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SEIZURES OF PERSONAL PROPERTY SUPPORTED BY REASONABLE SUSPICION: *United States v. Place*

Drug Enforcement Agency (DEA) agents, prompted by a call from Miami police officers,¹ met Raymond Place in the LaGuardia Airport in New York. During this encounter the agents had reasonable suspicion to believe that Place was smuggling narcotics,² and requested Place's permission to search his luggage. When Place refused to consent to such a search, one of the agents informed him that they were taking the suitcases to a federal judge to secure a search warrant. Place declined the agent's invitation to go with them. The agents took the luggage to Kennedy Airport, where a sniff by a trained narcotics dog indicated that one of the bags contained drugs. The seizure of Place's luggage had lasted about ninety minutes at this point.³ Later, execution of a search warrant yielded 1125 grams of cocaine. The federal court for the Eastern District of New York, relying on *Terry v. Ohio*,⁴ held that the officers' reasonable suspicion justified the detention of Place's luggage,⁵ but the United States Second Circuit Court of Appeals reversed that decision.⁶ The United States Supreme Court, while reasoning that the principles of *Terry* apply to an airport seizure of luggage, held that this particular seizure exceeded the permissible scope of a seizure based on reasonable suspicion. *United States v. Place*, 103 S. Ct. 2637 (1983).

Any analysis of a seizure of personal property from its owner must first focus on the specific language of the fourth amendment to the United

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1. Place's behavior had attracted the attention of police officers at the Miami International Airport as he waited to buy a ticket to New York. The officers accosted Place and asked him for his driver's license and airline ticket. Place complied with this request. Since Place's flight was about to leave, the Miami officers did not search his luggage even though he had consented to a search.

Place's parting remark that he had recognized the officers as police motivated further investigation on their part. They discovered that his two suitcases bore different addresses and that the telephone number which Place had given the airline belonged to a third address. The Miami officers phoned the DEA agents in New York and informed them of these events.

2. In addition to the events discussed *supra* note 1, other circumstances aroused the agents' suspicion. When the agents identified themselves to Place as federal narcotics agents, he replied that he knew that they were cops and had spotted them as soon as he exited the plane. Place acknowledged ownership of the luggage he had claimed and told the agents that the Miami authorities had searched it. The agents informed Place that they had been told otherwise.

3. The United States Supreme Court's analysis focused on this 90-minute period. The positive reaction of the police dog gave rise to probable cause to believe that the baggage contained drugs, a sufficient justification for a more prolonged seizure. See *infra* text accompanying notes 10-12. Because it was late on Friday afternoon, the agents held the luggage until Monday when they obtained a search warrant.

4. 392 U.S. 1 (1968). In *Terry*, the Court held that an officer may effect a brief seizure and "patdown" search of a suspect when the officer has reasonable suspicion, a lesser standard of certainty than probable cause, that he is armed and dangerous. See *infra* text accompanying note 16.

5. *United States v. Place*, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980).

6. *United States v. Place*, 660 F.2d 44 (2d Cir. 1981).

States Constitution: "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" Despite the preference for a warrant as authorization of a fourth amendment seizure,⁷ the fourth amendment imposes no absolute requirement that authorities secure a warrant before effecting a seizure.⁸ Presumably, a warrantless seizure can be made of effects on the basis of probable cause to believe that they are contraband⁹ or evidence of a crime.¹⁰ It has been suggested that a warrantless seizure may be made of luggage thought to contain those items as well;¹¹ until the decision in the instant case, however, the Court had not indicated that a seizure of personal property might be reasonable when based on a level of certainty less than probable cause.¹² In *Place*, the Court adopted reasonable suspicion as a sufficient basis for seizures of effects in the drug courier context. This note discusses the adequacy of the Court's analysis in adopting this standard and addresses the difficulty of applying the standard

7. Language in *Johnson v. United States*, 333 U.S. 10 (1948), indicates that a warrant is the preferable means of authorization for a seizure of personal property: "[The fourth amendment's] protection consists in requiring that [the probable cause determination be made] by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14 (footnote omitted).

8. *Cf. Chimel v. California*, 395 U.S. 752, 772-73 (1969) (White, J., dissenting) ("The Amendment does not proscribe 'warrantless searches' but instead it proscribes 'unreasonable searches' and this Court has never held . . . that warrantless searches are necessarily unreasonable."). Such a construction of the amendment applies to seizures as well. In *United States v. Watson*, 423 U.S. 411 (1976), the Court held that the fourth amendment does not require an officer to obtain a warrant before making a probable cause supported arrest in a public place.

9. The fourth amendment protects only legitimate expectations of privacy, that is, those which society is willing to recognize as reasonable. *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring). It is unlikely that the Court would rule that society recognizes as reasonable a privacy interest in the possession of an illicit object. *See* authorities cited *infra* note 11.

10. *See United States v. Chadwick*, 433 U.S. 1 (1977); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *cf. Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971) (indicating that the issue would be disposed of under the doctrine of "plain view").

11. Comment, *Seizing Luggage on Less than Probable Cause*, 18 AM. CRIM. L. REV. 637, 646 (1981) (citing *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979); *United States v. Chadwick*, 433 U.S. 1, 15-16 (1977)).

12. Several of the circuit courts including the Second Circuit in the instant case, *Place*, 660 F.2d at 44, agree that law enforcement officers may seize luggage upon reasonable suspicion that it contains narcotics. *See, e.g., United States v. Viegas*, 639 F.2d 42 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981); *United States v. Corbitt*, 675 F.2d 626 (4th Cir. 1982); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980); *United States v. Wallraff*, 705 F.2d 980 (8th Cir. 1983); *United States v. Martel*, 654 F.2d 1356 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 3551 (1983); *United States v. MacDonald*, 670 F.2d 910 (10th Cir.), *cert. denied*, 103 S. Ct. 373 (1982). The Louisiana Supreme Court would be receptive to this application of *Terry*. *See State v. Bailey*, 410 So. 2d 1123 (La. 1982) (seizure of battery charger upon reasonable suspicion that it is stolen is authorized by *Terry*).

in light of the possibility of varying privacy interests in luggage, depending on whether it is in its owner's possession and in light of the fourth amendment's particularity requirement.¹³

The Court's adoption of the reasonable suspicion standard for seizures of effects developed from *Terry* and its apparent approval, under certain circumstances, of a brief seizure of the person¹⁴ on the basis of reasonable suspicion.¹⁵ In *Terry*, the Court held that an officer may effect a stop and a limited search of the outer clothing of a person when he can articulate facts upon which "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others [is] in danger."¹⁶ *Terry* was the first case to sanction an intrusion upon interests protected by the fourth amendment based on a level of certainty less than probable cause. The Court deemed the reasonable suspicion standard sufficient because the governmental interest in the safety of an officer investigating suspicious circumstances outweighs the individual's privacy interest to the extent that the minimally intrusive stop and patdown are reasonable. However, the Court's narrow statement of its holding in *Terry*¹⁷ attests that the Court did not contemplate the ex-

13. Another important aspect of *Place* is its discussion of whether the dog sniff is a search within the meaning of the fourth amendment. However, this note focuses only on the issue of the propriety of the seizure of *Place*'s luggage. The sniff-search issue is treated in more detail in a topic note published in this volume of the Louisiana Law Review. Note, *Katz and Dogs: Canine Sniff Inspections and the Fourth Amendment*, 44 LA. L. REV. 1093 (1984).

14. The term *stop* is used consistently throughout this note as referring to a limited seizure of the person.

15. One should compare the differing degrees of certainty which meet the probable cause and reasonable suspicion standards. The level of information that supports probable cause is that which would lead a reasonable man to *believe* that an object is or contains contraband or evidence of a crime; reasonable suspicion is present when there are specific and articulable facts which prompt an officer to *reasonably suspect* that such is the case. Compare *Wong Sun v. United States*, 371 U.S. 471 (1963) (probable cause) with *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion).

16. 392 U.S. at 27.

17. The majority's holding was closely linked to *Terry*'s facts:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30. Justice Harlan's concurring opinion suggests that it might be permissible to stop a suspect on the basis of reasonable suspicion of his involvement in criminal activity without a coincidental suspicion that the person is armed and dangerous. *Id.* at 32-33 (Harlan, J., concurring). On the other hand, in a companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), the Court reasoned that the *Terry* rationale is limited to situations where

tension of its reasoning in that case to seizures of personal property. In dissent, Justice Douglas warned that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."¹⁸ Even though the narrow parameters of the majority's holding and Justice Douglas's reservations indicate that *Terry* would be limited to its facts as an exception to the probable cause requirement, the rationale of that case has been extended to cases of acute governmental interests other than the officer's safety.

Applications of *Terry* principles have, nevertheless, involved a peculiarly sensitive law enforcement interest or exigency. In *United States v. Brignoni Ponce*,¹⁹ the Court relied on the government's interest in the effective control of the Mexican border²⁰ to hold that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."²¹ In *Michigan v. Summers*,²² police observed the defendant leaving his residence as they approached with a search warrant and detained him while they conducted the search.²³ The Court held that the stop was valid because of the ex-

an officer suspects that an individual presents some danger to the safety of others. The Court wrote:

The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.

Id. at 64.

18. 392 U.S. at 39 (Douglas, J., dissenting).

19. 422 U.S. 873 (1975).

20. Justice Powell, writing for the majority of the Court, summarized the problem:

The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers."

Id. at 879.

21. *Id.* at 881. *Brignoni-Ponce* is the earliest case applying the reasoning in *Terry* to a situation involving a governmental interest other than the officer's safety. Consequently, it is also the first case in which the Court upheld a stop of a person supported by reasonable suspicion in the absence of a weapons patdown.

22. 452 U.S. 692 (1981).

23. The Court found that the officers had reasonable suspicion to detain Summers since "[t]he connection of an occupant to [a home subject to a search warrant] gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention." *Id.* at 703-04.

igent circumstance that Summers was alerted that incriminating evidence would be found and would flee. Despite these extensions of *Terry*, the Court had not considered an application of *Terry* principles to seizures of personal property until the decision in *Place*.²⁴

The *Place* Court could have disposed of the case, without making such an extension of *Terry*, by analyzing the seizure in terms of a stop of the person. This alternative is apparent upon consideration of the Court's treatment of the issue of the permissible scope of the luggage seizure, once it had adopted the reasonable suspicion standard. The majority reasoned that by taking Place's suitcases from his immediate possession, the DEA agents could have effectively seized Place's person. Since a traveler is unlikely to proceed without his luggage, the Court reasoned that the resulting seizure of the person controls the justifiable scope of the seizure of effects. In determining whether the seizure of Place's luggage exceeded its permissible scope, the Court focused on the seizure's ninety-minute duration before the sniff test resulted in probable cause to believe that drugs were present. The Court held that the length of time precluded any conclusion of reasonableness.²⁵ However, the Court need not have relied solely on the seizure of Place's suitcases in reaching this result.

The Court could have decided the case on the grounds of a *Terry* stop of Place's person by cumulating the entire course of events: the initial *Terry* stop of Place that occurred when the DEA agents accosted him, and the continuance of this seizure of Place's person that resulted from the seizure of his baggage.²⁶ The Court did not address the issue of whether Place was stopped from the time the DEA agents met him in New York. While the validity of even that kind of stop is not settled,²⁷

24. In *Place*, Justices Brennan and Blackmun concurred but would not have addressed the issue of applying *Terry* principles to seizures of personal property. Justice Brennan, pointing out that the Court's ruling as to the issue is *dicta*, would simply hold that in any event the seizure of Place's luggage exceeded its permissible scope. See 103 S. Ct. at 2646 (Brennan, J., concurring). Justice Blackmun's reasoning follows essentially the same approach. *Id.* at 2651 (Blackmun, J., concurring).

25. Additionally, the agents did not inform Place of the actual location to which his luggage was being taken, how long it would be retained, or how it would be returned to him.

26. Besides the Court's analysis of the seizure of Place's luggage as a seizure of his person from the point in time that his luggage was seized, the seizure of Place's baggage may be examined from two different perspectives. First, as a means of effectively seizing Place's person, it is a *continuation* of the initial stop. Secondly, it is a fourth amendment seizure of effects distinct from the seizure of Place's person. *Place*, 103 S. Ct. at 2646 (Brennan, J., concurring). Viewed from this second perspective, the seizure of effects is an additional *aggravating* circumstance to be considered in the scope of analysis of the *Terry* stop. This is true because the officers acquired no additional justification for investigative activity beyond that within the scope of the *Terry* stop until probable cause was produced. See *supra* note 3; cf. *Michigan v. Summers*, 452 U.S. 692 (1981) (continuing chain of increasingly intrusive police investigation sanctioned by a corresponding increase in justifications).

27. The validity of a stop supported by reasonable suspicion of one thought to be

apparently the Court will maintain the validity of this procedure in future cases.²⁸ Had the Court inquired into the scope of the initial seizure of Place's person as prolonged by the seizure of his luggage, it could only have concluded that the entire course of events exceeded the permissible scope of a *Terry* stop. Since, under this analysis, the ninety-minute seizure of luggage which the Court found to be unreasonable would be included in the scope of the initial seizure of Place's person, the Court would have reached the same result as it reached in *Place*. Also supportive of such a result is the Court's plurality opinion in *Florida v. Royer*,²⁹ which upheld the Florida Supreme Court's determination that a fifteen-minute stop of a suspected drug courier exceeds the permissible scope of a *Terry* stop. Despite the simplicity of the argument for the Court to decide *Place* under a traditional analysis of the *Terry* stop, that argument apparently was not presented for consideration. Thus, the Court discussed the problem in terms of whether a seizure of effects could be made upon less than probable cause.

The Court recognized that its task in applying *Terry* to seizures of drug courier luggage was to determine whether a substantial governmental interest is at stake and whether, in light of that interest, the seizure can be so minimally intrusive as to be justified by reasonable suspicion. The Court rejected an argument that only special law enforcement interests, like *Terry's* safety concern, justify an exception to the fourth amendment's probable cause standard. The majority reasoned that the law enforcement interest simply need be "sufficiently 'substantial' . . . not . . . independent of the interest in investigating crimes effectively."³⁰ Applying this "test," the Court concluded that the government's need to suppress drug courier activity is substantial because the allowance of luggage seizures supported by reasonable suspicion at airports "substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels."³¹ Next, the Court rejected the argument that seizures of effects from their owner's possession are absolute, that is, that the seizures cannot vary in terms of intrusiveness.³²

a drug courier depends on whether the law enforcement interest in suppressing that activity is "substantial." See *infra* text accompanying notes 30-38. *Terry* never was intended to be applied beyond the context of concern for the police officer's safety. See *supra* note 17; see also *Florida v. Royer*, 103 S. Ct. 1319, 1330 (1983) (Brennan, J., concurring); *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) (warning that the majority opinion would be used in later cases to reduce fourth amendment protections in other areas).

28. See *Florida v. Royer*, 103 S. Ct. 1319 (1983); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

29. 103 S. Ct. 1319 (1983).

30. *Place*, 103 S. Ct. at 2643.

31. *Id.*

32. The *Place* majority reasoned that "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent." *Id.* Justice O'Connor continued:

Finally, the Court concluded that at some point a "brief [detention] of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime."³³

While the Court recognized the appropriate analysis to employ in extending *Terry* to the drug courier context, its application of that analysis can be criticized. The Court's reason for concluding that the law enforcement interest is substantial is inadequate.³⁴ First, any time police are allowed to intrude upon constitutionally protected privacy interests, the probability that criminal activity will be detected is enhanced, possibly substantially so depending upon the degree of intrusiveness allowed.³⁵ Such a truism should not be offered as a decisive reason for deeming a law enforcement interest substantial. The Court also relied upon the transient nature of drug courier activity in justifying its conclusion that this area is appropriate for application of *Terry* principles. This reason is likewise unconvincing since criminal activity in general is transient by its very nature. Criminals destroy evidence and move about in hope of eluding the authorities, but that the opportunity to detect such activity and apprehend its participants is fleeting is no reason to dispense with fourth amendment protections.³⁶ Additionally, the Court's application of the *Terry* approach in reasoning that the need to suppress drug courier activity is substantial is conclusory. Reaching such a conclusion because the probability of apprehending drug couriers is increased by allowing a seizure

The 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. Moreover, 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 (footnotes omitted).

33. *Id.*

34. Before *Terry* should be extended to new types of seizures, the Court should find a peculiarly sensitive law enforcement interest is inherent in the setting of the seizure. The fourth amendment itself embodies a weighing of law enforcement concerns against the citizen's privacy interests. Thus, further balancing is appropriate only in light of a special law enforcement interest. *Place*, 103 S. Ct. at 2650 (Brennan, J., concurring); *Id.* at 2652 n.1 (Blackmun, J., concurring); *Summers*, 452 U.S. at 706 (Stewart, J., dissenting); *Johnson v. United States*, 333 U.S. 10 (1948) (fourth amendment protections disappear if officers perform a balancing of all of the circumstances on a daily basis). See *infra* note 35.

35. The Court has previously denounced such an approach.

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. . . . The investigation of crime would always be simplified if warrants [and other fourth amendment protections] were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's . . . property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey v. Arizona, 437 U.S. 385, 393-94 (1978).

36. See *supra* note 35.

of luggage based on reasonable suspicion presumes that which is at issue—the propriety of a seizure of luggage supported by reasonable suspicion.

Whether a finding that the need to suppress drug trafficking is “substantial” or “special” or “peculiarly sensitive” is warranted is not the focus of this discussion. Whatever label is conferred upon the policy decision that the Court must make in deciding to extend *Terry* principles, the Court should squarely recognize that it is evaluating the extent of the societal interest involved. In making such an evaluation, the Court should examine whether the enterprise may be combated effectively by the use of traditional law enforcement procedures and whether the criminal enterprise is especially transient as compared with criminal activity in general. These factors suggest problems in subduing the activity beyond those normally incident to enforcement of the criminal law. While drug courier activity actually may present law enforcement difficulties in addition to those inherent in detecting crime, the Court did not make this crucial determination.

The Court’s application of *Terry*’s ultimate balancing of the law enforcement interest against the fourth amendment intrusion in *Place* is also conclusory. The majority simply reasoned that since a seizure of property from its owner’s possession can vary in terms of its intrusiveness, at some point along the continuum of intrusiveness the seizure may be based upon reasonable suspicion. However, arguably this is not the determination that the Court should make at this point. Obviously, different circumstances may affect the intrusiveness of any invasion of fourth amendment interests. Instead, the focus of the Court’s inquiry at this point should be to ask whether, though the privacy interest merits fourth amendment protection,³⁷ the intrusion may be justified by reasonable suspicion. The assertion that an intrusion can vary in terms of intrusiveness is misleading as a reason for concluding that the *Terry* balancing approach is satisfied. The question that must be addressed, in relation to the continuum upon which the conceivable fourth amendment intrusions will fall, is whether such a seizure could *ever* conceivably be so justified considering the competing societal interests at stake.³⁸ The ultimate issue is whether the fourth amendment’s deference to the citizen’s privacy interest will subsist despite such

37. In this manner, the analysis would focus on the critical point at which a distinction can be drawn between protected and non-protected privacy interests. “[I]t is simply fantastic to urge that such a procedure [*i.e.*, the stop and patdown] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person” *Terry*, 392 U.S. at 16-17 (footnote omitted).

38. This statement is the converse of the Court’s phrasing of the issue in *Terry*: “[W]hether it is *always* unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.” *Id.* at 15 (emphasis added).

a seizure in light of the overall assessment of the significance of the governmental interest, *i.e.*, whether the seizure is reasonable.

The full effect of the Court's abbreviated version of what should, arguably, be a more extensive analysis will be revealed only by the passage of time. Perhaps the Court's conclusion that *Terry's* rationale supports a reasonable suspicion seizure of luggage is limited to the drug courier context.³⁹ In *United States v. West*,⁴⁰ a case which is strikingly similar to *Place* factually, the Court remanded the case to the First Circuit with instructions to apply the principles of *Place*. Thus, apparently the Court regards the issue as settled so far as drug courier activity is concerned. On the other hand, time may see the use of *Place's* conclusory analysis in determining the validity of seizures of effects in general. That lower courts are receptive to such an application is evident in *State v. Bailey*,⁴¹ in which the Louisiana Supreme Court upheld a seizure of a battery charger from the possession of the defendant and his companion on the basis of reasonable suspicion that it was stolen.

The Court's decision to extend the reasonable suspicion standard to seizures of effects raises serious questions regarding its application. For example, the Court in *Place* did not address the question of whether luggage not in its owner's possession is afforded less protection than baggage seized directly from its owner, as was *Place's* luggage.⁴² The location of the luggage may be an important factor in determining whether an owner has a constitutionally protected expectation of privacy, which, according to Justice Harlan's two-part test in *Katz v. United States*,⁴³ is a subjective expectation of privacy which society recognizes as reasonable. A traveler exhibits a diminished subjective expectation of privacy in his luggage when he places it in the airline's custody, especially in light of the general societal awareness that airports are areas of close scrutiny of both the traveler and his luggage.

This lessened expectation of privacy may result in an initial determination that no seizure, or intrusion upon a fourth amendment protected interest, has occurred. Since there was "no doubt that the agents made

39. The majority in *Place* was careful to limit to the drug courier context its conclusion that effects may be seized upon reasonable suspicion. See 103 S. Ct. at 2644. However, the holding in *Terry* was carefully circumscribed to the precise facts of that case and the officer's safety rationale; nevertheless, the Court has greatly extended the reasoning of that case, even to the point of using it as the basis for the holding in *Place*. See *supra* text accompanying notes 17-23.

40. 651 F.2d 71 (1st Cir. 1981), *cert. granted, judgment vacated, and remanded*, 103 S. Ct. 3528 (1983) (consider further in light of *Place*).

41. 410 So. 2d 1123 (La. 1982).

42. The Court relied upon the seizure of *Place's* luggage from his immediate possession in defining the permissible scope of the infringement upon his fourth amendment rights. See *supra* text accompanying note 25.

43. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

a 'seizure' of Place's luggage for purposes of the fourth amendment,"⁴⁴ the Court did not address this issue. The highly objective circumstance of removal of Place's luggage from his immediate possession made the seizure obvious. However, the issue of whether a seizure has in fact occurred is likely to arise in a situation in which the luggage was not taken directly from its owner's possession.⁴⁵ The test for determining whether a *Terry* stop of the person has occurred is whether a reasonable person under the circumstances would have believed that he was not free to leave.⁴⁶ Adapted to the seizure of luggage from its owner's immediate possession, the test would be phrased as whether the owner reasonably believed that he was not free to take the luggage with him. The test is not so easily adapted, however, to an interference with luggage outside of its owner's grip. Perhaps the test could be whether the owner reasonably believed that he could not reassert control over his property. The problem with this approach is that if the owner is not aware of the interference with his luggage, he cannot question his ability to control it. To rule that no constitutionally protected interest exists simply because the owner is not aware of the invasion would be ludicrous,⁴⁷ and to do so would be to grant law enforcement a *carte blanche* over baggage entrusted to an airline. Thus, the standard for determining whether a seizure of luggage out of its owner's possession has taken place must focus on the *traveler's expectation of privacy*, the factor which determines fourth amendment protection in the first place. One possible approach is to ask whether the officials' handling of the luggage is so different in nature from that which a traveler would reasonably expect upon surrendering possession to the airline that the handling would be objectionable to a reasonable person. However, an honest application of this standard might result in a determination that a seizure has been made in every instance.

Once it has been determined that a seizure of the luggage has taken place, the owner's expectation of privacy may define the police procedures allowed under the reasonable suspicion standard. While the ninety-minute detention of luggage taken directly from Place's possession was unreasonable,⁴⁸ perhaps the permissible scope of the seizure will be broader when the luggage is out of its owner's control at the time the seizure takes place. The owner's diminished expectation of privacy thus may

44. 103 S. Ct. at 2654.

45. *Cf. United States v. Van Leeuwen*, 397 U.S. 249 (1970) (29-hour delay in forwarding first class mail is not a seizure). *Van Leeuwen* shares the circumstance that the effect was not in its owner's possession.

46. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A majority of the Court has indicated approval of this standard. *See Florida v. Royer*, 103 S. Ct. 1319 (1983).

47. For instance, one should consider Congress's approach to the area of electronic surveillance, which involves intrusion upon the citizenry's privacy interests by the authorities without the former's awareness. *See* 18 U.S.C. §§ 2510-2520 (1982).

48. *See supra* text accompanying note 25.

authorize a seizure which is longer in duration and which removes the property farther from its owner than the seizure disallowed in *Place*. It might even be suggested that any seizure of luggage in the airline's custody, short of interfering with the traveler's interest in reclaiming the property, is permissible in scope.⁴⁹

Additionally, the Court's decision to extend *Terry* to seizures of effects may affect the application of the fourth amendment particularity requirement. The fourth amendment requires that an officer making a *Terry* stop must reasonably suspect that the particular individual stopped is armed or engaged in criminal activity.⁵⁰ As manifested by *Place*, in the drug courier setting it is often the authorities' reliance upon characteristics of the person,⁵¹ and not of his luggage, that produces reasonable suspicion. The absence of an indication that a particular bag contains drugs precludes a particularized suspicion as to that luggage.⁵² However, *Place* did not address this issue.⁵³

The particularity requirement is designed to restrict the scope of an investigative procedure by limiting those persons or things that may be subjected to it.⁵⁴ Particularity should be demanded in the area of seizures based upon reasonable suspicion because application of *Terry*'s lesser intrusion-reasonable suspicion principle involves a balancing of competing interests beyond that contained in the fourth amendment. Since that amendment specifies a particularity requirement for seizures based upon probable cause, a particularity requirement is appropriate for seizures based on less certainty than probable cause. Adherence to the particularity requirement would pay deference to the framers' choice of a rule protective of privacy at the expense of law enforcement concerns.⁵⁵ However, the

49. See *supra* note 45.

50. This statement is true as a general rule, but there are exceptions. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). See *infra* note 54.

51. Most notably, authorities often rely on the "drug courier profile," an abstract grouping of characteristics thought to be typical of drug smugglers. *Royer*, 103 S. Ct. at 1322 n.2.

52. Cf. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause Where the standard is probable cause, a . . . seizure of a person must be supported by probable cause particularized with respect to that person."). *Ybarra* is distinguishable, however, from the situation in *Place* in which police relied on reasonable suspicion as to *Place*'s person to authorize a seizure of *his* luggage.

53. Only one of *Place*'s two bags contained cocaine. No circumstances indicated which, if either, suitcase contained narcotics until the narcotics dog sniff.

54. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (the fourth amendment prohibits search and seizure of bar patron for whom there is no particularized probable cause even though he is in a tavern which, along with its proprietor, is subject to a search warrant based on probable cause); *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979) (the fourth amendment does not permit a warrant to issue which leaves to the discretion of officials executing the warrant what items will be seized).

55. See *supra* notes 34-35.

Place Court's support of the DEA's efforts to suppress drug courier activity may lead to an exception to the particularity requirement as the Court confronts the practical problems inherent in requiring particularized suspicion as to what may be innocent-looking luggage.⁵⁶

Thus, after the Court's decision in *Place* to extend *Terry*'s reasonable suspicion standard to seizures of drug courier luggage, difficult questions of application of fourth amendment protections remain. Undoubtedly, the problem of applying the fourth amendment's particularity requirement to seizures of innocent-looking luggage will arise. Likewise, owners' varying expectations of privacy in luggage depending on its location will require difficult determinations of whether a seizure occurred and whether the police conduct was reasonable. The most important and perhaps most difficult question, however, is whether the Court will extend its reasoning in *Place* to sanction seizures of effects in general on the basis of reasonable suspicion.

Curtis Ray Shelton

56. The Court has dispensed with the particularity requirement in the administrative search area due to practical considerations and the desire for effective enforcement of municipal building codes. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976); see *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967).