Fordham Law Review

Volume 44 | Issue 5 Article 4

1976

Constitutional Limitations on the Use of Canines to Detect Evidence of Crime

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NOTES

CONSTITUTIONAL LIMITATIONS ON THE USE OF CANINES TO DETECT EVIDENCE OF CRIME

I. INTRODUCTION

In order to resolve a fourth amendment search and seizure problem, two questions must be asked: first, was there a search or seizure; and second, if so, was it reasonable?[1] The Supreme Court has consistently maintained that a search is unreasonable unless authorized by a search warrant,[2] although a number of "well-delineated exceptions" have been carved from this rule.[3] However, the Court has been reluctant to establish firm guidelines to answer the first question. Since the fourth amendment prohibits only "unreasonable" searches and seizures, it has been suggested that it would be unwise to be encumbered by a technical definition.[4] While this may be true, it must be remembered that if a governmental intrusion is held initially not to be a search, there is no fourth amendment protection.[5] Thus, because the answer to the question of whether there is a search also determines whether judicial approval of the challenged intrusion is required, some standard is necessary.

The landmark case of *Katz v. United States*[6] established the "reasonable expectation of privacy"[7] test to determine whether a particular intrusion came within the scope of the fourth amendment. The case dealt with electronic surveillance,[8] but the test announced was intended to apply to all governmen-

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1. The fourth amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

2. E.g., Camara v. Municipal Ct., 387 U.S. 523, 528-29 (1967); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

3. Katz v. United States, 389 U.S. 347, 357 (1967); accord, Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). The exceptions may be separated into six major categories. See United States v. Robinson, 414 U.S. 218, 224 (1973) (incident to arrest); Chimel v. California, 395 U.S. 752, 762-63 (1969) (same); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (movable vehicle); Carroll v. United States, 267 U.S. 132, 153 (1925) (same); Warden v. Hayden, 387 U.S. 294, 298 (1967) (exigent circumstances); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (same); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent); Zap v. United States, 328 U.S. 624, 628 (1946), vacated on rehearing, 330 U.S. 800 (1947) (per curiam) (same); Harris v. United States, 390 U.S. 234, 236 (1968) (plain view); Ker v. California, 374 U.S. 23, 43 (1963) (same).

4. See Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968); Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. Rev. 968, 976 n.50 (1968).

5. See United States v. Lara, 517 F.2d 209, 211 (5th Cir. 1975); United States v. Johnson, 506 F.2d 674, 675 (8th Cir. 1974), cert. denied, 421 U.S. 917 (1975).

6. 389 U.S. 347 (1967).

7. Id. at 360 (Harlan, J., concurring).

8. See notes 23-31 infra and accompanying text.

tal intrusions.[9] Due to the inherent vagueness of the test, however, the doctrine has at times led to anomalous results.[10]

This Note will briefly trace the development from the original concept of a search to the expectation of privacy doctrine[11] and examine the line of cases in which a defendant's expectation has been subrogated to the demands of the "plain view" doctrine.[12] It will then analyze a question which has recently divided the courts and which highlights the conflict between those two doctrines—whether the use of a trained canine to detect narcotics is a search.[13] Two circuits have held that the use of a canine, at least in some circumstances, is not a search,[14] while a district court has held that the use of a canine is a search.[15] Unless the apparent conflict can be explained by the plain view doctrine, a further exception might have to be established. This could drastically affect search and seizure law.

II. FROM *Olmstead* TO *Katz*

Prior to the electronic surveillance cases, the Court's analysis of whether a particular intrusion was within the scope of the fourth amendment was concerned primarily with the physical area searched and its connection with the defendant,[16] rather than whether a search in fact occurred. This was the doctrine of "constitutionally protected areas."[17]

The Court first dealt with the question of a nontrespassory seizure of an intangible object in *Olmstead v. United States*.[18] The Court established that in order to find a search under the fourth amendment, there must be both a physical, trespassory intrusion and the seizure of a tangible object.[19] For

9. See, e.g., Cardwell v. Lewis, 417 U.S. 583, 591 (1974) (plurality opinion); United States v. Leonard, 524 F.2d 1076, 1086-87 (2d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3429 (U.S. Jan. 27, 1976) (No. 75-1016); United States v. Davis, 482 F.2d 893, 904-05 (9th Cir. 1973).

10. Compare United States v. Bronstein, 521 F.2d 459, 461-62 (2d Cir. 1975) (use of canine to detect marijuana not a search), with United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975) (use of canine to detect marijuana is a search); United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971), cert. denied, 405 U.S. 947 (1972) (use of flashlight to look into eight inch by one half inch gap in garage doors is not a search), with United States v. Pacheco-Ruiz, No. 74-3337 (9th Cir., Oct. 23, 1975) (per curiam) (flashlight probe of crawl space beneath dwelling is a search).

11. See, e.g., Katz v. United States, 389 U.S. 347 (1967); Part II infra.

12. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 464-72 (1971); United States v. Lee, 274 U.S. 559, 563 (1927); Part III infra.

13. See Part V infra.

14. United States v. Bronstein, 521 F.2d 459, 462-63 (2d Cir. 1975); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974).

15. United States v. Solis, 393 F. Supp. 325, 327 (C.D. Cal. 1975).

16. A "search" for fourth amendment purposes had always been interpreted as an intrusion upon security, and in connection with the phrase "in their persons, houses, papers and effects." What may be a "constitutionally protected area" for one person may not be for another. For example, a homeowner is protected while in his own home, but a burglar is not. See Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133, 133-34.

17. See Katz v. United States, 389 U.S. 347, 351 n.9 (1967); Silverman v. United States, 365 U.S. 505, 510-12 (1961).

18. 277 U.S. 438 (1928), overruled, Katz v. United States, 389 U.S. 347 (1967).

19. Id. at 464, 466.

thirty years, these criteria were strictly adhered to, and all attempts to circumvent them by drawing fine factual distinctions were rejected.[20] Although the second criterion, the seizure of a tangible object, was subsequently abandoned when an actual, physical intrusion was shown,[21] this did not substantially affect existing case law.[22]

The end of the physical intrusion standard was announced in *Katz v. United States*.[23] The petitioner was convicted for transmitting wagering information across state lines in violation of federal law. The F.B.I. had attached a listening and recording device to the outside of the public telephone booth from which petitioner had placed his calls and was allowed to introduce evidence of these calls at trial.[24] The Court, in reversing the conviction, held that the bugging of the telephone booth was a "search" for fourth amendment purposes.[25] The test to be applied was not whether there had been an actual intrusion into a constitutionally protected area, but whether the government had "violated the privacy upon which [the petitioner] justifiably relied" when he used the phone booth.[26] The presence or absence of a physical intrusion was not of constitutional significance, as the amendment "protects people, not places."[27] The Court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[28]

20. See On Lee v. United States, 343 U.S. 747 (1952) (Court held that there was no trespass ab initio where an informer wired for sound engaged petitioner in an incriminating conversation); Goldman v. United States, 316 U.S. 129, 135 (1942), overruled, Katz v. United States, 389 U.S. 347 (1967) (Court rejected petitioner's argument that he did not assume the risk that his conversation would be overheard since he did not intend to project his voice beyond his office walls).

21. Silverman v. United States, 365 U.S. 505, 509-12 (1961).

22. Cf. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (en banc) (use of a scintillator to detect presence of radioactive material within defendant's apartment not a search).

23. 389 U.S. 347 (1967).

24. Id. at 348.

25. Id. at 353. The Court's decision to eliminate the physical intrusion standard was undoubtedly influenced by the increasing number of surveillance devices which could intrude on one's privacy without any physical intrusion. As Justice Douglas said in his concurring opinion in Silverman, "[t]he 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." 365 U.S. at 513 (Douglas, J., concurring). See generally S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers 339-79 (1959); A. Westin, Privacy and Freedom 69-89 (1967). Dash explains that a parabolic microphone, used to pick up distant sounds at large gatherings such as football games, could also be used with a good possibility of success "to eavesdrop on a conversation taking place in an office on the opposite side of a hundred-foot-wide busy street." Dash, supra at 350.

26. 389 U.S. at 353. Justice Harlan, in concurring, described the 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).

27. Id. at 351.

28. Id. at 351-52 (citations omitted).

Having found that a search was made, the Court addressed the question of whether the search was reasonable. It found that the agents had acted on probable cause and had limited the scope of the surveillance to its specific purpose.[29] However, the search was not conducted pursuant to a search warrant, and this contravened the general rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[30] As the case did not fall within any of the recognized exceptions[31] the search was unreasonable.[32]

Thus, the Court established that neither a physical intrusion nor a seizure of a material object was required for a governmental action to come within the scope of the fourth amendment.[33]

III. Plain View and Open View Doctrines

From the general requirement of judicial approval before a valid search may be conducted, the Supreme Court has carved certain exceptions.[34] Among them is the "plain view" doctrine. In broad terms the doctrine holds that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[35] The rationale behind this doctrine is that what an officer sees before him does not constitute a search, and therefore, a search warrant is unnecessary.[36] However, what is perhaps a more accurate statement of the

29. Id. at 354.

30. Id. at 357 (footnotes omitted); see Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

31. See note 3 supra.

32. 389 U.S. at 357-59.

33. However, not every type of bugging or wiretapping situation constitutes a search. For example, in United States v. White, 401 U.S. 745 (1971), a sharply divided Court held that electronic surveillance with the consent of one of the parties was not a search. The Court stated that "[i]f the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." Id. at 751 (plurality opinion); see United States v. Wilner, 523 F.2d 68, 74 (2d Cir. 1975); United States v. Lippman, 492 F.2d 314, 318 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). While defendant may have had a subjective expectation of privacy, it was not justified, even though one of the recorded conversations occurred in his home. 401 U.S. at 752 (plurality opinion); cf. note 26 supra. See generally Greenawalt, The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation, 68 Colum. L. Rev. 189 (1968); 52 B.U.L. Rev. 831 (1972).

34. See note 3 supra.

35. Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam); see, e.g., United States v. Burton, 485 F.2d 715, 717 (8th Cir. 1973); Comment, Constitutional Standards for Applying the Plain View Doctrine, 6 St. Mary's L.J. 725 (1974).

36. See Ker v. California, 374 U.S. 23, 43 (1963); United States v. Wilson, 524 F.2d 595, 598 (8th Cir. 1975). The fact that no search occurs distinguishes this from the other exceptions to the warrant requirement. The discovery of evidence in plain view is not governed by the reasonable-

rule is that "[a]n officer lawfully in any place may, without obtaining a search warrant, seize any item in plain view, if he has probable cause to believe that the item is contraband, loot, anything used in committing a crime, or other evidence of crime, and if no further intrusion is necessary in order to make the seizure."[37] The distinction between the two formulations of the rule is that in the latter the evidence is subject to seizure only if no further intrusion is necessary. The law concerning search and seizure involves two distinct concepts. The first deals with when the evidence was discovered, while the second deals with the manner in which the discovery was made. The time of discovery may be divided into two categories—cases in which the discovery of evidence in plain view was subsequent to a lawful intrusion,[38] and cases in which it was prior to such an intrusion.[39] In order to distinguish between the two categories, the latter will be referred to as open view.

The Supreme Court, in *Coolidge v. New Hampshire*,[40] established three limitations regarding the applicability of the plain view doctrine: first, "plain view *alone* is never enough to justify the warrantless seizure of evidence;"[41]

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ness requirement of the fourth amendment. However, there are limitations which are inherent in its application. See notes 41-43 infra and accompanying text.

37. Model Rules for Law Enforcement, Warrantless Searches of Persons and Places 3-4 (1974) (footnotes omitted) [hereinafter cited as Model Rules].

38. E.g., Cady v. Dombrowski, 413 U.S. 433 (1973); Harris v. United States, 390 U.S. 234 (1968) (per curiam); Ker v. California, 374 U.S. 23 (1963). This involves the situation where the contraband is in plain view and inside a "constitutionally protected area" but subject to seizure because the officer is lawfully within the area. It usually occurs when an officer has begun a valid search, either pursuant to a search warrant or to one of the exceptions to the warrant requirement. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent); Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84, 88 (5th Cir. 1975) (same); Harris v. United States, 390 U.S. 234 (1968) (per curiam) (inventory search to protect impounded vehicle); Ker v. California, 374 U.S. 23 (1963) (incident to arrest); United States v. Mason, 523 F.2d 1122, 1126 (D.C. Cir. 1975) (same); United States ex rel. LaBelle v. LaVallee, 517 F.2d 750, 752 (2d Cir. 1975), cert. denied, 96 S. Ct. 803 (1976) (same); United States v. Rollins, 522 F.2d 160 (2d Cir. 1975) (search warrant); United States v. Truitt, 521 F.2d 1174 (6th Cir. 1975) (same); United States v. McCoy, 515 F.2d 962 (5th Cir. 1975), cert. denied, 96 S. Ct. 795 (1976) (same); United States v. Peterson, 522 F.2d 661, 665 (D.C. Cir. 1975) (hot pursuit); United States v. Gargotto, 476 F.2d 1009 (6th Cir. 1973), aff'd on remand, 510 F.2d 409 (6th Cir. 1974), cert. denied, 421 U.S. 987 (1975) (exigent circumstances).

Although the doctrine of "constitutionally protected areas" was expressly disavowed in Katz, the question of what protection the fourth amendment does afford usually "requires reference to a 'place.' " Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see T. Taylor, Two Studies in Constitutional Interpretation 112-13 (1969).

39. United States v. Lee, 274 U.S. 559 (1927); Hester v. United States, 265 U.S. 57 (1924). Searches prior to an intrusion include either of two situations. If an officer discovers contraband in plain view outside a "constitutionally protected area," he may seize it immediately. See id. However, if the contraband in plain view is inside such a protected area and the officer is outside, a warrant is usually required before a seizure may be made. See, e.g., Johnson v. United States, 333 U.S. 10 (1948); Taylor v. United States, 286 U.S. 1 (1932); Comment, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 489, 489 n.3 (1974); Model Rules, supra note 37, at 16.

40. 403 U.S. 443 (1971).

41. Id. at 468 (plurality opinion). This is consistent with the two constitutional protections

second, the initial intrusion must be legally justified;[42] and third, "the discovery of evidence . . . must be inadvertent."[43]

The third limitation—inadvertence—divided the Court.[44] As a result, the Court gave no indication as to the degree of expectation needed to render the plain view doctrine inapplicable. It is logical that the intent of the police should be a factor in deciding if the discovery of evidence is the product of a

afforded by a search warrant. First, any intrusion should be preceded by a careful judicial determination of its necessity. See Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Johnson v. United States, 333 U.S. 10 (1948). Second, the scope of any intrusion should be limited to its purpose. See Chimel v. California, 395 U.S. 752 (1969); Sibron v. New York, 392 U.S. 40 (1968). This is consistent with the first objective because it is preceded by a lawful intrusion. It is consistent with the second objective because, by limiting the scope of the search to what is discovered by the agent's senses, there is no danger of a general or exploratory search for evidence. Also, since there has been a prior intrusion, a person's privacy has already been invaded, and the minimal additional intrusion involved is outweighed by the legitimate need for effective law enforcement. If the police were required to ignore a piece of evidence until they could get a warrant, there is a good chance it would be removed or destroyed by the time they returned. Although communities with large police forces could arrange to guard the evidence for a short time it would still be a "needless inconvenience." 403 U.S. at 468. See generally Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 Harv. L. Rev. 1465 (1971).

42. 403 U.S. at 466 (plurality opinion). This is merely a restatement of the exclusionary rule, which provides that evidence gained through an illegal search or seizure, or information gained through such a search or seizure, must be excluded from both federal and state prosecutions. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (state); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (federal); Weeks v. United States, 232 U.S. 383 (1914) (same). The rationale is that suppression of evidence is necessary in order to deter law enforcement authorities from obtaining evidence through improper methods. For a discussion of the arguments pro and con see generally Coolidge v. New Hampshire, 403 U.S. 443, 490-91 (1971) (Harlan, J., concurring); Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), and studies cited therein; Canon, Is the Exclusionary Rule in Failing Health? Some New Data And a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974).

43. 403 U.S. at 469 (plurality opinion). The plurality's main concern was that the police should not be allowed to defer an arrest until a suspect was at home, thus enabling them lawfully to seize whatever was in plain view, and circumvent the requirement of a search warrant. That is, a planned warrantless seizure. See id. at 471-72 & n.27 (plurality opinion); United States v. Lisznyai, 470 F.2d 707, 709-10 (2d Cir. 1972), cert. denied, 410 U.S. 987 (1973).

44. There were two opposing dissenting views concerning the inadvertence requirement. The first was that the requirement would abolish seizure incident to arrest because "rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent." 403 U.S. at 509 (Black, J., concurring and dissenting) (Chief Justice Burger and Justice Blackmun also joined in this part of Justice Black's opinion). The second view was that the requirement would accomplish nothing since the scope of a search incident to arrest was already narrowly circumscribed. See, e.g., Chimel v. California, 395 U.S. 752 (1969). The requirement would "merely attach undue consequences to what will most often be an unintended mistake or a misapprehension of some of this Court's probable-cause decisions . . . ." 403 U.S. at 518 (White, J., joined by Burger, C.J., concurring and dissenting). Justice Harlan also disagreed with the requirement, but he concurred with the majority because he thought that the dissenters' position would "go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law . . . ." Id. at 492 (Harlan, J., concurring).

search, but whether the police are looking for one item in particular, or for evidence in general, it can hardly be said that they are not "searching."[45] Despite this problem, a majority of courts have adopted the inadvertence requirement and have cited *Coolidge* with approval.[46] On the other hand, some courts have circumvented this requirement through judicial interpretation.[47]

Although the Supreme Court has declared that the preintrusion discovery of evidence is not the product of a search,[48] it has not formally recognized the open view-plain view dichotomy and thus has not discussed the open view situation in detail. The only basic difference between plain and open view is whether the discovery was made before or after a lawful intrusion. The plain view standard, that an officer be in a location where he has a right to be and that the discovery be inadvertent, should apply to open view situations as well. It is arguable that the inadvertence factor should be given more weight in an open view situation since there is no lawful search already in progress, and there has been no prior lawful intrusion on defendant's privacy. In a search incident to arrest situation, for example, it is unlikely that an officer would not at least anticipate finding evidence in plain view. There should be no such anticipation in the open view situation, and any expectation of privacy should be a larger factor in determining whether an unexpected discovery or an exploratory quest has occurred. Any intrusion may be

45. A search, in the criminal sense, implies an exploratory quest, investigation, or hostility toward the individual whose privacy is invaded. See Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975); C. Berry, Arrest, Search, and Seizure 12 (1973); Note, The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment, 43 Fordham L. Rev. 571, 571-72 & n.13 (1975).

46. E.g., United States v. Mason, 523 F.2d 1122, 1127 (D.C. Cir. 1975); United States v. Williams, 523 F.2d 64, 66 (8th Cir. 1975); United States v. Rollins, 522 F.2d 160, 166 (2d Cir. 1975); United States v. Truitt, 521 F.2d 1174, 1175-76 (6th Cir. 1975); Comment, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 489, 508 & n.129, 513 (1974), and cases cited therein. The Model Rules, supra note 37, did not include the inadvertence standard because "[s]pecific language dealing with 'inadvertence' or 'accidental discovery' would probably confuse police officers without giving any greater protection to citizens' legitimate rights." Id. at 16. But the rules attempt to handle the situation in other ways. For example, rule 101B provides that: "An officer lawfully in any place in order to effect an arrest may not go into other rooms or parts of the premises solely for the purpose of looking for seizable items in plain view." Id. at 4. Also, rule 203 provides that: "Whenever an arrest warrant is sought, a search warrant should also be sought if time permits and if there is probable cause to believe seizable items relating to any specific crime will be present at the expected time and place of arrest." Id. at 6. These two rules would effectively serve the same purpose as the inadvertence standard.

47. See Comment, Constitutional Standards for Applying the Plain View Doctrine, 6 St. Mary's L.J. 725, 728-29 (1974).

48. United States v. Lee, 274 U.S. 559, 563 (1927); see Taylor v. United States, 286 U.S. 1 (1932), where the Court reversed defendant's conviction for violation of the prohibition laws after government agents had unlawfully entered defendant's premises to seize liquor. One of the factors influencing the agents was the odor of whiskey coming from within. The Court stated that the agents should have obtained a search warrant, "even after the odor had emphasized their suspicions." Id. at 6.

considered an invasion of an individual's privacy. But, using Justice Harlan's test in his concurring opinion in *Katz*,[49] although an individual's actual expectation of privacy might be invaded, his expectation is unreasonable if he exposes evidence to the public.[50] If he takes reasonable steps to protect his privacy, however, his expectation should be respected.[51] Although, in the majority of cases, mere anticipation of finding evidence would not be enough to transform a discovery into a search, the situation should be more closely scrutinized when there has not been a justified prior invasion which has been carefully circumscribed.[52]

The concept of the manner of discovery may also be divided into two categories—cases in which the evidence was discovered by a government agent's reliance on his own senses,[53] and those in which he relied on a "sense-enhancing" instrument.[54]

Involved are a variety of senses and sense-enhancing instruments which have been used by the police to discover evidence in plain view or open view. These include the senses of hearing, sight and smell.[55] The use of these

49. See note 26 supra.

50. See, e.g., United States v. Bronstein, 521 F.2d 459, 462 (2d Cir. 1975).

51. See Katz v. United States, 389 U.S. 347, 351-52 (1967); Comment, Constitutional Standards for Applying the Plain View Doctrine, 6 St. Mary's L.J. 725, 741 (1974) ("a person who exhibits a reasonable expectation of privacy is entitled to rely on it and should remain safe from warrantless police intrusions").

52. The lower courts have not applied a uniform standard. Compare United States v. Pacheco-Ruiz, No. 74-3337 (9th Cir., Oct. 23, 1975) (per curiam) (flashlight probe of area beneath house constituted a search) and United States v. Bradshaw, 490 F.2d 1097, 1101 (4th Cir.), cert. denied, 419 U.S. 895 (1974) (by looking through a crack between rear doors of truck, agent "searched" the truck), with United States v. Wright, 449 F.2d 1355 (D. C. Cir. 1971), cert. denied, 405 U.S. 947 (1972) (no search occurred where officers looked through a eight by one half inch crack in garage) and James v. United States, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969) ("[t]hat the policeman may have to crane his neck, or bend over, or squat does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby").

53. See, e.g., Harris v. United States, 390 U.S. 234 (1968) (per curiam) (sight); Ker v. California, 374 U.S. 23 (1963) (same); United States v. Cushnie, 488 F.2d 81 (5th Cir. 1973) (per curiam), cert. denied, 419 U.S. 968 (1974) (same); Nelson v. Moore, 470 F.2d 1192 (1st Cir. 1972), cert. denied, 412 U.S. 951 (1973) (same); Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968) (same); Shorey v. Warden, 401 F.2d 474 (4th Cir.), cert. denied, 393 U.S. 915 (1968) (same); United States v. White, 401 U.S. 745 (1971) (plurality opinion) (hearing); United States v. Pond, 523 F.2d 210 (2d Cir. 1975), cert. denied, 96 S. Ct. 794 (1976), (same); United States v. Walker, 522 F.2d 194 (5th Cir. 1975) (same); United States v. Johnston, 497 F.2d 397 (9th Cir. 1974) (same); United States v. Martinez-Miramontes, 494 F.2d 808 (9th Cir.), cert. denied, 419 U.S. 897 (1974) (same); United States v. Valen, 479 F.2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974) (same).

54. See, e.g., United States v. Lee, 274 U.S. 559 (1927) (searchlight); United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974) (flashlight); United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974) (binoculars); United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975) (canine); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974) (same). But see United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975) (canine's use held an unlawful search).

55. The senses of touch and taste have not been discussed with respect to the plain view

senses without an enhancer has usually been held to come within these doctrines.[56] A distinction has been made, however, when an enhancer has been used.

The use of electronic equipment has generally been termed a search.[57] Unless one of the parties consents to the surveillance, a warrant is necessary.[58] This electronic equipment principle applies not only to hearing aids, but also to other types of devices, such as tracking devices[59] and metal detectors.[60] However, the use of devices not usually considered the product of sophisticated modern technology has generally not been referred to as a search.[61] The majority of these cases involve the use of flashlights, which the courts have overwhelmingly held does not constitute a search within the fourth amendment.[62] Whether there was a prior lawful intrusion[63] is not a distinction of constitutional significance. The rationale is that it is "not a

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doctrine. Perhaps this is because physical contact, which is necessarily involved with the use of these senses, has usually been regarded as a search. Cf. Hernandez v. United States, 353 F.2d 624, 626 (9th Cir. 1965), cert. denied, 384 U.S. 1008 (1966) (squeezing of luggage to smell the contents constitutes a search).

56. E.g., Ker v. California, 374 U.S. 23 (1963) (sight); United States v. Walker, 522 F.2d 194 (5th Cir. 1975) (smell); United States v. Johnston, 497 F.2d 397 (9th Cir. 1974) (same); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969) (hearing).

57. The majority of cases dealing with this question have involved the use of hearing "aids," which has been discussed previously. See Part II supra.

58. See United States v. White, 401 U.S. 745 (1971) (plurality opinion) (defendant unaware that federal agent is wired); note 33 supra.

59. See, e.g., United States v. Holmes, 521 F.2d 859, 864 (5th Cir 1975) (use of a beeping device to determine location); United States v. Martyniuk, 395 F. Supp. 42, 45 (D. Ore. 1975) (same). But see United States v. Carpenter, 403 F. Supp. 361, 364-65 (D. Mass 1975) (use of a beeper not a search).

60. See, e.g., United States v. Albarado, 495 F.2d 799, 806, 808-09 (2d Cir 1974) (magnetometer—search at airport reasonable; subsequent frisk unlawful); United States v Epperson, 454 F.2d 769 (4th Cir.), cert. denied, 406 U.S. 947 (1972) (magnetometer—search at airport reasonable; subsequent frisk reasonable as a last resort). But cf. Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966) (en banc) (use of a scintillator to detect radium). However, Corngold was decided prior to Katz, and thus the decision may no longer be controlling. See United States v. Solis, 393 F. Supp. 325, 326-27 (C.D. Cal. 1975).

61. See cases cited in United States v. Bronstein, 521 F.2d 459, 462 n.3 (2d Cir. 1975).

62. For examples of these see cases cited in note 63 infra.

63. For examples of cases in which the use of a flashlight in a plain view situation has been held not to be a search see, e.g., United States v. Lara, 517 F.2d 209, 211 (5th Cir. 1975), United States v. Johnson, 506 F.2d 674, 676 (8th Cir. 1974), cert. denied, 421 U.S. 917 (1975); United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974); United States v. Walling, 486 F.2d 229, 236 (9th Cir. 1973), cert. denied, 415 U.S. 923 (1974); Williams v United States, 404 F.2d 493 (5th Cir. 1968); Petteway v. United States, 261 F.2d 53 (4th Cir 1958) (per curiam). For examples of cases in which the use of a flashlight in an open view situation has been held not to be a search see, e.g., United States v. Wright, 449 F.2d 1355, 1357 (D.C Cir. 1971), cert. denied, 405 U.S. 947 (1972); United States v. Hanahan, 442 F.2d 649, 654 (7th Cir 1971) (court referred to situation as plain view even though no prior intrusion was present); Safarik v. United States, 62 F.2d 892, 895 (8th Cir. 1933); United States v. Callahan, 256 F. Supp. 739 (D. Minn. 1964); cf. United States v. Lee, 274 U.S. 559 (1927) (searchlight).

search to observe that which is open and patent, in either sunlight or artificial light."[64] That is, the officer's natural handicap of limited vision during the nighttime can be compensated for by the use of artificial light. In this sense, the flashlight does not improve an individual's sight beyond what it would be at another time.[65] What would be visible during the day, and thus not the product of a search, is not transformed into a search merely by the use of a flashlight. At times, though, the rule has not been limited to its purpose, and this has led to some anomalous results.[66] A majority of courts, however, have applied the rule only when the discovery itself would have been justified within the plain view or open view doctrines if no flashlight had been used.[67]

IV. THE CONFLICT BETWEEN *Katz* AND *Coolidge*

It is obvious that the reasonable expectation of privacy doctrine and the plain view and open view doctrines often conflict.[68] Since *Katz*, protection of an individual's reasonable expectation of privacy from government infringement has been the prime objective of the fourth amendment.[69] Such infringement is not present in the typical plain view or open view situation because

64. Smith v. United States, 2 F.2d 715, 716 (4th Cir. 1924); see Walker v. Beto, 437 F.2d 1018, 1020 (5th Cir. 1971) (per curiam).

65. This rationale, however, does not apply to the use of other sense-enhancers which have been held not to be a search. For example, the use of a pair of binoculars, which actually improves the natural sight of an individual, has been held not to constitute a search. See United States v. Lee, 274 U.S. 559, 563 (1927) (searchlight comparable to use of field glasses). However, other limitations have been placed on the use of binoculars. See, e.g., United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973) (per curiam), cert. denied, 416 U.S. 936 (1974) (court used a Katz analysis and found that "there was . . . no reasonable expectation of privacy—considering the time of day and all the surrounding circumstances").

66. See, e.g., United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971) (per curiam), cert. denied, 405 U.S. 947 (1972), where the court affirmed a conviction based upon evidence discovered when police used a flashlight to look into an eight inch by one-half inch slit in a garage door. The court held that the use of the flashlight was not a search. Although the opinion did not state whether the evidence could have been viewed during daylight, it is reasonable to assume, considering the size of the aperture, that it would have been hidden from sight during daylight also. Thus, the rule should have been inapplicable. Cf. United States v. Pacheco-Ruiz, No. 74-3337, at 2 (9th Cir., Oct. 23, 1975) (per curiam).

67. See United States v. Pacheco-Ruiz, No. 74-3337, at 2 (9th Cir., Oct. 23, 1975) (per curiam) ("[t]he flashlight probe of the space beneath the dwelling house was a search"); Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970), where the court stated that: "We do not hold . . . that every use of a flashlight is not a search. A probing, exploratory quest for evidence of crime is a search governed by Fourth Amendment standards whether a flashlight is used or not. The mere use of a flashlight, however, does not magically transmute a non-accusatory visual encounter into a Fourth Amendment search." (emphasis omitted).

68. See Comment, Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy, 11 Cal. W.L. Rev. 505, 528-31 (1975) [hereinafter cited as Helicopter Surveillance]; Comment, Constitutional Standards for Applying the Plain View Doctrine, 6 St. Mary's L.J. 725, 732 (1974).

69. See Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974) (plurality opinion); United States v. Solis, 393 F. Supp. 325, 327 (C.D. Cal. 1975) ("Katz defines a search as a Governmental intrusion into an area in which a person has a reasonable expectation of privacy").

no search actually takes place.[70] The discovery itself, however, involves an intrusion into an individual's zone of privacy, and the doctrines conflict when an attempt is made to determine precisely what is a reasonable expectation. For example, if an officer is in a place where he has a right to be, and he sees evidence lying on a table near an open window, which any casual passerby is able to see, there is no search because defendant has not exhibited an expectation of privacy which could be deemed reasonable.[71] But if defendant had closed his window and drawn his blinds, so that the officer could see inside only by peering through a small crack in the blinds, then defendant has exhibited an expectation of privacy which would generally be respected by the courts.[72]

There is no general rule which effectively distinguishes a search from a non-search. In a pre-*Katz* electronic surveillance case, the Court stated that:

> Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if [the] agent . . . had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.[73]

The discovery of evidence through use of an electronic eavesdropping device was held analogous to the discovery of evidence through use of one's own senses and through use of a non-electronic sense-enhancer such as a pair of binoculars. While the use of electronic surveillance devices was subsequently held to be a search,[74] the use of one's own senses and the use of other sense-enhancers are still treated as non-searches.[75] The justification is that when electronic devices are used, the right of privacy is more seriously intruded upon.[76] The distinction is not merely the use of an electronic device, however, since the Court has also distinguished among the electronic eavesdropping cases. It has approved the use of such a device if one of the parties had consented to the eavesdropping.[77] However, the effect on defendant's expectation of privacy is the same whether or not a party consented. Analyzing both situations under a privacy standard, defendant's expectation of privacy in each instance seems equally reasonable or unreasonable.

Thus, in a borderline situation, the determination of whether a search has occurred (in which case general fourth amendment principles apply)[78] or has

70. See note 36 supra and accompanying text.

71. See People v. Becker, 533 P.2d 494 (Colo. 1975).

72. Jacobs v. Superior Ct., 36 Cal. App. 3d 489, 111 Cal. Rptr. 449 (5th Dist. 1973); see United States v. Bradshaw, 490 F.2d 1097 (4th Cir.), cert. denied, 419 U.S. 895 (1974); Comment, Police Helicopter Surveillance, 15 Ariz. L. Rev. 145, 152 (1973); notes 22-27 supra and accompanying text; cf. 3 C. Wright, Federal Practice and Procedure § 663, at 36-37 (1969).

73. On Lee v. United States, 343 U.S. 747, 753-54 (1952).

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

75. See Part III supra.

76. Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting).

77. United States v. White, 401 U.S. 745 (1971); see note 33 supra.

78. See Part I supra.

not occurred (in which case plain view or open view rules apply)[79] must be made on an ad hoc basis. This leads to inefficiency on the part of the police, who are unsure how to respond in certain situations, as well as to inconsistency on the part of the courts, which tend to interpret similar situations differently.[80]

Two factors aid in determining whether a person's expectation of privacy is unreasonable: whether steps were taken by defendant to protect his privacy and the amount of intrusion necessary to discover the evidence. The first factor must be judged on an ad hoc basis, since there are innumerable measures that can be taken to protect one's privacy. Although an individual's expectation of privacy varies from object to object,[81] the expectation is subjectively reasonable if steps are taken to protect it. The second factor, the amount of intrusion, varies with each combination of plain view and open view situations depending on whether a sense-enhancer is used. Where evidence is discovered through use of one's own senses the intrusion is so minimal that the first factor need not be considered. It is clear that any expectation of privacy would be unreasonable and the plain view or open view rules apply. Where the evidence can be discovered only through the use of a sense-enhancer, however, a much more difficult situation is presented. In such cases, the defendant has usually taken steps to protect his privacy, and the question whether this subjective expectation is reasonable depends upon the amount of intrusion involved.

V. The Use of Canines in Search and Seizure

Recently, a situation has arisen which illustrates the fine line between reasonable and unreasonable expectations of privacy. This involves the use of trained canines to detect marijuana.[82] The courts are divided on the question of whether the use of the canine's olfactory senses constitutes a search. If not, it would fall within the open view, sense-enhancer category.

In *United States v. Bronstein,*[83] police, upon reasonable grounds, used a canine to detect marijuana in defendant's suitcases at an airline terminal. The Second Circuit held that the limited use of the canine was not a search within

79. See Part III supra.

80. Compare United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975) (use of a canine to detect marijuana was not a search), with United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975) (use of canine to detect marijuana was a search); United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971) (per curiam), cert. denied, 405 U.S. 947 (1972) (use of flashlight to peer into slit in garage door was not a search), with United States v. Pacheco-Ruiz, No. 74-3337 (9th Cir., Oct. 23, 1975) (per curiam) (flashlight probe of space beneath dwelling was a search).

81. For example, an individual has a lower expectation in his car than in his home. See Cardwell v. Lewis, 417 U.S. 583, 590-92 (1974); cf. Carroll v. United States, 267 U.S. 132 (1925). See generally Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835 (1974).

82. The problem arises only if there is neither a search warrant nor one of the recognized exceptions to the warrant requirement present to justify the use of the canine. See United States v. Richards, 500 F.2d 1025, 1030 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (canine used after defendant had consented).

83. 521 F.2d 459 (2d Cir. 1975).

the fourth amendment.[84] In *United States v. Fulero*,[85] police detected marijuana in defendant's locker at a bus terminal in the same manner, and the District of Columbia Circuit dismissed as "frivolous," defendant's claim that a search had occurred.[86] However, in *United States v. Solis*,[87] the United States District Court for the Central District of California held the use of a canine to be "a search per se."[88]

In these cases, defendants had taken steps to protect their expectations of privacy at the time the canines were used.[89] The marijuana was hidden from sight, and the odor was undetected by agents standing nearby.[90] Thus, the defendants had exhibited subjective expectations of privacy.

The reasonableness of defendants' expectations of privacy[91] depends to a large degree on the second factor—the amount of intrusion involved in the use of the canine. That is, whether the use of a sense-enhancer to improve one's sense of smell is more analogous to the use of a detectaphone to improve one's hearing, which is prohibited without a warrant, or to the use of a flashlight to improve one's eyesight, which is permitted. The situation is more complicated than it might appear because the use of a canine involves characteristics peculiar to both situations. There are five arguments in favor of holding that the use of a canine to discover contraband outside a place where an individual

84. Id. at 463.

85. 498 F.2d 748 (D.C. Cir. 1974).

86. Id. at 749.

87. 393 F. Supp. 325 (C.D. Cal. 1975).

88. Id. at 327.

89. 521 F.2d at 460 (luggage at an airport terminal); 498 F.2d at 748 (locker at bus terminal); 393 F. Supp. at 325 (locked trailer at a public gas station).

90. 521 F.2d at 461 (luggage locked); 498 F.2d at 749 (locker closed); 393 F. Supp. at 327 (interior not exposed to public view). In both Bronstein and Fulero the defendants took affirmative steps to protect their privacy by using mothballs to disguise the distinctive odor of marijuana.

91. The District of Columbia Circuit, in Fulero, did not explain why there was no search. They did not discuss the defendant's contention regarding his expectation of privacy. The Second Circuit, in Bronstein, stated that the defendant's expectation of privacy was unreasonable because the baggage was shipped on a public air flight and "the menace to public safety . . . compels continuing scrutiny of passengers and their impedimenta." 521 F.2d at 462. A person who checks his luggage at an airport might expect that someone would "feel it, weigh it, check its locks, straps and seams to insure that it will not fall apart in transit, . . . shake it to determine whether the contents are fragile or dangerous," or even smell it. 521 F.2d at 465 (Mansfield, J., concurring); see United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974). But he would not expect a non-human sense-enhancer to be directed upon it to discover the presence of marijuana. Thus, defendant's expectation of privacy in his suitcase, while quantitatively lower than his expectation of privacy in his home, was still entitled to be protected. See United States v. Holmes, 521 F.2d 859, 865-66 (5th Cir. 1975) (expectation of privacy while driving on public roads, although minimal, was reasonable); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975) (same). If there were no reasonable expectation of privacy in this situation, the entire airport anti-hijacking program would not constitute a search. However, the courts have held otherwise, and have stated that there is a reasonable expectation of privacy regarding one's luggage. See 521 F.2d at 464 (Mansfield, J., concurring); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974); United States v. Davis, 482 F.2d 893, 904-05 (9th Cir. 1973).

has a subjectively reasonable expectation of privacy is not a search: the use of the canine does not involve a physical intrusion; the intrusion upon an individual's privacy is inoffensive; the intrusion is restricted because the canine is discriminate; the intrusion is not aimed at the person, but rather at an inanimate object; and the use of the canine is not a sophisticated, electronic device method.

Since the Court has expressly rejected the trespass requirement in order for there to be a search, the presence of an actual physical intrusion is no longer necessary.[92] An argument can be made, however, that the use of a canine does not involve any intrusion in that the canine detects molecules emitted *from* an object. Unlike a flashlight, there is no entrance *into* a protected area at all. This argument is no longer constitutionally viable. The use of a bugging device, which was declared a search in *Katz*,[93] performs an analogous function by transmitting or recording sound waves which are emitted. The magnetometer is also a passive device which "merely reacts to the effect of nearby metal on the earth's magnetic field,"[94] and its use has been declared a search, albeit reasonable.[95]

The intrusion involved in the use of a canine is less than that caused by most other sense-enhancers because the canine can discover evidence at a distance of as much as twenty-five yards.[96] A person's home or suitcase could be "examined" without interrupting the individual. This is even less offensive than the use of a magnetometer, since the use of the magnetometer requires an individual to do something that he might not otherwise do, *i.e.*, walk through the device. In this respect, although their use has been constrained, parabolic microphones[97] and binoculars[98] are analogous. The argument thus becomes inconclusive. Although the canine's use may unquestionably be limited to areas where defendant has no reasonable expectation of privacy, such as an open field,[99] this type of analysis presents the same problem—under what circumstances is a defendant's expectation reasonable?

The fact that the intrusion in using canines is more restricted than other sense-enhancers forms one of the most persuasive arguments for declaring their use reasonable. The canine is extremely reliable,[100] and any mistake

92. See notes 22-27 supra and accompanying text.

93. See notes 22-30 supra and accompanying text.

94. McGinley and Downs, Airport Searches and Seizures—A Reasonable Approach, 41 Fordham L. Rev. 293, 303 (1972).

95. United States v. Albarado, 495 F.2d 799, 802-03, 806 (2d Cir. 1974); United States v. Epperson, 454 F.2d 769, 770-71 (4th Cir.), cert. denied, 406 U.S. 947 (1972).

96. See United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975). The canine's sense of smell is approximately eight times that of a normal human. Id.; see Bradley, Narcotics Detection Dogs (pt. II), 41 F.B.I. Law Enf. Bull. 8 (Oct., 1972).

97. See note 25 supra and accompanying text.

98. Cf. note 65 supra.

99. See Hester v. United States, 265 U.S. 57, 59 (1924).

100. A trained canine is extremely effective in discovering marijuana. See 498 F.2d at 749; 393 F. Supp. at 326 & n.1. The extraordinary reliability of the canine may be temporary. If the use of canines were to become an established practice, it would not take long for someone to

favors the suspect.[101] While a bugging device allows an officer to detect both innocent and criminal conversations, and a flashlight allows him to see both innocent and criminal objects, the canine detects only contraband. Any intrusion is minimal because the only information gleaned from the "examination" is whether contraband is present. If an innocent person's suitcase were "examined" by the canine, the handler would learn only that marijuana was not present.[102]

Moreover, the canine's intrusion is aimed not at the person, but rather at an object.[103] However, other intrusions aimed at objects have been held to be searches. For example, every step of the airport anti-hijacking security system has been declared a search, although a reasonable one.[104] This includes not only the magnetometer, which is aimed at the person, but also the X-raying of both carry-on and checked luggage. Also, if the degree of intrusion involved was controlling, the steps taken by defendant to protect his privacy would be immaterial. If an individual exhibits an expectation of privacy, it should be protected, even if it is minimal.[105]

A final argument is that the use of the canine is not comparable to the use of sophisticated scientific equipment.[106] The use of scientific equipment is generally held to be a search.[107] This is partly because of the danger that allowing the use of such a device might open the door for use of more sophisticated devices developed in the future.[108] The use of a canine does not present this danger; thus, no "Big Brother" spectre is raised. Also, the presence of a canine is inoffensive to most people, and the police have used the animals to detect crime and locate criminals for a long time.[109] However, even the use of a relatively inoffensive device can be abused.[110] Some courts,

invent a chemical which would entice the canine to alert to innocent objects, thereby impairing its reliability. Another possibility which would seriously impair the canine's effectiveness is the invention of a "dog repellant."

101. For example, in Bronstein, the canine alerted to two of the four suitcases which contained marijuana. Defendant argued that the canine was only fifty per cent accurate. The Second Circuit rejected this argument, stating that the canine "responds only to marijuana. . . . [The canine] may be in error but her mistake favors the suspect and precludes search and subsequent arrest." 521 F.2d at 463.

102. The canine is still more intrusive than one's own senses since in each case the officer was unable to detect the marijuana without the canine's aid. See note 90 supra and accompanying text.

103. See 521 F.2d at 462-63 & n.5 (luggage).

104. See, e.g., United States v. Albarado, 495 F.2d 799, 802-03, 806 (2d Cir. 1974).

105. See United States v. Holmes, 521 F.2d 859, 865-66 (5th Cir. 1975); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975); cf. Katz v. United States, 389 U.S. 347, 351-52 (1967). The argument was made in Bronstein regarding the defendant's expectation of privacy with respect to his baggage. Other courts have held that such an expectation was reasonable. See note 91 supra.

106. See 521 F.2d at 463. Contra, id. at 464 (Mansfield, J., concurring).

107. See notes 57-60 supra and accompanying text.

108. See, e.g., Helicopter Surveillance, supra note 68, at 509-10; note 25 supra.

109. See generally M. Harney & J. Cross, The Narcotic Officer's Notebook 296-305 (2d ed. 1973).

110. The Second Circuit implied that their decision would have been different if the canine

for example, have stated that the use of a flashlight would be a search if its use were not restricted to its purpose.[111] Consequently, the inherent inoffensiveness of the device should not form the basis upon which the law is made.

Although arguments that the use of trained canines is not a search are very persuasive when considered collectively, they are less so when analyzed individually. In addition, there are three compelling arguments for holding that the use of a canine does constitute a search. These are: the discovery does not fit within the open view doctrine; the effect is the same as if there had been a physical intrusion; and the canine replaces rather than enhances an agent's olfactory sense.

The dog sniffing cases do not fall neatly within the open view situation. Although officers may be in a place where they lawfully have a right to be, discoveries are hardly inadvertent. Such discoveries are clearly intended since the canine was brought in to "smell for" contraband. Unless the limitations on the plain view doctrine are revised, a special exception would have to be made.[112]

The effect is the same whether a canine is used or whether the officers entered the completely enclosed area—contraband is discovered. In both cases the officers discover evidence inside a constitutionally protected area. Thus, the use of the canine might be the substantial equivalent of a physical entry.[113] Such use has been characteristic of a search. However, the effect test fails when it is applied to human senses. Courts have held that evidence discovered through a human's senses is not the product of a search. When an officer discovers evidence through use of his olfactory senses, courts have held that no search has occurred.[114] The fact that the effect test produces contradictory results points out a weakness in the argument.

The final argument is that the canine merely replaces rather than magnifies the agent's olfactory senses.[115] While the canine detects evidence through the use of its olfactory senses, the human agents can only perceive the detection by watching the canine. As such, the agent's sense of smell is not actually enhanced, but replaced. However, the applicability of this test is actually limited since it can be used only when the agent did not detect the evidence through use of the same sense that the enhancer aids. To illustrate, the use of a detectaphone enhances an agent's hearing as the use of a pair of binoculars enhances an agent's sight. Both devices allow agents to hear or see, respectively, what they would otherwise be unable to at any time during the day.

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was allowed to examine everyone's baggage. See 521 F.2d at 463; id. at 465 (Mansfield, J., concurring).

111. See note 67 supra.

112. Although the majority in Bronstein analogized the use of the canine with the use of sense-enhancers, 521 F.2d at 462 & n.3, and the concurring judge in Bronstein referred to the possibility of a "plain smell" doctrine, id. at 464 (Mansfield, J., concurring), none of the cases discussed whether this situation was encompassed by the open or plain view doctrines.

113. See 393 F. Supp. at 327.

114. United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974); see United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975).

115. See 521 F.2d at 464 (Mansfield, J., concurring).

While the former is a search,[116] the latter is not.[117] This argument, though, is on point here. While the use of a sense-enhancer raises justifiable constitutional questions, it is doubtful that the use of a replacer should raise those questions also.

Thus, an analysis of the various arguments indicates that the use of the canine is a search within the fourth amendment when it is focused on an object in which the defendant has a subjective expectation of privacy.

VI. CONCLUSION

As a result of the inherent vagueness of the *Katz* doctrine, three views have emerged to deal with the canine situation: first, that no search occurred;[118] second, that a search occurred but it was reasonable under the circumstances;[119] and third, that a search occurred and it was unreasonable absent a search warrant or exigent circumstances.[120]

While there are valid arguments for the view that no search occurs, the second and third views are preferable. Minimally intrusive methods of detecting evidence should be brought within the scope of the fourth amendment. If not, then the "plain view" rules should be strictly applied. However, if the first view, which was adopted by the District of Columbia and Second Circuits, is interpreted to stand for the proposition that no search occurs when there is probable cause or reasonable grounds for a limited intrusion,[121] a dramatic change in traditional search and seizure law would have been effected.[122] In this case, the intrusion would be excluded both from the scope

116. See Katz v. United States, 389 U.S. 347 (1967); cf. notes 23-30 supra and accompanying text.

117. See United States v. Lee, 274 U.S. 559 (1927) (dictum); cf. note 65 supra and accompanying text.

118. United States v. Bronstein, 521 F.2d 459 (2d Cir. 1975); United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974).

119. 521 F.2d at 465 (Mansfield, J., concurring).

120. United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975).

121. See 521 F.2d at 463.

122. A potentially dangerous change in traditional search and seizure law would also occur if those who held that the canine's use was reasonable under the circumstances were to permit the canine to be used in the absence of either exigent circumstances or one of the recognized exceptions to the warrant requirement. See note 3 supra. In Cardwell v. Lewis, 417 U.S. 583, 588-92 (1974), the Court held that the warrantless examination of the exterior of defendant's car upon probable cause was not an unreasonable search under the fourth amendment. The holding was not based upon the automobile exception, but on the fact that the invasion of privacy, " 'if it can be said to exist, is abstract and theoretical.' " Id. at 592 (plurality opinion), quoting Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974). The Court cautioned, however, that "the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. . . .

"In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence." 417 U.S. at 591 (plurality opinion). Thus, the canine sniffing cases are distinguishable because there the interior of the object and personal effects were examined. Probable cause alone is not a sufficient ground for a search. If it were, the warrant requirement would have been read out of the fourth amendment. See Coolidge v. New Hampshire, 403 U.S.

of the fourth amendment and from the inadvertence requirement of the "plain view" doctrine. The result would be a drastic erosion of an individual's right to privacy. An intrusion might be reasonable under the circumstances, but a neutral magistrate, not the police, should determine when an intrusion is necessary.[123]

Constitutional rights dealing with privacy should be liberally construed in order to protect individuals as much as possible.[124] Privacy is essential to the existence of a free society, and any intrusion upon it should be carefully limited.

As the previous section illustrates, there is no specific test which can be uniformly applied to determine whether there has been an unreasonable intrusion upon an individual's expectation of privacy—whether a search has occurred. However, an attempt must be made to develop a standard which could be easily comprehended and followed by both the police and the courts, and which would equitably balance the individual's right to privacy with the government's right to apprehend criminals.[125] Such a standard might be to declare that the use of any aid which improves, enhances, or replaces the natural senses of an officer is a search.[126] The continued reluctance to attempt to formulate a general standard can only lead to further confusion and dispute among the courts.

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443, 450-51 (1971); Katz v. United States, 389 U.S. 347, 356-57 (1967); Johnson v. United States, 333 U.S. 10, 14-15 (1948); United States v. Carter, 522 F.2d 666, 673 (D.C. Cir. 1975); United States v. Blanton, 520 F.2d 907, 912 (6th Cir. 1975).

123. See Katz v. United States, 389 U.S. 347, 356-59 (1967). In McDonald v. United States, 335 U.S. 451, 455-56 (1948), the Court stated: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

124. See Boyd v. United States, 116 U.S. 616, 635 (1886).

125. See E. Griswold, Search and Seizure: A Dilemma of the Supreme Court 52-57 (1975); Kalvan, The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 249 (1971).

126. See Helicopter Surveillance, supra note 68, at 529. "In the final analysis, whether a governmental intrusion into a private area constitutes a reasonable search under the Fourth Amendment depends on the kind and degree of intrusion which a free society is willing to tolerate. In the absence of a warrant supported by probable cause or certain recognized exceptions for a warrantless search, people living in a free society should not, for example, be required to tolerate intrusions into their privacy by the Government's use of electronic monitoring equipment, high power telescopes, or the keen olfactory powers of specially trained dogs. These and other extraordinary information gathering devices gravely threaten each person's ability to maintain any semblance of privacy." 393 F. Supp. at 328.