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## Fourth Amendment--Limited Luggage Seizures Valid on Reasonable Suspicion

Linda M. Sickman

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## FOURTH AMENDMENT—LIMITED LUGGAGE SEIZURES VALID ON REASONABLE SUSPICION

United States v. Place, 103 S. Ct. 2637 (1983).

### I. INTRODUCTION

Fifteen years after its landmark decision in *Terry v. Ohio*,<sup>1</sup> the United States Supreme Court extended the scope of the *Terry* doctrine to include seizures of personal property in *United States v. Place*.<sup>2</sup> The Court held that when law enforcement officers reasonably suspect, based on their observations, that a traveler is carrying luggage containing narcotics, they may conduct a properly limited investigative detention of the luggage. In *Place*, however, the ninety-minute seizure exceeded permissible bounds and therefore was unreasonable.<sup>3</sup> The Court concluded that some brief, warrantless detentions of luggage based only on reasonable suspicion do not violate the fourth amendment<sup>4</sup> because the government interest in curbing narcotics trafficking, coupled with the attendant enforcement problems, outweighs the minimal intrusion on an individual's protected interests.<sup>5</sup> In addition, the Court held that the exposure of Place's luggage, located in a public place, to a "canine sniff" for investigatory purposes did not constitute a

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<sup>1</sup> 392 U.S. 1 (1968). The *Terry* Court held that where police officers observe unusual conduct that leads them to conclude, in light of their experience, that criminal activity may be afoot and that the suspect may be armed and presently dangerous, they may investigate this behavior. If, after identifying themselves as police officers and making reasonable inquiries, nothing in the initial encounter dispels their reasonable fear for their own or others' safety, they are entitled to conduct a carefully limited search of the suspect's outer clothing in an attempt to discover weapons that might be used to assault them or others in the area. *Id.* at 30.

<sup>2</sup> 103 S. Ct. 2637 (1983).

<sup>3</sup> *Id.* at 2639.

<sup>4</sup> The fourth amendment provides:

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

U.S. CONST. amend. IV.

<sup>5</sup> The fourth amendment protects both "the interest in retaining possession of property and the interest in maintaining personal privacy." *Texas v. Brown*, 103 S. Ct. 1535, 1546 (1983) (Stevens, J., concurring).

"search" under the fourth amendment.<sup>6</sup>

This Note argues that the Court's decision to apply the *Terry* "reasonable suspicion" standard in the property context is justified, albeit unnecessary to the resolution of *Place*. Seizures of property, like those of persons, can vary in nature and extent; therefore, the Court appropriately applied the *Terry* balancing test to airport detentions of luggage that constitute less than full-scale seizures.

The Court's discussion of the "canine sniff" of *Place*'s luggage was also unnecessary to the outcome. While its decision arguably is supportable, the Court should have refrained from removing "canine sniffs" of property in public places from the purview of the fourth amendment until it could formulate a better informed analysis of this complex issue.

## II. FACTS OF *PLACE*

Because Raymond *Place*'s behavior aroused the suspicions of two law enforcement officers,<sup>7</sup> they approached *Place* as he waited in line at the Miami International Airport and asked for and received identification.<sup>8</sup> *Place* agreed to let the agents search the two suitcases he had checked, but the officers decided against the search because *Place*'s flight to New York was ready to depart; however, his parting comment that he had recognized that they were police rekindled their suspicions.<sup>9</sup> After further inquiry,<sup>10</sup> the officers relayed the information concerning *Place* to Drug Enforcement Administration (DEA) officials in New York.

Shortly after *Place* arrived at LaGuardia Airport, two DEA agents approached him, informed him that they believed he might be transporting narcotics,<sup>11</sup> and took his driver's license and airline ticket re-

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<sup>6</sup> 103 S. Ct. at 2645.

<sup>7</sup> The officers based their suspicions on the following facts: *Place* was departing from a "source city" and paid for his ticket in cash; he systematically scanned the lobby area while waiting in line and turned and looked over his shoulder while purchasing his ticket; he stared directly at the officers two or three times, paying particularly close attention to one of them after leaving the line; and, he began walking toward the departure gate, stopped for no apparent reason, turned around and headed back to the lobby area, and walked in a full circle, looking back continuously to see whether he was being followed. *United States v. Place*, 498 F. Supp. 1217, 1224 (E.D.N.Y. 1980), *rev'd*, 660 F.2d 44 (2d Cir. 1981), *aff'd*, 103 S.Ct. 2637 (1983).

<sup>8</sup> *United States v. Place*, 103 S. Ct. 2637, 2639-40 (1983).

<sup>9</sup> *Id.* at 2640.

<sup>10</sup> The officers discovered a discrepancy between the address tags on *Place*'s two checked suitcases. Local police in the town listed on the luggage tags informed the officers that neither address existed and that the telephone number *Place* had given the airline was that of a third address on the same street. *United States v. Place*, 660 F.2d 44, 45-46 (2d Cir. 1981), *aff'd*, 103 S.Ct. 2637 (1983).

<sup>11</sup> 103 S. Ct. at 2640. The DEA agents in New York claimed that the following facts, in addition to those relied upon by the officers in Miami, justified the LaGuardia stop: *Place*

ceipt.<sup>12</sup> After Place refused to consent to a search of his suitcases, one of the DEA agents responded that they were going to take the luggage to try to obtain a search warrant from a federal judge. Place declined the agents' invitation to accompany them.

The agents then transported both suitcases to Kennedy Airport where a trained narcotics detection dog performed a "sniff test." Approximately ninety minutes after the luggage had been seized, the dog reacted positively to the smaller suitcase. After obtaining a search warrant, DEA agents opened the suitcase, discovering 1,125 grams of cocaine.<sup>13</sup>

Indicted for possession of cocaine with intent to deliver,<sup>14</sup> Place moved in the district court to suppress the cocaine discovered during the search because he claimed his fourth amendment rights were violated by the warrantless seizure of his luggage.<sup>15</sup> The district court denied his motion, relying on *United States v. Van Leeuwen* to justify applying *Terry* standards to the detention of physical items.<sup>16</sup>

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broke into a sweat when questioned in Miami, and he remarked that he had recognized the officers as police; Place's baggage tags listed different addresses, neither of which were believed to exist; Place scanned the area at LaGuardia Airport and appeared nervous; and, he told the agents that he knew that they were "cops." *United States v. Place*, 498 F. Supp. at 1225-26.

Place displayed many of the traits listed in the "drug courier profile," a compilation of characteristics common to those engaged in narcotics trafficking. The DEA developed the profile in 1974 to provide its agents with guidelines for spotting couriers. Frequently found characteristics include: travel between major "source" and "use" cities; rapid turnaround times; travel with little or no luggage; departure from the plane either first or last; nervousness; use of an alias; and payment in cash. "Secondary" characteristics include: an almost exclusive use of public transportation to leave the airport; a telephone call immediately upon arrival; use of a fictitious callback number; and excessively frequent travel to "source" and "use" cities. Greene & Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 269-73 (1982).

<sup>12</sup> 103 S. Ct. at 2640. A later DEA computer check on Place's driver's license revealed no prior offenses. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841 (a)(1) (1981), prohibits any person from knowingly or intentionally manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance.

<sup>15</sup> 498 F. Supp. 1217 (E.D.N.Y. 1980). Place also argued that his detentions at the airports in Miami and New York were not grounded on reasonable suspicion and that the "sniff test" was administered in a manner calculated to achieve a tainted reaction from the dog. *Id.* at 1221, 1228. The district court rejected both arguments. *Id.* at 1225, 1228. Reserving his right to appeal the denial of his motion to suppress, Place then pleaded guilty and was convicted. *United States v. Place*, 660 F.2d at 45.

<sup>16</sup> *United States v. Place*, 498 F.Supp. at 1226-27. The district court asserted that *United States v. Van Leeuwen*, 397 U.S. 249 (1970), "extended the *Terry* logic to the detention of parcels of mail believed to contain contraband." 498 F. Supp. at 1226. In *Van Leeuwen*, the defendant mailed two packages under circumstances that aroused the suspicion of postal employees. Postal agents detained the packages for approximately 29 hours while customs officials obtained information about the addresses listed on the packages. *Van Leeuwen*, 397 U.S.

The Court of Appeals for the Second Circuit reversed, holding that the removal and ninety-minute detention of Place's luggage before the dog sniff established probable cause violated his fourth amendment rights because the seizure of the suitcases could not reasonably be characterized as a permissible *Terry*-type investigative stop.<sup>17</sup> Although deciding the case under *Terry* standards, the court criticized the lower court's reading of *Van Leeuwen* to expand the scope of the *Terry* doctrine to include seizures of property.<sup>18</sup> The United States Supreme Court granted certiorari to determine whether the fourth amendment prohibits law enforcement officers from briefly seizing luggage, reasonably suspected of containing narcotics, for the purpose of subjecting it to a "sniff test" by a trained narcotics detection dog.<sup>19</sup>

### III. DECISION OF THE SUPREME COURT

Because the prolonged seizure of Place's suitcases violated his fourth amendment rights, the United States Supreme Court, per Justice O'Connor, unanimously affirmed the court of appeals' reversal of Place's conviction.<sup>20</sup> The Court also held that the principles of *Terry v.*

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at 249. Because this information established probable cause, a United States commissioner issued a search warrant. Finding counterfeit coins when they opened the packages, the authorities revealed the packages and sent them to their destinations. *Id.* at 250. The Supreme Court held that because of the nature, suspicious character, and different destinations of the packages, the unavoidable delay in contacting the farthest destination, and the distance between the commissioner's office and the post office, "a 29-hour delay between the mailings and the service of the warrant cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment." *Id.* at 253.

<sup>17</sup> 660 F.2d at 52. Unless the DEA agents' actions fell within an exception to the requirements of the Warrant Clause, "the warrantless seizure of Place's baggage without probable cause would clearly violate the Fourth Amendment." *Id.* at 50.

<sup>18</sup> After noting the argument that *Terry* standards should not apply to the detention of personal property because property cannot resume its course independently after being detained as a person can, the court remarked that "for present purposes, in addition to assuming without deciding that an investigative stop was justified, we are willing also to apply the principles of *Terry* to seizures of property." *Id.* at 50. *Contra* Comment, *Seizing Luggage on Less than Probable Cause*, 18 AM. CRIM. L. REV. 637 (1981).

The appellate court claimed, however, that the district court's reliance on *Van Leeuwen* was "misplaced." 660 F.2d at 52. The court distinguished *Van Leeuwen* in four major respects: (1) the owner of the packages voluntarily gave up their custody and control during the time required for mail delivery; (2) the postal agents already had lawful custody of the parcels when they decided to detain them; (3) mere detention of mail not in the owner's control is no personal deprivation and produces, at most, a technical interference with one's person or effects; and (4) the *Van Leeuwen* Court only held that the short detention of mail was reasonable under the facts of the case. *Id.* at 52-53.

<sup>19</sup> 457 U.S. 1104 (1982). The Supreme Court also denied certiorari to Place's cross-petition on the issue of reasonable suspicion. 457 U.S. 1106 (1982).

<sup>20</sup> 103 S. Ct. 2637 (1983). Adhering to the "fruit of the poisonous tree doctrine," the Court disallowed the cocaine as evidence even though the DEA agents confiscated it pursuant to a search warrant founded upon probable cause. Because probable cause was established only as a result of the luggage detention and subsequent "canine sniff," the cocaine bore the

*Ohio*<sup>21</sup> and its progeny<sup>22</sup> permit law enforcement authorities to detain personal luggage briefly for the purpose of pursuing a properly limited investigation based on reasonable suspicion that the luggage contains narcotics.<sup>23</sup> In addition, the Court held that the exposure of Place's luggage to a trained narcotics detection dog did not constitute a "search" within the meaning of the fourth amendment.<sup>24</sup>

The Court began its discussion by acknowledging that the seizure of personal property is generally considered *per se* unreasonable under the fourth amendment unless authorized by a judicial warrant issued upon a showing of probable cause.<sup>25</sup> Where exigent circumstances exist or another recognized exception to the warrant requirement is present,<sup>26</sup> however, the Court permits warrantless seizures of containers if law en-

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taint of the unlawful seizure and therefore was inadmissible. *See generally* *Nardone v. United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>21</sup> 392 U.S. 1 (1968). In *Terry*, the Supreme Court approved a "stop and frisk" for weapons when the officer reasonably suspected that he was dealing with an armed and dangerous individual. *Id.* at 30. Prior to *Terry*, the "reasonableness" requirement of the fourth amendment in the criminal context was synonymous with the "probable cause" requirement of the fourth amendment's Warrant Clause. *Terry* was the first case to recognize the authority of law enforcement officials to conduct "stop and frisks" based only on reasonable suspicion, a lesser standard than probable cause. *Id.*

<sup>22</sup> Several cases followed *Terry*, all purporting to carefully maintain its narrow scope. *See, e.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (officer justified in ordering traffic law offender to step out of car and in frisking him because of a "bulge" in his jacket); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (although evidence was insufficient to justify the stop at issue, roving border patrols may stop and question motorists briefly about their citizenship based on reasonable suspicion that they are illegal aliens); *Adams v. Williams*, 407 U.S. 143 (1972) (stop and frisk upheld on the basis of an informant's tip).

The Supreme Court has also applied *Terry* principles in the context of narcotics violations. *See, e.g.*, *Michigan v. Summers*, 452 U.S. 692 (1981) (because special law enforcement interests outweigh the minimal additional intrusion resulting from detention in one's home while the police execute a valid search warrant, police may detain occupants of the premises without probable cause); *United States v. Mendenhall*, 446 U.S. 544, 565 (1980) (plurality opinion) (Powell, J., concurring) (three Justices found that the questioning of the defendant at an airport about possible drug smuggling constituted a valid *Terry*-type investigative seizure).

The Supreme Court, however, has refused to apply *Terry* to validate police conduct which approximates a full-scale search or seizure. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200 (1977) (because *Terry* principles apply only to government actions less intrusive than full-scale seizures, custodial interrogation of suspect at police station required probable cause because it was indistinguishable from traditional arrest).

<sup>23</sup> 103 S. Ct. at 2644.

<sup>24</sup> *Id.* at 2644-45. Technically, the Court's statements relating to the seizure of luggage *per se* and to the "canine sniff" constitute dicta because their discussion was unnecessary to the disposition of the case.

<sup>25</sup> *Id.* at 2641; *see, e.g.*, *Katz v. United States*, 389 U.S. 347, 357 (1967); *Marron v. United States*, 275 U.S. 192, 196 (1927).

<sup>26</sup> The Supreme Court has dispensed with the warrant requirement for searches and seizures of persons and property in several situations: searches incident to a lawful arrest, *see, e.g.*, *Chimel v. California*, 395 U.S. 752 (1969); automobile searches and seizures, *see, e.g.*, *Carroll v. United States*, 267 U.S. 132 (1925); plain view seizures, *see, e.g.*, *Ker v. California*,

forcement authorities have probable cause to believe that the container conceals contraband or evidence of a crime.<sup>27</sup> Under *Terry*, police officers may make limited investigatory seizures of persons based on *less* than probable cause if sufficient opposing law enforcement interests exist. The Court balances the competing interests to determine whether the seizure is reasonable.<sup>28</sup>

Applying the balancing test to seizures of property, the Court first assessed the substantiality of the law enforcement interests.<sup>29</sup> Because "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit,"<sup>30</sup> and because police face unique difficulties in detecting drug traffickers,<sup>31</sup> the Court found the government interest to be strong.<sup>32</sup>

Against this substantial government interest, the Court balanced the impact of the intrusion on an individual's fourth amendment interests when luggage is detained for investigative purposes.<sup>33</sup> Rejecting

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374 U.S. 23 (1963); and, searches and seizures made in hot pursuit, *see, e.g.*, *United States v. Santana*, 427 U.S. 38 (1976); *Warden v. Hayden*, 387 U.S. 294 (1967).

In a few narrowly defined situations, warrantless searches and seizures require no degree of suspicion as justification: consent searches, *see, e.g.*, *Stoner v. California*, 376 U.S. 483, 489 (1964) (suspect waives his fourth amendment rights); administrative searches in highly regulated industries, *see, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1972) (owner impliedly consents by entering highly regulated business); and, searches at the border or its functional equivalent, *see, e.g.*, *United States v. Ramsay*, 431 U.S. 606, 616-19 (1977) (fourth amendment does not apply at all at the border). As the latter examples indicate, none of the situations involve involuntary searches and seizures that implicate recognized fourth amendment interests in a criminal context.

<sup>27</sup> *See, e.g.*, *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>28</sup> 103 S. Ct. at 2642.

<sup>29</sup> *Id.* at 2643. The Court rejected Place's contention that only special law enforcement interests like officer safety can justify seizures based solely on reasonable suspicion:

In *Terry*, we described the governmental interests supporting the initial seizure of the person as "effective crime prevention and detection . . ." Similarly, in *Michigan v. Summers*, we identified three law enforcement interests that justified limited detention of the occupants of the premises during execution of a valid search warrant: "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm both to the officers and the occupants," and "orderly completion of the search." 452 U.S. at 702-703, 101 S. Ct. at 2594.

103 S. Ct. at 2643. The Court emphasized that "[t]he test is whether those [governmental] interests are sufficiently 'substantial,' . . . not whether they are independent of the interest in investigating crimes effectively and apprehending suspects." *Id.*

<sup>30</sup> *Id.* at 2642 (citing *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (plurality opinion) (Powell, J., concurring)).

<sup>31</sup> In the words of Justice Powell, "Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *Mendenhall*, 446 U.S. at 561-62 (Powell, J., concurring).

<sup>32</sup> 103 S. Ct. at 2643.

<sup>33</sup> *Id.*

Place's contention that there are no degrees of intrusion in the property context, the Court found the *Terry* rationale applicable to seizures of property as well as persons.<sup>34</sup> Justice O'Connor reasoned that, like intrusions on personal liberty, intrusions on possessory interests can vary in nature<sup>35</sup> and extent;<sup>36</sup> therefore, seizures of property can be charted along a continuum based on the severity of the intrusion. Thus, the Court concluded that some detentions of personal effects intrude so minimally on fourth amendment interests that the government interest in curbing drug trafficking justifies a properly limited investigative seizure based only on reasonable suspicion that the luggage contains narcotics.<sup>37</sup>

Turning its attention to the facts of *Place*, the Court premised its discussion on the theory that investigatory detentions of luggage seized from a suspect's custody should be subject to the same constitutional limitations as investigatory detentions of the person.<sup>38</sup> Justice O'Connor stressed that seizure of luggage from a suspect's immediate possession can invade personal liberty interests as well as possessory interests. Although technically remaining free, suspects realistically may have their plans disrupted by having to arrange for the return of the luggage or electing to remain with it until the investigation is completed.<sup>39</sup> Apply-

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<sup>34</sup> *Id.* at 2643-44. The *Terry* exception is premised on the notion that there exist varying degrees of intrusion on personal liberty interests. Because the brief "stop and frisk" is less intrusive than a formal arrest, the *Terry* Court reasoned that the general rule requiring probable cause (to render fourth amendment searches and seizures reasonable) could be replaced by the reasonable suspicion requirement when the balancing test shows a strong governmental interest and a limited intrusion on the individual. To justify applying the *Terry* doctrine to seizures of property, the Court in *Place* first had to find that different degrees of intrusion also exist in the property context. *Id.* at 2642-44.

<sup>35</sup> *Id.* at 2643. Justice O'Connor emphasized that "[t]he seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner." *Id.*

To illustrate the point, the Court contrasted the factual situation in *Place* (seizure from the owner's custody) with the situation in *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (detention of packages after the owner had relinquished control to the postal authorities). "*Van Leeuwen* was an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves." 3 W. LaFave, *Search and Seizure* § 9.6, p. 60 (1982 Supp.)" *Id.* at 2643-44 n.6 (emphasis added).

<sup>36</sup> *Id.* at 2643. The Court noted that "the police may confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog—or transport the property to another location." *Id.* at 2643-44.

<sup>37</sup> *Id.* at 2644.

<sup>38</sup> *Id.* at 2645. The Court rejected the government's argument that "the point at which probable cause for seizure of luggage from the person's presence becomes necessary is more distant than in the case of a *Terry* stop of the person himself." *Id.*

<sup>39</sup> *Id.* Justice O'Connor quoted Professor LaFave, who has suggested that, at least when the authorities do not inform the suspect of how and when his luggage will be returned, "seizure of the object is tantamount to seizure of the person. . . . [The] person must either remain on the scene or . . . seemingly surrender his effects permanently to the police. 3 W. LaFave, *Search and Seizure* § 9.6 at 61 (1982 Supp.)" The Court did note that "in some cir-



ing the *Terry* standards for seizures of persons to the seizure of Place's luggage, the Court found that the ninety-minute detention alone rendered the investigation unreasonable.<sup>40</sup>

The Court emphasized that the brevity of the invasion is important in determining whether the intrusion can be justified merely on reasonable suspicion.<sup>41</sup> The Court also indicated that the diligence of the officers in pursuing the investigation is relevant in ascertaining whether the length of the detention is reasonable.<sup>42</sup> In *Place*, the agents could have minimized the intrusion on Place's fourth amendment rights by arranging to have the narcotics detection dog waiting at LaGuardia Airport when Place's flight arrived, but they failed to do so.<sup>43</sup> The agents exacerbated the violation by failing to tell Place where they were taking his luggage, how long it might be detained, and how it would be returned to him if their investigation proved futile.<sup>44</sup>

Justice O'Connor also considered whether the "canine sniff" of Place's luggage constituted a search requiring probable cause.<sup>45</sup> She emphasized that a "canine sniff" does not require the opening of a suitcase and reveals only the presence or absence of narcotics. Therefore, unlike a traditional police search, a "canine search" avoids any of the inconvenience or embarrassment to the owner that may result from the wholesale disclosure of the luggage's contents to public scrutiny.<sup>46</sup> Noting that no other investigative procedure is so limited in the manner of conducting the inquiry and in the content of the information revealed,

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cumstances," seizures of property are less intrusive than seizures of the person; *id.* at 2645; however, it failed to discuss what might constitute such a "circumstance." See *infra* notes 125-26 and accompanying text.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The Court was not willing to approve the ninety-minute seizure of Place's luggage on less than probable cause primarily because it had never approved a *Terry*-type stop of a person for such a prolonged time period; however, the Court also refused to establish an outside time limitation for a valid investigative stop. *Id.* at 2646. Justice O'Connor believed that such a limit would undermine the ability of police to gauge their actions to the demands of each individual situation without concern about compliance with a rigid time frame. *Id.* at 2646 n.10.

<sup>42</sup> *Id.* at 2645.

<sup>43</sup> *Id.* at 2645-46. If the police had had a dog waiting, they could have saved time and avoided the intrusion on Place's possessory interests caused by the removal of his luggage to Kennedy Airport. *Id.* at 2646 n.9.

<sup>44</sup> *Id.* at 2646.

<sup>45</sup> Justice O'Connor considered the "canine sniff" issue because if the "canine sniff" "is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause." *Id.* at 2644. Place, however, did not contest the validity of "canine sniffs" in general in the district court, and the court of appeals did not address or decide the issue. Moreover, neither party briefed nor argued the issue before the Supreme Court. *Id.* at 2651 (Brennan, J., concurring).

<sup>46</sup> *Id.* at 2644.

the Court concluded that the "canine sniff" of Place's luggage did not constitute a "search" within the meaning of the fourth amendment.<sup>47</sup>

Justices Brennan and Marshall, who concurred only in the result, criticized the Court's reliance on *Terry* to uphold the constitutionality of luggage seizures based upon reasonable suspicion.<sup>48</sup> Justice Brennan argued that, in addition to being unnecessary to the judgment, the luggage seizure decision finds no support in *Terry* principles; the Court departed from settled fourth amendment doctrines and significantly diluted the constitutional protections against government interference with personal property.<sup>49</sup> Justice Brennan argued that *Terry* and its progeny represent narrowly defined exceptions to the probable cause requirement that should only apply to minimally intrusive police actions justified by special concerns like safety. These exceptions should not be employed to validate the use of any investigative technique that law enforcement authorities believe is necessary to combat crime.<sup>50</sup> He suggested that although *Terry* may validate seizures of property incidental to seizures of individuals, it does not authorize independent seizures of personal property upon less than probable cause.<sup>51</sup> In addition, Justice Brennan disapproved of the Court's hasty resolution of the "canine sniff" issue, claiming that it was unnecessary to the decision and that a future case could provide the Court with a better opportunity to address the complexities of the issue.<sup>52</sup>

Justice Blackmun, joined by Justice Marshall, also concurred only in the judgment,<sup>53</sup> expressing concern over what he believed to be "an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."<sup>54</sup> Despite his reservations, Justice Blackmun conceded that "a limited intrusion caused by a temporary seizure of luggage for investigative purposes *could fall* within the *Terry* exception" be-

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<sup>47</sup> *Id.* at 2644-45.

<sup>48</sup> *Id.* at 2646 (Brennan, J., concurring). Justice Brennan believed that the Court should have affirmed on the ground that the protracted detention exceeded the limits of a constitutionally permissible investigatory stop and refrained from any further discussion. *Id.*

<sup>49</sup> *Id.* at 2648-49.

<sup>50</sup> *Id.* at 2648.

<sup>51</sup> *Id.* at 2649. Justice Brennan distinguished seizures of persons, which interfere with personal privacy, from seizures of property, which interfere with one's possessory interests, asserting that *Terry* is applicable only to the former. *Id.* According to Justice Brennan, the police violated Place's constitutional rights "as soon as the officers seized respondent's luggage, independent of their seizure of him . . ." *Id.* at 2650.

<sup>52</sup> *Id.* at 2651.

<sup>53</sup> *Id.* at 2651 (Blackmun, J., concurring). Justice Blackmun expressed concern with the Court's opinion in the same two areas addressed by Justice Brennan, although his views differ somewhat from Justice Brennan's. *Id.*

<sup>54</sup> *Id.* at 2652.

cause the interception of drug traffickers in airports is a significant law enforcement interest.<sup>55</sup> He emphasized that "[t]he critical threshold issue is the intrusiveness of the seizure."<sup>56</sup> Justice Blackmun also agreed with Justice Brennan that because resolution of the "canine sniff" issue was not necessary to the outcome in *Place*, the Court should have deferred a decision until it had greater information that would enable it to address adequately the complexities of the issue.<sup>57</sup>

#### IV. ANALYSIS

##### A. WARRANTLESS SEIZURE OF LUGGAGE UPON REASONABLE SUSPICION

The most remarkable aspect of the Supreme Court's decision validating seizures of luggage upon less than probable cause is that the Court did not need to consider the issue at all. The ninety-minute detention of *Place*'s suitcases violated his fourth amendment rights and thereby tainted the confiscated cocaine, regardless of whether the Court found the initial luggage seizure justified. Therefore, Justices Brennan and Blackmun validly criticized the Court for ignoring a judicial convention by unnecessarily deciding a constitutional question.<sup>58</sup>

Although it was not compelled to address the issue, the Court cor-

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<sup>55</sup> *Id.* at 2652-53 (emphasis added). Because Justice Marshall joined in both of the concurring opinions, some confusion exists in ascertaining his position. Whereas Justice Brennan would always invalidate a temporary independent seizure of luggage based upon less than probable cause, Justice Blackmun indicated that such a practice conceivably could fall within the *Terry* exception.

<sup>56</sup> *Id.* at 2653. Justice Blackmun disagreed with the Court's view that the diligence of the police is a relevant factor in ascertaining the extent of the intrusion. In his view, whether the police conscientiously pursue the investigation does not affect the duration and intrusiveness of the seizure. *Id.* at 2653 n.2.

<sup>57</sup> *Id.* at 2653. Justice Blackmun also suggested that a "canine sniff" might fall within the *Terry* exception for minimally intrusive searches that can be justified on reasonable suspicion. *See infra* notes 119-21 and accompanying text.

<sup>58</sup> *Id.* at 2646 (Brennan, J., concurring); *id.* at 2651-52 (Blackmun, J., concurring). Justice Brennan suggested that the Court was "unable to 'resist the pull to decide the constitutional issues involved in this case on a broader basis than the record before [it] imperatively requires.'" *Id.* at 2646 (Brennan, J., concurring) (quoting *Street v. New York*, 394 U.S. 576, 581 (1969)).

The Supreme Court has developed a set of rules under which it has avoided deciding a significant number of the constitutional questions presented to it. Justice Rutledge once emphasized that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570 n.34 (1947) (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)). "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)); *see also* *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (listing other rules adopted by the Court to avoid deciding constitutional issues).

rectly extended the *Terry* doctrine to seizures of property. The central inquiry in fourth amendment analysis of police behavior involves the reasonableness of a particular government invasion into a citizen's protected interests.<sup>59</sup> In previous cases, the Court has considered two types of seizures in determining the justification required to render a specific seizure reasonable.<sup>60</sup> First, seizures "having the essential attributes of a formal arrest, . . . [are] unreasonable unless . . . supported by probable cause."<sup>61</sup>

Second, police may conduct certain limited invasions supported by less than probable cause.<sup>62</sup> In *Terry*, the Court first recognized a special category of police behavior so substantially less intrusive than a full-scale search or seizure that a balancing test could replace the strict probable cause requirement in determining whether an invasion is reasonable.<sup>63</sup> The Court balances the nature and scope of the intrusion against the substantial government interest served by the invasion. While a substantial law enforcement interest may justify a limited intrusion, "the police officer must be able to point to specific and articulable facts" warranting a reasonable belief that a suspect presents a threat to the asserted interest.<sup>64</sup>

Before applying the *Terry* balancing test, the *Place* Court had to reach two conclusions: (1) seizures of property can vary in nature and extent, and (2) limited airport seizures of luggage for investigatory purposes do not approximate full-scale seizures.<sup>65</sup> *Place* had contended that the *Terry* rationale was inapplicable to luggage seizures because all seizures of property result in a complete and absolute dispossession.<sup>66</sup> The Court justifiably rejected *Place's* argument.

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<sup>59</sup> *Terry v. Ohio*, 392 U.S. 1, 19 (1968); see also *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) ("The key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.").

<sup>60</sup> *Florida v. Royer*, 103 S. Ct. 1319, 1332 (1983) (Blackmun, J., dissenting).

<sup>61</sup> *Michigan v. Summers*, 452 U.S. 692, 700 (1981). In such cases, the standard of probable cause . . . represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.

*Dunaway*, 442 U.S. at 208. Probable cause exists when there is sufficient evidence to lead a reasonable and prudent person to believe that a crime has been or is being committed; it does not require evidence sufficient to convict. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

<sup>62</sup> See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>63</sup> *Dunaway*, 442 U.S. at 208-10.

<sup>64</sup> *Terry*, 392 U.S. at 21.

<sup>65</sup> See *supra* note 34. The Supreme Court addressed both of these issues indirectly, within the context of applying the *Terry* balancing test. 103 S. Ct. at 2643-44.

<sup>66</sup> 103 S. Ct. at 2643.

Seizures of property, like seizures of persons, can vary in nature and extent. Police can seize property directly from a suspect's custody<sup>67</sup> or from third parties having control over the property.<sup>68</sup> They can seize the property for a few minutes<sup>69</sup> or for several hours.<sup>70</sup> Officers can leave the property where it is<sup>71</sup> or move it to a different location.<sup>72</sup> In addition, seizures of property can be either accusatory or investigatory in nature. Most seizures occur after a search and entail the collection of evidence.<sup>73</sup> Seizure of property for evidentiary purposes is akin to an arrest because of its role in the prosecutorial process and its concomitant accusatory nature.<sup>74</sup> On the other hand, police conduct investigatory seizures of property to obtain information that will either support their suspicions and justify an extended detention based upon probable cause or dispel their fears and result in the seizure's termination.<sup>75</sup> Therefore, the Court validly determined that seizures of property, like seizures of

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<sup>67</sup> *United States v. Place*, 103 S. Ct. 2637 (1983) (seizure of luggage carried by defendant).

<sup>68</sup> *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (detention of mailed packages by postal authorities).

<sup>69</sup> *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981) (20-minute detention of suitcases), *cert. denied*, 103 S. Ct. 3551 (1983).

<sup>70</sup> *United States v. Regan*, 687 F.2d 531 (1st Cir. 1982) (22-hour detention of suitcase).

<sup>71</sup> *United States v. West*, 651 F.2d 71 (1st Cir. 1981) (drug detection dog brought to airport), *cert. granted, judgment vacated and remanded*, 103 S. Ct. 3528 (1983) (remanded for consideration in light of *Place*).

<sup>72</sup> *United States v. Place*, 103 S. Ct. 2637 (1983) (suitcases transported from LaGuardia to Kennedy Airport).

<sup>73</sup> One commentator has noted that

[s]eizure of an item not contemporaneous with a search is the exception rather than the rule. In fact, with the exception of a "plain view" seizure, a noncontemporaneous seizure happens only when the item seized is really the place that subsequently will be searched and from which other items will, in turn, be seized.

Comment, *supra* note 18, at 645. When a seizure involves the collection of evidence to be used at trial, controversies that arise usually concern the validity of the search rather than the seizure. *Id.*

<sup>74</sup> Prosecutors use property seized for evidentiary purposes at trial. Dispossession lasts as long as the police can utilize the property to incriminate the suspect.

<sup>75</sup> In *Adams v. Williams*, 407 U.S. 143, 164 (1972), the Court held that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." In *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981), the Court characterized the purpose underlying a *Terry* stop as "investigating possible criminal activity." But see Comment, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486, 1503 n.101 (1981) (Investigatory seizures, as opposed to nominally investigative information gathering activities, involve collecting data for the potential prosecution of a suspect) [hereinafter cited as Comment, *Reformulating Seizures*]. Compare Comment, *Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. & CRIMINOLOGY 499, 511-12 (1980) (Stops aimed at investigating a particular person are more intrusive than those designed to acquire information because a person stopped might incriminate himself; however, it is difficult to distinguish between purely informational and investigatory stops).

persons, can be plotted on a sliding scale.<sup>76</sup>

Some seizures of luggage entail less than full-scale seizures. For example, without moving the suitcases at all, DEA agents could seize luggage for a few minutes while a trained narcotics detection dog sniffs it for drugs. *Terry* and its progeny placed great importance on time and distance factors in determining whether a particular police action resembled a full-scale search or seizure. In *United States v. Brignoni-Ponce*,<sup>77</sup> the Court justified seizures of travelers based on reasonable suspicion because the stops usually lasted no more than a minute. In *Dunaway v. New York*,<sup>78</sup> the Court held that a custodial interrogation approximated a traditional arrest and required probable cause where the police transported the suspect to the police station for questioning. The longer police detain suspects or the farther they transport them, the more closely a particular category of police behavior resembles a full-scale search or seizure. Similarly, the longer police hold suitcases or the farther they move them, the more closely luggage detentions resemble full-scale seizures.

Moreover, police detain suitcases primarily for investigatory purposes. DEA agents and other law enforcement officers seize luggage at airports to obtain additional information about possible narcotics trafficking. Because police utilize luggage seizures as investigative tools, and because they have the ability to limit the time and area involved, the Court correctly concluded that some luggage seizures constitute less than full-scale seizures and justify application of the *Terry* balancing test.

Applying such a balancing test when police seize luggage directly from a suspect's custody, the seizure intrudes minimally on fourth amendment interests. In the past, the Court has analyzed various factors in assessing the degree of intrusion on a suspect's protected rights.

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<sup>76</sup> See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388-94 (1974). In *Terry*, the Court had faced the argument that "there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make an arrest." *Terry*, 392 U.S. at 11. See, e.g., Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 402 (1960); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 251 (1966). Also, less than 10 years before *Terry*, the Court had found that "[w]hen the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete." *Henry v. United States*, 361 U.S. 98, 103 (1959). See Note, *Constitutional Law—Notwithstanding an Absence of Probable Cause, a Police Officer May Stop, Question, and Pat Down an Individual Whom He Reasonably Believes To Be Engaged in Criminal Activity and Armed*. *Terry v. Ohio*, 392 U.S. 1 (1968), 47 TEX. L. REV. 138, 140-41 (1968). Therefore, the Court's decision in *Place* was no more revolutionary than its adoption of the sliding scale approach toward seizures of persons in *Terry*.

<sup>77</sup> 422 U.S. 873, 880 (1975).

<sup>78</sup> 442 U.S. 200 (1979).

These include the actual physical intrusiveness, the subjective effect of the intrusion, and the police officer's discretion in selecting suspects.<sup>79</sup> Although the Court has based its decision in various cases on the degree of psychological intrusion caused by the challenged government action,<sup>80</sup> occasionally it has avoided addressing the issue directly,<sup>81</sup> and it has even upheld police behavior that creates substantial anxiety.<sup>82</sup> To prevent arbitrary and oppressive interference by law enforcement officers, the Court requires articulable suspicion (or probable cause) to justify intrusions.<sup>83</sup> Therefore, the key variable in assessing the intrusiveness of a search or seizure of effects is the extent of the physical invasion.

Seizures of luggage intrude on fourth amendment interests to no greater degree than when police seize the suspects instead of their baggage. Luggage detentions may intrude on suspects' possessory interests in their luggage and their liberty interests in continuing with their travel plans;<sup>84</sup> however, *Terry*-type seizures of persons also may intrude on both possessory and liberty interests. *Terry*-type investigative detentions of the person may entail incidental seizures of personal effects, including luggage that the suspect might possess.<sup>85</sup> In addition, the Court applied

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<sup>79</sup> Greenberg, *Drug Courier Profiles*, Mendenhall and Reid: *Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49, 52 (1981).

<sup>80</sup> Compare *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding constitutionality of Border Patrol checkpoint stops of traffic) with *United States v. Ortiz*, 422 U.S. 891, 894 (1975) (roving patrols more likely to frighten travelers than checkpoint stops). In *Martinez-Fuerte*, the Court emphasized that the

objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.

428 U.S. at 558.

<sup>81</sup> See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Court did not note the great fear and anxiety suspects most likely suffer when police car headlights shine into their cars at night). Compare Greenberg, *supra* note 79, at 59 & n.7.

<sup>82</sup> See, e.g., *Terry*, 392 U.S. at 25 (frisks are severe intrusions upon personal security and must surely be annoying, frightening, and perhaps humiliating experiences).

<sup>83</sup> See, e.g., *Brignoni-Ponce*, 422 U.S. at 883 (reasonable suspicion requirement protects "residents of the border areas from indiscriminate official interference"); see also Greenberg, *supra* note 79, at 52 n.20.

<sup>84</sup> 103 S. Ct. at 2645. See *supra* note 39. Commentators have suggested that property seizures intrude on a suspect's liberty interests because property cannot move independently of its owner. Comment, *supra* note 18, at 645. Property seizures, however, need not inevitably intrude on a suspect's liberty interests because the luggage can be moved through other means. For example, the police could arrange for its delivery to the suspect or for its loading into the baggage compartment of a plane.

<sup>85</sup> 103 S. Ct. at 2649 (Brennan, J., concurring). The Court has never directly addressed the propriety of concomitant property seizures. In *Florida v. Royer*, 103 S. Ct. 1319, 1326 (1983), however, the Court indicated that the police officers justifiably detained the suspect and his luggage on reasonable suspicion. One commentator has suggested that the permissible scope of a *Terry*-type investigative detention may include "locating and examining objects abandoned by the suspect." 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2, at 37 (1978).

the same limitations on the permissible scope of an investigative detention of property as those applicable to seizures of suspects.<sup>86</sup> Therefore, police must restrict the time and area involved in luggage seizures to the same extent that they would for seizures of suspects.

In applying the second part of the balancing test, the Court correctly assessed the substantiality of the government interests asserted to justify the intrusion.<sup>87</sup> The narcotics problem has generated much social unrest in the United States. It penetrates all social strata and takes its toll in increased crime rates, lost wages, and extra demand for social services.<sup>88</sup> Police arrested an estimated 676,000 persons for narcotics laws violations in 1982.<sup>89</sup> In 1980, 3,449 drug abuse centers treated 181,500 clients at a total funding level of 486.6 million dollars.<sup>90</sup> Of the 20,358 inmates in federal prisons during 1981, 5,387 violated drug laws, compared to the 4,312 serving time for robbery.<sup>91</sup> United States Customs Service agents conducted 22,271 drug seizures during 1981 and confiscated contraband worth approximately \$5,236,630,000.<sup>92</sup>

Drug trafficking presents special law enforcement problems because of the inherently transient nature of courier activity at airports. Drug couriers can conceal their cargo relatively easily and can frequently spot narcotics agents and avoid contact with them. They can transport the narcotics on any one of thousands of flights leaving from several hundred airports. Although the drug courier profile<sup>93</sup> provides helpful guidelines for DEA agents, it does not solve all of the problems because

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<sup>86</sup> 103 S. Ct. at 2645.

<sup>87</sup> The Court advanced its weakest argument when it analyzed the strength of the government interest. Several commentators have criticized the substantiality of the law enforcement interest in curbing narcotics trafficking as justification for conducting searches and seizures based on less than probable cause. While their positions have some merit, the Court has acknowledged the use of the reasonable suspicion standard for narcotics investigations that involve *Terry*-type seizures. See *infra* notes 99-101 and accompanying text. It makes little sense to prevent luggage seizures on the ground that the law enforcement interest is not sufficiently substantial when the police have the right to detain individuals reasonably suspected of concealing drugs on their persons.

<sup>88</sup> One court has remarked that the societal costs of the narcotics trade, "in terms of ruined and wasted lives, are staggering." *United States v. Oates*, 560 F.2d 45, 59 (2d Cir. 1977). See generally G. AUSTIN & D. LETTIERI, *DRUGS AND CRIME*, NATIONAL INSTITUTE ON DRUG ABUSE (1976); U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83* (103d ed. 1982) [hereinafter cited as *STATISTICAL ABSTRACT*]; U.S. DEPARTMENT OF JUSTICE-FBI, *CRIME IN THE UNITED STATES* (1982) [hereinafter cited as *CRIME IN THE UNITED STATES*]; U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1982*, (T. Flanagan & M. McLeod eds. 1982) [hereinafter cited as *SOURCEBOOK*].

<sup>89</sup> *CRIME IN THE UNITED STATES*, *supra* note 88, at 167.

<sup>90</sup> *STATISTICAL ABSTRACT*, *supra* note 88, at 124.

<sup>91</sup> *Id.* at 192.

<sup>92</sup> *SOURCEBOOK*, *supra* note 88, at 428.

<sup>93</sup> See *supra* note 11.



narcotics traffickers' behavior often approximates that of innocent travelers.

In previous decisions, the Court has allowed limited intrusions based on similar government interests. Officer safety, combined with the law enforcement interest in deterring crime, justified allowing stop and frisks on less than probable cause in *Terry*:

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.<sup>94</sup>

Although officer safety provided the primary justification for frisks, Justice Harlan indicated in his concurring opinion in *Terry* that *Terry* implicitly held that, apart from any concern for officer safety, the interest in crime prevention and detection justifies seizures in the form of forcible stops.<sup>95</sup>

Other members of the Court have adopted Harlan's view. Justice Stevens, writing for the Court in *Michigan v. Summers*,<sup>96</sup> emphasized that the need to investigate criminal activity underlies *Terry*-type seizures.<sup>97</sup> In *Michigan v. Summers*, the Court further delineated the scope of what constitutes a substantial government interest. The Court noted three reasons that justify the detention of an occupant while police search premises pursuant to a valid search warrant: preventing flight should incriminating evidence be found; minimizing the risk of harm to the officers and occupants; and completing the authorized search in an orderly manner.<sup>98</sup>

In *United States v. Mendenhall*, three Justices indicated that curbing

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<sup>94</sup> *Terry*, 392 U.S. at 23.

<sup>95</sup> *Id.* at 32-33 (Harlan, J., concurring). Several commentators have disagreed with Harlan's view that a generalized interest in crime prevention and detection justifies a limited intrusion based only on reasonable suspicion. See, e.g., Amsterdam, *supra* note 76, at 395; Spillane, *Frisking the Fourth Amendment*, 10 HUM. RTS. 22 (Spring 1982); Note, *supra* note 76.

<sup>96</sup> 452 U.S. 692 (1981).

<sup>97</sup> *Id.* at 700 n.12. Professor LaFave has compiled a list of general "investigative techniques which may be utilized effectively in the course of a *Terry*-type stop." 3 W. LAFAVE, *supra* note 85, at 36. These include interrogation, communication with others, and examination of premises or objects. *Id.* at 36-37.

<sup>98</sup> 452 U.S. at 702-03. In *Summers*, however, the Court emphasized:

Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated . . . . The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself. *Id.* at 701. Because the intrusion was so slight compared to that caused by the search, the Court readily accepted more generalized law enforcement interests as justification for the detention. In *Place*, however, the government made no showing of probable cause. *United States v. Place*, 660 F.2d at 49.

narcotics trafficking justified a *Terry*-type seizure.<sup>99</sup> The plurality in *Florida v. Royer*<sup>100</sup> suggested that nothing in the *Terry* rationale prevents temporary detentions for questioning on reasonable suspicion where the government interest entails the suppression of illegal transactions in drugs or of any serious crime.<sup>101</sup>

The government interest in preventing the illegal entry of aliens into the United States justified temporary stops of travelers on reasonable suspicion near the Mexican border in *United States v. Brignoni-Ponce*.<sup>102</sup> The Court remarked:

The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens . . . . [T]hese aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.<sup>103</sup>

The *Brignoni-Ponce* Court indicated that the difficulty in patrolling the long Mexican border also justified the limited intrusion involved in these investigatory stops.<sup>104</sup>

The government interests asserted to justify the investigatory detention in *Place* mirror the substantial law enforcement concerns recognized by the Court in past cases. Therefore, the Court justifiably allowed these interests to override the minimal intrusion on a suspect's fourth amendment interests resulting from seizure of personal effects.

#### B. "CANINE SNIFFS" AS SEARCHES

The Supreme Court did not need to reach the issue of the constitutionality of the "canine sniff" of *Place*'s luggage because the Court could have reversed *Place*'s conviction on the grounds that the ninety-minute luggage detention violated his fourth amendment rights and thereby tainted the cocaine confiscated as a result of the seizure.<sup>105</sup> Thus, Justices Brennan and Blackmun correctly criticized the Court for unnecessarily deciding a constitutional question.<sup>106</sup>

The Court's lack of information greatly hindered its ability to deal

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<sup>99</sup> 446 U.S. 544, 560 (1980) (Powell, J., concurring).

<sup>100</sup> 103 S. Ct. 1319 (1983) (plurality opinion).

<sup>101</sup> *Id.* at 1324. The Court later noted that *Royer*'s behavior provided "adequate grounds for suspecting *Royer* of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention." *Id.* at 1326.

<sup>102</sup> 422 U.S. 873 (1975).

<sup>103</sup> *Id.* at 878-79; see *supra* text accompanying notes 88-92.

<sup>104</sup> *Id.*; see *supra* note 93 and accompanying text.

<sup>105</sup> See *supra* note 20.

<sup>106</sup> 103 S. Ct. at 2651 (Brennan, J., concurring); *id.* at 2653 (Blackmun, J., concurring); see *supra* note 58; see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (Supreme

adequately with the complexities of the "canine sniff" issue,<sup>107</sup> a topic that has divided the lower courts.<sup>108</sup> Although several arguments support the view that "dog sniffs" of luggage do not constitute searches, an equally strong case exists for the theory that "dog sniffs" are searches within the meaning of the fourth amendment.<sup>109</sup>

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Court ordinarily does not decide matters neither raised before it nor considered by the court of appeals).

Justice O'Connor believed, however, that the Court needed to decide the "canine sniff" issue to resolve fully the luggage seizure issue. She suggested that if "dog sniffs" were searches requiring probable cause, reasonable suspicion could never justify the initial seizure of a suspect's luggage in order to perform a sniff test. 103 S. Ct. at 2644.

Even if police were required to have probable cause to justify a "canine sniff," police could conduct luggage seizures based upon reasonable suspicion. In the past, the Court has established different requirements for various types of police behavior. *See, e.g.,* *Arkansas v. Sanders*, 442 U.S. 753 (1979) (police may seize luggage believed to contain contraband without a warrant, but subsequent search requires warrant); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (officer may question suspects about their citizenship and immigration status and ask them to explain suspicious circumstances based only on reasonable suspicion, but any further detention or search must be based on probable cause). The Court analyzes the constitutionality of each component of police behavior independently and according to the standards established for each.

<sup>107</sup> 103 S. Ct. at 2651 (Brennan, J., concurring).

<sup>108</sup> Several courts have held that "canine sniffs" are not searches within the meaning of the fourth amendment. *See, e.g.,* *United States v. Waltzer*, 682 F.2d 370 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 3543 (1983); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *United States v. Klein*, 626 F.2d 22, 26 (7th Cir. 1980); *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States v. Burns*, 624 F.2d 95, 101 (10th Cir. 1980); *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976); *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974) (*per curiam*).

The Ninth Circuit modified *Solis* in *United States v. Beale*, 674 F.2d 1327, 1335 (9th Cir. 1982), *cert. granted, judgment vacated and remanded*, 103 S. Ct. 3529 (1983) (remanded for consideration in light of *Place*), holding that a "dog sniff" is an invasion requiring reasonable suspicion. Discussing alternative means to investigate the contents of a suspect's luggage, the Supreme Court noted in *Royer* that "no Court of Appeals has held that more than an articulable suspicion is necessary to justify this kind of a warrantless search if indeed it is a search." 103 S. Ct. at 1328 n.10.

Courts have been more exacting in the context of "canine sniffs" of persons. *See, e.g.,* *United States v. Bronstein*, 521 F.2d 459, 462 (2d Cir. 1975) (intrusion more restricted because "dog sniff" directed at luggage instead of person), *cert. denied*, 424 U.S. 918 (1976); *id.* at 465 (Mansfield, J., concurring) ("canine sniff" of person would have been unreasonable under the facts of the case); *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) ("dragnet" sniffs of schoolchildren an unreasonable search). *But see Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (dragnet dog sniffs of persons not a search), *aff'd in part, remanded in part*, 631 F.2d 91 (7th Cir. 1980) (*per curiam*), *cert. denied*, 451 U.S. 1022 (1981). Dissenting from the denial of certiorari in *Doe v. Renfrow*, Justice Brennan argued that "dog sniffs" of persons are searches but that sniffs of inanimate objects might present a different situation. 451 U.S. at 1025-26 (Brennan, J., dissenting from denial of certiorari).

<sup>109</sup> Several commentators have addressed the constitutionality of "canine sniffs." *See, e.g.,* 1 W. LAFAVE, *SEARCH AND SEIZURE* § 2.2(f) (1978); Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75 (1976); Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976) [hereinafter cited as Note, *Constitutional Limitations*]; Comment, *United States v. Solis: Have the*

In essence, a search is a government intrusion that violates a person's reasonable expectations of privacy.<sup>110</sup> Various characteristics of "canine sniffs" lend support to the Court's view that no search occurs when police administer sniff tests of luggage in a public place.<sup>111</sup> The Court noted that "dog sniffs" do not require that police open luggage, thereby exposing constitutionally protected noncontraband items to public scrutiny.<sup>112</sup> "Canine sniffs" of luggage differ from magnetometer screenings, which have been held to constitute searches primarily because they are directed toward persons and reveal the presence of any metal, whether illegal or not. Police direct "dog sniffs" like the one in *Place* toward inanimate objects, not people.<sup>113</sup>

"Canine sniffs" also do not intrude on an innocent person's privacy interests in the luggage contents because "canine sniffs" reveal only the presence or absence of narcotics. Any error in detection resulting from a camouflaged scent "favors the suspect and precludes search and subsequent arrest."<sup>114</sup> Moreover, concealed drugs emit odors, and "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>115</sup> Finally, courts

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*Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410 (1976) [hereinafter cited as Comment, *United States v. Solis*]; Note, *Search and Seizure: The Detection of Marijuana by Trained Dogs—United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975), cert. denied, 96 S. Ct. 1121 (1976), 2 U. DAYTON L. REV. 149 (1977). These commentators generally agree that "dog sniffs" entail at least some degree of intrusion into a suspect's fourth amendment rights.

<sup>110</sup> See *Katz v. United States*, 389 U.S. 347 (1967) (bugging of a telephone booth constituted an impermissible warrantless search, even though probable cause existed). Prior to *Katz*, fourth amendment protection depended upon whether the police physically invaded an area in which the defendant had a right to privacy and seized a tangible object. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928). The *Katz* Court rejected *Olmstead's* "constitutionally protected areas" doctrine in favor of a "reasonable expectation of privacy" doctrine. *Katz*, 389 U.S. at 350-53.

<sup>111</sup> Relying on their unparalleled nature as an investigative method, Justice O'Connor characterized "canine sniffs" as "sui generis." 103 S. Ct. at 2644; see also Note, *Constitutional Limitations*, *supra* note 109, at 985-88.

<sup>112</sup> 103 S. Ct. at 2644.

<sup>113</sup> See, e.g., *Bronstein*, 521 F.2d at 462-63 (distinguishing *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974) (magnetometer scanning of persons held search) on the grounds that searches of persons intrude into intimate areas in which greater expectations of privacy exist).

<sup>114</sup> *Bronstein*, 521 F.2d at 463. But see *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1980) (dog repeatedly "alerted" to schoolchild, but no drugs were found during subsequent body searches), *aff'd in part, remanded in part*, 631 F.2d 91 (7th Cir. 1980) (per curiam), cert. denied, 451 U.S. 1022 (1981).

<sup>115</sup> *Bronstein*, 521 F.2d at 462 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)) ("plain view" doctrine). The *Bronstein* court continued:

If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search . . . .

We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.

have held that the use of sense-enhancing devices in such "plain view/smell" situations do not constitute searches.<sup>116</sup>

Although "canine sniffs" obtain only limited information, valid arguments exist that refute some of the reasons propounded in support of the Court's holding in *Place*. "Canine sniffs" do not intrude on innocent travelers' privacy interests in their luggage only to the extent that the dogs are well-trained and accurate, and that any errors tend toward nondetection. In addition, a "plain view/smell" doctrine cannot apply because police officers usually will not be able to detect the presence of narcotics under any conditions without using trained dogs.<sup>117</sup> Moreover, "canine sniffs" replace rather than enhance an officer's senses. Judge Mansfield, concurring in *United States v. Bronstein*, argued that a dog's sensitive nose replaces a police officer's senses in the same manner that hidden microphones replace an officer's hearing in areas where the sounds are otherwise inaudible. Comparing "canine sniffs" and magnetometers, Justice Mansfield noted that

Neither constitutes a particularly offensive intrusion, such as ransacking the contents of the hidden space, or exposing a person to indignities in the case of a personal search. But the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. The fact that the canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction.<sup>118</sup>

Therefore, any attempt to hold that "canine sniffs" do not constitute searches falls short of being completely persuasive.

If the Court wanted to resolve the issue, it could have applied *Terry* standards and held "dog sniffs" to be searches that are justifiable on the basis of reasonable suspicion<sup>119</sup> rather than adopting an inflexible "all or nothing" standard to analyze the constitutionality of "canine sniffs."<sup>120</sup> Because a "canine sniff" does not approximate a full-scale search in that it does not entail wholesale disclosure of the luggage's

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*Id.* at 461. The court in *United States v. Solis*, 536 F.2d 880, 881 (9th Cir. 1976) emphasized that the "dog sniff" consisted merely of a "monitoring of the air in an area open to the public."

<sup>116</sup> See, e.g., *Bronstein*, 521 F.2d at 462 ("canine sniffs" might enhance, but do not replace the officer's senses); *United States v. Hood*, 493 F.2d 677 (9th Cir.), *cert. denied*, 419 U.S. 852 (1974) (use of flashlight not a search).

<sup>117</sup> Comment, *United States v. Solis*, *supra* note 109, at 423; see also Note, *Constitutional Limitations*, *supra* note 109, at 988-89.

<sup>118</sup> *Bronstein*, 521 F.2d at 464 (Mansfield, J., concurring).

<sup>119</sup> Justice Blackmun suggested in *Place* that *Terry* principles might apply to "canine sniffs." 103 S. Ct. at 2653 (Blackmun, J., concurring). The Court can only apply the balancing test if *Terry* applies to searches of property as well as seizures.

<sup>120</sup> See *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (suggesting that a rigid all-or-nothing model of justification and regulation under the fourth amendment restricts the utility of limitations upon the initiation and scope of police action).

contents, courts could validly apply the *Terry* balancing test. A "dog sniff" involves a relatively limited intrusion on a suspect's fourth amendment interests. The strong government interest in detecting illegal narcotics trafficking could justify conducting "canine sniffs" based upon reasonable suspicion.<sup>121</sup>

In holding that "canine sniffs" do not constitute searches, the Court retreated markedly from progressive constitutional interpretation. It returned to the pre-*Terry* method of validating government intrusions based on less than probable cause by finding that no fourth amendment interests were implicated. The Court has removed "canine sniffs" of luggage in factual situations similar to *Place* from both the scope of the fourth amendment and the watchful eye of judicial scrutiny. Because it was not adequately informed about "canine sniffs," the Court should have refrained from taking such drastic action.

### C. IMPACT OF *PLACE*

Although the Court's decision extends the *Terry* doctrine to seizures of property, it probably will impact very little on current police practices when a suspect has custody of the luggage. Police officers most likely will only detain suitcases incidental to the primary seizure of the suspect for three reasons. First, individuals, rather than their luggage, usually provide the strongest grounds for establishing reasonable suspicion of criminal activity.<sup>122</sup> Second, police officers prefer to have the suspect available should they discover contraband and desire to make an arrest. Third, because the Court imposed the same time<sup>123</sup> and area<sup>124</sup> restrictions on seizures of luggage directly from a suspect's control that apply to investigative detentions of the person, police officers do not have any special incentive to seize luggage independently of the suspect. Because police may only permissibly detain luggage as long as

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<sup>121</sup> See *supra* notes 87-104 and accompanying text; see also 1 W. LAFAYE, *supra* note 109, at 288.

<sup>122</sup> Of the 15 characteristics on which the police officers in Miami and New York based their suspicions, only two directly related to the luggage. *United States v. Place*, 498 F. Supp. at 1224-26; see *supra* notes 7 & 11.

<sup>123</sup> 103 S. Ct. at 2645-46. The ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975) recommends that police detain an individual for a maximum of 20 minutes during a *Terry*-type investigative stop.

<sup>124</sup> Although the Court never directly indicated that the removal of *Place*'s luggage to Kennedy Airport rendered the seizure unreasonable, it did suggest that had the police brought the dog to LaGuardia, such "conduct also would have avoided the further *substantial intrusion* on respondent's possessory interests caused by the removal of his luggage to another location." 103 S. Ct. at 2646 n.9 (emphasis added). Even if police could move the luggage to another location, the time limitations restrict their ability to transport the suitcases more than a short distance.

they may constitutionally detain suspects, officers gain no advantages by allowing the suspects to leave.

The Court's decision, however, provides little guidance concerning how to apply the *Terry* exception to luggage seizures when the suspect does not have custody or control of the luggage. Courts might analogize such seizures to *United States v. Van Leeuwen*<sup>125</sup> and validate lengthier detentions on the grounds that they are less intrusive on fourth amendment interests than seizures from a suspect's custody. Such detentions do not intrude directly on suspects' possessory interests in their luggage.<sup>126</sup> Also, because suspects will not know that their luggage has been seized, they will not feel compelled to remain with it; thus, seizures do not intrude on suspects' liberty interests.

The Court should be extremely careful when it finally addresses this issue. If given too much freedom by the Court, police will have added incentive to seize luggage from the baggage racks. Although not intrinsically detrimental, extended detentions might cause great inconvenience for suspects. For example, should the investigation prove futile, police might not be able to return the luggage by the time suspects arrive to claim it.

The "canine sniff" decision also raises many questions that the Court failed to consider. Since the Court held that "canine sniffs" of luggage in a public place are not searches, sniffs of baggage pickup areas are not subject to constitutional scrutiny because no search or seizure occurs. Isolated or blanket investigations utilizing "dog sniffs" without any objective grounds for suspicion might also be immune from judicial scrutiny.<sup>127</sup> In addition, the Court left unresolved the issue of whether a "canine sniff" of a person in a public place constitutes a search.<sup>128</sup>

The use of dogs to sniff luggage for narcotics raises the question of

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<sup>125</sup> *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (detention of mail after suspect relinquished control); see *supra* note 16.

<sup>126</sup> One commentator has noted that "*Van Leeuwen* was an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves." 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6(e), at 71 (Supp. 1983).

The Court should be wary of applying *Van Leeuwen* in such circumstances. In *Van Leeuwen*, the defendant had relinquished control of mail to the postal authorities. Courts have applied *Van Leeuwen's* reasonableness standard almost exclusively in the mail context. Comment, *Demise of the Probable Cause Requirement in Seizures of Inanimate Objects*—*United States v. Place and United States v. Martell*, 51 U. CIN. L. REV. 405, 414 n.64 (1982). Second, the Supreme Court limited its holding in *Van Leeuwen* to the facts of that case, and only cited it twice before *Place*, neither time for its holding. See Comment, *supra* note 18, at 640 & n.46.

<sup>127</sup> Blanket investigations would run counter to the opinions of many lower courts that have indicated that their decisions would have been different had the "canine sniff" been part of a dragnet-type operation. See, e.g., *Bronstein*, 521 F.2d at 462.

<sup>128</sup> Justice Brennan has expressed his belief that "dog sniffs" of people constitute searches. *Doe v. Renfrow*, 451 U.S. 1022, 1025-26 (1981) (Brennan, J., dissenting from denial of certio-

what may be admitted into evidence at trial. A dog may "alert" law enforcement officers to a suitcase that contains a gun in addition to (or possibly instead of) drugs. Whether prosecutors will be able to introduce such ancillary evidence will most likely be a topic of intense debate during the next few years.<sup>129</sup> Because luggage will only be subject to full searches if a dog establishes probable cause by "alerting" to the apparent presence of drugs, police will not be able to utilize "canine sniffs" to discover evidence of crime in general. Therefore, the Court should permit the receipt of ancillary evidence since police will rarely discover it independently of discovering narcotics.

The Court should limit the applicability of the *Place* holding in its future decisions. The severe narcotics problem provides sufficient grounds for a seizure and properly limited investigative detention of luggage based only on reasonable suspicion.<sup>130</sup> Although critics have questioned the substantiality of the government interest in curbing narcotics trafficking as justification for such intrusions on a suspect's fourth amendment interests,<sup>131</sup> it makes no sense to prevent luggage seizures when police officers have the right to detain individuals suspected of transporting narcotics on their persons.

The Court must be careful to avoid approving *carte blanche* luggage seizures for any and all law enforcement interests. Such treatment of the *Place* extension of the *Terry* doctrine would further emasculate the probable cause requirement in cases of limited intrusions on a suspect's fourth amendment interests.<sup>132</sup> The *Terry* doctrine, whether in the context of searches and seizures of persons or property, should remain a stringently applied exception to the probable cause requirement.

## V. CONCLUSION

The Supreme Court's holdings in *Place* that law enforcement authorities may conduct limited seizures of luggage based upon reasonable suspicion and that "canine sniffs" of luggage located in a public place

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rari). Lower courts have also expressed a desire to place greater restrictions on "canine sniffs" of persons. See, e.g., *Bronstein*, 521 F.2d at 462; see *supra* note 108.

<sup>129</sup> Several commentators addressed the same concern after the Supreme Court decided *Terry*. See, e.g., LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40, 88 (1969); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 186 (1968); Case Comment, *Criminal Procedure: Frisk Permissible Where Reasonable Suspicion of Criminal Activity Exists*, 53 MINN. L. REV. 652 (1969).

<sup>130</sup> Although the specific issue of what constitutes reasonable suspicion was outside the scope of the Court's decision, its importance cannot be minimized. The full impact of the holding in *Place* depends partly upon the standards required to justify reasonable suspicion.

<sup>131</sup> See, e.g., Greenberg, *supra* note 79; Comment, *Reformulating Seizures*, *supra* note 75.

<sup>132</sup> *Contra* LaFave, *supra* note 129, at 55 n.82 (justification should match the degree of intrusion).



are not searches touched upon two areas of search and seizure doctrine never before addressed by the Court. Although general constitutional principles and precedent support the luggage seizure decision, the Court should have refrained from considering the "canine sniff" issue. Apart from the merits of these holdings, however, the Court's willingness to address issues unnecessary to the resolution of the case demonstrates its desire to revamp fourth amendment doctrine in the face of law enforcement's inability to curb rising crime rates.

LINDA M. SICKMAN