AIRPORT SEIZURES OF LUGGAGE WITHOUT PROBABLE CAUSE: ARE THEY "REASONABLE"?

Drug smuggling has become a pervasive problem in the United States.[1] Major metropolitan cities on both coasts, particularly New York, Miami, Los Angeles, and San Diego, are the primary entry points for narcotics brought into the United States.[2] From these "source cities" smugglers will frequently fly on to other major cities to distribute their narcotics. Because there are no customs inspections for flights within the United States, smugglers can fly with little fear of detection.

In response to this problem, the Federal Drug Enforcement Administration (DEA) has stationed agents in airport terminals in the major cities of distribution. These agents are trained to detect travelers who may be carrying narcotics. To aid the agents the DEA has created a "drug courier profile," which details characteristics generally associated with drug traffickers.[3] When the agents spot a traveler who

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1. The following is the 1980 Narcotics Intelligence Estimate (amount of drugs smuggled into the United States in 1980):

Heroin: 4 metric tons
Cocaine: 44 metric tons
Marijuana: 12,600 metric tons
Dangerous Drugs: 275 million dosage units
Total Street Value: 79.3 billion dollars

This estimate was provided by Ted Swift, Public Information Officer for the Federal Drug Enforcement Administration (DEA).

2. United States v. Mendenhall, 446 U.S. 544, 562 (1980); United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977).

3. DEA agents in Detroit created the drug courier profile in 1974. United States v. Van Lewis, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977). Paul Markonni, a DEA agent in Atlanta, created a similar profile. United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980). The Markonni profile consists of seven primary characteristics and four secondary characteristics. The primary characteristics are these:

(1) arrival from or departure to an identified source city;
(2) carrying little or no luggage, or large quantities of empty suitcases;
(3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip;
(4) use of an alias;
(5) carrying unusually large amounts of currency in the many thousands of dollars, usually on the person, in briefcases or bags;
(6) purchasing airline tickets with a large amount of small denomination currency; and
(7) unusual nervousness beyond that ordinarily exhibited by passengers.

The secondary characteristics are these:

fits the profile, they approach him, identify themselves, ask a few questions, and often ask to see his airline ticket. If they become suspicious, they ask to inspect the passenger's luggage; if he refuses, they may take the luggage and submit it to a sniff search by a narcotics detector dog.[4]

It is not clear whether such a "seizure" of the traveler's luggage[5] without probable cause[6] is constitutional. The Supreme Court has held that *Terry v. Ohio*[7] permits law enforcement officers to seize and detain persons briefly in airports on only a reasonable suspicion[8] that they are engaged in criminal activity.[9] The Court will soon decide whether *Terry* allows airport seizures of luggage without probable cause.[10] Early lower court decisions upheld such a seizure on the grounds that *Terry* permits a seizure and detention of luggage without probable cause for an even longer period than it permits a seizure and detention

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(1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport;

(2) immediately making a telephone call after deplaning;

(3) leaving a false or fictitious call-back telephone number with the airline being utilized; and

(4) excessively frequent travel to source or distribution cities.

Id.

4. There is general agreement among courts that a sniff search is not a search within the purview of the fourth amendment and is therefore not subject to constitutional scrutiny. *See* United States v. Goldstein, 635 F.2d 356, 360 (5th Cir.) (cases cited), *cert. denied*, 452 U.S. 962 (1981). *But see* United States v. Beale, 674 F.2d 1327, 1335 (9th Cir. 1982) (sniff search is a fourth amendment intrusion that may be based only on a "founded" or "articulable" suspicion that the luggage contains contraband), *petition for cert. filed*, 51 U.S.L.W. 3321 (U.S. Oct. 18, 1982) (No. 82-674). The prevailing view that a sniff search is not a search protected by the fourth amendment has been criticized. *See, e.g.*, 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(f), at 284-90 (1978); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973, 984-89 (1976); Comment, United States v. Solis: *Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410 (1976).

5. A seizure of property can be defined as physically removing property from the possession of another. *See* United States v. O'Connor, 658 F.2d 688, 692 (9th Cir. 1981); United States v. Hunt, 496 F.2d 888, 891-92 (5th Cir. 1974); 1 W. LAFAVE, *supra* note 4, § 2.1, at 221-22.

6. *See infra* text accompanying note 21.

7. 392 U.S. 1 (1968). *See infra* note 27.

8. A requirement of reasonable suspicion is less strict than a requirement of probable cause. Reasonable suspicion requires that the law enforcement officer reasonably *suspect* that a person is engaged in criminal activity, whereas probable cause requires that the officer reasonably *believe* that a crime has been or is being committed. *See infra* text accompanying note 21.

9. *See* Reid v. Georgia, 448 U.S. 438, 440 (1980) (by implication) (per curiam); United States v. Mendenhall, 446 U.S. 544, 552-53 (1980); *infra* note 36 and accompanying text.

Justice Stewart, in a portion of the opinion in United States v. Mendenhall, 446 U.S. 544 (1980), joined only by Justice Rehnquist, adopted the following test to determine when a person is "seized": "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

10. United States v. Place, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

of the person;[11] two recent decisions, *United States v. Place*[12] and *United States v. Martell*,[13] however, have clouded the issue of whether airport seizures of luggage without probable cause are constitutionally permissible.[14]

This note addresses the constitutionality of airport seizures of luggage conducted without probable cause in the context of the *Martell* and *Place* decisions. The note begins with an outline of general fourth amendment principles.[15] After a review of the early treatment of airport seizures of luggage,[16] the note details four possible approaches that may be taken to determine the constitutionality of airport seizures of luggage.[17] The note concludes with a critical analysis of the approaches and chooses an approach that strikes a balance between the needs of law enforcement and the protection of individual rights.[18]

I. GENERAL FOURTH AMENDMENT PRINCIPLES

All arrests and most searches and seizures[19] must be supported by probable cause.[20] Probable cause is present "where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[21] Although the fourth amendment warrant clause requires that no warrant be issued without probable cause,[22]

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11. *See* United States v. West, 651 F.2d 71 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. Aug. 14, 1981) (No. 81-307); United States v. Viegas, 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 971 (1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); *infra* notes 38-55 and accompanying text.

12. 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

13. 654 F.2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772).

14. Over sharp dissents, both decisions conclude that luggage can be seized without probable cause, but the two courts differ greatly in their approaches and solutions. *See infra* notes 61-103 and accompanying text.

15. *See infra* notes 19-27 and accompanying text.

16. *See infra* notes 36-53 and accompanying text.

17. *See infra* notes 60-103 and accompanying text.

18. *See infra* notes 104-24 and accompanying text.

19. *See infra* notes 26-27 and accompanying text.

20. *See* Dunaway v. New York, 442 U.S. 200, 208-16 (1979); Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975).

21. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

22.

> 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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

it does not require that all arrests and all searches and seizures be undertaken with a duly executed warrant. Because arrests often involve sudden observations of criminal behavior that necessitate swift action, courts do not always require a warrant.[23] Under certain circumstances, searches and seizures also do not require the issuance of a warrant.[24] Warrantless searches and seizures made with probable cause are permitted as "specifically established and well-delineated" exceptions to the fourth amendment probable cause requirement.[25]

Courts permit searches and seizures *without* probable cause in four situations. The most far-reaching extension of any probable cause exception is the "stop and frisk" doctrine, which allows a police officer to stop or "seize" a person on a "reasonable and articulable" suspicion that he is engaged in criminal activity. Moreover, if the officer suspects that the person is armed and dangerous, he may conduct a limited frisk or "search" for weapons.[26] The Supreme Court first upheld the consti-

23. The Supreme Court has held that a warrant for a felony arrest in public places with probable cause is not constitutionally required. United States v. Watson, 423 U.S. 411, 423 (1976); *cf.* Payton v. New York, 445 U.S. 573, 587-89 (1980) (absent exigent circumstances, an arrest in the individual's home cannot be made without a warrant).

24. Warrantless searches and seizures conducted with probable cause are permitted under the following exceptions:

(a) A search incident to a lawful arrest, *see e.g.*, Chimel v. California, 395 U.S. 752 (1969) (upheld warrantless search of arrestee's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him);

(b) A search conducted under exigent circumstances, *see* Cupp v. Murphy, 412 U.S. 291 (1973) (upheld limited warrantless search to prevent imminent destruction of evidence);

(c) Seizures of objects in "plain view," *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (officer lawfully on premises may seize evidence discovered inadvertently);

(d) A search of an automobile, *see* Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless seareh of automobile allowed in circumstances that would not justify other warrantless searches); Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of an automobile permissible because of its inherent mobility); and

(e) A search involving consent, *see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

25. *See* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); *accord* Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Martell, 654 F.2d 1356, 1363-64 & n.1 (9th Cir. 1981) (Nelson, J., dissenting), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772).

26. The other three situations are not relevant to airport seizures of luggage. Courts do not require probable cause for inspections and administrative searches, commonly conducted by health, fire, or safety inspectors pursuant to a governmental regulatory scheme. *See* Camara v. Municipal Court, 387 U.S. 523 (1967) (upheld inspection search without probable cause that the particular dwelling violates the housing code). Courts also permit border searches without probable cause. *See* United States v. Ramsey, 431 U.S. 606 (1977); Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Courts justify border searches (limited to the American border or its "functional equivalent," *see Almeida-Sanchez*, 413 U.S. at 272) because of the need for "national self-protection" from travelers entering the country, *id.* (quoting Carroll v. United States, 267 U.S. 132, 154 (1925)). Courts also permit law enforcement officers to seize persons while searching physical areas pursuant to a warrant. *See* Michigan v. Summers, 452 U.S. 692, 701, 705 (1981) (execution of a search warrant founded on probable cause to believe that a dwelling contains

tutionality of the "stop and frisk" in *Terry v. Ohio*.[27]

The Supreme Court justifies searches and seizures without probable cause on the principle that the governmental interest in conducting the search and seizure outweighs any intrusion on the fourth amendment rights of the individual.[28] In interpreting the fourth amendment probable cause requirement there are two distinct theories that the Court could adopt to permit searches and seizures without probable cause. The Court may adopt a theory that the fourth amendment prohibits only unreasonable searches and seizures,[29] or it may adopt a theory that the fourth amendment permits searches and seizures without probable cause only as well-defined exceptions to the probable cause requirement.[30]

Assuming that airport seizures of luggage without probable cause should be permitted,[31] the particular theory that the Court adopts has a direct bearing on whether a particular seizure will be constitutionally permissible. If the Court adopts a reasonableness theory, it will permit any seizure of luggage without probable cause as long as it is reason-

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contraband authorizes a seizure of the occupants without probable cause to believe the occupants are engaged in criminal activity; justification is that because a search warrant has already authorized a significant intrusion, the seizure of the occupants represents a minimal incremental intrusion).

27. 392 U.S. 1 (1968). In *Terry* the Court held that law enforcement officers could search a person briefly on only a reasonable suspicion that the person is engaged in criminal activity and may be armed and dangerous. *Id.* at 30. Although the *Terry* Court expressly declined to decide whether an officer could seize a person without probable cause for purely investigative purposes, without a reasonable suspicion that the suspect may be armed and dangerous, *id.* at 19 n.16, the Court later recognized the constitutionality of such an investigative stop. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (Border Patrol officers permitted to seize persons for brief "stop and inquiry" when the officers have a reasonable suspicion that the suspects are illegal aliens); *see also* Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam) (reasonable and articulable suspicion of criminal activity); United States v. Mendenhall, 446 U.S. 544, 560-66 (1980) (Powell, J., concurring). *Terry* supplies support for allowing seizures of luggage without probable cause. *See infra* notes 89-103 and accompanying text.

28. *See* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

29. Read literally, this is what the fourth amendment states, *see supra* note 22.

The theory that the fourth amendment prohibits only unreasonable searches and seizures is drawn from language in the Court's opinion in Michigan v. Summers, 452 U.S. 692, 699-701 (1981) ("general rule" of reasonableness is to be applied to judge searches and seizures that involve limited intrusions). *See supra* note 26; *infra* note 63.

30. The Court adopted the "narrow exceptions" theory in Dunaway v. New York, 442 U.S. 200, 208-09 (1979). *See infra* note 33. Recall that warrantless searches and seizures *with* probable cause are permitted only as specified exceptions. *See supra* notes 24-25 and accompanying text.

31. There is support for the view that seizures of luggage without probable cause should not be permitted under any circumstances. *See* United States v. Belcher, 685 F.2d 289 (9th Cir. 1982); United States v. Martell, 654 F.2d 1356, 1363 (9th Cir. 1981) (Nelson, J., dissenting), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772); Comment, *Seizing Luggage on Less than Probable Cause*, 18 AM. CRIM. L. REV. 637 (1981); *infra* notes 79-86 and accompanying text.

able.[32] If, however, the Court adopts the view that seizures of luggage without probable cause must fall under an exception to the probable cause requirement, specifically the *Terry* exception, it must still determine the extent to which *Terry* should be applied to the seizure. The Court could choose to apply the constitutional standards of *Terry* equally to seizures of persons and to seizures of luggage and hold that because seizures resulting in lengthy detentions of persons are unconstitutional,[33] seizures resulting in lengthy detentions of luggage are unconstitutional as well.[34] The Court could also decline to apply the *Terry* standards equally to seizures of luggage and of persons, upholding seizures resulting in lengthy detentions of luggage on the theory that such seizures are less intrusive than seizures of persons.[35]

Thus, there are four approaches that the Court could follow: no seizures of luggage without probable cause permitted; all reasonable seizures permitted; seizures permitted under *Terry* to the same extent as

32. This approach was taken by the majority in United States v. Martell, 654 F.2d at 1360. *See infra* notes 63-78 and accompanying text.

33. *See* Dunaway v. New York, 442 U.S. 200 (1979).

In *Dunaway* the defendant was suspected in an attempted robbery, but the police lacked probable cause to arrest him. Nonetheless, the police took the defendant into custody, transported him to the police station, and detained him there for interrogation. Within an hour after he was taken into custody, the defendant made incriminating statements and was arrested. The Supreme Court rejected the government's contention that the detention was permissible under *Terry*. *Id.* at 207. Writing for the majority, Justice Brennan noted that the detention was "in important respects indistinguishable from a traditional arrest." *Id.* at 212. The intrusion was much more severe than the "stop and frisk" permitted in *Terry*. The Court stated: "Indeed, any 'exception' [to a requirement of probable cause] that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

That the defendant was taken into custody and transported to the police station weighed heavily in the decision. *Id.* at 212. But it is not clear that the result necessarily would have been different had the defendant in *Dunaway* been interrogated for the same length of time on the street or in his home. The Court in *Dunaway* was concerned that lengthy detentions without probable cause, if permitted, would emasculate the fourth amendment's probable cause requirement. *Id.* at 212-13; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (brief period of detention a factor that will justify a *Terry* stop).

The Court of Appeals for the Ninth Circuit has imposed a 20-minute limit on detentions of persons without probable cause. *See* United States v. Martell, 654 F.2d at 1360; United States v. Wasserteil, 641 F.2d 704, 707-08 (9th Cir. 1981); United States v. Chamberlin, 644 F.2d 1262, 1267 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981). In addition, the Model Code of Pre-Arraignment Procedure authorizes an officer to stop a person in certain circumstances without probable cause for no longer than 20 minutes. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975).

34. This approach was taken by the majority in United States v. Place, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982). *See infra* notes 87-97 and accompanying text.

35. This approach was taken by the dissent in United States v. Place, 660 F.2d 44, 54, 55 (2d Cir. 1981) (Kaufman, J., dissenting), *cert. granted*, 102 S. Ct. 2901 (1982). *See infra* notes 98-103 and accompanying text.

seizures of persons permitted; or seizures permitted under *Terry* to a greater extent than seizures of persons permitted.

II. AIRPORT SEIZURES OF LUGGAGE

The Supreme Court has indicated that a person may be "seized" and detained for a brief period of time in an airport on a reasonable suspicion that the person is engaged in criminal activity.[36] The Supreme Court will soon rule on the constitutionality of a seizure of a person's luggage on a reasonable suspicion; the federal courts of appeals that have considered the issue have rendered widely divergent opinions.[37]

A. *Early Treatment.*

Two of the first cases to present the issue of whether law enforcement officials could seize a person's luggage without probable cause were *United States v. Klein*[38] and *United States v. Viegas*.[39] In *Klein*,

36. Reid v. Georgia, 448 U.S. 438 (1980) (by implication) (per curiam); United States v. Mendenhall, 446 U.S. 544 (1980).

In *Mendenhall*, a three-judge plurality held that the defendant was "seized" within the meaning of the fourth amendment, but that the seizure was justified because the agents possessed a reasonable and articulable suspicion of criminal activity. 446 U.S. at 560 (Powell, J.; Burger, C.J., & Blackmun, J., concurring in part & in the judgment). This suspicion combined with the compelling public interest in detecting drug smugglers warranted the *Terry* stop. *Id.* at 561-66. Justices Stewart and Rehnquist concluded that no seizure had occurred; therefore, no interest protected by the fourth amendment was violated. *Id.* at 555.

In *Reid*, the Court held that the agent acted unlawfully when he seized the defendant because he did not have a reasonable suspicion that the defendant had committed a crime. Thus, the Court implied that had the agent had a reasonable suspicion, he could have lawfully seized the defendant. 448 U.S. at 441 ("We conclude that the agent could not . . . have reasonably suspected the petitioner of criminal activity *on the basis of these observed circumstances*.") (emphasis added). The Court vacated the judgment and remanded the case to the Georgia Court of Appeals for further proceedings.

On remand, the Georgia Court of Appeals held for the defendant. State v. Reid, 158 Ga. App. 570, 274 S.E.2d 164 (1981). But the Georgia Supreme Court reversed, holding that the defendant had not been "seized" and that his fourth amendment rights had therefore not been violated. *See* State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981), *cert. denied*, 102 S. Ct. 369 (1981).

37. *See, e.g.*, United States v. Regan, No. 81-1722, slip op. (1st Cir. Sept. 1, 1982); United States v. Belcher, 685 F.2d 289 (9th Cir. 1982); United States v. Corbitt, 675 F.2d 626 (4th Cir. 1982); United States v. MacDonald, 670 F.2d 910 (10th Cir. 1982); United States v. Place, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982); United States v. Martell, 654 F.2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772); United States v. Viegas, 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. West, 495 F. Supp. 871 (D. Mass. 1980), *aff'd*, 651 F.2d 71 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. Aug. 14, 1981) (No. 81-307); United States v. Casey, No. H-78-74 (D. Conn. Feb. 7, 1979) (nnreported), *aff'd*, No. 79-1109 (2d Cir. June 14, 1979) (unpublished order).

38. 626 F.2d 22 (7th Cir. 1980).

39. 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981).

Chicago DEA agents seized two travelers' suitcases without probable cause. The suitcases were later discovered to contain narcotics.[40] The Court of Appeals for the Seventh Circuit upheld the seizures, citing two Supreme Court decisions to support its holding.[41]

The *Klein* court first looked to *United States v. Van Leeuwen*,[42] in which the Supreme Court upheld as constitutional the brief detention of two suspicious-looking packages sent through the mail. The Court reasoned that the detention involved "no possible invasion of the right 'to be secure' in the 'persons, houses, papers, and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures.' "[43] The *Klein* court viewed the detention in *Van Leeuwen* as analogous to the detention of the suitcases. The court recognized "the possible difference between the privacy interest in packages surrendered in the mails and that in luggage carried by an individual,"[44] but concluded that the defendants' privacy interests were "adequately protected."[45]

In support of its conclusion that the defendants' privacy interests were protected, the *Klein* court cited *Arkansas v. Sanders*,[46] in which the Court refused to extend the automobile search exception[47] to permit the warrantless search of luggage found in the defendant's automobile. In *Sanders*, the Court recognized the existence of a significant expectation of privacy in the contents of luggage; this expectation, ac-

40. The agents, alerted by a deputy sheriff at Fort Lauderdale's airport, stopped the defendants at O'Hare Airport. After learning that one defendant was traveling under an assumed name and after both defendants denied having keys to open the locked suitcases they were carrying, the agents developed a reasonable suspicion that the suitcases contained narcotics. The agents told the defendants that they were free to go, but that their suitcases would be detained until the agents could get a search warrant. After a drug detector dog conducted a sniff search, the agents obtained a search warrant and discovered cocaine in the suitcases. The defendants were convicted, and they appealed.

41. *See* United States v. Klein, 626 F.2d at 25-26. The court cited Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Van Leeuwen, 397 U.S. 249 (1970).

42. 397 U.S. 249 (1970).

43. *Id.* at 252. Writing for a unanimous Court, Justice Douglas noted that *Terry* "went further than we need go here." *Id.* Justice Douglas did add that "theoretically . . . detention of mail could at some point become an unreasonable seizure," but stated that detention for ninety minutes pending an investigation was not excessive. *Id.*

44. 626 F.2d at 26.

45. *Id.*

46. 442 U.S. 753 (1979).

47. The automobile search exception was set forth in Carroll v. United States, 267 U.S. 132 (1925), in which the Court upheld a warrantless search with probable cause of an automobile on grounds that the automobile's inherent mobility makes it impracticable to obtain a warrant in advance of the search. *See also supra* note 24.

cording to the Court, is not lessened by carrying the luggage in an automobile.[48]

Applying the *Sanders* rationale, the *Klein* court held that the defendants' privacy interest in the contents of their luggage was not violated by a mere seizure based on reasonable suspicion.[49] The court reasoned that a person had a lesser expectation of privacy in the outside of luggage than in its contents. Accordingly, as long as the contents were not disturbed by a warrantless search, seizing the luggage without probable cause would not intrude on any significant privacy interests.[50]

In *United States v. Viegas*,[51] the Court of Appeals for the First Circuit delivered a holding similar to the holding of the Court of Appeals for the Seventh Circuit in *Klein*. The *Viegas* court cited *Van Leeuwen* and *Klein* in upholding the conviction of a man whose luggage was seized without a warrant, submitted to a sniff search, and subsequently opened pursuant to a warrant.[52] The court recognized that the defendant was inconvenienced by the seizure of the luggage but concluded that "the impact on his reasonable expectation of privacy . . . in no way compares with an actual search of the contents."[53]

Although the issue of airport seizures of luggage without probable cause appeared to be rather easily resolved by the courts in *Klein* and *Viegas*,[54] two later cases have made it apparent that the issue is far

48. 442 U.S. at 764.

49. 626 F.2d at 26.

50. The *Klein* court again used *Van Leeuwen* for support. *See id.* In *Van Leeuwen*, Justice Douglas noted that "[n]o interest protected by the Fourth Amendment was invaded" by detaining the packages: "[t]he significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained." United States v. Van Leeuwen, 397 U.S. at 253.

51. 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981).

52. 639 F.2d at 45.

53. *Id.* (citations omitted). In *Viegas*, DEA agents stopped the defendant at the airport after he had concluded his air travel and was on his way home. The court noted that the defendant would have been more inconvenienced if he had been continuing on to another destination. *Id.* In a later case, the Court of Appeals for the First Circuit held that even this greater inconvenience was "not of sufficient degree to require a different result." United States v. West, 651 F.2d 71, 74 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. Aug. 14, 1981) (No. 81-307).

The First Circuit, however, has recognized that at some point seizures of luggage without probable cause will be unconstitutional. *See* United States v. Regan, No. 81-1722, slip op. (1st Cir. Sept. 1, 1982). In *Regan*, the court held that a seizure resulting in a 22-hour detention of the defendant's luggage without probable cause violated the fourth amendment. *Id.* slip op. at 11. The court viewed the lengthy detention as too intrusive to be permitted under *Terry*: "A rule allowing *long-term* baggage detentions on anything less than probable cause seems to us simply too dangerous to be accepted." *Id.* slip op. at 12 (emphasis in original).

54. The *Klein* court treated the issue in a few paragraphs. *See* 626 F.2d at 26. The *Viegas* court treated it in one paragraph. *See* 639 F.2d at 45.

from resolved.[55] In *United States v. Martell*,[56] the Court of Appeals for the Ninth Circuit held that *Terry* did not apply to the seizure of inanimate objects, but that such a seizure is nonetheless permissible as long as it is reasonable.[57] In *United States v. Place*,[58] the Court of Appeals for the Second Circuit stated that seizures of luggage should be permitted under *Terry* to the same extent as seizures of persons are permitted.[59]

B. *The Four Approaches.*

The four possible approaches[60] to determining the constitutionality of airport seizures of luggage are illustrated in the majority and dissenting opinions in *United States v. Martell*[61] and *United States v. Place*.[62]

The first approach permits all reasonable seizures of luggage and rejects the interpretation that there are certain limited exceptions to the fourth amendment probable cause requirement. Instead, the fourth amendment provides a general standard of reasonableness on which all searches and seizures must be judged.[63] This approach was first applied to seizures of luggage by the Court of Appeals for the Ninth

55. *See* United States v. Martell, 654 F.2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772); United States v. Place, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

56. 654 F.2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772).

57. *Id.* at 1363. The court upheld a seizure which resulted in a 20-minute detention of the defendant's luggage. The dissent contended that probable cause was required for all seizures of luggage. *Id.* at 1365.

58. 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

59. *Id.* at 50. The court held that a seizure of the defendant's luggage resulting in a 90-minute detention was unconstitutional; the court commented, however, that it was "willing also to apply the principles of *Terry* to seizures of property." *Id.* The dissent argued that a seizure of luggage was less intrusive than a seizure of the person and that a longer detention was therefore permissible under *Terry*. *Id.* at 55.

60. *See supra* text following note 35.

61. 654 F.2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (U.S. Mar. 15, 1982) (No. 81-1772).

62. 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

63. The view that the fourth amendment prohibits only unreasonable searches and seizures is drawn from an expansive interpretation of Michigan v. Summers, 452 U.S. 692 (1981). *See supra* notes 26 & 29; *see also* Note, *Gauging the Reasonableness of Nonarrest Seizures: The Emerging Rule of* Michigan v. Summers, 46 ALB. L. REV. 631 (1982) (*Michigan v. Summers* creates a rule of reasonableness to judge all searches and seizures without probable cause).

This interpretation has been questioned. *See, e.g.*, Bernstein & Eisenstein, *1981 Supreme Court Update: The Criminal Law*, TRIAL 54, 56 (Oct. 1981); Comment, *Reasonable Suspicion Authorizes Detention of Occupants of Validly Searched Premises*, 59 WASH. U.L.Q. 1393, 1393 (1982) (*Michigan v. Summers* represents a new exception to the fourth amendment probable cause requirement).

Circuit in *United States v. Martell*.[64] The court, over a strong dissent, upheld a seizure resulting in a twenty-minute detention of the defendants' luggage without probable cause.[65]

In a startling departure from *Klein* and *Viegas*, the *Martell* court held that *Terry* and its progeny do not apply to the seizure of inanimate objects.[66] The court perceived a "conceptual difference" between a seizure of persons and the seizure of their luggage[67] and interpreted the language of *Dunaway v. New York*[68]—that any seizure of a person is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment"[69]—to limit *Terry*'s applicability.[70] The *Martell* court concluded that in light of *Dunaway*, *Terry* does not apply to the seizure of inanimate objects, "a seizure of which constitutes a substantially less serious intrusion upon rights of the individual."[71]

Instead of applying *Terry*, the court used a general fourth amendment standard of reasonableness to judge the seizure of the defendants' suitcases.[72] The court cited several cases that upheld either a border search or an administrative search, and noted that the courts in these cases did not consider their decisions exceptions to the probable cause requirement.[73] Rather, "[t]hese decisions are bottomed upon the concept that in the light of all the circumstances the searches are not unreasonable by constitutional standards."[74]

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64. 654 F.2d at 1357-63.

65. On September 30, 1979, DEA agents in San Diego, alerted by authorities in Anchorage, began surveillance of Martell and Minneci at the San Diego airport. The agents followed the two men to a hotel. Martell then left the hotel with a third man in a pickup truck driving in a manner apparently designed to avoid surveillance. Martell soon returned to the hotel, at which time he and Minneci went back to the airport and purchased two tickets to Anchorage. The agents stopped the two men in the terminal. After the men refused to consent to a search of their luggage, the agents escorted them to the Harbor Police Office and subjected the luggage to a sniff search. When the drug detector dog gave a positive alert for narcotics the agents obtained a search warrant, and a search revealed a large quantity of cocaine.

66. 654 F.2d at 1359.

67. *Id.* at 1358.

68. 442 U.S. 200 (1979). *See supra* note 33.

69. *Id.* at 209 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

70. United States v. Martell, 654 F.2d at 1359.

71. *Id.* at 1359 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

72. United States v. Martell, 654 F.2d at 1359.

73. *Id.* at 1360; *see, e.g.*, United States v. Ramsey, 431 U.S. 606 (1977) (upheld border search); United States v. Schafer, 461 F.2d 856 (9th Cir.) (upheld admission of narcotics discovered during an administrative search of luggage of airplane passengers leaving Hawaii; search conducted to prevent exportation of plants, pests, and diseases), *cert. denied*, 409 U.S. 881 (1972).

74. United States v. Martell, 654 F.2d at 1361. The court cited Michigan v. Summers, 452 U.S. 692 (1981), in support of its holding that warrantless searches and seizures without probable cause are permissible as long as they are not unreasonable. 654 F.2d at 1361 n.3; *see also supra* notes 26, 29 & 63.

fourth amendment. Judge Nelson viewed the fourth amendment as containing a warrant requirement for every search and seizure, subject to certain specific exceptions.[80] For support, she quoted passages from the same cases cited by the majority in support of its interpretation that the fourth amendment prohibits only unreasonable searches and seizures.[81] The judge concluded that, because the seizure of inanimate objects does not fit into any of the well-established exceptions, the seizure of defendants' suitcases without a warrant was unlawful.[82]

Judge Nelson also rebutted the majority's use of *Van Leeuwen* as precedent, presenting compelling reasons why *Van Leeuwen* has no "application outside the mail context."[83] In her dissent, the judge noted that *Van Leeuwen* was the only case cited to support the warrantless seizure of an inanimate object without probable cause, yet Justice Douglas' short opinion in *Van Leeuwen* gave no indication that it was setting out such a broad new interpretation of the fourth amendment.[84] Judge Nelson maintained that *Van Leeuwen* only established the boundaries of fourth amendment protection with respect to the privacy interests in the contents of mail.[85] She argued that because mail is voluntarily released to government officials, the detention of mail represents a lesser intrusion than does the seizure of an object in possession of the individual.[86]

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80. *Id.* at 1363-64.

81. *Id.* at 1364-65 (discussing United States v. Ramsey, 431 U.S. 606, 621 (1977)) ("[T]he 'border search' exception . . . is a long-standing, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained . . ."); United States v. Schafer, 461 F.2d 856 (9th Cir.) (in administrative search context, "[t]he proposition is firmly established that 'except' in certain carefully defined classes of cases, a search of private property is 'unreasonable' unless it has been authorized by a valid search warrant") (quoting Camara v. Municipal Court, 387 U.S. 523, 529 (1967), *cert. denied*, 409 U.S. 881 (1972)). *See supra* text accompanying notes 73-74. Judge Nelson also summarily dismissed *Michigan v. Summers*, stating in a footnote that *Summers* only deals with the detention of people. *See* United States v. Martell, 654 F.2d at 1365 n.2 (Nelson, J., dissenting).

82. United States v. Martell, 654 F.2d at 1365 (Nelson, J., dissenting).

83. *Id.* at 1366-69.

84. Judge Nelson stated that it is "unlikely that the *Van Leeuwen* Court would think to dispense with both the probable cause and warrant requirements in a broad range of cases without an extended discussion of the careful balancing of interests that would lead to such a result." *Id.* at 1366-67.

85. *Id.* at 1367. The dissent noted that Justice Douglas began by emphasizing the important privacy interests in the contents of one's mail and then concluded that there was "no possible invasion" of fourth amendment rights when the mail was merely detained. *Id.* (quoting United States v. Van Leeuwen, 397 U.S. 249, 252 (1970)).

86. In fact, the detention of mail in *Van Leeuwen* was not really a seizure at all. The *Van Leeuwen* Court at no point labelled the detention of the mail a seizure; the Court stated that "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited." United States v. Van Leeuwen, 397 U.S. at 253.

The third approach to the constitutionality of airport seizures of luggage is based on an interpretation of *Terry* that permits seizures of luggage to the same extent that it permits seizures of persons. This approach resembles the second approach in that it interprets the fourth amendment as prohibiting searches and seizures without probable cause, subject to certain exceptions, one of which is the *Terry* stop and frisk. The key distinction is that the third approach applies the *Terry* exception to inanimate objects. Thus, whereas a seizure of luggage without probable cause is per se unconstitutional under the second approach, such a seizure is permissible under the third approach as an exception to the probable cause requirement. In short, the third approach applies the same constitutional standards to seizures of luggage as are applied to *Terry* seizures of persons.[87] In *United States v. Place*,[88] the Court of Appeals for the Second Circuit first advanced the theory that seizures of luggage without probable cause should be allowed to the same extent as *Terry* seizures of persons. The *Place* majority held that the ninety-minute detention of the defendant's luggage without probable cause was an unconstitutional seizure within the meaning of *Terry*.[89] After stating that "with rare exceptions"—such as the *Terry* stop exception—all warrantless seizures are per se unreasona-

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Judge Nelson also distinguished Arkansas v. Sanders, 442 U.S. 753 (1979), stating that in *Sanders*, since the Court found probable cause, presumably the only issue was whether the police had to obtain a warrant to search the suitcase. *Id.* at 1365-66 n.3. Exigent circumstances and probable cause presumably justified the warrantless search; these two elements were absent in *Martell*. *Id.*

87. Thus, a seizure of luggage will not be permitted if a similar seizure of the person would have been an unconstitutional *Terry* stop. The "rule" is particularly important with respect to seizures resulting in lengthy detentions of luggage: because seizures of persons that result in lengthy detentions are unconstitutional, *see supra* note 33, under the "rule," seizures of luggage resulting in detentions of the same leugth will also be held unconstitutional.

88. 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982).

89. Two Dade County detectives stopped the defendant in *Place* at the Miami International Airport. The detectives spotted him nervously scanning the terminal, asked him for identification, and asked permission to examine his baggage. The defendant agreed, but the detectives, noticing that the defendant's flight to New York left in five minutes, allowed him to depart.

Two DEA agents in New York, alerted by the detectives, observed the defendant walking through the terminal at LaGuardia Airport continuously scanning the area. After the defendant had picked up his baggage, the agents stopped him and asked to see his ticket and identification. The agents then asked the defendant if he would consent to a search of his luggage. The defendant refused, and the agents seized the suitcases and told the defendant he was free to go. One and a half to two hours later the suitcases were subjected to a sniff search at Kennedy Airport. The dog reacted positively to one of the bags and a search warrant was obtained. The search uncovered 1,125 grams of cocaine, and the defendant was subsequently convicted of possession. United States v. Place, 498 F. Supp. 1217 (E.D.N.Y. 1980) *rev'd*, 660 F.2d 44 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 2901 (1982).

ble,[90] the court concluded that the same *Terry* principles that apply to seizures of persons must be applied to seizures of property.[91] Otherwise, according to the court, the warrantless seizure would "clearly violate" the fourth amendment.[92]

In applying the *Terry* principles equally to seizures of persons and property, the majority rejected the theory that the inconvenience and intrusion is less when a person's luggage is seized. The *Place* court stated that "[t]he Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property," noting that "[i]n both cases there is an infringement of the person's freedom of action."[93] The *Place* court noted that if the agents had taken the defendant into custody for almost two hours in order to allow a dog to conduct a sniff search of *his person*, the lengthy detention would have been a seizure in violation of his fourth amendment rights under *Dunaway*.[94] That the agents chose to seize his luggage instead should not create a different result, the court reasoned. Therefore, the court held that the detention of luggage without probable cause for a period of over ninety minutes was an unlawful warrantless seizure within the meaning of *Terry*.[95] Like the dissent in *Martell*, the *Place* court distinguished *Van Leeuwen*, viewing it as limited to the detention of mail.[96] The court also distinguished *Klein*, *Viegas*, and *West*, noting that in these cases the duration of the detention was considerably less than that of the detention in *Place*.[97]

The fourth approach, adopted by Judge Kaufman in his dissent in *Place*[98] and by the courts in *Klein*, *Viegas*, and *West*[99] takes the view that *Terry* permits seizures of luggage to a greater extent than it permits

90. United States v. Place, 660 F.2d at 47 (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

91. *Id.* at 50.

92. *Id.*

93. *Id.* at 51. "Police custody of his person precludes him from freely moving about. Police custody of his baggage deprives him of the use of it and its contents. Both create uncertainty and anxiety on his part." *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 52-53. The court stated: "Unlike the dispossession of hand baggage in a person's custody . . . the mere detention of mail not in his custody or control amounts to at most a minimal or technical inteference with his person or effects, resulting in no personal deprivation at all." *Id.*

97. *Id.* at 53. The author of the *Place* opinion, Judge Mansfield, affirmed the conviction of a traveler in United States v. Casey, No. H-78-74 (D. Conn. Feb. 7, 1979), *aff'd*, No. 79-1109 (2d Cir. June 14, 1979). In *Casey*, the defendant's bag was seized without probable cause and held for *over a day* before a sniff search was conducted.

98. United States v. Place, 660 F.2d at 54 (Kaufman, J., dissenting).

99. *See supra* notes 38-54 and accompanying text.

seizures of persons. The rationale behind this approach is that the seizure of luggage amounts to a lesser intrusion on privacy interests than does the seizure of persons. This lesser intrusion justifies a longer detention.

In his dissent in *Place*, Judge Kaufman distinguished between taking a person into custody and seizing a person's property. The latter, according to the Judge, entails a minimal intrusion of privacy interests. Judge Kaufman contended that "a person's principal privacy interest lies not in the baggage itself, but in the contents."[100] According to the dissent, as long as the contents are not searched without a warrant, the person's privacy interests are not violated. Thus, the minimal intrusion of a mere seizure balanced against the compelling government interest in preventing drug smuggling justifies a longer detention of luggage than would be allowed of a person.[101] Finally, Judge Kaufman maintained that *Van Leeuwen* applied to seizures of luggage,[102] reasoning that the difference between the privacy interest in property placed in the mail and property held by an individual was a "nebulous distinction."[103]

III. A Critical Analysis of the Four Approaches

The threshold question in an analysis of airport seizures of luggage without probable cause is whether such seizures should be permitted under *any* circumstances. One could conclude, as did Judge Nelson in *Martell*, that all seizures of luggage without probable cause are unconstitutional.[104] Such a rule, however, would greatly hamper law enforcement efforts to combat drug smuggling. When law enforcement officers have a reasonable suspicion that a person is carrying narcotics, they are permitted to seize and detain him briefly for investigative purposes. To prohibit the officers from also seizing his luggage would frustrate the purpose of seizing the person.[105] The seizure of the person

100. 660 F.2d at 55 (Kaufman, J., dissenting) (citing Arkansas v. Sanders, 442 U.S. 753, 764 (1979) and United States v. Chadwick, 433 U.S. 1, 13 n.8 (1977)).

101. 660 F.2d at 55 (Kaufman, J., dissenting). In addition, Judge Kaufman maintained that *Van Leeuwen* applied to seizures of luggage, reasoning that the difference between the privacy interest in property placed in the mail and property held by an individual was a "nebulous distinction." *Id.* at 55-56. Judge Kaufman also found *Klein*, *Viegas*, and *West* indistinguishable. *Id.* at 56 n.2.

102. United States v. Place, 660 F.2d at 56.

103. *Id.*

104. *See supra* notes 79-86 and accompanying text.

105. Presumably, under a rule that all seizures of luggage without probable cause are unconstitutional, a person not under suspicion could carry away the luggage when the possessor of the luggage was seized unless the officers had probable cause to believe that the suitcase contained contraband.

allows the officers to conduct a brief investigation in which the suspect will either verify or dispel the officer's suspicion. If the officers are unable to have a drug detector dog conduct a brief sniff search of the person's luggage, they may be unable to determine whether their suspicion is justified.

Assuming, then, that some airport seizures of luggage without probable cause are permissible, the task is to articulate a theory defining which seizures should be permitted and establishing the standard by which they should be judged. Under the reasonableness theory adopted by the *Martell* majority, all airport seizures without probable cause would be judged on a case-by-case balancing of the governmental interest against the intrusion that the search and seizure entails. Allowing such an ad hoc determination, however, would emasculate the general rule that only searches and seizures conducted with probable cause are reasonable;[106] specifically, it would give the police a great deal of discretion by requiring only that they act "reasonably."[107]

Furthermore, the Court has held that warrantless searches and seizures *with* probable cause are recognized as "well-delineated" exceptions[108] and that there must be "a showing by those who seek exemption . . . that the exigencies of the situation [make] that course imperative."[109] In light of such a strict standard for warrantless searches and seizures with probable cause, it is fallacious to assert that any search and seizure without probable cause should be permitted as long as it is reasonable.

A better interpretation of the fourth amendment would treat airport seizures of luggage without probable cause as falling under the *Terry* stop exception to the probable cause requirement.[110] This inter-

106. The Supreme Court expressly rejected such an ad hoc determination of reasonableness in Dunaway v. New York, 442 U.S. 200, 213 (1979). *See* Comment, *Reasonable Suspicion Authorizes Detention of Occupants of Validly Searched Premises*, 59 WASH. U.L.Q. 1393, 1406 (1982); *see also supra* note 33.

107. The Court in *Dunaway* stated that "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing must be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" 442 U.S. at 213 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

108. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1972). *See supra* notes 24-25.

109. *Id.* at 455 (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).

110. The interpretation rejects the theory that searches and seizures without probable cause should be judged by a general rule of reasonableness. *See supra* notes 29 & 63 and accompanying text. Instead, searches and seizures without probable cause should be permitted under well-defined exceptions to the fourth amendment probable cause requirement. *See* Dunaway v. New York, 442 U.S. 200 (1979); *see also supra* note 30 and accompanying text. Each exception should be clearly limited to prevent any one exception from swallowing the requirement of probable cause. *Id.* at 213. These exceptions would be justified on the basis of both a strong governmental

pretation permits seizures of luggage without probable cause if the law enforcement officer has a reasonable suspicion that the luggage contains contraband. But the right to seize an individual's luggage pursuant to *Terry* must be strictly circumscribed.

Contrary to Judge Kaufman's contention in his *Place* dissent, the seizure of luggage is highly intrusive.[111] Judge Kaufman stresses the minimally intrusive nature of a seizure of luggage, noting that the individual's privacy interest is protected by the procurement of a warrant before the contents are searched.[112] His view that the individual's expectation of privacy[113] is not violated as long as the contents are not exposed without a warrant[114] adopts too narrow a definition of intrusion.

The Supreme Court has stated that the legitimate expectations of privacy protected by the fourth amendment stem from real and personal property concepts.[115] Nothing could be a more fundamental personal property concept than the right of a person in possession and control of his property to expect that he will be able to maintain control over his property until he voluntarily relinquishes possession. A seizure of his property violates his legitimate privacy expectations and,

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interest and the very minimal intrusion that the conduct entails. An important factor in evaluating the particular search and seizure would be an examination of the viable alternatives. If the governmental interest could be adequately served by less intrusive conduct, the particular search and seizure should be declared a violation of the fourth amendment.

At least two Supreme Court cases dealing with the lawfulness of a particular *Terry* search and seizure have noted the importance of either the existence of or lack of viable alternatives. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding spot-check stops unreasonable under the fourth amendment but noting that roadblock-type stops might be a permissible alternative); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (noting lack of practical alternatives for policing border in upholding *Terry* stop by roving Border Patrol).

The interpretation serves as an adequate substitute for a requirement of probable cause. It allows law enforcement agents to advance important recognized governmental interests in certain situations without a strict requirement that they believe criminal activity is present. At the same time, by permitting only minimally intrusive conduct, it ensures that the fourth amendment rights of individuals are not eroded. Finally, this interpretation reduces the risk of untrammeled police discretion by establishing delineated exceptions instead of ad hoc determinations of reasonableness. *See* United States v. Dunaway, 442 U.S. at 213-14; *supra* note 107 and accompanying text.

111. *See infra* notes 115-20 and accompanying text.

112. United States v. Place, 660 F.2d at 54-55 (Kaufman, J., dissenting); *see supra* notes 98-100 and accompanying text.

113. *See* Katz v. United States, 389 U.S. 347 (1967) (individuals' legitimate expectations of privacy are protected by the fourth amendment).

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

115. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). In *Rakas*, the Court held that a passenger in an automobile, who asserts neither a property nor a possessory interest in the automobile, does not have a legitimate expectation of privacy in the areas of the automobile searched. *Id.* at 148.

therefore, the owner deserves fourth amendment protection.[116]

Airport seizures of luggage are particularly intrusive. A seizure of luggage represents a significant restriction on the traveler's freedom of action.[117] As the *Place* majority correctly demonstrated, the seizure of a person's luggage "deprives him of the use of it and its contents."[118] Indeed, the seizure of a person's luggage can result in a de facto seizure of the person. Without access to his luggage, the traveler may be unable to fly to his destination. The result is that the traveler is "seized" as surely as if the law enforcement officers had prevented him from leaving.[119]

Because airport seizures of luggage without probable cause are so intrusive, such seizures should only be permitted subject to strict standards. Consistent with the approach adopted by the *Place* majority,[120] the law should permit seizures of luggage without probable cause for no longer a period than it would permit the seizure of the person. In other words, courts should apply the same constitutional standards to seizures of luggage as they apply to seizures of persons.

There is another compelling justification for according similar treatment to seizures of luggage and persons. If a person is seized on a

116. The intrusive dispossession that occurred in *Martell* and *Place* is very different from the detention of the packages in *Van Leeuwen*. In *Van Leeuwen* the packages were not in the defendant's possession when they were detained. *See* United States v. Van Leeuwen, 397 U.S. at 252. Indeed, the defendant probably was not aware that the packages had been detained. Even if he was aware of the detention, he had little or no expectation of using the packages or their contents at the moment they were detained. Instead, he had the expectation that the packages would arrive at their destination in a reasonable time. To detain the packages for 90 minutes, until probable cause was established, as was done in *Van Leeuwen*, would not cause the packages to arrive unreasonably late. If the packages in *Van Leeuwen* had been detained for several days without probable cause, the defendant would have had a strong case that the detention was an unlawful seizure. Presumably, this is what Justice Douglas meant when he stated that at some point the detention could have become an unreasonable seizure in violation of the fourth amendment. *See Id.*

117. *See* United States v. McCain, 556 F.2d 253 (5th Cir. 1977). In *McCain*, the defendant's luggage was seized and searched by airport customs inspectors pursuant to a valid border search. Meanwhile, the defendant was interrogated and subsequently confessed to having a bag of cocaine in her body. The Court held that the cocaine must be suppressed as evidence because the defendant had not been given *Miranda* warnings. *Id.* at 256. The court noted that even if the defendant was not physically restrained from leaving, "she was obviously able to leave only if she was willing to abandon her luggage, and this itself is a sufficient restriction on one's freedom of action so as to trigger the giving of *Miranda* warnings before proceeding with any interrogation." *Id.* at 255.

118. United States v. Place, 660 F.2d at 51. *See supra* note 93 and accompanying text.

119. *See* United States v. McCain, 556 F.2d at 255; 3 W. LAFAVE, *supra* note 4, § 9.6(e)(Supp. 1982) (seizure of luggage may be "tantamount" to a seizure of the person "because that person must either remain on the scene or else seemingly surrender his effects permanently to the police").

120. *See supra* notes 87-97 and accompanying text.

reasonable suspicion, he must be released after a brief period of time if the law enforcement officers do not establish probable cause to arrest. An officer should not be able to circumvent the requirement of brevity by releasing the suspect after a few minutes yet retaining his luggage indefinitely until he can establish probable cause to arrest.

Therefore, if a law enforcement officer has a reasonable and articulable suspicion both that a person is engaged in criminal activity and that the luggage he is in possession of may contain contraband, the officer should be permitted to seize the luggage and detain it for a brief period to determine if there is probable cause to search its contents. If after a brief investigation the officer does not find probable cause to search, he must release the person's luggage. If the officer reasonably believes that a sniff search of the suspect's luggage would confirm or dispel his suspicions, he should be able to submit the luggage to a sniff search, provided that it would not result in a lengthy detention of the luggage.

Imposing a requirement that the detention resulting from the seizure be brief would not cause a great hardship to law enforcement officials. In order to seize a person under *Terry*, an officer must have a reasonable and articulable suspicion that the person is engaged in criminal activity.[121] Generally, this suspicion stems from observations of odd behavior such as a person nervously scanning the airport terminal, or ascertaining curious information, such as noting conflicting identification on the person's luggage.[122] In most cases, very little investigation would be necessary to confirm or dispel the officer's suspicions. If the officer is still not satisfied but does not have enough information to establish probable cause, he could release the person and his luggage and continue surveillance. Also, he could attempt to establish probable cause independent of a custodial interrogation. It is more likely, however, that the detainee will clear up the suspicion adequately or, after a brief interrogation, that the officer will have probable cause to arrest.[123]

Requiring that a sniff search not result in a lengthy detention also does not create a hardship. The need for a sniff search arises in the context of an investigative stop made on the suspicion that the person is carrying narcotics. This stop frequently takes place in major airports where the DEA has concentrated its efforts to detect drug smugglers. It would not be excessively burdensome to require that agents wishing to

121. *See* Terry v. Ohio, 392 U.S. 1 (1968); *supra* note 27.

122. *See supra* note 3.

123. *See* LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 MICH. L. REV. 39, 93 (1968).

conduct sniff searches keep a drug detector dog at the airport while they are maintaining surveillance.[124]

IV. CONCLUSION

Any relaxation of the probable cause requirement by the Supreme Court should be made with extreme caution to ensure that individuals' fourth amendment rights are not violated. The farther that the Court strays from judging fundamental rights on the basis of a long-established objective standard, the more likely that such rights will be eroded. This danger lends support to the approach of maintaining carefully delineated exceptions to the probable cause requirement.

Broad and undefined standards, such as a standard of reasonableness, carry with them the great risk of gradual erosion of fourth amendment protections. For this reason, the *Terry* investigative stop and frisk exception to the probable cause requirement should be narrowly construed to permit only minimally intrusive conduct in the face of a compelling governmental interest. The government has a compelling interest in preventing the widespread trafficking of narcotics; consequently, airport seizures of luggage without probable cause should be permitted under *Terry*. One must recognize, however, that the seizure of luggage is nonetheless a severe intrusion that should be accorded application of the same fourth amendment standards applied to the seizure of persons.

John M. Schohl

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124. *See* United States v. Place, 660 F.2d at 52.

Moreover, if seizures of luggage are to be permitted on only a reasonable suspicion, the burdens of complying with the requirement should be borne by the police. United States v. Regan, 687 F.2d 531, 538 n.8 (1st Cir. 1982):

> Were the rule otherwise—were delays of one, two or more days to be accepted by courts—drug enforcement personnel might use only one detector dog to service an entire metropolitan area, and suitcases might be piled high in the security room awaiting the dog's weekly or bi-monthly rounds. We think that where the only basis for holding luggage is reasonable suspicion, expeditious action is essential.

Id.