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Random Canine Sniff Searches Do Not Violate Fourth Amendment, People v. Mayberry, 644 P.2d 810 (Cal.)

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RANDOM CANINE SNIFF SEARCHES DO NOT VIOLATE FOURTH AMENDMENT

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

In the current split of authority over the scope of the fourth amendment's[1] protection against unreasonable[2] searches[3] the California Supreme Court, in *People v. Mayberry*,[4] sided with those courts holding

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1. The fourth amendment to the United States Constitution 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 person or things to be seized.

U.S. Const. amend. IV.

2. "[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." Elkins v. United States, 346 U.S. 206 (1970). *See* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 388 (1974); Fankel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361, 366 (1921). The Supreme Court has consistently maintained that a search is unreasonable unless authorized by a search warrant. *E.g.,* Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Johnson v. United States, 333 U.S. 10, 14-15 (1948). The Supreme Court, however, has carved out a number of "well-delineated exceptions" from this rule. Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions may be separated into six major categories. *See* United States v. Robinson, 414 U.S. 218, 224 (1973) (incident to arrest); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (movable vehicle); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk); Harris v. United States, 390 U.S. 234, 236 (1968) (plain view); Warden v. Hayden, 387 U.S. 294, 298 (1967) (exigent circumstances).

3. "The Supreme Court, quite understandably, has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment." 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 223 (1978). One explanation is offered in 79 C.J.S. SEARCHES AND SEIZURES § 1 (1952):

> [T]he term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search."

Id. at 775. *Accord* Brown v. State, 372 P.2d 785 (Alaska 1962); People v. Holloway, 230 Cal. App. 2d 834, 41 Cal. Rptr. 325 (1964); People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965); State v. Smith, 242 N.C. 297, 87 S.E.2d 593 (1955).

Black's Law Dictionary defines a "search" as:

> An examination of a man's house or other buildings or premises, or of his person, or of his vehicle, aircraft, etc., with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged.

BLACK'S LAW DICTIONARY 1211 (5th ed. 1979).

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

that the use of police-trained dogs to randomly inspect and detect the odor of narcotics emanating from airport luggage does not constitute a search within the meaning of the fourth amendment.

The San Diego Police Department's Narcotics Task Force routinely used a police-trained narcotics detection dog to check all luggage from incoming flights originating in Florida.[5] During such an inspection[6] a drug detection dog "alerted"[7] a member of the Narcotics Task Force to appellant Mayberry's luggage, indicating the presence of illegal narcotics.[8] After Mayberry claimed his luggage, police notified him that a dog had "alerted" the officers to the suitcase, and that they would search Mayberry's luggage after obtaining a warrant.[9] The officers then requested that the appellant expedite the process and consent to the search.[10]

After the search uncovered drugs, police charged Mayberry with transporting and possessing marijuana.[11] At trial, the appellant moved

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5. The San Diego Police claim that statistically there is a high probability that luggage coming off incoming flights originating in Florida will contain narcotics. At Mayberry's trial, the prosecution offered as evidence police testimony that in 1979 the police found drugs on twenty-five flights, fourteen of which, or fifty-six percent, originated in Florida. However, during that same year a total of 1,825 flights flew from Florida to San Diego. Therefore, less than one percent (0.76%) of the Florida flights were found to have narcotics aboard. 117 Cal. App. 3d 360, 361, 172 Cal. Rptr. 629, 630 (1981), *vacated,* 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

6. The luggage inspected was from a flight originating in Miami, Florida. Mayberry had boarded the flight in Dayton, Ohio. *Id.*

7. When a trained dog "alerts" his handler to the concealed presence of contraband—by means of a trained action such as biting, snarling, pawing or throwing his head back—he is indicating his recognition of the particular scents of various contraband. *See* United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974) (per curiam); United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975), *rev'd on other grounds,* 536 F.2d 880 (9th Cir. 1976); People v. Furman, 30 Cal. App. 3d 454, 456, 106 Cal. Rptr. 366, 368 (1973). For a discussion of the training and reliability of drug detecting dogs, see 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).

8. 117 Cal. App. 3d 360, 361, 172 Cal. Rptr. 629, 630 (1981).

9. *Id.*

10. *Id.*

11. *Id.* Appellant was charged with violation of the CAL. [HEALTH & SAFETY] CODE §§ 11,357a, 11,359, 11,360a (Deering Supp. 1982). Section 11,357(a) provides:

> Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than . . . ($100), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison.

Section 11,359 provides in part:

> Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison. . . .

Section 11,360(a) provides in part:

to suppress the marijuana as the product of an illegal search and seizure.[12] Mayberry alleged that the dog's sniffing his luggage constituted an unreasonable exploratory search.[13] The trial court denied the motion,[14] and the California Supreme Court affirmed[15] and *held*: The

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[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, . . . shall be punished by imprisonment. . . .

12. People v. Mayberry, 117 Cal. App. 3d at 361, 172 Cal. Rptr. at 630 (1981). The California Penal Code states that "[a] defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on . . . the following grounds: "(1) . . . The search or seizure without a warrant was unreasonable." CAL. [PENAL] CODE § 1538.5(a)(1) (Deering Supp. 1982).

In addition, appellant claimed state constitutional protection. Art. 1, § 13 of the California Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13. *Cf.* U.S. Const. amend. IV.

A claim that evidence has been seized illegally, that is, obtained in violation of a constitutional provision, automatically implicates the exclusionary rule. Under the exclusionary rule, evidence obtained in violation of the privileges guaranteed by the U.S. Constitution must be excluded at trial. BLACK'S LAW DICTIONARY 506 (5th ed. 1979). The exclusionary rule was first introduced in Weeks v. United States, 232 U.S. 383 (1914). In *Weeks* the Supreme Court held that evidence seized in violation of the fourth amendment's prohibition against unreasonable searches and seizures could not be used in federal court. The Court, in Mapp v. Ohio, 367 U.S. 643 (1963), extended the exclusionary rule to the states through the due process clause of the fourteenth amendment, holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

For a comprehensive discussion of the exclusionary rule, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* 1975 WASH. U.L.Q. 621; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Comment, *Admissibility of Illegally Seized Evidence—the Federal Exclusionary Rule—A Historical Analysis,* 38 U. DET. L.J. 635 (1961). *See generally* 1 W. LAFAVE *supra* note 3, at § 1.1–.11.

13. People v. Mayberry, 31 Cal. 3d at 339, 644 P.2d at 812, 182 Cal. Rptr. at 619 (1982).

14. *Id.* at 339, 644 P.2d at 812, 182 Cal. Rptr. at 619. The trial court reasoned that the statistical information regarding the flow of narcotics from Florida to San Diego was a sufficient basis upon which the police could base their reasonable suspicion that narcotics would be found on board such flights. *Id. See supra* note 8. The court went on to conclude that a dog sniff search constituted a minimal intrusion, justified by reasonable police efforts to curtail the flow of illegal narcotics. *Id.*

On appeal the judgment was reversed. People v. Mayberry, 117 Cal. App. 3d at 362, 172 Cal. Rptr. at 631 (1981). The appellate court stressed that in order for a sniff search to be upheld, it must be shown that the investigation was not a "general exploratory search." *Id.* at 361, 172 Cal. Rptr. at 630 (citing People v. Nagdeman, 110 Cal. App. 3d 404, 410, 168 Cal. Rptr. 16, 19-20 (1980); People v. Williams, 51 Cal. App. 3d 346, 349, 124 Cal. Rptr. 253, 255 (1975)). Therefore, the police must demonstrate that there existed "some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location. . . ." *Id.* at 361-62, 172 Cal. Rptr. at 630-31 (quoting People v. Evans, 65 Cal. App. 3d 924, 933, 134 Cal. Rptr. 436, 441 (1977)). The

use of police-trained dogs to detect the odor of narcotics in airport luggage is a limited, unintrusive investigation which does not constitute a search within the meaning of the fourth amendment.[16]

The fourth amendment primarily protects individuals against "unreasonable searches and seizures."[17] To claim protection under the fourth amendment an individual[18] must show that a search of constitutional dimension[19] actually occurred and that the search was unreason-

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court concluded that the statistical data proffered failed to meet this requirement and the appellant's motion to suppress was erroneously denied. *Id.* at 631.

15. People v. Mayberry, 31 Cal. 3d 335, 644 P.2d 810, 812 Cal. Rptr. 617 (1982).

16. *Id.* at 340, 644 P.2d at 813, 182 Cal. Rptr. at 620.

17. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.") (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)); Berger v. New York, 388 U.S. 41, 53 (1967) (quoting *Wolf* in reference to a conversation recorded by an electronic device); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Jones v. United States, 357 U.S. 493, 498 (1958) ("the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy"); Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 STAN. L. REV. 995, 997 (1971) ("[T]he right to be secure in the privacy of one's home against arbitrary governmental intrusions is the heart of the fourth amendment").

The fourth amendment was inserted in the Bill of Rights as direct opposition to the indiscriminate searches and seizures conducted in England under the authority of "writs of assistance" and "general warrants." General warrants were so called because they failed to state with any particularity those against whom they could be used. Writs of assistance, which were general warrants that described the object, but not the place, of the search, and which expired only upon the death of the issuing monarch, were used in the colonies by customs officials attempting to enforce the trade legislation of Parliament. In 1760 the American colonists rebelled against the use of writs of assistance when, upon the death of King George II, new writs of assistance were to be issued en masse. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-59 (1970).

The first American provision against general warrants was section 10 of Virginia Bill of Rights of 1776, which reads:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

2 B.P. POORE, THE FEDERAL STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1909 (1877). In addition to Virginia, six other states had constitutional provisions which served as precedents leading to the adoption of the fourth amendment. *See* N. LASSON, *supra,* 79-83.

18. In approaching the issue of whether there exists a privacy right to invoke the fourth amendment there must be a determination of whether the aggrieved party has "standing" to bring a fourth amendment claim. Unless the individual possesses a personal interest in the item searched, he has no standing to invoke the exclusionary rule. C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 96 (1980).

19. For a search to violate the fourth amendment it must be the product of governmental

able.[20] Because of the vagueness in the wording of the fourth amendment,[21] however, the courts have not articulated a general rule which effectively distinguishes between a search and other intrusions by police.[22]

Historically, the Supreme Court adopted the view that for there to have been a fourth amendment search the police must have physically intruded into a "constitutionally protected area."[23] The Court defined these areas as penumbras of those expressly stated in the fourth amendment itself: "persons, houses, papers, and effects."[24] In *Olmstead v. United States,*[25] the Supreme Court narrowly defined what constitutes a protected area, holding that the fourth amendment did not cover the seizure of conversations through wiretapping.[26] The Court in *Olmstead*

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action and the victim must have possessed a reasonable expectation of privacy in the items searched. *See generally* C. WHITEBREAD, *supra* note 18, at § 4.02.

20. *See supra* note 2. This requires determining whether a valid warrant has been issued, and, if not, whether the criteria for one of the six exceptions to the warrant requirement has been met. C. WHITEBREAD, *supra* note 18, at § 4.03.

21. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 353 (1974). "But the fourth amendment is not clear. The work is giving concrete and contemporary meaning to that brief, vague, general unilluminating text. . . ." *Id.*

22. Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime,* 44 FORDHAM L. REV. 973, 983 (1976).

23. Silverman v. United States, 365 U.S. 505 (1961). In holding that the police officers violated the fourth amendment by using a "spike mike," an electronic listening device which turned the defendant's heating system into a microphone, the Court stated, "But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a *constitutionally protected area*." *Id.* at 512 (emphasis added). *See also* On Lee v. United States, 343 U.S. 747, 751-54 (1952) (recording of a conversation in the defendant's place of business by a microphone concealed on a person invited onto the premises held not to violate the fourth amendment); Goldman v. United States, 316 U.S. 129, 134-36 (1942) (recording of a conversation by placing listening devices against the wall of an adjoining office held not to violate the fourth amendment); Olmstead v. United States, 277 U.S. 438, 464, 466 (1928) (recording of a telephone conversation by placing listening devices on telephone wires leading to the defendant's house held not to violate the fourth amendment). For a further discussion of *Olmstead*, see *infra* notes 26-27 and accompanying text.

24. The Supreme Court concerned itself primarily with the physical area searched and its relation to the defendant. Within the penumbra of "persons" were bodies, Schmerber v. California, 384 U.S. 757 (1966); and clothing, Beck v. Ohio, 379 U.S. 89 (1966). "Houses" extended to warehouses, See v. City of Seattle, 387 U.S. 541 (1967); apartments, Clinton v. Virginia, 377 U.S. 158 (1964); hotel rooms, Stoner v. California, 376 U.S. 483 (1964); garages, Taylor v. United States, 286 U.S. 1 (1932); business offices, United States v. Lefkowitz, 285 U.S. 452 (1932); and stores, Amos v. United States, 255 U.S. 313 (1921). "Papers and effects" included automobiles, Preston v. United States, 376 U.S. 364 (1964); and letters, *Ex parte* Jackson, 96 U.S. 727 (1878).

25. 277 U.S. 438 (1928).

26. In *Olmstead* government officers obtained evidence of a conspiracy by tapping the telephone lines of the conspirators and reading their conversations. 277 U.S. at 456-57. The Court

established that a defendant must show both a physical, trespassory intrusion and the seizure of a tangible object in order to invoke the fourth amendment's protection against unreasonable searches.[27] Initially, the Supreme Court applied this test strictly, refusing to circumvent these criteria by drawing factual distinctions.[28]

In 1967, however, the Court pronounced the end of the physical intrusion standard in *Katz v. United States*.[29] The Supreme Court concluded in *Katz* that the proper test was not whether police had physically invaded a constitutionally protected area, but rather whether the government had violated the privacy upon which an individual justifiably relied.[30] In stating that the fourth amendment "protects people,

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held that the wiretapping did not violate the fourth amendment reasoning that "[t]he insertions were made without trespass upon any property of the defendants." 277 U.S. at 457. In addition, the Court reasoned that since the evidence was secured merely by the use of the sense of hearing, there was no seizure. *Id.* at 464. In finding that there was no entry into the defendant's premises the Court concluded that the fourth amendment "can not be extended and expanded to include telephone wires reaching to the whole world. . . ." *Id.* at 465.

27. The Court stated:

> The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.

Id. at 464. The Court later added:

> Neither the cases we have cited nor any of the many Federal decisions brought to our attention hold the 4th Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house "or outlage" for the purpose of making a seizure.

Id. at 466. *See also supra* note 2. The "act of physically taking and removing tangible personal property is generally a 'seizure.'" 68 AM. JUR. 2d *Searches and Seizures* § 8, at 667 (1973).

28. *E.g.,* Lopez v. United States, 373 U.S. 427, 438-39 (1963) (recording of a conversation in the defendant's place of business by a tape recording device concealed on a person invited onto the premises held not a fourth amendment violation); On Lee v. United States, 343 U.S. 747, 753-54 (1952) (same); Goldman v. United States, 316 U.S. 129, 134 (1942) (recording of a conversation by placing listening devices against the wall of an adjoining office held not a fourth amendment violation).

29. 389 U.S. 347 (1967).

30. *Id.* at 353. In *Katz* FBI agents bugged a public telephone booth and recorded petitioner's end of his phone conversations. These recordings provided the basis for an indictment charging the petitioner with transmitting wagering information across state lines in violation of a federal statute. *Id.* at 348. In reversing petitioner's conviction, the Supreme Court held that by electronically listening and recording these conversations, the FBI agents violated the privacy upon which petitioner had justifiably relied while using the telephone booth. Such an intrusion constituted a search and seizure within the meaning of the fourth amendment. *Id.* at 353. In conclusion the Court gave no constitutional significance to the fact that there was no penetration of the walls of the phone booth. *Id.*

In his concurring opinion, Justice Harlan described the test as having two requirements: "first,

not places,"[31] the Court recognized no constitutional significance in the presence or absence of a physical intrusion[32] of the person or property. *Katz* thus raised, but did not decide, the question of what types of sense-enhanced activities the Court would regard as searches under the fourth amendment.

Ten years later in *United States v. Chadwick*,[33] the Court applied the *Katz* reasonable expectation of privacy test to a warrantless search of a double-locked footlocker.[34] The Court concluded that luggage is intended as a repository for personal effects. As such, the fourth amendment equally protects the person who safeguards personal possessions by locking them in a piece of luggage and the person who locks the doors of his home.[35] In its application of this notion in *Arkansas v.*

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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). *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 7 (1977) (legitimate and reasonable expectation of privacy protects luggage in trunk of car from warrantless governmental intrusion); United States v. Dionisio, 410 U.S. 1, 14-15 (1973) (no legitimate and reasonable expectation of privacy in the characteristics of a person's voice); Couch v. United States, 409 U.S. 322, 332-36 (1973) (no reasonable expectation of privacy in voluntarily surrendered documents); United States v. White, 401 U.S. 745, 751-52 (1971) (simultaneous recording of conversations not violation of justifiable expectation of privacy). For an in-depth discussion of Justice Harlan's two requirements, see W. LAFAVE, *supra* note 3, at 229-34; Amsterdam, *supra* note 21, at 384-85.

31. 389 U.S. at 351.

32. *Id.* at 353. The Court's decision was undoubtedly influenced by the increasing number of surveillance devices which were being used by law enforcement officials to intrude on an individual's privacy without any physical invasion. The ground had been laid for this decision by Justice Douglas in his concurring opinion in Silverman v. United States, 365 U.S. 505, 512 (1961) (Douglas, J., concurring). "The depth of the penetration of the electronic device . . . is not the measure of the injury. . . . [T]he command of the Fourth Amendment [should not] be limited by nice distinctions turning on the kind of electronic equipment employed." *Id.* at 513 (Douglas, J., concurring).

33. 433 U.S. 1 (1977).

34. *Id.* at 11. Federal agents seized the footlocker as it was being placed in the trunk of a car after a narcotics dog had signalled the presence of narcotics inside the footlocker. Sometime after the footlocker was safe in official custody, the federal agents opened it, without obtaining a warrant, and discovered marijuana. The Court, in granting the appellant's motion to suppress the narcotics as fruits of a warrantless search, held that the factors which diminish the privacy aspects of an automobile do not apply to a footlocker; although a footlocker has some of the mobile characteristics that support warrantless searches of automobiles, a person's expectations of privacy are substantially greater in personal luggage than in an automobile. *Id.* at 13.

35. *Id.* at 11. "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protections of the Fourth Amendment Warrant Clause." *Id.*

The Court's holding reaffirmed the general principle that closed packages and containers may not be searched without a warrant and declined to extend the "automobile exception" to permit a warrantless search of any movable container found in a public place. *See supra* note 2. *See also*

Sanders,[36] the Court further noted that the presence or absence of a lock on the luggage played no part in determining the subjective expectation of privacy.[37] The Court relied on the objective nature of the container as personal luggage as the critical factor in determining whether a privacy interest existed.[38]

In its effort to further define what constitutes a fourth amendment search, the Court, in *Harris v. United States*,[39] held that the police may seize any object that comes within their "plain view" as they legitimately go about their business.[40] The Court concluded that an officer's actions in response to that which he sees before him do not constitute a search and therefore are not subject to the restrictions of the fourth amendment.[41] In cases following *Harris* the lower federal courts have extended by analogy the parameters of the "plain view" doctrine[42] to include sounds[43] and odors.[44]

United States v. Vickers, 599 F.2d 132, 133 (6th Cir. 1979) (illegal to search locked footlocker taken from automobile); United States v. Stevie, 582 F.2d 1175, 1178 (8th Cir. 1978) (individual's expectation of privacy in contents of luggage is entitled to fourth amendment protection regardless of location inside automobile).

36. 442 U.S. 753 (1979). The Supreme Court has questioned some of its reasoning in *Sanders* but the Court still adheres to its holding. United States v. Ross, 102 S. Ct. 2157 (1982).

37. 442 U.S. at 762-63 n.9.

38. *Id.* The Court found the fact that the luggage was seized from an automobile to be of no constitutional significance. The Court reasoned that a legitimate expectation of privacy in the contents of personal luggage is not diminished simply because the owner is arrested in a public place. *Id.* at 766-67 (Burger, C.J., concurring).

39. 390 U.S. 234 (1968) (per curiam).

40. *Id.* at 236.

41. *Id.* The plain view doctrine is intended to provide a basis for making a seizure without a warrant. *See, e.g.,* Frazier v. Cupp, 392 U.S. 731, 740 (1969) (consent of accomplice to search allows plain view admission of evidence gained against defendant); Kerr v. California, 374 U.S. 23, 43 (1963) (discovery of marijuana on kitchen counter during lawful arrest).

The concern here is with plain view as descriptive of a situation which establishes that there has been no search at all within the meaning of the fourth amendment. For an in-depth discussion of the plain view doctrine, see W. LAFAVE, *supra* note 3, at § 22.

42. Coolidge v. New Hampshire, 403 U.S. 433 (1971), is the case most often cited in support of the plain view doctrine. *Coolidge* established the two elements that must be met to invoke the plain view doctrine: first, the officer must have been previously authorized to be in the position which afforded him the view of the object; second, the officer must discover the object inadvertently. *Id.* at 466-67, 469. For a useful discussion of these requirements, see Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 MERCER L. REV. 1047, 1073-78, 1081-88 (1975).

Courts have applied the doctrine to legitimize use of flashlights, United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971); binoculars, United States v. Minton, 488 F.2d 37 (4th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974); and searchlights, United States v. Lee, 274 U.S. 559 (1927).

43. *E.g.,* United States v. Fisch, 474 F.2d 1071 (10th Cir. 1973) (no search occurred when, by

The Supreme Court has not ruled on the question of whether a sniff search violates the fourth amendment. Without guidance from the Court, lower federal and state courts have divided on the question. One of the earliest cases to scrutinize the propriety of sniff inspections under the fourth amendment was *United States v. Bronstein*.[45] In holding that no fourth amendment search had occurred, the Second Circuit proffered two theories.[46] Judge Mulligan, writing for the court, reasoned that detection by a trained dog is no different from detection by an officer through the use of his own olfactory senses.[47] Judge Mansfield, in a concurring opinion, rejected the majority's "plain smell" analysis, arguing that the situation was analogous to *Katz*.[48] He based his concurrence on his conclusion that the action of a sniffing dog does not invade an individual's lower expectation of privacy in luggage turned over to a common carrier.[49] Judge Mansfield cautioned, how-

lying prone at the connecting door, federal agents overheard incriminating remarks made by conspirators).

44. *E.g.,* United States v. Ventresca, 380 U.S 102, 111 (1965) (upheld warrant based on sight, smell, and sound indicating operation of a distillery within house); United States v. Sentovich, 677 F.2d 834, 836 (11th Cir. 1982) (warrant granted based on smelling of marijuana in suitcase by police officer); United States v. Johnson, 497 F.2d 397, 398 (9th Cir. 1974) (no " 'reasonable expectation of privacy' from lawfully positioned agents 'with inquisitive nostrils' "); United States v. Martinez-Miramontes, 494 F.2d 808, 810 (9th Cir.), *cert. denied,* 419 U.S. 897 (1974) (detection of marijuana by smelling crevice where trunk closes not a fourth amendment search).

Many courts support the theory that a dog sniff inspection does not constitute a search but may provide probable cause for the issuance of a search warrant. *E.g.,* United States v. Venema, 563 F.2d 1003, 1005 (10th Cir. 1977) (dog sniffing the air around a locker not a search); United States v. Solis, 536 F.2d 880, 881 (9th Cir. 1976) (dog sniffing air outside trailer not a search); United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974) (held "frivolous" to contend that dog sniffing air around footlocker in bus depot is a search).

45. 521 F.2d 459 (2d Cir.), *cert. denied,* 424 U.S. 918 (1975).

46. *Id.* at 461. The canine sniff was instigated after drug enforcement agents became suspicious of defendant's activities in the airport terminal. This was the first case of its kind to be heard by the Second Circuit. The court noted the District of Columbia's Circuit Court opinion in United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974), which described as "frivolous," the contention that a dog sniff was a search. United States v. Bronstein, 521 F.2d 459, 459 (2d Cir.), *cert. denied,* 424 U.S. 918 (1975).

47. 521 F.2d at 471. The court noted the well-known fact that marijuana has an offensive and pungent odor and the fact that it was packed in moth balls was undoubtedly to hide that odor from detection by drug enforcement agents. The court found no reason to distinguish detection by a sensitive and schooled canine from detection by a drug enforcement agent. *Id.*

48. 521 F.2d 459, 464 (Mansfield, J., concurring). Judge Mansfield stressed that the police officers did not see or smell anything, nor were their senses enhanced. He concluded that the officers' senses were replaced by the more sensitive canine nose, drawing an analogy to the use of the hidden microphone used to detect sounds otherwise inaudible, the illegality of which has long been established. *Id.*

49. *Id.* at 465. Judge Mansfield stated that:

ever, that dragnet sniff searches[50] would violate society's normal expectation of privacy.[51]

In 1981 the federal courts returned to the issue of sniff searches. The Fifth Circuit Court of Appeals, in *United States v. Goldstein*,[52] rationalized its holding that airport sniff searches are constitutionally permissible by concluding that airline passengers' reasonable expectation of privacy in their luggage does not extend to the airspace surrounding that luggage.[53] The court reasoned that the use of a trained dog's sensitive nose[54] cannot convert a sniff of the exterior of a suitcase into a search.[55]

> [O]ne who consigns luggage to the common luggage area of a public carrier, airport or similar facility cannot expect to enjoy as much privacy with respect to the bag as he would with respect to his person or property carried by him personally into, on or from the carrier or facility. . . .
>
> Since a person's expectation of privacy with respect to his baggage declines as the anticipated public access to the baggage increases, it is not unreasonable, where the police have reasonable grounds to suspect the presence of contraband, to permit use of an external method or device to determine whether the baggage contains contraband.

Id. *See also* United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1980), *cert. denied,* 450 U.S. 923 (1981) (no reasonable expectation of privacy in luggage when it is subject to inspection for the protection of public safety); United States v. Burns, 624 F.2d 95, 101 (10th Cir.), *cert. denied,* 449 U.S. 954 (1980) (dog sniffing of locked briefcase not a fourth amendment search).

50. Dragnet searches are indiscriminate exploratory searches seeking to uncover any evidence of criminal activity. *See generally* Note, *Fourth Amendment—Searches—Use of Canine to Detect Drug Paraphernalia on School Children is an Unreasonable Search Under the Fourth Amendment,* 9 AM. J. CRIM. L. 127 (1981).

51. 521 F.2d at 465 (Mansfield, J., concurring). "However, I would strictly limit such a search to cases where there are grounds for suspicion, . . . and would not permit a wholesale examination of all baggage in the hope that a crime might be detected." *Id.*

52. 635 F.2d 356 (5th Cir.), *cert. denied,* 452 U.S. 962 (1981).

53. *Id.* at 361. *Goldstein* is distinguishable from the previously discussed cases involving dragnet sniff searches. In *Goldstein,* after a drug enforcement agent observed that the appellant met certain aspects of the drug courier profile, he decided to use a trained dog to examine appellant's bags. *Id.* at 359. The court stated that the officers were not required to have a reasonable suspicion before subjecting the luggage to a sniff search. *Id.* at 360. However, the court went on and concluded that because the defendant met certain aspects of the drug courier profile, the officers had probable cause. *Id.* at 361.

The court noted the decisions in *Bronstein*, 521 F.2d at 462, and United States v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980), which held that because of airport security measures passengers have no reasonable expectation of privacy in their checked baggage, but declined to reaffirm that conclusion. 635 F.2d at 361 n.7.

54. It has been shown that a dog's nose is eight times more sensitive than a human's. *E.g.,* United States v. Solis, 536 F.2d 880, 881 (9th Cir. 1976).

55. *Id.* at 361. The court cited *Sullivan* for the reasoning that because an agent's own unaided detection of the odor of controlled substances would not constitute a search, "the agent's use of a dog's more enhanced olfactory sense cannot convert a sniff of the exterior of those suitcases into a search." *Id.* (citing United States v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980)).

The following year, in *United States v. Beale,*[56] the Ninth Circuit Court of Appeals expressly rejected the application of the plain view doctrine to sniff searches.[57] The court, finding the use of a trained dog more closely analogous to the use of an independent detection device,[58] cited *Katz* and its progeny[59] for the proposition that the dog's sense of smell replaces rather than enhances an officer's own senses and thus constitutes an invasion into the owner's expectation of privacy regarding his luggage.[60] The court acknowledged the highly discriminating[61] and minimally intrusive qualities of the canine nose, but concluded that this merely diminished rather than obliterated the intrusion.[62] In expressly rejecting the Fifth Circuit's holding in *Goldstein,* the court stated that after the Supreme Court's holdings in *Katz, Chadwick,* and *Sanders,* it is untenable to assert that a passenger's reasonable expectation of privacy does not extend to the airspace surrounding his luggage.[63]

When faced with virtually the same facts as those in *Beale,* the Sec-

56. 674 F.2d 1327 (9th Cir. 1982).

57. *Id.* at 1333-34. While on duty at the Fort Lauderdale Airport, Detective Berks noted that the appellants were acting suspiciously. *Id.* at 1328. After asking appellants a few questions, and learning of previous drug arrests, Detective Berks released a police-trained dog in the baggage area in the vicinity of appellants' bags. *Id.* at 1328-29. The dog alerted the detective to one of appellants' bags. *Id.* In holding that a dog sniff is a fourth amendment search, the court found the analogy between the use of a canine's acute sense of smell and the use of a flashlight or binoculars "inapt." *Id.* at 1333.

58. *Id.* at 1333. The court reasoned that the dog does not amplify its handler's perception; it replaces it. *Id.*

59. The court noted that since *Katz*, the use of most forms of independent detection devices has uniformly been held to constitute a search. *Id.* at 1333 n.12 (citing United States v. Henry, 615 F.2d 1223, 1227 (9th Cir. 1980) (x-ray scan) and United States v. Alabrado, 495 F.2d 799, 805-06 (2d Cir. 1974) (magnetometer)).

60. *Id.* at 1333. The court stated that the sense enhancing devices which have generally been permitted are those which are commercially available, which citizens might expect members of the public as well as law enforcement officials to possess and which are used in locations in which the ordinary citizen might otherwise observe the property or activity. *Id.* at 1333 n.12.

61. Unlike the dragnet detection devices, that is, x-ray scans and magnetometers, the dog detects only illegal narcotics. *Id.* at 1334. *See generally* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs,* 11 GA. L. REV. 75 (1976).

62. *Id.* at 1334 n.13. The court paraphrased *Katz* stating, "[W]hat Beale sought to exclude when he locked his suitcase was not only the intruding human eye—it was also the intruding canine nose." *Id.* at 1334. The court concluded that no matter what an individual conceals within his luggage, he has a right to assume "that a trained canine nose will not broadcast its incriminating contents to the authorities." *Id. See generally* Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime,* 44 FORDHAM L. REV. 973 (1976).

63. 674 F.2d at 1335 n.20.

ond Circuit Court of Appeals, in *United States v. Waltzer,*[64] rejected the *Beale* decision and held that canine sniffing does not intrude on the privacy interest attached to an individual's luggage and is therefore not tantamount to a search.[65] While the court acknowledged that individuals have a protectable privacy interest in their personal luggage, it reasoned that because the luggage is not opened and the sniffing discloses only narcotics, the only privacy interest intruded on is that associated with the secret possession of illegal substances.[66]

Various state courts also approve the use of police trained detection dogs. Courts in Arizona and Washington have held as permissible under the fourth amendment dragnet sniff searches of airport luggage.[67] In *State v. Morrow*,[68] the Arizona Supreme Court, agreeing with the Second Circuit in *Bronstein*, reasoned that a dog's sniff is not a search and therefore it is immaterial whether there was prior reasonable suspicion.[69] The court, however, also applied the plain view doctrine and concluded that if the officer was lawfully on the premises where the search was conducted, the dog's detection of contraband is analogous to a police officer's detection through the use of his own senses.[70] Similarly, in *State v. Wolohan*,[71] the Washington Court of Appeals reasoned that because the sole purpose of the dog sniff was to detect contraband, there was no violation of a reasonable expectation of privacy.[72]

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64. 682 F.2d 370 (2d Cir. 1982), *cert. denied,* 51 U.S.L.W. 3919 (U.S. June 27, 1983).

65. *Id.* at 373.

66. *Id.* The court stressed the fact that the sniffing is confined to the exterior of the luggage and is less inconvenient and humiliating for the owner than other less discriminating and more intrusive methods of investigation. *Id.*

67. State v. Morrow, 128 Ariz. 309, 312, 625 P.2d 898, 901 (1981); State v. Wolohan, 23 Wash. App. 813, 818, 598 P.2d 421, 424 (1979).

68. 128 Ariz. 309, 625 P.2d 898 (1981).

69. *Id.* at 312, 625 P.2d at 901. Dogs were used regularly in dragnet sniff searches of all domestic luggage in the Tucson International Airport. The court held that a dog sniff of the air around a bag or parcel is not a search for fourth amendment purposes. *Id.*

70. *Id.* at 313, 625 P.2d at 902. The court quoted *Bronstein* stating:

> If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search (citations omitted). We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.

Id. at 313, 625 P.2d at 902 (quoting United States v. Bronstein, 521 F.2d 459, 461 (2d Cir.), *cert. denied,* 424 U.S. 918 (1975). *See supra* notes 46-48 and accompanying text.

71. 23 Wash. App. 813, 598 P.2d 421 (1979).

72. *Id.* at 818, 598 P.2d at 424. A detective and a police-trained dog were on duty daily in the

The California Courts of Appeals addressed the issue of dragnet dog sniff searches in *People v. Williams*[73] and *People v. Evans*.[74] In both cases the lower courts held the dog sniffing to be an unconstitutional search within the meaning of the fourth amendment.[75] In *People v. Matthews,*[76] the California Court of Appeals retreated from its position in *Williams* and *Evans*, permitting a dragnet sniff search[77] but for a reason wholly unrelated to the use of the dog. The court based its holding on the fact that the sniff search was an unintrusive customs search in a border area[78] and as such, did not require even reasonable

parcel areas of mass transportation depots in Phoenix, Arizona, searching for controlled substances. *Id.* at 814, 598 P.2d at 422. The dog alerted the police to a package which was addressed to Wolohan. *Id.* In affirming Wolohan's conviction for possession of marijuana the Court declined to follow the California Court of Appeals in People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977) and People v. Williams, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975), noting that the sniff is a minimal and limited intrusion and the contents of the bag remain entirely undetected except for concealed narcotics. 23 Wash. App. at 817, 598 P.2d at 423-24. The court concluded that there can be no reasonable expectation of privacy in the area in which the bag is located nor in the air immediately surrounding the bag. *Id.*

In his dissenting opinion, Judge McInturff cited the numerous cases which required a reasonable suspicion regarding the presence of contraband prior to employing a police-trained detector dog to support his conclusion that this "sniffing expedition" violated the fourth amendment. He reiterated the long-established notion that the essential purpose of the fourth amendment is to impose a standard of "reasonableness" on the exercise of discretion by government officials in order to safeguard the privacy and security of individuals against arbitrary invasions. Therefore, the permissibility of a particular government practice is judged by balancing its intrusion on the individual against its promotion of a legitimate governmental interest. *Id.* at 823-25, 598 P.2d at 426-28.

73. 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

74. 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977).

75. *Id.* at 933, 134 Cal. Rptr. at 441, 51 Cal. App. 3d at 350, 124 Cal. Rptr. at 255. In *Williams*, the police were held to be trespassing when they conducted an unauthorized general dog sniff in a secured baggage area of an airline terminal. *Id.,* 124 Cal. Rptr. at 255. The court held that no probable cause to suspect the presence of contraband existed prior to the dogs "nosing it out," and as a result, the sniff search was unconstitutional. *Id.*

In *Evans*, police-trained dogs were used to sniff the outside of all mini-warehouses in a storage complex. 65 Cal. App. 3d at 928, 134 Cal. Rptr. at 437. The court concluded that as a result of the trial record's silence regarding any preknowledge of the presence of contraband, the dog sniff was exploratory in nature and therefore a violation of the fourth amendment. *Id.* at 933, 134 Cal. Rptr. at 441. The court distinguished *Evans* from cases where the dog sniff was merely an independent investigation corroborating a tip from a reliable informant. *Id.* at 933-34, 134 Cal. Rptr. at 441-42. The court stressed that because the informant's tip serves as a reasonable basis upon which to suspect the presence of contraband, the use of a dog is no longer indiscriminate but rather solely directed to the particular contraband. *Id.* at 936, 134 Cal. Rptr. at 443.

76. 112 Cal. App. 3d 11, 169 Cal. Rptr. 263 (1980).

77. *Id.* at 20, 169 Cal. Rptr. at 268. *See supra* note 51 and accompanying text.

78. 112 Cal. App. 3d at 18-19, 169 Cal. Rptr. at 267-68.

suspicion.[79]

In *People v. Mayberry*,[80] the California Supreme Court held[81] that a dragnet sniffing expedition at a public airport did not violate the fourth amendment protection against unreasonable searches.[82] Rejecting the Ninth Circuit's reasoning in *Beale*, the court held that an individual can have no protectible privacy interest in illegal narcotics.[83] The court recognized a significant distinction between the sanctity of private luggage which contains personal effects and luggage which is used to conceal illegal narcotics.[84]

The court, citing with approval the Fifth Circuit decision in *Goldstein*, affirmed the notion that passengers' reasonable expectation of privacy does not extend to the airspace surrounding their luggage.[85] The court applied the plain view doctrine and likened the escaping smell of narcotics to the emanation of fluid leaking from a container.[86] In concluding that any privacy right is lost when a substance escapes into the surrounding area, the court found no constitutionally significant difference in the odor being detected by a dog or by a human.[87]

In her dissent, Chief Justice Bird vigorously argued that dog sniff

79. *Id.* The dog was used in a car terminal at the Port of Long Beach, which the court reasoned to be part of the "border area" which "includes not only land border crossing checkpoints, but also checkpoints at all ports of entry." *Id.* at 17, 169 Cal. Rptr. at 266. The court explained that the term "border search" is merely a "shorthand way of defining the limitation that the Fourth Amendment imposes upon the right of customs agents to search without probable cause." *Id.* at 18, 169 Cal. Rptr. at 267. The court went on to note that while an intrusive border search must meet federal fourth amendment reasonableness standards, this search was nonintrusive and as such, no suspicion was necessary. *Id.* at 18-19, 169 Cal. Rptr. at 267. *See also* Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973) ("a border search is not one where probable cause is required"); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967) ("mere fact that a person is crossing the border is sufficient cause for a search"); People v. Superior Court, 33 Cal. App. 3d 523, 530, 109 Cal. Rptr. 143, 148 (1973) ("not even suspicion required to justify a nonintrusive inspection of persons, their vehicles and effects at a border-crossing") (quoting *Henderson*, 390 F.2d at 808). For an in-depth discussion of probable cause and border searches, see W. LAFAVE, *supra* note 3, at § 3.1–.5, 10.5.

80. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).

81. The court's holding was a five to one decision. *Id.* at 343, 644 P.2d at 814, 182 Cal. Rptr. at 621.

82. *Id.* at 337, 644 P.2d at 811, 182 Cal. Rptr. at 618.

83. *Id.* at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620. The court concluded, therefore, that there can be no legitimate objection to an unintrusive inspection which reacts only to such contraband. *Id.*

84. *Id.*

85. *Id.* at 341-42, 644 P.2d at 814, 182 Cal. Rptr. at 621.

86. *Id.* "The odor is detectable by the nose, as the leak is visible to the eye." *Id.*

87. *Id. See supra* notes 41-48 and accompanying text.

inspections always constitute searches within the meaning of the fourth amendment.[88] Chief Justice Bird disagreed with the majority's conclusion that odors escaping from a suitcase and fluid leaking from a container are analogous.[89] The Chief Justice pointed out that although the fluid becomes, as a result of the leak, visible to the human eye, the escaping odor remains undetectible to the human nose.[90] In noting that a narcotics detection dog perceives odors totally undetectible to humans, Chief Justice Bird concluded that sniffing dogs "are like electronic listening devices which pick up sounds inaudible to the human ear."[91] Citing *Katz*, *Sanders*, *Chadwick*, and *Bronstein*, the Chief Justice stressed that the "hallmark" of any intrusive search into a closed area is the detection of something otherwise hidden from human view.[92]

By holding dragnet sniff searches permissible under the fourth amendment, the California Supreme Court made a sharp, unexplained break from a consistent line of decisions of courts of appeals of the state.[93] Its decision virtually excludes from judicial control police activity which unquestionably invades personal privacy.[94] While the court correctly points out that canine sniffing of property is a minimally intrusive and highly discriminating way for the police to gather information of great value in the detection of easily hidden contraband,[95] it ignores a vast body of precedent which has established that the important factor in determining a fourth amendment search is not the relative accuracy of the sensing device but the intrusion into a closed area and disclosure of that which is otherwise hidden from human detection.[96]

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88. 31 Cal. 3d at 352, 644 P.2d at 820, 182 Cal. Rptr. at 627 (Bird, C.J., dissenting).

89. *Id.* at 351, 644 P.2d at 819-20, 182 Cal. Rptr. at 626-27.

90. *Id.* The Chief Justice concluded that this is clearly not a plain smell case. *Id.*

91. *Id.*

92. *Id.* at 350, 644 P.2d at 819, 182 Cal. Rptr. at 626.

93. *See, e.g.,* 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).

94. *See* W. LAFAVE, *supra* note 3, at 286. "[I]n every case in which the trained canine nose has been used in such an indiscriminate fashion, the court has without hestiation held that such *was* a search and that the search was unreasonable under the fourth amendment." *Id.* (emphasis in original).

95. 31 Cal. 3d at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620.

96. *E.g.,* United States v. Bronstein, 521 F.2d 459 (2d Cir.), *cert. denied,* 424 U.S. 918 (1975);

The court's application of the plain view doctrine is, as the dissent points out,[97] unpersuasive. The sniffing by a dog is unquestionably different from the sniffing by a human being. Trained dogs are able to detect odors well outside the range of human sensory perception.[98] While it is well established that use of an aid to perception does not always render an investigation a search,[99] the vital distinction to be made is whether the aid permits an officer to detect data otherwise imperceptible to human sense or whether it is simply a more efficient method for detecting that which could be detected through the use of the officer's own senses.[100]

The *Mayberry* court's conclusion that placing illegal narcotics in private luggage strips the luggage of its protectable privacy interest summarily rejects the Supreme Court's holdings in *Chadwick* and *Sanders*.[101] Focusing on the nature of the contents of luggage rather than blanketly classifying it as "personal" is a logical way to measure the reasonable privacy expectation associated with that luggage. The problem with this approach, however, is that it will require the search of all luggage before determining which pieces are deserving of the lower level of privacy protection. As such, this method is certainly inconsistent with the notion of expanding and safeguarding the protections afforded by the fourth amendment.[102]

The current split of authority concerning the permissibility of dragnet sniff searches under the fourth amendment calls for a response from the Supreme Court.[103] The *Mayberry* opinion unfortunately fails to provide the insight needed for balancing the public interest in safe-

supra notes 46-52 and accompanying text. Virtually all commentators on the subject agree that reliance on a trained canine nose to detect that which the police officer could not discover by use of his own senses constitutes a search. *E.g.,* W. LAFAVE, *supra* note 3, at 282 n.166. *See also* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs,* 11 GA. L. REV. 75 (1976); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime,* 44 FORDHAM L. REV. 973 (1976); United States v. Solis: *Have the Government Supersniffers Come Down with a Case of Nasal Congestion?,* 13 SAN DIEGO L. REV. 410 (1976).

97. 31 Cal. 3d 350, 644 P.2d at 819, 182 Cal. Rptr. at 626 (Bird, C.J., dissenting).

98. *See supra* note 54.

99. *See supra* note 43 and accompanying text.

100. *See supra* note 49 and accompanying text.

101. *See* 31 Cal. 3d 350, 644 P.2d at 819, 182 Cal. Rptr. at 626 (Bird, C.J., dissenting).

102. *See* notes 36-45 and accompanying text.

103. Many commentators have repeated Lederer's query, "Where indeed will reasonable means to search stop and 1984 begin?" Lederer & Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs,* THE ARMY LAWYER, DA PAM 27-50-4, 11 (April 1973).

guarding privacy with the state's desire for more efficient methods of crime detection.

[Just prior to the publication of this Comment the Supreme Court held in *United States v. Place* that the exposure of a traveler's luggage to a police-trained narcotics detection dog did not constitute a search within the meaning of the fourth amendment.

The precise issue before the Court in *Place* was whether the warrantless seizure and prolonged detention of luggage on less than probable cause violated the fourth amendment. The Court unanimously affirmed the Second Circuit Court of Appeals' conclusion that the prolonged detention of defendant's luggage exceeded the permissible limits of an investigative stop under the standards first defined in *Terry v. Ohio*. Justice O'Connor, writing for the Court, went further, however, and held that the exposure of luggage in a public place to a canine sniff test is not a search within the meaning of the fourth amendment. She concluded, without advertence or citation to any lower federal or state court decisions on the issue, that a canine sniff is a peculiarly limited search, both in the manner in which the information is obtained—it avoids the embarrassment and inconvenience that ordinarily accompanies other investigative methods—and in the content of the information revealed by the procedure—it discloses only the presence of contraband items.

Justices Brennan, Marshall and Blackmun concurred in the judgment, but strongly disapproved of the Court's resolution of the sniff search issue. Justice Brennan, with whom Justice Marshall joined, pointed out that the issue was neither briefed nor argued before the Court. Noting that "[a] dog adds a new and previously unobtainable dimension to human perception," Justice Brennan indicated his preference that the question of sniff searches of inanimate objects be left for later cases.

Justice Blackmun, with whom Justice Marshall also joined, thought the issue too complex for the Court's cursory treatment, and argued that two cases in which certiorari was currently pending would better afford the Court a full airing of the issue.]

R.F.B.