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Fourth Amendment Search and Seizure Requirements as Applied to Sniffing Investigations by Police Dogs: People v. Mayberry

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CASE NOTES

Fourth Amendment Search and Seizure Requirements as Applied to Sniffing Investigations by Police Dogs: *People v. Mayberry*

Challenges to police investigative activities in criminal proceedings often present constitutional questions concerning the fourth amendment's search and seizure restraints.[1] One novel investigative technique that has been recently challenged is the use of dogs trained to smell illegal drugs and other contraband.[2] Although using dogs in police work is not new,[3] the question of whether sniffing by police dogs constitutes a search remains controversial. In *People v. Mayberry*[4] the California Supreme Court ruled that dragnet-type investigations by police using trained dogs to sniff luggage do not constitute a "search" and that therefore the constitutional limitations imposed by the fourth amendment cannot be invoked.[5] The *Mayberry* decision, however, distorts search and seizure case law precedent and opens a door to the abuse of personal privacy.

I. THE *Mayberry* CASE

Between 1977 and 1980,[6] San Diego police narcotics agents regularly checked all luggage coming off Florida[7] flights for ille-

1. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

2. The method used to train dogs for this purpose is described in 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, 414-15 (1976).

3. *See id.* at 414.

4. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

5. *Id.* at 338, 644 P.2d at 811, 182 Cal. Rptr. at 618. "Dragnet" in this context means without particularized suspicion.

6. Brief for Respondent at 3, People v. Mayberry, 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

7. Flights from Florida were chosen for the checks because of a "high" frequency of

gal drugs. A qualified[8] narcotics dog was allowed to sniff each piece of baggage before the baggage was moved to the passenger claim area.[9] On August 8, 1979, "Corky," a narcotics dog, "alerted"[10] to the defendant's suitcase. An identifying tape was placed on the suitcase, and it was transported to the baggage claim area with the rest of the luggage from the incoming flight.[11] When Mr. Mayberry picked up the suitcase, a police officer identified himself and requested that Mayberry accompany him to an airport office. After being informed of Corky's alert, Mayberry consented to a search of his luggage. When the suitcase was opened, officers found marijuana.[12]

Mayberry was charged with three counts of marijuana possession. He moved to suppress evidence of the marijuana found in his baggage, contending that Corky's smelling of his baggage constituted an unreasonable exploratory search. His motion was denied, and he pleaded guilty to transporting marijuana.[13] The trial court found that the law enforcement officers and Corky were fully trained in narcotics detection, had reason to believe narcotics could be found, but had no specific suspicion regarding the defendant.[14]

The Fourth District Court of Appeal reversed the denial of defendant's motion to suppress and gave directions to dismiss the action.[15] The court held that the actions of the narcotics

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narcotics seizures in luggage from such flights. In 1979, 56% of drug seizures at the San Diego airport involved incoming flights originating in Florida. Flights on which drugs were found, however, represented only about three-fourths of one percent of all Florida to San Diego flights. 31 Cal. 3d at 340, 644 P.2d at 812, 182 Cal. Rptr. at 619.

8. Prior appellate cases require adequate demonstration of a dog's training and experience in narcotics detection before the dog's reaction to a particular suitcase or other object is admitted into evidence. *See, e.g.*, People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977); People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973).

9. 31 Cal. 3d at 336-37, 644 P.2d at 811-12, 182 Cal. Rptr. at 618-19.

10. A narcotics dog "alerts" by barking, biting, scratching, or pawing at a container.

11. 31 Cal. 3d at 339, 644 P.2d at 812, 182 Cal. Rptr. at 619.

12. *Id.*

13. *Id.* at 338, 644 P.2d at 811, 182 Cal. Rptr. at 618.

14. *Id.* at 339-40, 644 P.2d at 812, 182 Cal. Rptr. at 619.

15. People v. Mayberry, 117 Cal. App. 3d 360, 172 Cal. Rptr. 629 (1982). CAL. PENAL CODE § 1538.5(m) (West 1982) allowed Mayberry to appeal the denial of his motion to suppress the evidence of the marijuana discovery despite his guilty plea.

> A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

sniffing dog constituted a search, and then proceeded to consider whether the search was reasonable. Noting that use of a narcotics sniffing dog must be based on "some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location,"[16] the court concluded that the police lacked reasonable suspicion and that Corky's efforts were therefore unreasonable and "unlawful."[17]

The California Supreme Court vacated the holding of the court of appeal and reinstated the decision of the trial court.[18] The majority opinion recognized a consistent line of lower California decisions holding dog sniffing to be a "search" for purposes of the fourth amendment.[19] The court, however, ignored these California decisions and relied instead on nine federal cases to support its holding that the use of police dogs during drug investigations does not constitute a search.[20] The court offered two reasons for its holding. First, unlike mechanical investigatory devices (magnetometers, telescopes, recorders, etc.) which intrude in sweeping and indiscriminate fashion into one's

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Id.

16. People v. Mayberry, 117 Cal. App. 3d 360, 361, 172 Cal. Rptr. 629, 630-31 (quoting People v. Evans, 65 Cal. App. 3d 924, 933, 134 Cal. Rptr. 436, 445 (1977)). The court went on to say that finding narcotics on 14 out of 1,825 flights from Florida to San Diego did not amount to "reasonable suspicion." 117 Cal. App. 3d at 361, 172 Cal. Rptr. at 631.

17. *Id.* at 361, 172 Cal. Rptr. at 631.

18. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617.

19. *Id.* at 340-41, 644 P.2d at 812-13, 182 Cal. Rptr. at 619-20. While the majority refused to follow the California precedent, they did recognize that "these cases have invalidated the use of drug sniffing dogs in situations similar to *Mayberry* 'unless preceded by prior information or a reasonable suspicion that narcotics may be present in the subject area.'" *Id.*

The California cases the court cited were 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); People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977); People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975); People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973).

20. 31 Cal. 3d at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620. The federal cases on which the court relied were United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *reh'g denied*, 635 F.2d 582 (1980), *cert denied*, 451 U.S. 1022 (1981); United States v. Venema, 563 F.2d 1003 (10th Cir. 1977); United States v. Race, 529 F.2d 12 (1st Cir. 1976); United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459 (2d Cir.), *cert. denied*, 425 U.S. 918 (1975); and United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974). Also cited were Annot., 31 A.L.R. FED. 931 (1977); Comment, *supra* note 2; Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976).

private affairs and personal effects, "police dogs are trained to 'alert' or react *only to contraband.*"[21] Second, "although an airline passenger may reasonably anticipate that the *contents* of his luggage will not be exposed in the absence of consent or a search warrant, 'the passenger's reasonable expectation of privacy does not extend to the airspace surrounding that luggage.' "[22] In a spirited dissent, Chief Justice Bird challenged the majority for following federal courts whose decisions on the "issue have been justly criticized as 'short on reasoning and unsound.' "[23] She argued that by saying no "search" is involved, the majority allows government use of trained dogs without constitutional restraints.[24] Chief Justice Bird specifically attacked the conclusion that sniffing by police dogs is not a search because the dogs "alert" only to narcotics:

> The fact that the canine's search is more particularized and discriminate than that of the magnetometer is not a basis for legal distinction. The important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.[25]

Thus she decided that sniffing by narcotics-detecting dogs constitutes a search within the meaning of the fourth amendment. Then, stressing the "general rule"[26] that fourth amendment intrustions must be justified by probable cause subject to a few narrow exceptions,[27] Chief Justice Bird concluded that the search was unreasonable.[28]

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21. 31 Cal. 3d at 342, 644 P.2d at 813, 182 Cal. Rptr. at 620 (emphasis in original).

22. *Id.* at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621 (quoting United States v. Goldstein, 635 F.2d 356, 361 (5th Cir. 1981)) (emphasis in original).

23. *Id.* at 344, 644 P.2d at 815, 182 Cal. Rptr. at 622 (Bird, C.J., dissenting) (quoting 1 W. LAFAVE, SEARCH AND SEIZURE 283 (1978)).

24. *Id.*

25. *Id.* at 344, 644 P.2d at 819, 182 Cal. Rptr. at 626 (quoting United States v. Bronstein, 521 F.2d 459, 464 (2d Cir.), *cert. denied*, 425 U.S. 918 (1975)).

26. *Id.* at 354, 644 P.2d at 821, 182 Cal. Rptr. at 628 (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).

27. The narrow exceptions include border searches, administrative searches, and airport searches for weapons. *See* Dunaway v. New York, 442 U.S. 200 (1979); People v. Hyde, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974).

28. 31 Cal. 3d at 353-55, 644 P.2d at 820-22, 182 Cal. Rptr. at 627-29. Chief Justice Bird weighed the factors in favor of a finding of reasonableness (the search was based on police policy; no individual police discretion was allowed; the search was directed at domestic flights originating in Florida with a history of drug traffic; the search was directed at inanimate and unattended objects; and the search was limited in scope) against the factors in favor of a finding of unreasonableness (the search was conducted without a

II. ANALYSIS

The California Supreme Court in *Mayberry* failed to analyze correctly fourth amendment search and seizure principles when it held that sniffing by police dogs is not a search. By thus excusing police from fourth amendment restraints in situations similar to *Mayberry*, the court jeopardized individual rights of personal privacy.

A. Fourth Amendment Search and Seizure

The fourth amendment declares that "[t]he 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."[29] Thus, in determining those situations in which the fourth amendment applies, two simple but fundamental threshold questions must be posed. Has a search within the meaning of the fourth amendment taken place? If so, was the search reasonable?

1. A search within the meaning of the fourth amendment

In *Katz v. United States*,[30] the United States Supreme Court put an end to the doctrine of "constitutionally protected areas,"[31] holding that the test applied to determine when a search has occurred is whether the government "violated the privacy upon which . . . [a defendant] justifiably relied."[32] The presence or absence of a physical intrusion is not of constitutional significance, since the amendment "protects people, not places."[33] What a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[34]

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warrant; the officers had no particular information about defendant's luggage; the officers' experience showed that the chance of finding narcotics in luggage was three-fourths of one percent).

29. U.S. CONST. amend. IV.

30. 389 U.S. 347 (1967).

31. *Id.* at 351 n.9 (1967). *Cf.* Silverman v. United States, 365 U.S. 505, 510-12 (1961).

32. 389 U.S. at 353. Justice Harlan, concurring, described the court's test as having two requirements: "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.'" *Id.* at 361 (Harlan, J., concurring).

33. *Id.* at 351.

34. *Id.* at 351-52.

Instead of considering Mayberry's expectation of privacy, the *Mayberry* court side-stepped *Katz*[35] by analyzing the intrusiveness of the police action. "[O]ne who secrets illegal narcotics in his suitcase has no [protectable] privacy interest in those narcotics, nor any legitimate objections to an unintrusive method of detection."[36] The *Mayberry* court rationalized that federal cases have concluded that dog-sniffing investigations of the Mayberry type are not intrusive of anyone's reasonable expectation of privacy because such procedures involve no physical entry into anyone's possessions.[37]

The United States Supreme Court has clearly recognized an expectation of privacy with respect to the contents of private baggage.[38] A more difficult question arises, however, when the odor of the contents of private baggage pervades the airspace surrounding the container. Undisputedly, had one of the police officers smelled the illegal narcotics, no search would have occurred.[39] Several courts have extended this rule by holding that an agent's use of a dog's more acute olfactory sense cannot convert a sniff into a search.[40] This extension, however, is inconsistent with the rationale behind the rule. When the odor of property concealed in personal luggage pervades the air surrounding the luggage, it is as though the baggage were opened for all to view its contents. For example, unwrapped limburger cheese reveals its location to the public. But this is true only because the public can smell the odor. When the odor of a substance is undetectable by human senses, even if it can be proven to exist outside the container, the owner has a reasonable expectation of privacy that the contents of the package will go undetected.[41]

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35. It is interesting to note that not once does the majority cite the *Katz* decision, perhaps the most important fourth amendment decision of the past generation. *See generally*, Peebles, *The Uninvited Canine Nose and the Right of Privacy: Some Thoughts on* Katz *and Dogs*, 11 GA. L. REV. 75 (1976).

36. 31 Cal. 3d at 342, 644 P.2d at 813, 182 Cal. Rptr. at 620.

37. *Id.*

38. *See* United States v. Chadwick, 433 U.S. 1 (1977).

39. United States v. Goldstein, 635 F.2d 356, 361 (5th Cir. 1981); United States v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980).

40. 635 F.2d at 361; United States v. Bronstein, 521 F.2d 459, 461 (2d Cir.), *cert. denied*, 425 U.S. 918 (1975).

41. People v. Campbell, 67 Ill. 2d 308, 367 N.E.2d 949 (1977). "It is in our judgment immaterial whether . . . [the] action is characterized as a search, 'a monitoring of the air' or described in some other manner. The fundamental and decisive inquiry is whether the conduct in using the dogs was reasonable." *Id.* at 314-15, 367 N.E.2d at 952. This type of misplaced emphasis on the reasonableness of the search, rather than on the reasonableness of the defendants' expectation of privacy which is being violated, is common among

This reasonable expectation of privacy does not exist for the owner of the luggage which contains the strong smelling cheese since it can readily be smelled by anyone near the baggage. Hence, when the odor is smelled no privacy right is violated and no search occurs. This is not true for the owner of the luggage, the contents of which cannot be detected by human senses. It is reasonable to assume that since no human could smell the contents of the baggage, the contents would remain private. Thus, using investigatory aids to detect luggage contents in which a person has a reasonable expectation of privacy must constitute a search.[42]

In *Horton v. Goose Creek Independent School District*,[43] the Fifth Circuit, finding "an abundance of precedent but scant guidance,"[44] declared, "Certain minimal intrusions, though perhaps not expected, cannot be completely unexpected. Nor are they intolerable. But the run of the mill intrusion does not reveal such information and certainly would not reveal the scent of one seed of marijuana, as would the sniff of the trained dog."[45]

According to the *Horton* court, "[t]he proper way to determine whether the use of a given aid to perception renders an investigation a search, . . . is to consider both whether the aid permits an officer to detect data otherwise imperceptible to human senses and whether the aid is one generally in use in society."[46] Although *Horton* was decided after *Mayberry*, the *Horton* court merely applied a formula used by the other federal courts[47] and widely recommended by commentators.[48] This

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such cases.

42. United States v. Beale, 674 F.2d 1327 (9th Cir. 1982). "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.* at 1334.

43. 677 F.2d 471 (5th Cir. 1982).

44. *Id.* at 475.

45. *Id.* at 480.

46. *Id.* at 478.

47. *See* United States v. Beale, 674 F.2d 1327 (9th Cir. 1982); Jones v. Latexo Indep. School Dist., 499 F. Supp. 233 (E.D. Tex. 1980).

48. *See* 1 W. LAFAVE, SEARCH AND SEIZURE 283 (1978); Gardner, *Sniffing For Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980); Comment, *Search and Seizure in the Public Schools: Are Our Children's Rights Going to the Dogs?* 24 ST. LOUIS U.L.J. 119 (1979); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976); Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L.F. 1167, 1197-1201.

formula is consistent with *Katz* and provides a balance: the individual rights of privacy are protected, yet police investigations are not unduly restrained.

Under this formula, the defendant's right of privacy in the contents of his luggage is maintained to the extent that another human being using his natural senses could not discover the contents of the baggage. The odor detected by trained dogs is fainter than that which humans could possibly perceive; moreover, although dogs have long been used in police work,[49] it cannot be said that society expects dogs to be used to inspect airport luggage. This does not mean that the defendant has an absolute right to conceal contraband in his luggage. But the discovery of any contraband so concealed which the police cannot detect unaided by dogs must constitute a search within the meaning of the fourth amendment.

2. Reasonableness of a search under the fourth amendment

Because the California Supreme Court held that dog sniffing does not constitute a search, it did not reach the issue of whether such a technique for discovering contraband was reasonable under the fourth amendment. There is scant precedent considering the reasonableness, and thus the legality, of dragnet-type police searches using trained dogs. Only two states and one federal court of appeals have decided the issue.

The Washington Court of Appeals in *State v. Wolohan*[50] was the first to decide that indiscriminate sniffing by a police dog of packages awaiting shipment at a Greyhound bus terminal was not an "illegal search."[51] The *Wolohan* court had difficulty, however, as did the *Mayberry* court, separating the issue of whether the police action amounted to a search from the issue of whether the search was reasonable, and concluded that "the sniffing of the dog was not an illegal search, but more properly his alert comes within the 'plain-smell doctrine'. . . . However, even if the sniffing of the dog were construed to be a search, it was a reasonable search."[52]

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49. *See* United States v. Solis, 536 F.2d 880, 881 (9th Cir. 1976) (a trained dog's sense of smell is more than eight times as sensitive as a human's).

50. 23 Wash. App. 813, 598 P.2d 421 (1979).

51. *Id.* at 820, 598 P.2d at 425. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.2(f) at 51 n.185 (Supp. 1982) (describing *Wolohan*'s result as "outrageous").

52. 23 Wash. App. at 817, 598 P.2d at 425. It is difficult to know what the Washington Court of Appeals meant by "illegal search." The context implies that the sniffing by

Although the *Wolohan* court seemed to hold that no search occurred, which as previously shown is clearly inappropriate since the contraband could be discovered only by a drug-sniffing dog and not by a police officer, the court did thoughtfully consider the reasonableness of the police action. Two reasons were given in *Wolohan* for a finding of reasonableness. First, "[c]ommon carriers have the right to protect themselves and not be the unwitting carriers of contraband and may search parcels if they have reason to believe they contain contraband."[53]

The facts of *Wolohan* make this rationale inapplicable to *Mayberry*. In *Wolohan*, the defendant was using the common carrier not for personal transportation, as in *Mayberry*, but to deliver packages, as he would use a parcel service. Since the delivery company's purpose in *Wolohan* was to transport second class mail not related to any passenger, the carrier had, as the court stated, a right to protect itself from acting as the conduit in the commission of a crime. The right to search for contraband in personal luggage is substantially more restricted.[54]

The second reason given in *Wolohan* for the finding of reasonableness was that the "sniff of a bag or parcel by a dog in a baggage or parcel area is a minimal and limited intrusion."[55] This, it will be shown, is a critical element in the fourth amendment formula for determining reasonableness.

The Arizona Supreme Court in *State v. Morrow*[56] also had difficulty separating the issue of whether a search occurred from the issue of the reasonableness of the police action. Thus the Arizona court, like the *Mayberry* court, decided that the police action was not a search, emphasizing the intrusiveness of the in-

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the police dog was not a search within the meaning of the fourth amendment. However, the "plain-smell doctrine" is merely an exception to the requirement that police obtain a search warrant before conducting a search and is inapplicable when no search occurs. The plain-smell doctrine was advanced as a support for the court's holding in *Mayberry*, but was refuted by Chief Justice Bird. She said that since the " 'sniffer dog' actually perceives odors *undetectable to humans*, much as an electronic listening device picks up sounds inaudible to the human ear," this "case [is] wholly outside the pale of the 'plain smell' theory which the majority is attempting to invoke." 31 Cal. 3d at 352, 644 P.2d at 820, 182 Cal. Rptr. at 627 (Bird, C.J., dissenting) (quoting Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 236 (E.D. Tex. 1980)) (emphasis added by Chief Justice Bird).

53. 23 Wash. App. at 817, 598 P.2d at 424.

54. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Ross, 102 S. Ct. 2157 (1982).

55. 23 Wash. App. at 817, 598 P.2d at 424.

56. 128 Ariz. 309, 625 P.2d 898 (1981).

vestigation rather than the defendant's expectation of privacy.[57] However, the court stressed the reasonableness of the police investigation when it stated, "[w]here there is no violation of the integrity of the bag, what is seen, heard, or smelled without actually penetrating or intruding into the the bag may be used as a basis for further investigation."[58] The intrusiveness of the detection method may, as the *Morrow* court rightly stated but wrongly applied, be used to determine the reasonableness of the search.

The Fifth Circuit's *Horton* decision is the most recent opinion analyzing the reasonableness of dragnet-type investigations using police dogs.[59] Although *Horton* dealt with the use of dogs in and around a public school, its reasoning, in part, is applicable to *Mayberry*. The Fifth Circuit in *Horton* held:

> Under the balancing procedure of *Terry*, [need to search v. infringement on personal privacy right[60]] when there is some level of articulable individualized suspicion, we think that the need for the search outweighs the intrusiveness, and canine sniffing of property is a reasonable procedure under the fourth amendment. When there is no individualized suspicion, though, the balance tips in the opposite direction. The intrusiveness of the search is unchanged, but the justification is diminished, if not eliminated. When there if *no* reason to believe that a search will produce evidence of crime, beyond the knowledge that some people are criminals and that searching everyone's property will identify the criminal few, the Constitution does not tolerate intrusions on protected privacy, even when those intrusions are only "limited searches."[61]

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57. *Id.* at 312-13, 625 P.2d at 901-02.

58. *Id.* at 313, 625 P.2d at 902. Chief Justice Bird recognized this problem in *Mayberry*. "The nature of the activity may be relevant to a determination of *reasonablenss*, but, in determining Fourth Amendment coverage as a threshold matter, the primary focus is upon the interest to be protected, rather than upon the means of violating it." 31 Cal. 3d at 348-49, 644 P.2d at 817, 182 Cal. Rptr. at 624 (Bird, C.J., dissenting) (emphasis in original).

59. 677 F.2d 471 (5th Cir. 1982).

60. Terry v. Ohio, 392 U.S. 1 (1968) (investigatory stop to search for weaspons permissible if founded on "articulable suspicion"). While no other court has decided whether dragnet sniffing by dogs is reasonable, several courts have held that such sniffing, because it is nonintrustive, is reasonable if the police officer has probable cause or at least reasonable suspicion. *See* United States v. Waltzer, 682 F.2d 370 (2d Cir. 1982); United States v. Klein, 626 F.2d 22 (7th Cir. 1980) ("[W]e need [not] confront the thorny problem of an indiscriminate, dragnet-type sniffing expedition." *Id.* at 27); United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459, (2d Cir.), *cert. denied*, 425 U.S. 918 (1975).

61. 677 F.2d at 481-82.

In her dissenting opinion in *Mayberry*, Chief Justice Bird noted that the California Supreme Court expressed "grave doubt" whether under *Terry*, the six percent possibility of discovering weapons was enough to justify a search.[62] She concluded that police predictions of a three-quarters of one percent chance that someone's checked luggage might contain drugs would clearly fall short of the standard.[63]

To require that police investigations be limited in some fashion is not unreasonable. However, by holding that police dog investigations of personal luggage do not amount to a search, *Mayberry* releases police in similar situations from the fourth amendment standard of reasonableness and thereby opens a door to the abuse of personal privacy. Chief Justice Bird recognized that

> the totally unrestrained use of trained dogs to sniff out the contents of areas where there is a justifiable expectation of privacy . . . tends to undermine "the kind of open society to which we are committed." . . . [N]othing "invoke[s] the spectre of a totalitarian police state as much as the indiscriminate, blanket use of trained dogs at roadblocks, airports, and train stations."[64]

B. Precedent Relied on by the Mayberry *Court*

The *Mayberry* court, in reaching its conclusion that "canine olfactory investigations" do not constitute a search, rejected a long line of California cases with facts comparable to those in *Mayberry*,[65] and relied instead on nine federal cases and one California appellate court decision.[66] However, the courts in these later cases have often confused the issue of whether there was a search with the question of whether the search was reasonable.

Furthermore, the fact situations in many of the cases relied on by the *Mayberry* court are significantly distinguishable from

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62. 31 Cal. 3d at 355, 644 P.2d at 821, 182 Cal. Rptr. at 628 (Bird, C.J., dissenting) (citing People v. Hyde, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974)).

63. 31 Cal. 3d at 355, 644 P.2d at 821-22, 182 Cal. Rptr. at 628-29 (Bird, C.J., dissenting). *See also supra* note 7.

64. *Id.* at 353, 644 P.2d at 820, 182 Cal. Rptr. at 627 (Bird, C.J., dissenting) (quoting 1 W. LAFAVE, SEARCH AND SEIZURE 286 (1978) and United States v. Beale, 674 F.2d 1327, 1335 n.20 (9th Cir. 1982)).

65. *See supra* note 19.

66. 31 Cal. 3d at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620. *See also supra* note 20 and accompanying text.

Mayberry. The amount of suspicion present in the mind of the police officer at the time of the dog sniffing investigation is one of the facts which most clearly distinguishes these cases. Only in *People v. Matthews*[67] and *United States v. Race*[68] did police have no individual suspicion about the defendant at the time the police dogs were used. Both of these cases, however, are easily distinguished because both involved border searches,[69] which traditionally have been subject to less stringent tests than other types of searches. "Not even suspicion is required to justify a non-intrusive inspection of persons, their vehicles and effects at a border crossing."[70] *Mayberry*, however, was not attempting to cross a national border.[71]

United States v. Fulero,[72] another border search case cited in *Mayberry*, is distinguishable on other grounds as well, since the police had at least a reasonable suspicion that defendant's footlocker contained marijuana before the investigation began.[73] Thus, even if the defendant's expectation of privacy was violated, the search was reasonable because, unlike in *Mayberry*, there was individually focused suspicion.

United States v. Sullivan,[74] *United States v. Klein*,[75] and *United States v. Goldstein*,[76] all cited in *Mayberry* as supportive of its holding, like *Fulero*, consider the issue of whether the police, after observing the defendants (and in the case of *Klein* actually talking to defendants), had enough reasonable suspicion

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67. 112 Cal. App. 3d 11, 169 Cal. Rptr. 263 (1980).

68. 529 F.2d 12 (1st Cir. 1976).

69. *Race* involved the inspection of packages incoming on foreign flights by customs agents at Boston's Logan Airport. *Id.* at 13. *Matthews* involved the inspection by customs officials of automobiles being imported into the United States at Long Beach, California. 112 Cal. App. 3d at 16, 169 Cal. Rptr. at 265.

70. People v. Superior Court, 33 Cal. App. 3d 523, 531, 109 Cal. Rptr. 143, 148 (1973).

71. Mayberry was flying from Dayton, Ohio, to San Diego, California. At a stopover in Dallas to change airplanes, he boarded a flight which had originated in Miami. 31 Cal. 3d at 339, 644 P.2d at 812, 182 Cal. Rptr. at 619.

72. 498 F.2d 748 (D.C. Cir. 1974).

73. *Id.* at 748-49. United States Customs Service agents were notified by an employee at the Greyhound bus depot in Yuma, Arizona (port of entry) that the "situation appeared suspicious."

74. 625 F.2d 9 (4th Cir. 1980).

75. 626 F.2d 22 (7th Cir. 1980).

76. 635 F.2d 356 (5th Cir. 1981). In Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982), decided shortly after *Mayberry*, the Fifth Circuit clearly expressed its view that dragnet-type searches are not tolerated by the Constitution. *See supra* notes 43-49 and accompanying text.

to justify the sniffing of defendant's luggage by a police dog.[77] Although these cases are otherwise similar to *Mayberry*, they do not support the *Mayberry* holding because the police in *Mayberry* had no prior suspicion whatsoever about the defendant.[78]

The remaining federal cases relied on by *Mayberry* are all distinguishable on other grounds as well. Although *United States v. Solis*,[79] upon which the *Mayberry* court relied, could be read to support *Mayberry*, the Ninth Circuit in *United States v. Beale*[80] explained its holding in *Solis* and labeled "oversimplif[ied]" the government's contention that *Solis* established "that the use of trained dogs to sniff the exteriors of containers, including luggage, is not a search in violation of the fourth amendment."[81] The court concluded, "[W]e hold—consistent with the unarticulated reasoning of *United States v. Solis* . . . that the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage *is* a fourth amendment intrusion."[82]

In *United States v. Venema*,[83] also cited in *Mayberry*, the court held that the defendant had no reasonable expectation of privacy in the contents of a locker searched by police because at the time the defendant rented the locker the manager warned him that she allowed the police to bring their dogs on the premises to detect marijuana.[84] Thus, the *Venema* court correctly held that the sniffing by a police dog did not amount to a "search" because Venema, unlike Mayberry, was in a "poor posi-

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77. Police became suspicious of defendants in each case because they matched certain characteristics of the drug courier profile. United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978), describes the drug courier profile in detail.

78. To some extent *Klein*, *Sullivan*, and *Goldstein*, are caught in the same tangle as *Mayberry*. While stating that sniffing by trained dogs does not constitute a search, these cases read as though the court in each case actually believed the investigation to be a fourth amendment intrusion, but reasonable under the circumstances. For example, in *Klein* the court said that suspicious circumstances "coupled with the agents' previous observation of defendants and the information from the Florida deputy sheriff were not enough to establish probable cause, either for an arrest or for a search of defendants' luggage, but were certainly enough to give the agents reasonable suspicion to believe that the suitcases contained contraband." 626 F.2d at 25.

79. 536 F.2d 880 (9th Cir. 1976).

80. 674 F.2d 1327 (9th Cir. 1982).

81. *Id.* at 1330. The Ninth Circuit further stated that "Beale's privacy interest in the contents of his suitcase was far greater than Solis' expectation of privacy." *Id.* at 1332.

82. *Id.* at 1335 (citations omitted) (emphasis in original).

83. 563 F.2d 1003 (10th Cir. 1977).

84. *Id.* at 1006.

tion to assert that he had a justifiable expectation of privacy."[85]

In *United States v. Bronstein*,[86] upon which the *Mayberry* court also relied, the court concluded, "There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta."[87] However, the importance the Supreme Court has placed on personal luggage tends to limit the application of *Bronstein*. The United States Supreme Court in *United States v. Chadwick*[88] and again in *Arkansas v. Sanders*[89] emphasized the importance of a person's privacy interest in personal luggage. In *Sanders*, the Court stated that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy."[90] Although the *Bronstein* rationale seems valid when applied to weapons, it is less convincing when applied to narcotics. Passengers know their carry-on luggage will be viewed by electronic devices at an airport and therefore have no expectation of privacy for guns, weapons or other metal objects. This is not to say, however, that passengers lose their reasonable expectation of privacy in all the contents of their baggage. In addition, luggage not carried on board the plane with the passengers is not subject to the same rigorous inspection as carry-on luggage, and, consequently, passengers have higher expectations of privacy for checked luggage.

In *Doe v. Renfrow*,[91] the final case cited as precedent by the *Mayberry* court, the Seventh Circuit adopted the district court's holding that "[b]ringing . . . nonschool personnel [marijuana-sniffing dog and trainer] into the classroom to aid the school administrators in their observation for drug abuse is, of itself, not a search."[92] The *Renfrow* court recognized that school officials were acting in loco parentis and should not be compared with police officers.

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85. *Id.*

86. 521 F.2d 459 (2d Cir. 1975).

87. *Id.* at 462.

88. 433 U.S. 1 (1977).

89. 442 U.S. 753 (1979).

90. 442 U.S. at 652. A recent decision may have weakened the rationale behind the holding in *Sanders*. *See* United States v. Ross, 102 S. Ct. 2157 (1982).

91. 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

92. Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979).

> School officials fulfilling their state empowered duties will not be held to the same standards as law enforcement officials when determining if the use of canines is necessary to detect drugs within the schools. This latter standard applies only when the purpose of the dog's use is to fulfill the school's duty to provide a safe, ordered and healthy educational environment.[93]

Since none of the decisions upon which the court relied were directly on point and many were misinterpreted by the court, the holding of the *Mayberry* court that police dog sniffing of personal luggage is not a search within the meaning of the fourth amendment is not as settled in the law as the California Supreme Court concluded. A more careful analysis of search and seizure law suggests that the court's holding was unwarranted.

C. *The Scope of the* Mayberry *Decision*

The scope of application of the *Mayberry* decision remains to be seen. For example, will police be free, as Chief Justice Bird feared, "to utilize dogs to undertake 'a wholesale examination of all baggage in the hope that a crime might be detected' "?[94] Although the decision in *Mayberry* speaks only of illegal narcotics in personal luggage, what of illegal narcotics found elsewhere? Are police free to walk the public streets with their trained dogs sniffing out illegal drugs? Suppose discriminating sensor devices are developed which would detect contraband from a considerable distance. Would *Mayberry* be cited as authority for police to cruise suburban neighborhoods using these devices to discover narcotics being used or stored in private homes?

Several commentators and courts have suggested that rather than create narrow areas in which police investigations are totally unrestrained by the Constitution, the creation of a "limited search" or "subsearch" is more appropriate.[95] One commentator who has suggested the use of subsearches explained that

> [t]he reasonableness of such a subsearch would be gauged by a balancing process in which the primary considerations would be the individual's expectations of privacy on the one hand and

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93. 475 F. Supp. at 1021.

94. People v. Mayberry, 31 Cal. 3d 344, 644 P.2d 815, 182 Cal. Rptr. 622 (Bird, C.J., dissenting) (quoting 1 W. LaFave, Search and Seizure 286 (1978)).

95. *See* Peebles, *supra* note 35. *See also* Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982).

> both the degree of the intrusion and the circumstances occasioning that intrusion on the other. This approach could be utilized in a wide variety of instances involving minor governmental investigative activity. . . .[96]

The United States Supreme Court has already adopted the limited search or subsearch in certain circumstances. For example, in *Terry v. Ohio*[97] the Court decided that it is not "unreasonable for a policeman to seize a person and subject him to a limited search for weapons . . . [without] probable cause for an arrest."[98] Although *Terry* makes it clear that this type of limited search still falls within the scope of fourth amendment protection,[99] it simply held that a limited search to protect the police officer from "an armed and dangerous individual" is reasonable and therefore does not offend the fourth amendment even if probable cause is lacking.[100]

Had the *Mayberry* court acknowledged that the police conduct was at least a limited search or subsearch, then the investigation would have been subject to "reasonable" restraints. When an individual is able to justly claim even the smallest reasonable expectation of privacy, it is important that any intrusion upon that expectation be measured by fourth amendment standards. To assure that the rights of the individual will always be considered foremost, courts must hold that these intrusions are "searches" as that term is used in the fourth amendment so that police officers will be required to prove the reasonableness of their actions. After a search is found to have taken place, the court should determine the reasonableness of the police investigation by comparing the extent of the intrusion with society's need to intrude upon the defendant's privacy.

When police officials use trained narcotics dogs to sniff for contraband, the court may often find that such a search is reasonable under the circumstances. A finding of reasonableness should be made when police have at least reasonable individual suspicion and the search is nonintrusive. In rare cases a finding of reasonableness may be appropriate in dragnet-type investigations, provided that the search is nonintrusive and of an inanimate object, and that the police have somewhat more than mere

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96. Peebles, *supra* note 35, at 95.
97. 392 U.S. 1 (1968).
98. *Id.* at 15.
99. *Id.* at 16-19.
100. *Id.* at 27.

suspicion of the group being investigated. This finding of reasonableness may require the creation of a new exception to the probable cause and search warrant requirements of the fourth amendment. Such an exception, narrowly limited to nonintrusive, discriminate searches, conducted in a public place, would achieve the goal of both reasonable protection of personal privacy and reasonable enforcement of the law.

III. Conclusion

In *People v. Mayberry* the California Supreme Court faced the difficult task of deciding whether police use of drug detecting dogs at an airport baggage terminal to find concealed illegal narcotics constituted a search within the meaning of the fourth amendment. This Case Note contends that the California court did not accurately reflect the current state of fourth amendment search and seizure law when it held that the police action in *Mayberry* did not amount to a search. The *Mayberry* court improperly applied the analysis for determining the reasonableness of a search to the issue of whether the police action amounted to a search. The issue in *Mayberry* is more properly analyzed by initially considering the expectation of privacy held by a defendant and whether this expectation was reasonable. The court must conclude that the police action amounted to a search for purposes of the fourth amendment if it determines that a defendant's reasonable expectation of privacy was violated by the police investigation. The court should then consider the reasonableness of the search by balancing the extent of the intrusion with the societal need to infringe upon the defendant's right of privacy. Although *Mayberry* may result in tough enforcement of drug laws, the decision opens the door to abuse of personal privacy by leaving police dog sniffing investigations unchecked by fourth amendment restraints.

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