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Constitutional Law--Fourth Amendment--When May a Police Officer's Perception of Certain Odors Provide a Sufficient Basis for Searches or Seizures Without Warrants?

CONSTITUTIONAL LAW—FOURTH AMENDMENT—WHEN MAY A POLICE OFFICER'S PERCEPTION OF CERTAIN ODORS PROVIDE A SUFFICIENT BASIS FOR SEARCHES OR SEIZURES WITHOUT WARRANTS?

INTRODUCTION

Modern criminal cases, particularly those involving illicit drugs or controlled substances, frequently raise questions relating to the perceptions by law enforcement officers of certain telltale odors.[1] Specifically, courts are asked to consider police officers' perceptions of odors which indicate the presence of contraband or criminal activity, as in a possessory offense in progress. In some cases, such as those involving searches without warrants, the legal effect to be given perceived odor has been a threshold issue.[2]

Although the fact patterns of many Supreme Court cases have included police perceptions of relevant odors,[3] the Court rarely has had occasion squarely to address whether odor itself may justify warrantless searches and seizures. The Court last ruled directly on this issue in 1948, in *Johnson v. United States*,[4] holding that odor alone could not

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1. *See, e.g.*, New York v. Belton, 453 U.S. 454, 455-56 (1981) (odor of marijuana led to arrest of car occupants and search of their car); Delaware v. Prouse, 440 U.S. 648, 650 (1979) (police officer arrested car occupant after detecting marijuana odor and finding marijuana within the car); Schmerber v. California, 384 U.S. 757, 768-69 (1966) (odor of alcohol and symptoms of intoxication were sufficient both to arrest driver for driving while under the influence of alcohol and to extract blood sample).

Although many cases arise in the context of automobile stops, odor plays an important role in other situations as well. *See, e.g.*, United States v. Park, 531 F.2d 754, 757-58 (5th Cir. 1976) (odor of ether and other factors created probable cause sufficient for the issuance of a search warrant for a home where drug manufacturing was suspected); United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974) (odor of marijuana emanating from luggage created probable cause for search of luggage and arrest of owner).

In a recent case, the aroma of insecticide emanating from a suspect, when coupled with other factors, was instrumental in securing a conviction for burglary of a fumagated premises. *A Court Odor: The Nose Knows*, Nat'l L.J., Jan. 19, 1987, at 39, col. 1.

2. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948) (issue involved was whether odor of burning opium was sufficent to permit warrantless search of hotel room); Taylor v. United States, 286 U.S. 1 (1932) (issue was whether odor of whiskey along with other factors was sufficient to permit search of garage without warrant); United States v. Burrow, 396 F. Supp. 890, 895-96 (D. Md. 1975) (issue was whether odor of burned marijuana was sufficient to permit warrantless search of van).

3. *See* United States v. Johns, 469 U.S. 478, 480-81 (1985); *Belton*, 453 U.S. at 455-56; *Prouse*, 440 U.S. at 650; *Schmerber*, 384 U.S. at 768-69.

4. 333 U.S. 10 (1948). For a discussion of *Johnson*, see *infra* notes 57-83 and accompanying text.

justify a search without a warrant.[5] If *Johnson* was truly intended to establish such a blanket prohibition, it has arguably, in light of subsequent rulings of the Court[6] on similar fourth amendment issues[7] and more directly related rulings by the circuit courts of appeals, lost much of its force.[8] As a result, the current state of the law regarding warrantless searches and seizures arising from the perception of odor is not fully clear.

There is no dispute that the perception of odor, when distinctive and detected by a person able to accurately identify the odor, should be accorded great weight in establishing probable cause[9] for the issu-

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5. *Johnson*, 333 U.S. at 13-15.

6. *See Johns*, 469 U.S. 478 (1985). For a discussion of the Court's favorable attitude toward warrantless searches based on odor in *Johns*, see *infra* notes 166-72 and accompanying text.

7. The fourth amendment to the United States Constitution governs searches and seizures. It reads:

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

U.S. CONST. amend. IV. The provisions of the fourth amendment are applicable to actions of agents of the states as well as the federal government. Mapp v. Ohio, 367 U.S. 643 (1961).

In explaining the first clause of the fourth amendment, the Supreme Court recently stated that

> [t]his text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. This Court has . . . construed this protection as proscribing only governmental action . . . .

United States v. Jacobsen, 466 U.S. 109, 113 (1984) (footnotes omitted). "As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true." Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring).

8. *See, e.g.*, United States v. Haley, 669 F.2d 201, 203-04 (4th Cir.), *cert. denied*, 457 U.S. 1117 (1982). For a discussion of *Haley*, see *infra* note 172 and accompanying text.

9. Probable cause is the minimum quantum of proof required by the fourth amendment for the issuance of warrants for the search or seizure of persons or property. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1, at 441-44 (1978). Traditionally, probable cause was required for arrests, searches and seizures made without warrants. Carroll v. United States, 267 U.S. 132, 161 (1925). Probable cause is more than the level of articulable, reasonable suspicion of criminal activity needed to perform a brief investigative stop, *see* Terry v. Ohio, 392 U.S. 1, 26-27 (1968), but it is clearly less than the proof beyond a reasonable doubt which is essential for conviction. Brinegar v. United States, 338 U.S. 160, 174-75 (1949). Probable cause is a reasonable belief of guilt, grounded on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Id.* at 175. Probable cause for the issuance of a search warrant has been

ance of warrants.[10] Notwithstanding the prohibition articulated in *Johnson*,[11] many warrantless searches and seizures stemming from the perception of odors have been upheld. In some cases, these searches have been made incident to arrest;[12] that is, the odor provided probable cause to arrest for possession of contraband which in turn provided justification for the search.[13]

A number of cases have addressed the issue more directly. The Fourth Circuit has analogized the emanation of odor to the sense of sight,[14] so as to fall within the existing "plain view" doctrine[15] which

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described as "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). In other words, "the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [contraband] was being transported . . . . " *Carroll*, 267 U.S. at 162 (describing probable cause for search of an automobile without a warrant). Hence, probable cause to search involves the logical belief that certain items have a connection to a crime and will be found in a particular place. Probable cause to arrest requires the justifiable belief that a particular crime has been committed by the particular person to be arrested. *See* 1 W. LAFAVE, *supra*.

10. *See* Johnson v. United States, 333 U.S. 10, 13 (1948) (testimony as to the presence of the odor of a forbidden substance has always been sufficient to justify the issuance of a search warrant); De Pater v. United States, 34 F.2d 275, 276 (4th Cir. 1929) ("It is too well determined to require argument that knowledge of a crime may be acquired through the sense of smell alone."); *see also infra* notes 75-76 and accompanying text.

11. *Johnson*, 333 U.S. at 13 ("odors alone do not authorize a search without a warrant").

12. *See, e.g.*, New York v. Belton, 453 U.S. 454, 455-56, 460 (1981) (search of containers within automobile permissible when marijuana odor gave rise to arrest of occupants); United States v. Leazar, 460 F.2d 982, 984-85 (9th Cir. 1972) (search of automobile upheld when marijuana odor created probable cause to believe that the driver was using the vehicle to possess contraband); United States v. Schultz, 442 F. Supp. 176, 182 (D. Md. 1977) (search of car, yielding gun, upheld when marijuana odor and other factors indicated that the driver was committing a possessory offense in the police officer's presence).

13. A lawful custodial arrest justifies a contemporaneous search of the person arrested and of the immediate area without a warrant. *Belton*, 453 U.S. at 460; Chimel v. California, 395 U.S. 752, 762-63 (1969); Weeks v. United States, 232 U.S. 383, 392 (1914).

14. United States v. Haley, 669 F.2d 201 (4th Cir.), *cert. denied*, 457 U.S. 1117 (1982).

15. *See* Harris v. United States, 390 U.S. 234, 236 (1968) (evidence found in plain view on door jamb of car admissible despite lack of search warrant since officer had right to open car door as part of normal procedure); *see also* Texas v. Brown, 460 U.S. 730, 738-39 (1983) ("plain view" rule allowed seizure of evidence when officer's access to evidence was justified by routine traffic stop). *See generally* Coolidge v. New Hampshire, 403 U.S. 443, 464-72 (1971) (in-depth discussion of the "plain view" doctrine).

For a further discussion of *Harris*, see *infra* text accompanying notes 103-07. For a further discussion of *Brown*, see *infra* text accompanying notes 134-55. For a further discussion of *Coolidge*, see *infra* text accompanying notes 108-24. For a further discussion of the plain view doctrine, see *infra* text accompanying notes 102-55.

permits seizures, and possibly searches, without warrants.[16] This analogy has been termed "plain smell" or "plain odor."[17] Although the Supreme Court has permitted warrantless seizures of items in "plain view" and has recognized that the contents of containers which can be inferred from external indications also fall within "plain view,"[18] it has yet to categorically adopt the "plain smell" analogy.[19]

This Note will take the position that the groundwork has been laid for the Supreme Court to adopt the "plain smell" analogy, and that, in fact, the Court favors moving in this direction. If adopted, the "plain smell" rule will likely give rise to more searches and seizures without warrants than a literal reading of *Johnson*[20] would appear to allow.

ODOR AND THE WARRANT REQUIREMENT

In 1914, the Supreme Court, deciding *Weeks v. United States*,[21] held that the defendant's fourth amendment right to be secure from unreasonable searches and seizures[22] was violated when a United States Marshal entered the accused's home and, acting without a warrant, found and seized private papers for use as evidence in his criminal proceeding.[23] While acknowledging that the marshal's actions were the result of his "praiseworthy" efforts to "bring the guilty to punish-

16. *See Haley*, 669 F.2d at 203-04 ("characteristic which brings the contents [of sealed containers in a car trunk] into plain view is the odor given off by those contents"), *cert. denied*, 457 U.S. 1117 (1982); *see also* United States v. Haynie, 637 F.2d 227, 233-34 (4th Cir. 1980) (search of car trunk upheld where marijuana odor emanated from trunk because distinctive odor placed search within ambit of plain view), *cert. denied sub nom.* Fletcher v. United States, 451 U.S. 972 (1981); United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1974) (inadvertant discovery and subsequent search of boxes in van upheld under plain view analysis where police smelled marijuana upon lawful entry of van). *But see* United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979) (odor of marijuana emanting from van did not create plain view justification for search of sealed boxes therein, because van owner had reasonable expectation of privacy in boxes, and odors in van may have originated from other sources), *aff'd on rehearing*, 615 F.2d 10 (2d Cir. 1980); *see also* United States v. Johns, 707 F.2d 1093, 1095-96 (9th Cir. 1983) (marijuana odor emanating from trucks merely justified *seizure* of packages in plain view therein, search of contents, however, required warrant), *rev'd on other grounds*, 469 U.S. 478 (1985).

17. *See, e.g., Dien*, 609 F.2d at 1045.

18. *See Brown*, 460 U.S. 730. For a discussion of *Brown*, see *infra* text accompanying notes 134-55.

19. *See* United States v. Sharpe, 470 U.S. 675, 699 n.12 (1985) (Marshall, J., concurring) (noting that the case law respecting whether odor creating probable cause also justifies a warrantless search remains unsettled).

20. 333 U.S. 10 (1948). For a further discussion of *Johnson*, see *infra* text accompanying notes 57-83.

21. 232 U.S. 383 (1914).

22. U.S. CONST. amend. IV. For a discussion of the fourth amendment, see *supra* note 7.

23. *Weeks*, 232 U.S. at 386, 398.

ment,"[24] the Court nonetheless found the search and seizure to be improper.[25] Under the Court's interpretation of the fourth amendment, the marshal was required to arrive "armed with a warrant issued . . . upon sworn information and describing with reasonable particularity the thing for which the search was to be made"[26] in order to avoid a "direct violation of the constitutional prohibition against such action."[27] The Court noted that the fourth amendment was conceived in order to safeguard the privacy of citizens against unreasonable invasions of the home, in light of the intrusions which had occurred under British rule with the use of general warrants called writs of assistance.[28] Its enactment served to embody the fundamental principle that "a man's house [is] his castle . . . not to be invaded by any general authority to search and seize . . . . "[29] The Court in *Weeks* found it necessary, therefore, to exclude the improperly obtained evidence from the trial of the accused.[30]

Early on, however, the Supreme Court also indicated that the warrant requirement was subject to certain exceptions. *Weeks* recognized the "search incident to arrest" exception, whereby the person of an arrestee and the area within his immediate control could be searched.[31]

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24. *Id.* at 393.

25. *Id.*

26. *Id.*

27. *Id.* The Court stressed that "without sworn information and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused." *Id.* at 393-94.

28. *Id.* at 390.

29. *Id.* at 390-91 (constitutional protection "appl[ies] to all invasions on the part of the government and its employés [sic] of the sanctity of a man's home and the privacies of life") (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

30. *Id.* at 398. The necessity of exclusion was explained as follows:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.

Id. at 393. The Court noted that "efforts . . . to bring the guilty to punishment . . . are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Id.* The Court also explained that judicial integrity could not permit the use of such evidence: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394.

Weeks did not create an exclusionary rule applicable to the states, however, and it was not until 1949 that the fourth amendment was held applicable to state actions. Wolf v. Colorado, 338 U.S. 25 (1949) (overruled in Mapp v. Ohio, 367 U.S. 643 (1961)). The Court did not require exclusion of improperly obtained evidence from the states' cases-in-chief until Mapp v. Ohio, 367 U.S. 643 (1961).

31. 232 U.S. at 392. The "search incident to arrest" exception was amplified in

Ten years later, in *Hester v. United States*,[32] the Court distinguished "open fields" from houses,[33] and held that contraband seen in open fields was not within the protection of the fourth amendment.[34]

In 1925, in *Carroll v. United States*,[35] the Court announced what has become known as the "automobile exception."[36] In *Carroll*, federal prohibition agents had gathered some evidence that Carroll and another were "bootleggers" transporting illegal liquor by car over a particular route from time to time.[37] After an earlier unsuccessful attempt,

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Agnello v. United States, 269 U.S. 20 (1925), in which the Court recognized that there was a "right" to contemporaneously search, without a warrant, persons lawfully arrested while committing a crime, and to search the place of the arrest and seize weapons, fruits, and instrumentalities of the crime, and articles that could be used to facilitate escape. *Id.* at 30. Although the precise scope of a search incident to a lawful arrest has been subject to change several times during this century, the general modern principle is that the person of the arrestee and area within his immediate control may be searched to prevent escape, injury, and destruction of evidence. Chimel v. California, 395 U.S. 752, 762-63 (1969). A *Chimel* search can only flow from an already lawful arrest. The search, no matter how fruitful, cannot retroactively justify a baseless arrest. *See* Henry v. United States, 361 U.S. 98, 103 (1959). Probable cause to search need not exist for the discovery of any particular item of evidence, provided the arrest is lawful and the search is contemporaneous and properly confined in scope. *See* New York v. Belton, 453 U.S. 454, 460-63 (1981). Under *Belton*, the arrestee need not have the ability to reach the "immediate control" area at the moment of the search. *Id.* Justice Brennan in dissent, however, believed the Court substantially expanded the permissible scope of searches beyond the original objective of deterring arrestees from reaching weapons or contraband. *Id.* at 466 (Brennan, J., dissenting).

32. 265 U.S. 57 (1924). In *Hester*, federal revenue officers, while presumably trespassing on land near Hester's father's house, observed contraband whiskey. *Id.* at 58. Despite the lack of any warrant, the Court held that the officers' observations constituted admissible testimony. *Id.*

33. *Id.* at 59 ("the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields").

34. *Id.* at 50. For a more recent "open fields" case, see California v. Ciraolo, 476 U.S. 207 (1986), in which the Court held that aerial observation of a yard enclosed by a ten-foot high fence did not violate the fourth amendment and, therefore, no warrant was necessary to observe the yard with the naked eye. *Id.* at 1813. Four Justices dissented, arguing that the defendant's reasonable expectation of privacy had been infringed and that purposeful aerial police surveillance without a warrant violated the defendant's fourth amendment right. *Id.* at 1818 (Powell, J., dissenting). *Cf.* Dow Chem. Co. v. United States, 476 U.S. 227 (1986). In *Dow Chemical*, the Court held that Environmental Protection Agency surveillance of a 2,000-acre industrial complex by use of sophisticated aerial photographs taken from navigable airspace did not violate the fourth amendment, because there was no constitutionally protected expectation of privacy from aerial observation. *Id.* at 1827. Four Justices dissented, arguing that the method of surveillance is not relevant when an expectation of privacy, accepted as reasonable by society, is invaded without a warrant. *Id.* at 1834 (Powell, J., dissenting).

35. 267 U.S. 132 (1925). For a discussion of the *Carroll* doctrine as applied to containers, see *infra* notes 125-130.

36. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971).

37. 267 U.S. at 135-36.

the agents were able to stop the "bootleggers" driving on the highway.[38] Acting without a warrant, the agents searched the car on the belief that it concealed contraband. Liquor was found in the upholstery, and was subsequently used in evidence.[39] The Court upheld the search and the resulting arrests and convictions.[40]

The *Carroll* Court reasoned that the fourth amendment freedom from unreasonable searches and seizures must be defined by historical reference.[41] The Court demonstrated that traditionally it was considered reasonable to search vehicles without warrants, presumably because of their ability to leave an area rapidly before a warrant could be obtained.[42] Thus, the power to conduct such searches was intended to reflect a careful balance between public interests and the rights of individuals.[43] Exigence, resulting from the impracticability of obtaining a search warrant, was but one requisite; probable cause to believe that the vehicle contained contraband was equally necessary to justify the search.[44] In framing this exception for automobiles, the *Carroll* Court reacknowledged the general requirement of a search warrant for most searches and seizures conducted by law enforcement officials[45] and carefully noted the historical difference between a vehicle search and the "search of a store, dwelling house or other structure in respect of which a proper official warrant may readily be obtained . . . ."[46]

At the time of *Carroll,* the Court had yet to consider the reasonableness of a warrantless search based upon perceived odor. The Court did not address this issue until eight years later in *Taylor v. United States,*[47] another prohibition case and precursor of *Johnson v. United States.*[48] In *Taylor,* a group of prohibition agents decided to investi-

38. *Id.* at 134-36.

39. *Id.* at 136.

40. *Id.* at 162.

41. *See id.* at 149 ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interest and rights of individual citizens.").

42. *See id.* at 153. The Court noted that a statute passed in 1789 by the same Congress which proposed the Bill of Rights, authorized government agents to enter ships or vessels which they suspected contained concealed articles subject to import duties. Acting without warrants, the agents could search for and seize any such concealed items. The statute required, however, that a warrant be obtained for a like search of a building. *Id.* at 150-51. Later statutes also allowed officials to similarly stop and search vehicles or persons suspected of being involved in illegal activity. *See id.* at 151-53.

43. *See id.* at 156.

44. *Id.* at 155-56.

45. *Id.* at 156.

46. *Id.* at 153.

47. 286 U.S. 1 (1932).

48. *See* 333 U.S. 10 (1948). Both cases dealt with warrantless searches for, and seizures of, contraband within buildings. The perception of odor was a key factor in es-

gate a certain location following complaints indicating the presence of illegal liquor.[49] Taylor, the resident of the premises, was known to have been previously convicted of violating prohibition laws.[50] Upon arriving at the location, the agents detected the smell of whiskey emanating from a garage adjacent to Taylor's residence.[51] Peering through small openings in the garage, the agents observed a number of cases they suspected contained jars of whiskey. After removing a lock and entering the garage, the agents conducted a search which uncovered a large cache of liquor. Taylor was arrested when he appeared at the garage.[52]

The Court did not dispute the probative value of odor,[53] but found that the search could not be justified.[54] The search was unreasonable, because the agents had not obtained, or even attempted to obtain, a search warrant despite "abundant opportunity" to do so.[55] The Court found no justification or excuse for this omission: "[T]here was no probability of material change in the situation during the time necessary to secure [a] warrant. Moreover a short period of watching would have prevented any such possibility."[56]

The Court next dealt with odor and warrantless searches in *Johnson v. United States,*[57] in which it announced that a search without a warrant was unreasonable per se.[58] In *Johnson,* an experienced police lieutenant of the Seattle narcotics detail had received information that

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tablishing probable cause in each case. Both searches were held unreasonable. *See id.* at 12-14; 286 U.S. at 5-6.

49. 286 U.S. at 5.

50. Taylor v. United States, 55 F.2d 58, 59-60 (4th Cir.), *rev'd,* 286 U.S. 1 (1932). The Supreme Court did not mention this fact. *See* 286 U.S. at 5.

51. 286 U.S. at 5.

52. *Id.*

53. *Id.* at 6 ("[p]rohibition officers may rely on distinctive odor as a physical fact indicative of possible crime").

54. *Id.*

55. *Id.; cf.* Steele v. United States, 267 U.S. 498 (1925) (after viewing evidence in a garage, the agents obtained a warrant).

56. 286 U.S. at 6. Prior to *Taylor,* the courts of appeals had upheld similar searches. *See, e.g.,* Mulrooney v. United States, 46 F.2d 995, 996 (4th Cir. 1931) (warrantless search of premises consisting of residence and barroom upheld where odor of mash was detected by prohibition agents); *accord* McBride v. United States, 284 F. 416 (5th Cir. 1922), *cert. denied,* 261 U.S. 614 (1923).

Taylor may not have achieved its desired effect. Some courts, upholding indoor searches based upon smell, have distinguished *Taylor* by emphasizing the presence of additional factors. *See* United States v. Kronenberg, 134 F.2d 483 (2d Cir. 1943) (fumes of burning opium coupled with arguably suspicious actions of apartment's occupants created "more evidence to go on"); Pong Ying v. United States, 66 F.2d 67, 68 (3d Cir. 1933) (fumes of burning opium coming from an apartment and noises indicating occupancy were sufficient to establish that a crime was being committed in the officers' presence).

57. 333 U.S. 10 (1948).

58. *Id.* at 14.

unknown persons were smoking opium in a certain hotel.[59] An attempt to get further information at the hotel revealed a strong odor of burning opium in the hallway. The lieutenant left and returned with several federal narcotics agents approximately one hour later. The officers, all experienced in narcotics work, recognized the strong and unmistakable odor of burning opium.[60] The odor was traced to a room, from which fumes were wafting through spaces in and around the door.[61] The officers knocked on the door and, in response to the occupant's query, the lieutenant identified himself. There was a delay and noises were heard before the door was opened by the sole occupant.[62] When asked about the odor, Johnson denied any smell of opium.[63] She was then told, "I want you to consider yourself under arrest because we are going to search the room."[64] The search yielded opium and still warm smoking apparatus.[65]

Johnson's conviction was affirmed by a unanimous Court of Appeals for the Ninth Circuit, which viewed the search as incident to a valid arrest based upon probable cause created by the odor.[66] The Ninth Circuit found no bar to holding that smell alone could be sufficient to constitute probable cause.[67] In that court's view, the search was reasonable even without a warrant, because "delay for the purpose of securing a warrant for arrest and search in the circumstances probably would have been fatal to the detection of the suspected crimes."[68]

The Supreme Court disagreed. It found no merit in the government's contention that the room search properly flowed from a valid arrest.[69] The government argued that justification for the arrest was based upon probable cause—created by the odor—that a crime was occurring in the room, coupled with the knowledge—acquired once the

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59. *Id.* at 12.

60. *Id.*

61. Johnson v. United States, 162 F.2d 562, 563 (9th Cir. 1947), *rev'd*, 333 U.S. 10 (1948).

62. 333 U.S. at 12. The Supreme Court described the circumstances as "a slight delay, some 'shuffling or noise' in the room," before the defendant opened the door. *Id.* The court of appeals described the pre-search events somewhat differently: "There were sounds of some one [sic] scurrying around within the room for several minutes, after which the officer was admitted by appellant." 162 F.2d at 563.

63. 333 U.S. at 12.

64. *Id.* at 12.

65. *Id.*

66. 162 F.2d at 562-63. The permissible scope of a "search incident to arrest" at that time was construed rather broadly. *See* Harris v. United States, 331 U.S. 145 (1947) (allowing a five-hour search).

67. 162 F.2d at 563 ("the smell of opium fumes may in some circumstances be second only to the well-known maxim that 'Seeing is believing' ").

68. *Id.*

69. 333 U.S. at 15.

door was opened—that Johnson was the only occupant of that room.[70] Instead, the Court determined that knowledge of Johnson's presence was obtained by her involuntary submission to authority.[71] In finding the arrest unlawful, the Court intimated that officers should be certain of whom they are going to arrest before observing the interior of a room.[72] After disposing of the "search incident to arrest" justification, the Court attacked the search, finding it unconstitutional.[73]

The *Johnson* Court acknowledged, however, that "[a]t the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant."[74] In so doing, the Court rejected the notion that *Taylor*[75] stood for the premise that odors could not constitute probable cause for any search. Rather, the Court stated that *Taylor* "held only that odors alone do not authorize a search without a warrant. . . . Indeed it might very well be found to be evidence of most persuasive character."[76]

The Court, as noted above, made it clear that it was not question-

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70. *Id.* at 15-16.

71. *Id.* at 16 ("It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest."). The defendant, in the words of the officer, "stepped back acquiescently and admitted [the officers]." *Id.* at 12.

72. *See id.* at 15-16. The Court of Appeals for the Ninth Circuit, in *Johnson*, was not alone in failing to perceive the critical importance of this circumstance. *See* Pong Ying v. United States, 66 F.2d 67, 68 (3d Cir. 1933). In *Pong Ying*, noises indicated the presence of an unknown number of people in a particular apartment from which the odor of opium was emanating. The Third Circuit commented:

> Now here we have not a mere suspicion that a violation of law had been committed or was likely to be committed, but one of the then actual commission of an unlawful act. There was some one [sic] within the room. Unburning opium in a room would, of course, cause no fumes, but burning opium would. So the fact of escaping opium fumes was evidence to the officers that opium was being used and burned in that apartment. . . .
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> . . . The defendant . . . was within and in control of [the] apartment . . . . Some one [sic] within those premises created the fumes of the unlawful drug . . . .

Id. at 67-68.

73. *See* 333 U.S. at 16-17. In a footnote, the Court rejected the government's alternative contention that the search was the legitimate product of "hot pursuit" because the facts did not indicate a chase. *Id.* at 16 n.7.

74. *Id.* at 13.

75. 286 U.S. 1 (1932).

76. 333 U.S. at 13. The Court outlined that to use odor as a basis for a warrant, a magistrate would have to find "the affiant qualified to know the odor," and the odor "sufficiently distinctive to identify a forbidden substance." *Id.* The Court added: "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 333 U.S. at 14 n.4 (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)).

ing the existence of probable cause. Instead, it focused its concerns on the unreasonableness of unfettered police discretion. The Court stressed:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[77]

The Court conceded that "exceptional circumstances" could obviate the necessity of a warrant, as the need for effective law enforcement would outweigh the right of privacy,[78] but reaffirmed the general rule requiring warrants by flatly refusing to find any such justification in *Johnson*.[79] Only the opium fumes constituted evidence threatened with destruction so as to create an "exceptional circumstance,"[80] and this evidence could not have been preserved indefinitely in any event.[81] In the Court's view, testimony by the officers could have sufficed, nor "would [it have] perish[ed] from the delay of getting a warrant."[82] The Court, in conclusion, stated: "If the officers in this case were excused

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77. *Id.* at 13-14. In this regard, the Court remarked that "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime . . . . " *Id.* at 14 n.3 (quoting United States v. Lefkowitz, 285 U.S. 452, 454 (1932)).

78. Examples of "exceptional circumstances," which today are referred to as exigent circumstances, include suspects fleeing or likely to take flight, searches involving a moveable vehicle, or the possibility of removal or destruction of evidence or contraband. *See id.* at 15. For further elaborations on the exigent circumstances principle, see Vale v. Louisiana, 399 U.S. 30, 35-36 (1970); Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970). *See also* Texas v. Brown, 460 U.S. 730, 735-36 (1983) (listing circumstances, including "exigent circumstances," under which a warrant is not required).

79. 333 U.S. at 15.

80. The Court seemed to overlook the substantial possibility that the opium itself could have been destroyed by the burning and disposal of any remnants. Indeed, courts often are reluctant to concede such a result. *See, e.g.*, Polson v. City of Lee's Summit, 535 F. Supp. 555, 559 (N.D. Mo. 1982) (in holding that marijuana smoke does not permit warrantless search of residence, court only indirectly acknowledged that loss of evidence could result); State v. Dorson, 62 Haw. 377, 384-85, 615 P.2d 740, 746-47 (1980) (likely destruction of evidence was included in the court's definition of exigent circumstances, but the odor of burning marijuana did not create an exigent circumstance allowing a warrantless search of a home). The explanation of this curiosity appears to be that no court truly doubts that the evidence will be destroyed, but that countervailing interests against intrusion outweigh the significance of such destruction. *See Polson*, 535 F. Supp. at 559.

81. 333 U.S. at 15.

82. *Id.*

from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."[83]

Supreme Court rulings after *Johnson* have demonstrated that odor is still regarded as capable, whether independently or in conjunction with other factors, of establishing probable cause for at least some arrests and searches without warrants.[84] For example, the Court, in *Schmerber v. California*,[85] found that "there was plainly probable cause" to arrest the defendant for driving while under the influence of intoxicants, when, shortly after an accident, the officer smelled the odor of liquor on the defendant's breath and observed other symptoms of drunkenness.[86] In *New York v. Belton*,[87] the odor of marijuana emanating from a validly stopped car, as well as the observation of an envelope marked "Supergold"[88] within the car, were sufficient to provide probable cause for the arrest of its occupants.[89] In *United States v. Johns*,[90] the odor of marijuana emanating from trucks justified a search of their contents.[91] In each of these arrest or vehicular search cases, the lower court finding that probable cause arose from odor was not questioned. The Supreme Court, however, has not found occasion to explicitly reconsider *Johnson*.

PRIVACY AND PLAIN VIEW

Since *Johnson*, a number of major developments in fourth amendment interpretation and analysis have emerged.[92] Notably, a new form

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83. *Id.*

84. *See generally* Annotation, *Odor of Narcotics as Providing Probable Cause For Warrantless Search*, 5 A.L.R. 4TH 681 (1981).

85. 384 U.S. 757 (1966).

86. *Id.* at 768-69. The same facts that established probable cause, viewed in light of the risk of losing evidence with the passage of time, also justified requiring Schmerber to submit to a blood test for alcohol. *Id.* at 770-71. Reasoning that a delay in obtaining this evidence might have led to its loss, the Court upheld as reasonable the warrantless search and seizure. Yet only seven years earlier, in Henry v. United States, 361 U.S. 98 (1959), the Court had reaffirmed its holding in *Johnson*, that "the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant." *Id.* at 101.

87. 453 U.S. 454 (1981).

88. *Id.* at 455-56.

89. *Id.* at 462-63. The arrests, in turn, supported a search of the passenger compartment of the car and of any containers therein capable of holding a weapon or evidence of the crime. *Id.* at 460-61; *see also* Delaware v. Prouse, 440 U.S. 648, 650, 663 (1979) (similar arrest invalid because underlying car stop was without legal basis).

90. 469 U.S. 478 (1985).

91. *Id.* at 482-83. For a discussion of *Johns*, see *infra* notes 166-77 and accompanying text.

92. These developments have further defined what constitutes an unreasonable search and seizure within the meaning of the fourth amendment. In some instances, fourth amendment protection has been interpreted quite broadly. However, many deci-

of fundamental analysis recognizing "reasonable expectations of privacy" has become the guiding principle in fourth amendment jurisprudence.

The reasonable expectation of privacy standard was first advanced in *Katz v. United States*.[93] *Katz* dealt with the admissibility of audio evidence gathered as a result of the warrantless installation of electronic eavesdropping equipment atop an outdoor public telephone booth.[94] In installing the eavesdropping device, the government agents had apparently acted in reliance upon earlier rulings which had limited fourth amendment protection to physical intrusions and seizures of tangible items from constitutionally protected areas.[95]

The parties in *Katz* agreed that the issue before the Court was whether a telephone booth, like a home, was a "constitutionally protected area."[96] The Court, however, found this characterization to be misguided.[97] The proper focus in determining whether a "search" or "seizure" is violative of the fourth amendment is whether a justifiable expectation of privacy has been invaded.[98] Applying this rationale, the

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sions have broadened the circumstances in which police may effect searches and seizures without violating the fourth amendment. For a general discussion of significant fourth amendment developments since *Johnson*, see C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 47-158 (1978).

93. 389 U.S. 347 (1967).

94. *Id.* at 348.

95. *Id.* at 356. The earlier cases, which the Court overruled in *Katz*, were Goldman v. United States, 316 U.S. 129 (1942) (eavesdropping device placed against the exterior of a wall permitted on the basis of lack of physical trespass), and Olmstead v. United States, 277 U.S. 438 (1928) (telephone wiretapping in basement of office building and on public streets did not violate fourth amendment where no trespass on defendants' property). In two later cases, also decided prior to *Katz*, physical intrusion, however minor, proved the dispositive factor in finding fourth amendment violations. *See, e.g.*, Clinton v. Virginia, 377 U.S. 158 (1964) (Clark, J., concurring) ("spiked" mike used by police officers sufficiently penetrated premises to constitute actual trespass); Silverman v. United States, 365 U.S. 505 (1961) (electronic listening device pushed through adjoining party wall and touching heating ducts of house held to be unauthorized physical penetration).

96. 389 U.S. at 349.

97. *Id.* at 350-51. Because the focus of the fourth amendment's protection is on persons instead of places, the Court recognized that the application of the amendment's proscription did not depend on the "presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. The Court rejected the contention that the fourth amendment was inapplicable to all surveillance without trespass or seizure of a material object, stating: "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to . . . oral statements, overheard without any . . . trespass." *Id.*

98. *Id.* at 351-52. In his concurring opinion, Justice Harlan explained that fourth amendment protection rests on the individual's *subjective* expectation of privacy and the *objective* determination of whether "society is prepared to recognize [that individual's expectation] as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). He offered the following illustration: "[A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.*

Court held that Katz had a reasonable expectation of privacy in his telephone conversations,[99] and was entitled to the protection of the warrant process, because "the Fourth Amendment protects people, not places."[100]

Although the reasonable expectation of privacy test broadened fourth amendment applicability in the context of *Katz*, the test also allowed for new limitations. The Court recognized that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[101]

"Plain view" is another important doctrinal development, which, despite its similarity to the "open fields" doctrine, stands on its own foundation.[102] The principle was first considered by the Court in *Harris v. United States.*[103] In *Harris*, a police officer opened the door of an impounded automobile to roll up a window in order to secure the car.[104] In so doing, the officer found evidence of a crime.[105] Despite the lack of a search warrant, the Court upheld the use of this evidence.[106] The Court stated: "It has long been settled 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."[107]

"The plain view" doctrine was discussed in detail in *Coolidge v. New Hampshire.*[108] In *Coolidge*, the state attempted to justify the seizure and subsequent search of a parked automobile on the ground that the automobile was in plain view when seized.[109] The Court, in a

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99. *Id.* at 352-53.

100. *Id.* at 351. Justice Harlan qualified this statement in his concurrence by recognizing that reference to "place" is necessary to determine what protection the fourth amendment affords to those people. *Id.* at 361 (Harlan, J., concurring). For example, a telephone booth is both a place "accessible to the public" and a "temporarily private place" for each occupant. *Id.* "Place," therefore, figures into the analysis of whether the individual's expectation is reasonable.

101. *Id.* at 351. The reciprocal of this principle is that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52. *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 266-72 (1984) (discussing effects of *Katz*).

102. For a discussion of the "open fields" doctrine, see *supra* notes 32-35 and accompanying text.

103. 390 U.S. 234 (1968) (per curiam).

104. *Id.* at 235.

105. *Id.* at 235-36. The evidence was the robbery victim's automobile registration card found on the door jamb. *Id.*

106. *Id.* at 236. The Supreme Court specifically stated that the evidence was discovered as a result of the "measure taken to protect the car while it was in police custody," and not as a result of the search. *Id.* The fourth amendment does not require a warrant "in these narrow circumstances." *Id.*

107. *Id.*

108. 403 U.S. 443 (1971).

109. *Id.* at 464.

plurality opinion, acknowledged that in some situations police may seize evidence in plain view without a warrant.[110] It noted that in most cases, any evidence will be in plain view, at least at the moment it is seized,[111] and the problem is "to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal."[112] Those circumstances may occur, the Court explained, when the police have legal authority to intrude upon an area and inadvertently observe evidence.[113] As a supplementary principle, the "plain view" doctrine rests upon prior justification for an intrusion, rather than creating such a justification on its own.[114] The examples given by the Court of "supplemented" justification for seizure included evidence found during a legitimate search for other evidence, or evidence discovered while in "hot pursuit."[115]

Observing that "*any* intrusion in the way of search and seizure is an evil,"[116] the *Coolidge* Court outlined the two purposes for the constitutional warrant requirement: the elimination of unnecessary intrusions by providing for a prior determination of probable cause by a neutral and detached party; and the limitation of necessary intrusions by requiring a particularized description of the subject of the search.[117] The Court reasoned that plain view seizures do not violate constitutional safeguards because no new intrusion results.[118] To guard against the evils of the general exploratory search "abhorred by the colonists,"[119] the Court also required that any item seized be "immediately

110. *Id.* at 465. The plurality opinion was written by Justice Stewart. *Id.* at 445. Parts II-A, II-B, and II-C were joined in only by Justices Douglas, Brennan, and Marshall. *Id.* Justice Harlan concurred in Parts I, II-D, and III of the Court's opinion and in the judgment. *Id.* at 491 (Harlan, J., concurring).

111. *Id.* at 465.

112. *Id.*

113. *Id.* at 465-66. "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Id.* at 465 (citations omitted). The Court also explained that "[w]here the initial intrusion that brings the police within plain view of such an article is supported . . . by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Id.*

114. *Id.* at 466.

115. *Id.* at 465. The Court also included a general category covering those situations in which an officer is not engaged in the search for evidence against the party in question, "but nonetheless inadvertently comes across an incriminating object." *Id.* at 466.

116. *Id.* at 467.

117. *Id.*

118. *Id.* ("The 'plain view' doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress.").

119. *Id.*

apparent" as evidence.[120] Thus, the Court explained, "the seizure of an object in plain view is consistent with the [particularity] objective, since it does not convert the search into a general or exploratory one."[121] Finally, to avoid intentional circumvention of the warrant requirement, the Court required that any discovery of "plain view" evidence be inadvertent, not anticipated.[122] In conclusion, the *Coolidge* Court maintained that warrants were still generally required, absent exigent circumstances.[123] The Court stated: "Incontrovertible testimony of the senses that an incriminating object is on the premises . . . may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure."[124]

Much of subsequent fourth amendment case law has dealt with the scope of the automobile exception announced in *Carroll v. United States*[125] and the search of containers. For example, in *United States v. Chadwick*,[126] the government argued that portable containers, such as footlockers, should be treated similarly to vehicles and should be exempted from the warrant requirement.[127] The Court rejected the vehicle analogy,[128] as well as the assertion that, when dealing with containers, the fourth amendment could simply be satisfied by searches pursuant to probable cause.[129] The Court found that the placing of personal effects inside a locked footlocker, with the contents not open to

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120. *Id.* at 466. Furthermore, the Court stated: "[T]he 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.*

121. *Id.*

122. *Id.* at 469-71. For a discussion of the criticisms of this requirement, see 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 3.4(k), 3.7(f), at 236-39, 290-92 (1984); *see also* 403 U.S. at 508-09 (Black, J., concurring in part and dissenting in part) ("[o]nly rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent"); *id.* at 516-21 (White, J., concurring in part and dissenting in part) (discussing his "great difficulty" with the majority's view that discovery of the evidence must be "inadvertent" as opposed to "anticipated").

123. 403 U.S. at 468 ("no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.").

124. *Id.*

125. See *supra* notes 35-46 and accompanying text.

126. 433 U.S. 1 (1977).

127. *Id.* at 6-7.

128. *Id.* at 12-13. In explaining the difference between portable containers and automobiles, the Court observed that mobility was not the only reason underlying the automobile exception. The Court articulated, for the first time, another basis for vehicle searches; the "diminished expectation of privacy which surrounds the automobile." *Id.* at 12. This basis was necessary to account for warrantless searches held permissible by the Court in those cases where the vehicle was unlikely to become mobile. *Id.*

129. *Id.* at 7.

public view, created a legitimate privacy interest subject to the protection of the warrant clause of the fourth amendment, absent exigent circumstances.[130]

A footnote in the case of *Arkansas v. Sanders*,[131] however, suggests the following limit to the warrant requirement for containers:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view" thereby obviating the need for a warrant.[132]

The *Sanders* Court, therefore, seemingly recognized a constructive plain view doctrine which could justify both seizures of containers *and* searches of their contents.[133]

The principle that no legally significant expectation of privacy exists in a container, the contents of which can be inferred from its appearance, was applied in 1983 in *Texas v. Brown*.[134] In *Brown*, an officer conducting a routine motorist stop at night, shined his flashlight into Brown's car and saw him drop a small, uninflated, opaque party

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130. *See id.* at 11, 13. The court in *Chadwick* introduced the word "legitimate" in lieu of "reasonable" to describe legally cognizable expectations of privacy. One writer has called this reformulation "unilluminating and dangerous;" "unilluminating because it points the Court toward only its own conclusion as to the legitimacy of an individual's expectation of privacy," and dangerous because the Court, dealing with exclusionary rule cases, will be tempted to focus not on protectable privacy interests but rather on "the guilty defendant with something to hide . . . . After all, how can a criminal have a *legitimate* expectation of privacy when he has concealed contraband or evidence of a crime?" Wasserstrom, *supra* note 101, at 386 (footnotes omitted). According to Professor Wasserstrom, this line of thinking could also create a problem for the defendant when the issue involves his standing to challenge a search. *Id.* at 386 n.771. The contrary point of view might be that the significance of this terminology, if indeed there is any, is that the Court seeks to point up the objective quality of the protected privacy expectation. For a further discussion in this regard, see *supra* notes 34, 98 and accompanying text.

131. 442 U.S. 753 (1979).

132. *Id.* at 764-65 n.13. The *Sanders* footnote was dicta. *Sanders* dealt only with the removal of a suitcase from the trunk of a taxicab and the subsequent search of the contents. *Id.* at 754-56. The initial search of the taxicab trunk and the seizure of the suitcase were not at issue. Only the search of the suitcase was in question. *Id.* at 754, 756.

133. *See id.* at 764-65 n.13. The *Sanders* footnote seems to add a gloss to the "plain view" doctrine of *Coolidge*. *Coolidge* only made reference to allowing seizures; it did not address the question of when the seized item could be subjected to a further search. *See* 403 U.S. at 464-65. For a further discussion of *Coolidge*, see *supra* notes 108-24 and accompanying text.

134. 460 U.S. 730 (1983).

balloon, which was tied off at the end.[135] From experience, the officer knew that narcotics were often kept in such balloons. Upon observing other indications of possible narcotics in the car, he seized the balloon.[136] The balloon felt like it contained a powdery substance.[137] A police chemist, also apparently acting without warrant, examined the contents of the balloon and found the powder to be heroin.[138] The sole issue on appeal, however, involved the validity of the original seizure of the balloon under the "plain view" doctrine.[139]

In a plurality opinion written by Justice Rehnquist, the Court expressed dissatisfaction with the "immediately apparent" and "inadvertently discovered" plain view standards established in *Coolidge*.[140] The plurality felt that the "immediately apparent" standard had been interpreted to require too great a degree of certainty as to the incriminatory nature of evidence,[141] and that the "inadvertently discovered" standard was unnecessary.[142] Nevertheless, all of the justices determined that these two elements of the *Coolidge* "plain view" doctrine

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135. *Id.* at 733.

136. *Id.* at 734.

137. *Id.*

138. *Id.* at 735.

139. *Id.* at 732-33. Specifically, the question was whether the officer had to *know* what the contents of the balloon were, so as to fall within the *Coolidge* "immediately apparent" evidence requirement. *Id.* at 735.

140. *Id.* at 736-37. Although it was acknowledged that the *Coolidge* formulation has been generally applied by the lower courts and was worthy of serving as a "point of reference for further discussion," *id.* at 737, Justice Rehnquist pointed out that these rules had been "sharply criticized" and as the creation of only a plurality of the Court, the precedent was not binding. *Id.*

141. *Id.* at 741. The "immediately apparent" element was criticized as implying that "an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Id.; see infra* note 144 and accompanying text.

142. *See* 460 U.S. at 743. Justice Rehnquist did not expressly state if, or why, he found fault with the "inadvertant discovery" element. In a footnote, however, Justice Rehnquist cited four court of appeals and state cases in which the "inadvertance" requirement had not been followed. *Id.* at n.8. For example, United States v. Santana, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), questioned the "viability" of this requirement in light of the "plethora of opinions" in *Coolidge*, making "it hard to see how . . . this frequently cited case [could] stand[] for anything except that Coolidge's conviction was reversed." *Id.* at 369 n.8.

Presumably, Justice Rehnquist was in agreement with the opinions of Justices Black and White in *Coolidge* which criticized the "inadvertance" element for being unduly restrictive, unnecessary and illogical in practice and application. *See* 403 U.S. at 506-10 (Black, J., concurring in part and dissenting in part); *id.* at 516-22 (White, J., concurring in part and dissenting in part). For a further discussion of *Coolidge*, see *supra* notes 108-24 and accompanying text.

Concurring in *Brown*, Justice White renewed his disapproval of the "inadvertance" requirement of *Coolidge*. 460 U.S. at 744 (White, J., concurring).

had been satisfied.[143] In the Court's collective view, probable cause to believe that the balloon contained narcotics was sufficient to satisfy the "immediately apparent" requirement; certainty was not required.[144] In adopting a constructive sight standard, the plurality remarked: "The fact that [the officer] could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer."[145] Given probable cause, the item could be seized.[146]

In a concurring opinion in *Brown,* Justice Stevens, joined by Justices Brennan and Marshall,[147] stated that the fourth amendment protects two different interests: personal privacy, which is threatened by search, and possession of property, which is threatened by seizure.[148] While a seizure is usually preceded by a search, the "converse is often true" when containers are concerned.[149] Insofar as the seizure of a container does not necessarily compromise the secrecy of its contents,[150] Justice Stevens noted that the authority to seize a container does not automatically abrogate the necessity of obtaining a warrant for a search of its contents.[151] Nevertheless, Justice Stevens concluded that *both* a seizure and a search could be justified without regard to any privacy interest where, as here, the contents of the container were revealed to a virtual certainty by its outward appearance.[152]

Unlike *Johnson,*[153] the plurality opinion in *Brown* stated that pro-

143. *See* 460 U.S. at 743; *see also id.* at 744-46 (Powell, J., concurring); *id.* at 750-51 (Stevens, J., concurring).

144. *See id.* at 741-42 (plurality opinion); *id.* at 746 (Powell, J., concurring); *id.* at 747 (Stevens, J., concurring).

145. *Id.* at 743.

146. *Id.* at 742.

147. *Id.* at 747 (Stevens, J., concurring).

148. *Id.*

149. *Id.* at 747-48.

150. *Id.* at 748.

151. *Id.* He continued: "If a movable container is in plain view, seizure does not implicate any privacy interests . . . . The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot." *Id.* at 749-50.

152. *Id.* at 750-51 (citing a footnote in Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1979), for the proposition that such constructive visibility would also serve to diminish the privacy interest). For a discussion of the *Sanders* footnote, see *supra* notes 131-33 and accompanying text. *See also* Robbins v. California, 453 U.S. 420, 428 (1981) ("Expectations of privacy are established by general social norms, and to fall within the second exception of the *[Sanders]* footnote . . . a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer."). *Robbins* was substantially overruled on other grounds by United States v. Ross, 456 U.S. 798 (1982). The *Ross* Court, however, continued to recognize that fourth amendment protection extends only to containers which conceal their contents from plain view. *Id.* at 815, 822-23.

153. 333 U.S. 10 (1948). For a discussion of *Johnson,* see *supra* notes 57-83 and accompanying text.

cedure by way of warrant was "preferred" but was subject to "flexible, common-sense exceptions."[154] The plurality also noted that intrusions of less than full-scale searches or seizures had been exempted from the warrant requirement.[155]

The related issue of what constitutes a "search" within the meaning of the fourth amendment was addressed in *United States v. Place*,[156] decided two months after *Brown*. In *Place*, the Court ruled that a "canine sniff" of a traveler's luggage at an airport by a trained dog was not a "search" within the meaning of the fourth amendment.[157] As a result, neither a warrant nor probable cause was required for that investigative procedure.[158] The Court reasoned that the canine sniff was a *sui generis* procedure, which was not only minimally intrusive, but also solely indicative of the presence or absence of contraband without revealing the contents of the container.[159] The Court further held that reasonable suspicion, rather than probable cause, was a sufficient basis for temporarily seizing luggage for the purpose of subjecting it to a "canine sniff" and, thus, no warrant was required.[160]

Similarly, in *United States v. Jacobsen*,[161] the Court held that a field chemical test using a small sample of a suspicious powder did not constitute a "search" within the meaning of the fourth amendment, because the test was only capable of indicating whether the powder was cocaine.[162] The Court also found that a package which had been opened and reclosed by private parties could subsequently be searched, and its contents seized, by government agents, if the package had constructively revealed its contents to be contraband.[163] As such, the package could not support any legitimate expectation of privacy.[164] The re-

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154. *See* 460 U.S. at 735.

155. *See id.* at 735-36. While the *Johnson* Court sought to establish a firm, general requirement for warrants, the net effect of many later decisions is apparent in the *Brown* Court's casual enumeration of matters falling outside of *Johnson's* "rule." Justice Powell, in his concurrence, commented: "[The plurality's opinion] appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and the purpose of that Amendment." *Id.* at 744 (Powell, J., concurring).

156. 462 U.S. 696 (1983).

157. *Id.* at 707. The Court, however, found the seizure of Place's luggage for 90 minutes until the arrival of the drug-detecting dogs to be unreasonable. *Id.* at 707-10.

158. *See id.* at 706-07.

159. *Id.* at 707.

160. *See id.*

161. 466 U.S. 109 (1984).

162. *Id.* at 122-23 ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."). In *Jacobsen*, employees of a private freight carrier, while checking a damaged package, discovered white powder in plastic bags inside the box. The bags were repacked and a drug agent later examined its contents and tested a sample. *Id.* at 111-12.

163. *Id.* at 121, 125.

164. *Id.* at 121.

maining requirement of probable cause to seize the contraband was established through the knowledge of the Federal Express employees who had previously viewed the contents of the package.[165]

United States v. Johns[166] is a more recent indication of the Supreme Court's increasingly favorable attitude toward the use of odor as a justification for warrantless searches. *Johns* involved a search after police officers perceived the odor of marijuana coming from pickup trucks containing plastic wrapped packages.[167] The issue of a delayed warrantless search[168] was disposed of on the basis of the automobile exception.[169] The Court did not have to consider the government's argument, raised only before the court of appeals, that the odor of marijuana emanating from the seized packages constructively placed their contents in plain view, thereby eliminating the need for a search warrant.[170] Indeed, the Court could have limited its discussion of odor in stating: "After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicles contained contraband."[171] Yet the Court commented further:

> Whether respondents ever had a privacy interest in the packages reeking of marihuana is debatable. We have previously observed that certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance, and based on this rationale the Fourth Circuit has held that "plain odor" may justify a warrantless search of a container. The Ninth Circuit, however, rejected this approach [in the proceedings below] and the Government has not pursued this issue on appeal. We need not determine whether respondents possessed a legitimate expectation of privacy in the packages.[172]

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165. *See id.* at 121-22. In this regard, the Court noted that, prior to the field test, "the agents had probable cause to believe the package contained contraband," *id.* at 121 n.20, as they "had already learned a great deal about the package from the Federal Express employees." *Id.* at 121.

166. 469 U.S. 478 (1985).

167. *Id.* at 480-81.

168. The trucks were impounded and the packages were placed into storage for three days before being opened. *Id.* at 481.

169. *Id.* at 483.

170. *Id.* at 481.

171. *Id.* at 482.

172. *Id.* at 486 (citing Arkansas v. Sanders, 442 U.S. 753, 764-65 & n.13 (1979); United States v. Haley, 669 F.2d 201, 203-04 & n.3 (4th Cir.), *cert. denied*, 457 U.S. 1117 (1982)). In *Haley*, the court applied odor to the "outwardly inferrable" plain view rationale of *Robbins*. 669 F.2d at 203. The *Haley* court stated that "[a]nother characteristic which brings the contents of a container into plain view is the odor given off by those contents." 669 F.2d at 203 (citing United States v. Haynie, 637 F.2d 277 (4th Cir. 1980)). The *Haley* court found that the odor of marijuana coming from a person and his car

Justice Brennan, in a dissenting opinion which was joined in by Justice Marshall,[173] took issue with the Court's suggestion of what he termed a "very definite view with respect to the merits" of an issue not before it.[174] Justice Brennan pointed out that the circuits were not in agreement on the issue of "plain odor."[175] More important, Justice Brennan noted that the Court's "off-hand commentary" contradicted *Johnson v. United States*,[176] the Court's "only precedent" on this issue. He concluded: "In these circumstances, surely it is improper for the Court to suggest how it would resolve this important and unsettled question of law."[177]

"PLAIN SMELL" AND THE FUTURE

It is, of course, impossible to state with certainty the direction future Supreme Court rulings will take. While the Court appears to favor "plain smell" analysis,[178] it has also pointed out that the issue has not been resolved.[179] Even if the "plain smell" analogy is adopted, its actual requirements cannot be predicted. If it follows an exact parallel with the traditional *Coolidge* formulation, the elements of "lawfully-

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after he was stopped for speeding was sufficient to justify a search of the car and its contents. *Id.* at 202-04.

In United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), *rev'd*, 469 U.S. 478 (1985), the Ninth Circuit acknowledged that the odor of marijuana could contribute to the establishment of probable cause to believe that a container contained contraband, and would support a seizure without a warrant. 707 F.2d at 1095-96. The *Johns* court, however, interpreted Texas v. Brown, 460 U.S. 730 (1983), to require a search warrant in order to search already seized packages. 707 F.2d at 1095-96. It did not find any recognized exception to the warrant requirement arising from the odor. *Id.*

173. 469 U.S. at 488 (Brennan, J., dissenting).

174. *Id.* at 489.

175. *Id.* at 489 (citing United States v. Dien, 609 F.2d 1038 (2d Cir. 1979)). In *Dien*, the Second Circuit rejected the idea that there was no reasonable expectation of privacy in a cardboard box, located in a van, that reaked of the odor of marijuana because the contents had been placed into "plain view" or "plain smell." *Id.* at 1045. The court observed:

> By placing the marihuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the drivers' [sic] seat, petitioners manifested an expectation that the contents would remain free from public examination. The fact that the agents detected the odor of marijuana emanating from the van did not alter this.

Id.

176. 469 U.S. at 489. For a discussion of *Johnson*, see *supra* notes 57-83 and accompanying text.

177. 469 U.S. at 489.

178. *See supra* notes 166-72 and accompanying text.

179. *See* United States v. Sharpe, 470 U.S. 675, 699 n.12 (1985) (Marshall, J., concurring) (noting that the issue of whether odor which creates probable cause justifies a warrantless search remains unresolved).

present," "inadvertently-discovered," and "immediately-apparent" (i.e., probable cause) would apply.[180] Furthermore, the *Coolidge* plurality stated that plain view alone is never enough to justify a further warrantless search of contraband, beyond what has already been seen.[181] In this regard, police would have probable cause to search and seize a package smelling of marijuana but, absent exigency, a warrant would have to be obtained to inspect the contents.[182] This sort of "plain smell" would do little to change the long-standing warrant requirement.

Recent decisions of the Supreme Court suggest, however, that a determination of "plain smell," at least with respect to contraband, would result in a finding that there was no legally cognizable expectation of privacy in the object or area in question, thereby overcoming both the owner's possessory interest against seizure and the privacy interest against search or intrusion.[183] This concept has already been accepted, in various forms, by some of the circuits.[184] It is a trend more

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180. For a discussion of the *Coolidge* "plain view" doctrine, see *supra* notes 108-24 and accompanying text.

181. *See* Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); *see also* State v. Gauldin, 44 N.C. App. 19, 22, 259 S.E.2d 779, 781 (Ct. App. 1979) (searches under a "plain smell" rationale must, by definition, be more intrusive than the original, inadvertant sighting, because "the sense of smell, unlike eyesight, does not always pinpoint what is being sensed and where the material is located").

182. *See* 1 W. LAFAVE, *supra* note 9, § 2.2, at 240-47. LaFave points out that the "plain view" rule in *Coolidge* is often mistakenly applied to situations in which observations of evidence have been made without a prior physical intrusion, such as in the case of an officer standing on a public way who is able to look through the window of a private residence and view contraband. *See id.* at 243-44. Under the "plain view" exception discussed in *Coolidge*, a search (or some other intrusion) is already under way, and evidence that is plainly visible may be seized. *See id.* at 244-45. In the case of what LaFave refers to as "nonintrusive plain view," *see id.* at 245, there has been no underlying intrusion, and only the lawfulness of the observation itself is established. *Id.* It is another question whether the officer may then create an intrusion by seizure or physical search without prior judicial approval. *See id.* As a result of the confusion in terminology, LaFave contends that "some of the debate concerning what is or is not in plain view is focused upon a false issue." *Id.* It is only where there is no constitutionally protected area, such as "open fields," or when exigent circumstances are present, that a "nonintrusive" observation of evidence will permit search or seizure. *See id.* at 242-43.

183. *See supra* notes 166-72 and accompanying text.

184. *See, e.g.*, United States v. Lueck, 678 F.2d 895, 903 (11th Cir. 1982) (U.S. Customs officer's detecting smell of marijuana upon inspection of package supported probable cause for warrantless search of package); United States v. Haynie, 637 F.2d 227, 233 (4th Cir. 1980) (odor of marijuana detected by police officer established probable cause for warrantless search of automobile trunk); United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1974) (warrantless search of boxes permissible where emitting odor of marijuana and thus in "plain view" of detectives lawfully searching van). Several cases have upheld warrantless searches based upon odor and the exigency created by a lack of time to obtain a warrant. *See, e.g.*, United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974) (drug agent detecting smell of marijuana lawfully searched suitcase without war-

than ten years old.[185]

As stated above, this expanded "plain smell" rationale would depend upon the determination that there was no longer a legitimate expectation of privacy.[186] One essential factor which would render any expectation of privacy unreasonable would logically be, as observed by Justice Stevens in *Brown*, establishment through odor of a degree of certainty equivalent to plain view that the container or area to be searched contains contraband or other evidence closely connected to a crime.[187] Thus, it would not be enough merely to detect an odor. The

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rant, as exigency created by mobility of traveler); United States v. Ogden, 485 F.2d 536, 538-39 (9th Cir. 1973) (luggage of airline passenger lawfully searched without warrant based on odor of marijuana and exigency of half-hour remaining until flight departure), *cert. denied*, 416 U.S. 987 (1974). Many cases couple odor with the automobile exception. *See, e.g.*, United States v. Barron, 472 F.2d 1215, 1217 (9th Cir.) (odor of marijuana, coupled with flight from border patrol, created probable cause for warrantless search), *cert. denied*, 413 U.S. 920 (1973); Fernandez v. United States, 321 F.2d 283, 286-87 (9th Cir. 1963) (odor of marijuana detected during border checkpoint stop justified warrantless search). Searches have also been upheld on the premise that odors provide probable cause that a person is currently committing an offense. *See, e.g.*, United States v. Leazar, 406 F.2d 982, 984 (9th Cir. 1972) (odor of marijuana, coupled with suspicious behavior, created probable cause to believe that crime was being committed); United States v. Schultz, 442 F. Supp. 176, 182 (D. Md. 1977) (odor of marijuana smoke, establishing probable cause to search for marijuana, would inevitably have led to discovery of weapon).

185. For an example of a state case decided over a decade ago, see People v. Miller, 33 Cal. App. 3d 191, 195-96, 108 Cal. Rptr. 788, 791 (Ct. App. 1973) (establishing "identifiable odor" as a factor in establishing reasonable grounds for a seizure).

186. *See* Texas v. Brown, 460 U.S. 730, 750-51 (Stevens, J., concurring). The New York Court of Appeals has observed:

> Just as there is no reasonable expectation of privacy in items left in the plain view of an officer lawfully in the position from which he observes the item, there can be no reasonable expectation that plainly noticeable odors will remain private. . . . Furthermore, the common use of mothballs and talcum powder by drug traffickers to cover such odors indicates that there is no such expectation of either confining the odors or of privacy in the odors emanating from one's luggage.

People v. Price, 54 N.Y.2d 557, 562, 431 N.E.2d 267, 269, 446 N.Y.S.2d 906, 908 (1981) (citations omitted).

In a dissenting opinion in Illinois v. Andreas, 463 U.S. 765 (1983), Justice Brennan criticized the Court's tendency to equate the privacy right with a right of secrecy. He defined the privacy right as also including a right to not be disturbed, "to be let alone." *Id.* at 775 (Brennan, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

187. 460 U.S. at 750-51 (Stevens, J., concurring). The degree of certainty Justice Stevens contemplated for plain view issues was "virtual" certainty: "It seems to me that in evaluating whether a person's privacy interests are infringed, 'virtual certainty' is a more meaningful indicator than visibility." *Id.* at 751 n.5.

Whether a majority of the Court agrees with Justice Stevens' "degree of certainty equivalent to plain view" formulation is open to debate following Illinois v. Andreas, 463 U.S. 765 (1983). *Andreas* was a police "controlled delivery" case in which a previously

contextual circumstances would have to clearly exhibit the presence of the evidence.

While, as *Johnson* recognized, odor can be an important indicator,[188] unquestionably the sense of smell does not convey the same sort of information as sight or hearing.[189] In some cases, smell may actually convey a more certain indication of crime than sight.[190] The smell of gunpowder, for example, when standing alone, will be more revealing than the sight of dark colored powder. In other cases, however, sight can convey more definite information such as the precise location, or the particular possessor, of contraband.[191] The danger of reliance upon

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inspected container was reopened without a warrant. Although the container and its contraband had left police control and observation for a time, the reopening was found to be in accord with plain view principles. *Id.* at 771-72. The *Andreas* Court held that it was sufficient that the container was found at first opening to contain contraband, even though at the reopening there was a possibility that the contraband had been removed from the container. *Id.* at 772. The Court stated that "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost." *Id.* at 771-72 (footnote omitted). The Court added that "the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container." *Id.* at 772. A "substantial likelihood" that the contents had not changed between openings was sufficient to invoke a plain view justification. *Id.* at 773. The reopening of the container was not deemed an exception to the warrant requirement because the Court held that the reopening was not a "search" at all within the meaning of the fourth amendment. *Id.* at 772. The Court explained that this was so because objects within plain view lose their claim to privacy. *Id.* at 771-72.

Further, Justice Brennan pointed out that the right to keep certain information beyond official scrutiny was only one aspect of the privacy interest protected by the fourth amendment; the other aspect was "the right to be let alone." *Id.* at 775 (Brennan, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The right to be let alone comprehends "the right not to have one's repose and possessions disturbed." *Id.* Justice Brennan thought that the Court's anlaysis was flawed in that it rested on the idea that the privacy right is only a secrecy right. *Id.* at 776.

188. Johnson v. United States, 333 U.S. 10, 13 (1948). For a general discussion of *Johnson*, see *supra* notes 57-83 and accompanying text. For a specific discussion of the odor issue in *Johnson*, see *supra* notes 66-76 and accompanying text.

189. *See* 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7 (1978).

190. 1 W. LAFAVE, *supra* note 9, § 3.6, at 651.

191. *See id.* at 650; People v. Marshall, 69 Cal. 2d 51, 69 Cal. Rptr. 585, 442 P.2d 665 (1968). In *Marshall* the court argued that:

> To hold . . . that an odor, either alone or with other evidence of invisible contents can be deemed the same as or corollary to plain view, would open the door to snooping and rummaging through personal effects. Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found.

Id. at 59, 69 Cal. Rptr. at 589-90, 442 P.2d at 669-70. Professor LaFave has pointed out that a distinction is often made in cases where a portable container appears to contain only contraband and nothing else, thereby reducing concerns about rummaging through personal effects. 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7, at 486-87 (1978).

smell results from the possibility of lingering odor, which may erroneously suggest the continued presence of a substance.[192] Another possible danger involves the mistaken identification of a scent. To avoid this potential problem, the *Johnson* Court, as well as others, have established a two-part requirement that must be met in order to act upon an odor: the smell must be sufficiently distinctive to permit identification, and the person perceiving the odor must be sufficiently familiar with it by experience or training in order to properly make such an identification.[193] Conceivably, the perception of odor could be easier to fabricate than other forms of evidence, as in an attempt to justify an unlawful search.[194]

In many cases, the context in which the odor is perceived could be vital in filling in the "picture."[195] Unlike the odors of contraband substances themselves, the odors of many substances associated with crime will be innocuous when standing alone.[196]

Another essential factor in analyzing the legitimacy of an expectation of privacy in a "plain smell" search is the setting. As many courts have recognized, what is a reasonable search in one setting can be manifestly unreasonable in another.[197] One setting which has traditionally

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192. *See* United States v. Bradshaw, 490 F.2d 1097, 1101 (4th Cir.) (odor of liquor could be explained by the possibility of lingering with an "equally probable" chance of truth), *cert. denied,* 419 U.S. 895 (1974); People v. Hilber, 403 Mich. 312, 325, 269 N.W.2d 159, 164 (1978) ("It is . . . beyond ordinary experience to be able to determine with reasonable accuracy the length of time a persistent odor has lingered.")

193. *See* Johnson v. United States, 333 U.S. 10, 13 (1948); United States v. Bowman, 487 F.2d 1229, 1230-31 (10th Cir. 1973).

194. *See* United States v. Lee, 83 F.2d 195, 196 (2d Cir. 1936).

195. *See* DePater v. United States, 34 F.2d 275, 276 (4th Cir. 1929) ("It is a matter of common knowledge . . . that the degree of certainty of [odor] evidence necessarily depends upon the circumstances of each particular case.").

196. For example, ether and gasoline can be "innocent" substances, or can be used in the manufacture of illicit drugs and the commission of arson, respectively. *See* United States v. Tate, 694 F.2d 1217, 1221 (9th Cir. 1982) (Because there are many innocuous uses of ether, its odor, without further evidence, cannot establish probable cause to search), *vacated on other grounds,* 468 U.S. 1206 (1984). *But see* People v. Duncan, 42 Cal. 3d 91, 103-04, 227 Cal. Rptr. 654, 661, 720 P.2d 2, 9 (1986) (a police officer who smells ether in an otherwise innocuous situation may justifiably further investigate). Similarly, incense, mothballs, air freshener, and talcum power are not ordinarily indicative of a criminal act, except when other factors strongly suggest that these substances are being used to mask the odor of marijuana or other contraband. *See* Waugh v. State, 275 Md. 22, 27, 338 A.2d 268, 271 (1975) (sharp distinction drawn between detection of marijuana odor and that of talcum powder which officer smelled and believed was being used as a cover-up). The court in *Waugh* stated: "[I]f Detective Schwartz had actually smelled what he believed to be the odor of *marijuana* coming from the suitcases, this would have constituted probable cause for him to have searched the suitcases." *Id.* at 30, 338 A.2d at 272 (emphasis supplied by the court).

197. *See, e.g.,* Payton v. New York, 445 U.S. 573, 586-87 (1980) (searches and seizures inside a home without a warrant are presumptively unreasonable); *see also* Oliver v.

received the greatest protection has been the home.[198] Indeed, despite the many changes in fourth amendment jurisprudence in the last twenty years,[199] the modern Court has reaffirmed the basic protection of the security of the home. In the recent case of *United States v. Karo*,[200] the Court drew a distinction between the use of electronic devices to monitor the movements of a vehicle on public roads and their use to determine the presence of evidence within a home.[201] In finding that the latter activity was impermissible without a warrant, the Court stated: "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."[202] The Court in *Karo* further explained, "[a]t the risk of belaboring the obvious,"[203] that basic fourth amendment jurisprudence recognizes the expectation of privacy from governmental intrusion in a private residence as "justifiable."[204]

The Supreme Court also has held that warrantless arrests, even felony arrests, are presumptively unreasonable when performed in a home.[205] Any such arrest would have to be justified by exigency.[206] Furthermore, even if an arrest warrant has been obtained, the Court has not approved unconsented routine entry into a third party's home to execute the warrant.[207]

Nevertheless, in deciding *Washington v. Chrisman*,[208] the Court

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United States, 466 U.S. 170, 176-80 (1984) (discussing searches and privacy in the context of open fields).

198. *See Payton*, 445 U.S. at 590-91.

199. *See supra* note 92 and accompanying text.

200. 468 U.S. 705 (1984).

201. *Id.* at 714-16.

202. *Id.* at 714-15.

203. *Id.* at 714.

204. *Id.* at 714. For a further discussion of *Karo*, see *infra* notes 229-30 and accompanying text.

205. Payton v. New York, 445 U.S. 573, 586 (1980). The Court declared that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. The necessity of an arrest warrant to enter a suspect's home is particularly significant in light of the fact that the Court has held that, as a general rule, warrants are not constitutionally required for arrests. *See* United States v. Watson, 423 U.S. 411 (1976).

206. *See* 445 U.S. at 590. For a discussion of "exigent circumstances," see *supra* note 78.

207. *See* Steagald v. United States, 451 U.S. 204 (1981) (requiring a search warrant to enter a third party's home).

208. 455 U.S. 1 (1982). In *Chrisman*, a student stopped for underage possession of alcohol was allowed to return to his dormitory to obtain identification. The student was accompanied by the apprehending officer. *Id.* at 3. While waiting in the doorway, the officer observed what appeared to be marijuana. He then entered the room and confirmed the presence of the contraband. *Id.* at 4. The Court held that the officer had not impermissibly intruded, as he had the right to be wherever the arrested student went. The officer was thus legally positioned to take action upon his "plain view" discovery. *Id.*

permitted a "plain view" seizure in a dormitory on the ground that there was a prior valid intrusion in the form of an arrest.[209] On the other hand, in *Oliver v. United States,*[210] the Court refused to apply the "open fields" exception to the curtilage or area immediately surrounding the home,[211] noting that: "The [Fourth] Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference."[212] The *Oliver* Court also indicated that legitimate expectations of privacy could arise in offices and commercial buildings, as the protection of these settings is based upon societal expectations with "deep roots" in the history of the fourth amendment.[213]

While "plain smell" clearly may be of assistance to law enforcement in container settings, and unnecessary in cases falling within the *Carroll*[214] exception and its progeny—in which authorization to search without warrant is easily established, the more difficult applications of "plain smell" arise in other settings. In his dissent in *United States v. Jacobsen,*[215] Justice Brennan posed two scenarios. The first involved a drug-detecting police dog which could roam the streets at random, alerting police to drug possessors.[216] The other concerned a drug-detecting device which could be set up on a street corner or in a patrol car to scan passersby or homes, respectively.[217] In this regard, the Court has already held in *United States v. Place*[218] and *United States v. Jacobsen,*[219] that trained dog sniffs and chemical field tests, respec-

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at 7. The officer's "custodial authority" to monitor the movements of the arrestee arose from the general risks of escape and injury implicit in arrests. *Id.*

209. *Id.* The court acknowledged the significance of an intrusion of a residence by distinguishing *Payton* and *Johnson* on the basis of the custodial situation. The Court stated: "The circumstances of this case distinguish it significantly from one in which an officer, who happens to pass by chance an open doorway to a residence, observes what he believes to be contraband inside." *Id.* at 9 n.5 (citations omitted).

210. 466 U.S. 170 (1984).

211. *Id.* at 180. For a discussion of the "open fields" warrant exception, see *supra* notes 32-34 and accompanying text.

212. 466 U.S. at 178. The Court continued: "For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.' " *Id.* (quoting Payton v. New York, 445 U.S. 573, 601 (1980)).

213. *Id.* at 178 n.8.

214. *See* 267 U.S. 132 (1925). For a discussion of *Carroll,* see *supra* text accompanying notes 35-46.

215. United States v. Jacobsen, 466 U.S. 109, 133 (1984) (Brennan, J., dissenting).

216. *Id.* at 138.

217. *Id.*

218. 462 U.S. 696 (1983). For a discussion of *Place,* see *supra* text accompanying notes 156-60.

219. 466 U.S. 109 (1984). For a discussion of *Jacobsen,* see *supra* notes 161-65 and accompanying text.

tively, which merely indicate the presence or absence of illegal drugs without further revelation, do not compromise any legitimate interest in privacy.[220] These hypothetical inspections, therefore, either directly or by analogy, are not "searches" within the meaning of the fourth amendment and would not require a warrant.[221] Significantly, the results of these "non-searches" could conceivably give rise to seizures and further searches under a broad "smell" rationale which overcomes all privacy interests.[222]

Notwithstanding *Place's* "non-search" designation, it is useful to examine the possible distinctions between the use of dogs or electronic amplification devices to detect odors in light of the "plain smell" rationale we have considered up to this point. With "plain smell," as favored by the Court in *Johns*,[223] the reasonable expectation of privacy vanishes when the contraband is constructively exposed or obvious to the senses.[224] It would be a greater step, however, to maintain that odor which is only apparent when amplified many times, or which can only be detected by a creature with sensory capabilities far greater than that of human beings, is "plain smell" to those present.[225] In com-

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220. *See* 466 U.S. at 109 (chemical test); 462 U.S. at 707 (dog sniff); *supra* notes 156-65 and accompanying text.

221. *See* 466 U.S. at 109; 462 U.S. at 707. For a critical discussion of the Court's "nonsearch" classifications, see Burkoff, *When is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515 (1984).

222. *See supra* notes 172, 184-86 and accompanying text.

223. 469 U.S. 478 (1985). For a discussion of *Johns*, see *supra* notes 166-77 and accompanying text.

224. *See* United States v. Johnston, 497 F.2d 397, 398 (9th Cir. 1974) (rejecting argument that defendant had a reasonable expectation of privacy from drug agents with "inquisitive nostrils"); United States v. Rivera, 486 F. Supp. 1025, 1033 (N.D. Tex. 1980) ("[t]he central premise of the 'plain smell' argument . . . is that the odor of marijuana is so recognizable as to negate the expectation of privacy"), *aff'd*, 654 F.2d 1048 (5th Cir. 1981); People v. Mayberry, 31 Cal. 3d 335, 343, 182 Cal. Rptr. 617, 621, 644 P.2d 810, 814 (1982) ("[T]he escaping smell of contraband from luggage . . . is detectable by the nose, as the leak is visible to the eye.").

225. *See* United States v. Beale, 674 F.2d 1327, 1333-34 (9th Cir. 1982), *vacated*, 463 U.S. 1202 (1983), *on remand*, 728 F.2d 411 (9th Cir.), *on reh'g*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984). In *Beale*, the Ninth Circuit stated:

> A trained canine's sense of smell is more than eight times as sensitive as a human's. Moreover, the dog does not amplify its handler's perception; it is an independent detection device, alerting the officer to information he would have been utterly unable to detect with his own senses. . . . Thus, the use of trained canines to monitor the contents of personal luggage cannot be analyzed as a variant of human plain view or plain smell.

674 F.2d at 1333 (citations omitted). The circuit court's finding that a dog sniff was a fourth amendment search, albeit limited, was vacated by the Supreme Court, because it was clearly in conflict with its holding in United States v. Place, 462 U.S. 696 (1983). United States v. Beale, 463 U.S. 1202 (1983), *on remand*, 728 F.2d 411 (9th Cir.), *on reh'g*, 736 F.2d 1289 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984). Beale's conviction for

parison, the overhearing by artificial means of otherwise private conversations was the type of search and seizure of private intangibles that *Katz v. United States*[226] sought to control. While the *Katz* case dealt with the search and seizure of intangible evidence, rather than the detection of an intangible which leads to tangible evidence, its message was broad: fourth amendment limits on police discretion must keep pace with advances in technology.[227]

The Court has held that the use of a searchlight or binoculars does not constitute a fourth amendment "search."[228] Recently, however, in *United States v. Karo*,[229] the Court ruled that the difference between an electronic device that infringes a privacy interest and one that does not turns on whether the device provides information about the contents of a home which is otherwise unobtainable without a warrant.[230]

Karo can be reconciled with *Place* and *Jacobsen*, if one recognizes that the Court engages in a balancing test each time it examines whether there is a reasonable expectation of privacy.[231] For example, in

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intent to distribute a controlled substance was eventually affirmed by the Ninth Circuit. United States v. Beale, 736 F.2d 1289 (9th Cir.), *cert. denied*, 469 U.S. 1072 (1984).

226. 389 U.S. 347 (1967). For a discussion of *Katz*, see *supra* notes 93-101 and accompanyng text.

227. *See* 389 U.S. at 352; *see also* United States v. Karo, 468 U.S. 705, 712 (1984) ("the exploitation of technological advances . . . implicates the Fourth Amendment").

228. *See* Texas v. Brown, 460 U.S. 730, 739-40 (1983) (use of flashlight to illuminate automobile interior is not a fourth amendment search); United States v. Lee, 274 U.S. 559, 563 (1927) (use of searchlight not proscribed by fourth amendment); *see also* United States v. Lace, 669 F.2d 46, 51 (2d Cir.) (use of binoculars does not implicate the fourth amendment), *cert. denied*, 459 U.S. 854 (1982).

Indeed, the use of a variety of extrasensory devices has been found constitutionally permissible. The Ninth Circuit has stated:

> Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case. On the other hand, wiretaps, breaking and entering, and many other searches fall on the other side of the line.

United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978) (footnote omitted).

229. 468 U.S. 705 (1984).

230. *Id.* at 715-16. *Karo* involved the placement of an electronic location "beeper" which agents had concealed in a can of ether in order to monitor the can's movement. *Id.* at 708.

In United States v. Knotts, 460 U.S. 276 (1983), the Court found that the warrantless use of a beeper placed upon a car to track its movements on public roads did not violate a reasonable expectation of privacy. *Id.* at 281-82. According to the *Knotts* Court, the beeper provided no information which police could not have obtained by ordinary visual surveillance. *Id.* at 282. In *Karo*, however, the beeper provided information about the contents of a house; information that was not obtainable by visual surveillance. 468 U.S. at 715, 720-21.

231. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 8 (1985) ("We have described 'the

Place, the Court declared: "We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[232] It is likely that this principle will continue to play a great role in future determinations of reasonableness under the fourth amendment.[233]

CONCLUSION

It remains to be seen whether the Supreme Court will adopt "plain smell," and if so, in what form and with what limits. While an extra degree of caution may be appropriate in evaluating reliance on odors,[234] one should not lose sight of the great reliance placed upon all of the human senses as a matter of everyday existence. The concept that reasonable perceptions of odor by law enforcement officers are not sufficient to permit warrantless searches is, therefore, a concept contrary to popular notions of common sense. It is submitted that odors of contraband which are readily apparent and distinctive may, in some situations, properly negate any reasonable expectation of privacy in that contraband. The authorization of warrantless searches in all odor cases, however, is not suggested.

Abrogation of privacy interests in odor cases should only follow from close scrutiny of the facts and circumstances of each case. The degree of certainty that contraband or evidence of a crime exists in a particular location is a key consideration.[235] Logically, it should be at least highly probable, if not "virtually certain,"[236] that the suspected item or substance is present.

The reasonableness of an odor-based search should also, as recognized in *Johnson*,[237] hinge upon the setting. For instance, warrantless intrusion of a traditionally protected site,[238] such as a residence, ordi-

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balancing of competing interests' as 'the key principle of the Fourth Amendment.' ") (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)); Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests"); Terry v. Ohio, 392 U.S. 1, 21 ("there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' ") (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

232. 462 U.S. at 703.

233. For a further discussion of the balancing principle, see 1 W. LAFAVE, *supra* note 9, § 2.1, at 234-40.

234. *See supra* text accompanying notes 192-96.

235. *See supra* notes 152, 191-92 and accompanying text.

236. *See supra* note 187 and accompanying text.

237. *See* Johnson v. United States, 333 U.S. 10, 14-15 (1948).

238. *See supra* note 100 and text accompanying notes 198-207.

narily should not be based, absent exigent circumstances, solely upon the emanation of odor. In contrast, a container, located in a place open both to the police and the general public, which exudes a strong, readily recognizable scent of contraband, should be subject to both seizure *and* search.

A more vexatious question is posed by the possibility of warrantless physical searches based upon dog sniffs which indicate the presence of illicit substances. It is true that odors discernable only by dogs are not amenable to conceptions of "plain view" and "plain smell" which require human perception.[239] Nonetheless, it has been argued that when *any* amount of aroma emanates, any valid privacy claim in the object in question is lost. To borrow the words of one court: "It is logically simplistic that once one releases something into the open air, there can be little reasonable expectation of asserting one's claims of privacy in either the item itself or in the surrounding air."[240]

The issue that lies at the heart of the fourth amendment, however, is not whether odor can be a ground for search, but when. Ultimately, questions regarding the permissible use of "plain smell" may hang in the balance between the governmental interest in warrantless searches and the expectations of privacy that society is prepared to recognize as reasonable.

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239. *See supra* notes 224-25 and accompanying text.

240. People v. Price, 54 N.Y.2d 557, 562, 431 N.E.2d 267, 269, 446 N.Y.S.2d 906, 908 (1981) (citations omitted). It should be noted, however, that in this pre-*Place* case, the court was clearly not advocating any warrantless intrusion beyond the dog sniff itself. Indeed, the court explicitly pointed out that, unlike the air around the contraband-bearing luggage, the defendant "had a reasonable expectation of privacy in the closed suitcases." *Id.* at 561, 431 N.E.2d at 269, 446 N.Y.S.2d at 908.