepard may be offensive at best . . . to the innocent sniffee."[213] Thus, given the fallibility of the dogs' capabilities, all assurances of accuracy, discrimination, and nonintrusiveness are for naught.

The thirteen year-old plaintiff in *Doe v. Renfrow*,[214] innocent as she was, surely was quite unimpressed with the accuracy of the animal that examined her person; the dog having erred, Doe then saw the assurance of nonintrusiveness vanish.[215] The moment a dog so errs, the innocent searchee is subjected to an examination of a highly indiscriminate and intrusive nature. The trained canine is not a divining rod of crime; it is merely an ignorant animal drilled in a simple task.[216] The intervention of odors more intriguing than contraband — such as that of a potential mate or a hated feline[217] — render its strict training forgotten. The courts are mistaken, then, in considering the detector dog an infallible indicator of crime. In fact, the dogs are inclined to err, thus rendering boasts as to their accuracy, discrimination, and nonintrusiveness untrue.

C. On Reasonable Suspicion

A minority of courts have held that while a sniff search does constitute a fourth amendment intrusion, the intrusion is reasonable and allowable if undertaken with reasonable

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212. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246 (1983).

213. *Id.* at 1246-47 (footnotes omitted).

214. 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

215. *See supra* notes 123-31 and accompanying text.

216. *See* Comment, *supra* note 10, at 414-18 (discussing the training that the dogs are subjected to).

217. *See* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 228 n.2 (E.D. Tex. 1980) (dogs known to mistakenly respond to a variety of innocuous odors).

suspicion.[218] The basis for this position is the belief that, because the sniff search is minimally intrusive, an officer's "founded" or "articulable" suspicion provides adequate fourth amendment protection.[219]

The courts that adhere to this rationale — most notably *United States v. Beale*[220] — permit what is determined to be a fourth amendment search to proceed with neither prior judicial approval nor a finding of probable cause. The practical result of this is not unlike the result that issues from those courts which fail to recognize the sniff search as a fourth amendment intrusion in the first instance.[221] The same protection, or lack of protection, is provided for in either case: persons are liberally subjected to sniff searches without a showing of probable cause. It appears that the courts are unanimous in reflecting a decided unwillingness to relinquish such an effective investigatory tool as the trained detector dog.[222]

Clearly, then, the *Beale* court was not so revolutionary in holding that the canine sniff constitutes a fourth amendment intrusion; the practical effect is unchanged. Where prior courts erred in failing to recognize the sniff search as a fourth amendment intrusion in the first instance, thus never reaching the issue of reasonableness, the *Beale* court erred in failing to recognize the unreasonableness of the search.

V. A Proposed Analysis

The constitutionality of canine sniff searches must be examined according to the rule established in *Katz v. United States*.[223] Although most courts concede this much, few apply the *Katz* analysis properly, thus allowing the conclusion

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218. *See, e.g.*, United States v. Beale, 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984); People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973); State v. Elkins, 47 Ohio App. 2d 307, 354 N.E.2d 716 (1976).

219. *See* United States v. Beale, 674 F.2d 1327, 1335 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

220. 674 F.2d 1327 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984). *See generally* Note, *Re-examining the Use of Drug-Detecting Dogs Without Probable Cause*, 71 GEO. L.J. 1233 (1982-83).

221. *See supra* notes 88-134 and accompanying text.

222. *See* W. LAFAVE, *supra* note 201, § 2.2(f), at 286-87 (1978).

223. 389 U.S. 347 (1967).

that sniff searches are not violative of the fourth amendment. A proper application of *Katz* renders the opposite conclusion.

As established in the *Katz* decision and recounted in subsequent opinions,[224] fourth amendment analysis entails a two-pronged inquiry. First, it must be determined whether the intrusion complained of constitutes a fourth amendment search.[225] The *Katz* decision has been interpreted as mandating that a governmental intrusion constitutes a fourth amendment search if it violates the subject's reasonable expectation of privacy. An expectation of privacy is reasonable if it is one which society is prepared to recognize.[226]

If it is determined that there did occur a fourth amendment intrusion, it must then be asked whether the intrusion was reasonable;[227] the fourth amendment proscribes only *unreasonable* searches and seizures.[228] The *Katz* Court explicitly tied the warrant clause to the reasonableness requirement of the fourth amendment, thus establishing that a search is "*per se* unreasonable under the Fourth Amendment"[229] if it is not accompanied with prior judicial approval — "subject only to a few specifically established and well-delineated exceptions."[230]

A. Is the Dog Sniff a Search?

People expect that the things they carry about, concealed from public view, will be treated as private. They do not anticipate that their personal effects will be examined in search of crime, unless the requirements of the fourth amendment have been met. The canine sniff search performs such an investigatory function; the dog's nose effectively delves into one's pockets, or purse, or locker,[231] and

224. *See supra* note 34.
225. *See Katz*, 389 U.S. at 352-53.
226. *See id.* at 361 (Harlan, J., concurring).
227. *See id.* at 354-57.
228. See *supra* note 2 for full text of the fourth amendment.
229. *Katz*, 389 U.S. at 357.
230. *Id.*
231. *See* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 233 (E.D. Tex. 1980) ("dog's inspection was virtual equivalent to a physical entry into the students' pockets and personal possessions").

"broadcasts its incriminating contents to the authorities."[232] Thus, the canine sniff is equivalent to the wiretap or magnetometer. Because the sniff search "discloses hidden items within areas where there is a normal expectation of privacy,"[233] it is a fourth amendment intrusion.

The only argument which would persuade an opposite conclusion is that which contends that because of the sniff search's accuracy, discrimination, and nonintrusiveness, it is somehow less of a search.[234] This argument supposes a perfectly accurate, perfectly discriminate, and highly nonintrusive procedure.[235] As has been shown, however, the trained canine can boast of none of these qualities.[236] Because the dogs err, the inevitable follow-up investigations render the procedure indiscriminate and intrusive.[237] Thus the innocent are threatened and require fourth amendment protection.[238]

B. Is the Search Reasonable?

The reasonableness of a search cannot be determined by a consideration of its relative intrusiveness, as has been attempted by some courts.[239] On the contrary, the *Katz* decision established that a fourth amendment search is reasonable only if it is supported by a warrant, subject to a few narrow exceptions.[240] A sniff search, then, is unreasonable and therefore unconstitutional if it is conducted without a warrant, unless the search comes within one of the recognized exceptions to the warrant requirement.[241]

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232. United States v. Beale, 674 F.2d 1327, 1334 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984).

233. United States v. Bronstein, 521 F.2d 459, 464 (2d Cir. 1976) (Mansfield, J., concurring), *cert. denied*, 424 U.S. 918 (1976).

234. *See supra* notes 213-17 and accompanying text.

235. *See* Loewy, *supra* note 212, at 1246.

236. *See supra* notes 213-17 and accompanying text.

237. *See supra* text accompanying notes 127-28.

238. *See* Loewy, *supra* note 212, at 1246.

239. *See, e.g.*, United States v. Beale, 674 F.2d 1327, 1334 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3529 (1983), *aff'd*, 736 F.2d 1289 (1984); State v. Elkins, 47 Ohio App. 2d 307, 354 N.E.2d 716, 719 (1976).

240. *See Katz*, 389 U.S. at 357.

241. These exceptions to the fourth amendment warrant requirement are: (1) plain view; (2) exigent circumstances; (3) automobile search; (4) search incident to an arrest; (5) border search; (6) inventory search; (7) consent search; (8) investigative

Of these exceptions,[242] it appears that three in particular would frequently apply in sniff search incidents. Clearly, if the subject consents, the search may constitutionally proceed. Likewise, a sniff search may be employed incident to a valid arrest, as that exception allows the police officer to search the arrestee and the area within the arrestee's immediate control.[243] Finally, under the exigent circumstances exception, police are permitted to conduct a search, upon a finding of probable cause, in order to prevent the destruction of evidence. A police officer may be justified by exigent circumstances in conducting a sniff search of a suspect's luggage.[244]

It is evident, then, that this useful investigative tool would not be rendered obsolete by a finding that it is subject to fourth amendment strictures. Rather, its use would merely be confined by constitutional limitations.[245]

VI. CONCLUSION

With *Katz v. United States*[246] the United States Supreme Court established that fourth amendment protections extend to nontrespassory and nonintrusive invasions upon one's personal inviolability.[247] The *Katz* Court declared that a search cannot be sanctioned "upon the sole grounds that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least in-

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detention search; and (9) search of regulated business. *See* Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-82*, 71 GEO. L.J. 339, 369-96 (1982-83).

242. *See supra* note 241.

243. In United States v. Chadwick, 433 U.S. 1 (1977), the Supreme Court ruled that the search of a container was not incident to the arrest if such container was in the control of the police. *Id.* at 15. However, the Court then went on to permit the seizure of such containers, reasoning that the nature of a seizure was much less intrusive than the nature of a search. *Id.* It seems, then, that similar reasoning would apply in the case of dog sniffing, that is, it would be permissible incident to an arrest, as its nature is less intrusive than a conventional search. *See* Note, *supra* note 220, at 1249-50.

244. *See* Note, *supra* note 220, at 1249-50.

245. *Cf.* Katz v. United States, 389 U.S. 347, 358-59 (1967) (ruling that warrantless wiretapping is a fourth amendment intrusion). Clearly, the *Katz* decision has not resulted in the obsolescence of wiretapping.

246. 389 U.S. 347 (1967).

247. *See supra* notes 24-41 and accompanying text.

trusive means . . . ."[248] Unfortunately, the rule of *Katz* has largely been ignored by subsequent courts that have considered the constitutionality of canine sniff searches.

These courts are persuaded that the relative inoffensiveness of the sniff search renders it acceptable. In support of this conclusion, the courts propose, alternatively or conjunctionally, a plain smell analysis and an argument establishing the discrimination and nonintrusiveness of the sniff search procedure. However, both of these propositions are mistaken. The correct result is that the canine sniff search does constitute a fourth amendment intrusion and must therefore proceed according to the strictures of that amendment. An opposite conclusion would too often subject the innocent to unreasonable searches and seizures, a prospect which the fourth amendment was intended to prevent.[249]

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248. *Katz*, 389 U.S. at 356-57.
249. *See* Loewy, *supra* note 212, at 1246-47.