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The "Reasonableness" of the Investigative Detention: An "Ad Hoc" Constitutional Test

CHRISTINE M. WISEMAN*

Nowhere is the acknowledgment of tension in a free society between governmental power and personal liberty more pointed than in the warrant requirement of the fourth amendment, and in no statement does the rationale of that warrant requirement find more classic expression than in the comments of orator William Pitt:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force does not cross the threshold of the ruined tenement.3

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2. 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.

The United States Supreme Court has consistently eroded the warrant requirement when compelling state interest has demanded it in the areas of seizures of persons and seizures of things. Throughout, it has maintained a distinction between the two types of seizures. However, in the rapidly developing law of the investigative detention, one of the newly recognized categorical exceptions to the warrant requirement, these distinctions in large part have been obliterated. Moreover, the recent cases of *Florida v. Royer* and *United States v. Place* appear to be the latest in a series of Supreme Court decisions, commencing with *Terry v. Ohio* and *Michigan v. Summers*, which ostensibly combine to structure a framework for testing the constitutionality of the investigative detention—a test whose prongs are at best difficult to ascertain and at worst vest unfettered discretion in the hands of law enforcement officers.

5. 460 U.S. 491 (1983) (plurality opinion).
7. 392 U.S. 1 (1968). See also Ybarra v. Illinois, 444 U.S. 85 (1979) (warrant to search bar for drugs did not authorize officers to pat-down customers without reasonable belief that customers were armed and dangerous); Dunaway v. New York, 442 U.S. 200 (1979) (*Terry* and its progeny do not support state's application of a balancing test to custodial interrogations to justify mere "reasonable suspicion" as standard relevant to seizures for interrogative purposes); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (except where there is an "articulable and reasonable suspicion" that either the vehicle or an occupant is subject to seizure for violating the law, "stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) ("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."); Adams v. Williams, 407 U.S. 143 (1972) (informant's tip provided officer with reasonable suspicion sufficient to justify limited intrusion upon suspect to insure officer's safety); Chimel v. California, 395 U.S. 752, 762-63 (1969) (utilizing *Terry* to justify the proper parameters of a "search incident to an arrest"); Sibron v. New York, 392 U.S. 40, 65 (1968) (rejecting as unreasonable officer's reaching into suspect's pocket to remove packet of heroin: "The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man.").
What is apparent in a study of the evolution of the constitutional test is that the Court has no prevailing ideology as to the parameters of the investigative detention other than a general deference to law enforcement interests and practices in crime prevention. The result is a constitutional test whose prongs have evolved on a happenstance basis according to the individual facts at issue in a given case. Hence, any analysis of the constitutional test must necessarily involve an examination of the factual minutiae upon which each of the prongs of the test is premised.

I. Terry: The "Stop and Frisk"

In the 1968 case of Terry v. Ohio, the Supreme Court considered whether it is always unreasonable for a police of-

9. 392 U.S. 1 (1968). Prior to the Terry decision, a number of authors prepared thorough analyses of the then existing state of investigative detention law. These articles discuss the underpinnings of the investigative detention and the legal arguments both for and against it. They also acclimate the reader to the prevailing sentiments at the time immediately prior to the Terry decision. See generally Abrams, Constitutional Limitations on Detention for Investigation, 52 Iowa L. Rev. 1093, 1117 (1967) (specifically, arguing that the reasonableness doctrine should not be employed to circumvent the protections of the warrant clause; "the fourth amendment's first clause, unreasonable search and seizure, is subordinate to, and must be consistent with, the warrant clause"); Finkel & Oberman, The Constitutional Arguments Against "Stop and Frisk," 3 Crim. L. Bull. 441 (1967) (full text of brief filed with United States Supreme Court by petitioners in Sibron v. New York, 392 U.S. 40 (1968); comprehensive discussion of constitutional argument against allowing what petitioners claimed was, in essence, an arrest or seizure on less than probable cause); Kuh, In-Field Interrogation: Stop, Question, Detention and Frisk, 3 Crim. L. Bull. 597 (1967) (text of speech given to law enforcement officers prior to Terry decision; practical examples of "reasonable suspicion"); Raphael, "Stop and Frisk" in a Nutshell: Some Last Editorial Thrusts and Parries Before it All Becomes History, 20 Ala. L. Rev. 294 (1968) (identification of constitutional problems inherent in stop and frisk statutes and discussion of implications inherent in promulgating such statutes).

A line of Wisconsin cases follows the Terry progression. See generally State v. Williamson, 113 Wis. 2d 389, 335 N.W.2d 814 (1983) (upholding pat-down search of defendant which revealed a loaded pistol; justified under totality of the circumstances in that two men approached squad car, stopped and stared at officers, and one responded that he had been previously convicted of carrying a gun and was currently wanted); State v. Goebel, 103 Wis. 2d 203, 307 N.W.2d 915 (1981) (officer justified in detaining and questioning defendant stopped in automobile in order to establish his identity and an explanation of his suspicious conduct consisting of nervousness and quick motions as if to place something under his car seat); State v. Flynn, 92 Wis. 2d 427, 285 N.W.2d 710 (1979) (upholding officer's removal of wallet from defendant's pocket after defendant refused to identify himself; court observed that confrontation occurred in early morning hours when street was otherwise deserted, that burglary had been committed in area half-hour earlier, and that defendant had just emerged from an alley in company of suspect fitting description of burglar); Wendricks v.
ficer to seize a person and subject him or her to a limited search for weapons when there is no probable cause for an arrest.10 Rejecting the argument that a "stop" and a "frisk" do not rise to the level of a "search" and a "seizure" within the meaning of the fourth amendment,11 the Court invoked the "unreasonable search and seizure" language of the fourth amendment12 as the general premise upon which to assess their constitutionality. That is, it attempted to ascer-

State, 72 Wis. 2d 717, 242 N.W.2d 187 (1976) (investigative stop valid where, following an armed robbery of store, officers noticed suspicious occupants in a taxi and, upon stopping the taxi and ordering occupants out, found a gun); Jones (Hollis) v. State, 70 Wis. 2d 62, 69, 233 N.W.2d 441, 445 (1975) ("A temporary investigative stop of one possessing information as to a crime may certainly be reasonable, depending upon the exigencies of the situation."); State v. Williamson, 58 Wis. 2d 514, 206 N.W.2d 613 (1973) (extending Terry principles to the stop of an automobile); State v. Beaty, 57 Wis. 2d 531, 205 N.W.2d 11 (1973) (upholding search in which as a result of protective pat-down, officer felt several large lumps in defendant's pocket, reached in, and pulled out coins and papers which were evidence of the burglary for which he was convicted); Waite v. State, 57 Wis. 2d 218, 222, 203 N.W.2d 719, 721 (1973) ("Given the fact of a suspicious bulge in an outer coat pocket, the officer acted reasonably and for his own protection in determining what caused the bulge."); State v. Chambers, 55 Wis. 2d 289, 198 N.W.2d 377 (1972) (during valid consent search of apartment for drugs, officers patted defendant down upon his entry into the dwelling; pat-down was valid in that drug search created a volatile atmosphere in which officers were outnumbered by apartment occupants, and defendant had entered the dwelling unannounced wearing a heavy jacket with large pockets). See also Wis. Stat. § 968.24 (1981-82) (temporary questioning without arrest); Wis. Stat. § 968.05 (1981-82) (search during temporary questioning).

10. See Terry, 392 U.S. at 15.
11. The Court noted:

[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."

Id. at 16. Circumstances which elevate a simple encounter to a seizure and distinctions between "types" of seizures are now open to greater scrutiny as a result of the Terry line of cases. See Williamson, The Dimensions of Seizure: The Concepts of "Stop" and "Arrest," 43 OHIO ST. L.J. 771 (1982) (examining the determination of when there has been a seizure within the meaning of the fourth amendment and the distinction between seizures in the nature of a stop and those that constitute an arrest). See also LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40 (1968) (criticizing lack of specific guidelines in the early Court opinions; comprehensive discussion of the leading early cases and predicted implications); Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Problem of Stop and Frisk, 45 CONN. B.J. 146 (1971) (analyzing Terry, Sibron, and Peters).

12. See supra note 2.
tain the "reasonableness," given the circumstances, of the particular governmental invasion of the citizen's personal security.\textsuperscript{13}

The first step in the Terry Court's fourth amendment analysis was a determination of whether the governmental interest which allegedly justified the intrusion outweighed the nature of the intrusion itself.\textsuperscript{14} Failing that, there would be no need to inquire further; the intrusion would be per se unreasonable and hence violative of the fourth amendment.\textsuperscript{15} However, once the governmental interest to be served could be seen to outweigh the intrusiveness of the police conduct, it was necessary to look specifically to the particular conduct at issue in the police-citizen encounter.\textsuperscript{16} The Court recognized that at this second step its inquiry was a dual one: to ascertain "whether the officer's action was justified at its inception, and whether [the officer's action] was reasonably related in scope to the circumstances which justified the interference in the first place."\textsuperscript{17} Moreover, in assessing whether the police officer's conduct in a "stop and frisk" situation was justified at its inception, the Supreme Court announced that a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."\textsuperscript{18} Furthermore, the Court noted that this standard exceeded mere subjective "good faith" on the part of the police officer and was to be measured by objective criteria: "[Whether] the facts available to the officer at the moment of the seizure or the search 'warrant a man of

\begin{footnotes}
\item 13. See Terry, 392 U.S. at 19.
\item 14. See id. at 20-21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).
\item 15. 392 U.S. at 20-21.
\item 16. Id. at 21.
\item 17. Id. at 20-21.
\item 18. Id. at 21.
\item 19. Id. at 22. The Court placed a check on the individual officer's discretion when it stated:
The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.
\item Id. at 21 (footnote omitted).
\end{footnotes}
reasonable caution in the belief' that the action taken was appropriate."\(^{20}\) As to the second aspect of the Court's dual inquiry — the relationship of the scope to the intrusive action — the Court was more restrictive, confining its definition of scope to "that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . ."\(^{21}\)

Thus, in recognition of a legitimate government interest in crime prevention,\(^{22}\) the Court designed a test for deciding the constitutionality of a stop and frisk for weapons which required: (1) a balancing of the governmental interest against the nature of the intrusion; and, in the event the balance weighed in favor of the government, (2) an objective or "reasonable person" assessment of whether the police officer could point to specific and articulable facts which warranted a belief that criminal activity might be afoot and that the suspect might be armed and dangerous;\(^{23}\) and (3) an assessment of whether the frisk was confined in scope to the discovery of weapons on the suspect.

Following the *Terry* decision, the question of under what circumstances the dictates of *Terry* become applicable posed considerable dilemma. In retrospect,\(^{24}\) it is relatively clear that the *Terry* Court intended its test to apply only to situations involving a forcible stop, that is, to those situations in which the police had a right to insist upon an encounter, and

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20. *Id.* at 21-22.
21. *Id.* at 26.
22. The *Terry* court emphasized that it was dealing with "an entire rubric of police conduct — necessarily swift action predicated upon on-the-spot observation of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant requirement." *Terry*, 392 U.S. at 20. It was thus clearly concerned with an extension of governmental authority in the area of crime prevention as opposed to crime detection. *See also* 3 W. LAFAYE, supra note 4, § 9.2; H. WAY, supra note 1, at 53-55.
only to those situations specifically involving a forceable “stop” and accompanying “frisk”:

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.  

Furthermore, in a footnote, the Court pointedly declined to apply Terry principles either to an interrogation or to a simple police-citizen “encounter” which did not also involve a “seizure” of the person. The implication in the latter situation was simply that since there was no “seizure” of the person, the fourth amendment did not apply. Thus, immediately after the Terry decision, there existed four types of police-citizen encounters susceptible to varying degrees of scrutiny under the fourth amendment: (1) a simple encounter involving no seizure of the person; (2) the investigative detention or investigative interrogation premised upon something less than probable cause, the constitutionality of which was as yet untested; (3) the “stop and frisk”; and (4) an arrest.

25. Terry, 392 U.S. at 30. See also Wis. Stat. § 968.05 (1981-82) (employing similar wording).
26. The court stated:

We thus decide nothing today concerning the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves “seizures” of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a “seizure” has occurred.  

Terry, 392 U.S. at 19 n.16.
II. MENDENHALL: SEEDS OF THE INVESTIGATIVE DETENTION

The issue of when a simple encounter became a seizure so as to bring it within the purview of the fourth amendment was answered to some extent by the Supreme Court in *United States v. Mendenhall*.27 The Mendenhall case involved a confrontation between federal narcotics officers and a defendant on the concourse of an airport terminal. The defendant had arrived in Detroit on a commercial airline flight from Los Angeles. She was observed by two agents from the Drug Enforcement Administration (DEA) who claimed that her conduct was characteristic of a drug courier in that her actions met those noted in the government's "drug courier profile."28 The officers approached her and asked to see her ticket, which they discovered bore a different name than did her license. Although the defendant appeared nervous and shaken, she complied when asked to accompany the agents to the DEA office for further questioning. Once she entered the DEA office, an agent asked the defendant if she would consent to the search of her person and her handbag, informing her that she had the right to refuse to do so.29 The defendant responded, "Go ahead." At that point, a policewoman arrived and told the defendant that the search would require her to remove her clothing. The defendant responded that she had a plane to catch, to

27. 446 U.S. 544 (1980). See generally Greenberg, *Drug Courier Profiles*, Mendenhall and Reid: Analyzing Police Intrusions on Less than Probable Cause, 19 AM. CRIM. L. REV. 49 (1981) (examining the Court's decisions regarding searches based upon drug courier profiles and recommending that because "consent" entails inherent evidentiary problems it should be excluded as a justification for "limited intrusive police actions"); Comment, Reformulating Seizures — Airport Drug Stops and the Fourth Amendment, 69 CALIF. L. REV. 1486 (1981) (arguing that determining whether a seizure has occurred is inconsistent with the principles of *Terry* and advocating that airport drug stops are seizures and as such trigger application of the *Terry* reasonableness balancing test); Comment, Mendenhall and Reid: The Drug Courier Profile and Investigative Stops, 42 U. PIT. L. REV. 835 (1981) (analyzing whether, under *Terry*, an investigatory stop can be justified solely on the basis that a person matches certain characteristics which are contained in the drug courier profile); Note, United States v. Mendenhall: DEA Airport Search and Seizure, 16 NEW ENG. L. REV. 597 (1981) (featuring commentary and analysis of Mendenhall and other cases involving DEA stop and seizure); Note, Airport Drug Seizures: How the Federal Courts Strike the Fourth Amendment Balance, 58 NOTRE DAME L. REV. 668 (1983) (discussing Mendenhall).

28. Mendenhall, 446 U.S. at 547 n.1.

29. Id. at 548.
which the agent replied that if no narcotics were found there would be no further delay. The defendant then began to disrobe, removing two packages of heroin from beneath her clothing in the process.

In the course of a much divided opinion, the Supreme Court dissected the police conduct into three stages: (1) the initial stop on the concourse, (2) the removal of the defendant from the concourse to the DEA offices, and (3) the strip search. In response to the government's argument that the defendant had consented to the search of her person, the Court undertook an analysis of whether the defendant's consent was in fact voluntarily given or tainted by earlier police conduct violative of the fourth amendment. In so doing, the Court implied that there were three options available with regard to the initial encounter on the concourse: (1) it was not a seizure; (2) it was a seizure which met the requirements of a "Terry "stop and frisk"; or (3) it was an arrest for which a finding of probable cause was necessary.

Reaffirming the concurring opinions of Justices White and Harlan in Terry and therefore the existence of a simple encounter which invokes no constitutional protections, the Court once again noted that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets" although "ordinarily the person addressed has an equal right to ignore his interrogator and walk away." However, it went on to distinguish such an encounter from a "seizure" subject to fourth amend-

30. Chief Justice Burger and Justices Stewart, Rehnquist, Blackmun, and Powell agreed that there were three phases to the police-citizen encounter at issue in Mendenhall: the initial encounter on the concourse, the removal to the DEA offices, and the strip search. Justices Stewart and Rhenquist validated all three encounters on the basis of consent. They found that the encounter on the concourse did not amount to a seizure which would have vitiated the consent given by Mendenhall in the second and third phases of the encounter. Chief Justice Burger and Justices Blackmun and Powell, however, felt the question of seizure on the concourse was too close and therefore assumed that a seizure had in fact occurred. They nevertheless found this seizure constitutional under the Terry test. They then justified the removal to the DEA offices and the strip search on the basis of Mendenhall's untainted consent. Justices White, Brennan, Marshall, and Stevens dissented.

31. Id. at 553 (quoting Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)).

32. 446 U.S. at 553 (quoting Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring)).
ment review, thereby acknowledging in law the second class of police-citizen confrontation which had been alluded to earlier in *Terry*:

We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.\(^\text{33}\)

Nor was the standard for ascertaining a "seizure" promulgated as a subjective standard dependent upon the subjective belief of either the person "seized" or the intent of police to detain the suspect.\(^\text{34}\) Instead, the Court once again utilized a "reasonable person" standard, ruling that a person is "seized" within the meaning of the fourth amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."\(^\text{35}\) Thus, unless the presence of the officers was "threatening," or there was some physical touching, a compelling tone of voice, or a display of weapons,\(^\text{36}\) a belief by the citizen that he or she was "seized" would under no circumstances be objectively reasonable.\(^\text{37}\) Utilizing this

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33. 446 U.S. at 553-54.
34. See *id.* at 554 n.6, where the Court stated: "We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."
35. *Id.* at 554.
36. *See id.*
37. The Court specifically refused to recognize as relevant to the existence of a seizure the fact that the person made statements or acted in a manner contrary to his or her interests. *See id.* at 555-56. Therefore, no matter what the feelings of the citizen, if these feelings are not supported by objectively identifiable police conduct, they are of no consequence to the determination of whether a seizure occurred.

The Supreme Court has most recently applied this same standard in the case of *Immigration and Naturalization Serv. v. Delgado*, 104 S. Ct. 1758 (1984). The Court determined that the actions of Immigration and Naturalization Service agents in systematically moving through a factory to inquire as to workers' citizenship while other INS agents were stationed at each exit did not constitute a fourth amendment seizure of the factory's work force. In a decision which Justice Brennan characterized as being "rooted more in fantasy than in the record," *id.* at 1769 (Brennan, J., dissenting), the majority concluded that although agents were stationed at the factory exits,
standard, Justices Stewart and Rehnquist found no seizure in any of the police activities which occurred on the concourse and justified the removal to the DEA offices and the strip search on the basis of consent, untainted by any unconstitutional DEA conduct on the concourse.38

Chief Justice Burger and Justices Powell and Blackmun joined in that determination.39 However, they found the question of the existence of a seizure on the concourse extremely close and assumed therefore that the stop did in fact constitute a seizure.40 Nevertheless, it was their determination that such conduct by the DEA officers could be justified under the principles enunciated in Terry.

Thus, Chief Justice Burger and Justices Powell and Blackmun took up the issue left undecided by the majority in Terry and in fact recognized the applicability of Terry principles to a police stop or a police detention for purposes of investigation.41 Utilizing the first prong of the Terry test, the justices encountered little difficulty in ascertaining a compelling governmental interest in detecting "those who would traffic in deadly drugs for personal profit,"42 and in ascertaining that the intrusion upon Mendenhall's privacy was minimal.43 Nor did they perceive any problem in justifying the officer's action in detaining Ms. Mendenhall. Despite Justice Powell's statements to the contrary,44 it was the

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displayed badges, carried walkie-talkies, and were armed, there was nothing in their conduct to suggest an intent to prevent people from leaving. 104 S. Ct. at 1763. Instead, the Court determined that "the obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." Id. The "mere possibility" that workers would be questioned if they sought to leave should not, therefore, have resulted in "any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." Id. at 1764 (emphasis added).

Although the Court disclaims any decision on the precise issue, id. at 1762, it seems apparent that whatever "objective" Mendenhall factors may be present, mere questioning of an individual by police, without more, does not constitute a seizure of the person under the fourth amendment.

38. See Mendenhall, 446 U.S. at 558-60.
39. See id. at 560 (Powell, J., concurring).
40. See id.
41. See id. at 560-61 (citing Terry for the general proposition "that a reasonable investigative stop does not offend the Fourth Amendment.").
42. Id. at 561.
43. Id. at 562-63.
44. Id. at 565 n.6.
fact that Mendenhall's conduct on the concourse met the government's drug courier profile that clearly qualified as an articulable basis for the suspicion of criminal activity. Having established that her detention on the concourse was constitutionally justifiable, her consent to be removed to the DEA offices and her consent to the search of her person while in those offices was constitutionally sound. The concurring justices, therefore, did not proceed further to analyze the reasonableness of the scope of the intrusion upon her person while on the airport concourse.

III. Summers: Investigative Detention

The categorical extension of Terry stop-and-frisk principles to those situations involving limited intrusions or investigative detentions which fall short of an arrest occurred in Michigan v. Summers. Utilizing a process of inductive reasoning from the holdings of such cases as Terry, Adams v. Williams, United States v. Brignoni-Ponce, and United


46. 407 U.S. 143 (1972). The Adams case was the Court's first appreciable discussion of Terry. In Adams a reliable informant told a police officer that a man in a car carried a gun at his waist and narcotics in his car. The officer approached the car and asked the suspect to step out of the car. The suspect rolled down his window instead. The officer then reached through the window and removed a gun from the suspect's waist, precisely where the informant said it would be. A subsequent search of the car disclosed narcotics.

In upholding as reasonable the officer's actions, the Supreme Court stated: "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." Id. at 146. The Court supported its decision by pointing out that the informant was known to the officer and was reliable, the incident took place in an area of high crime, and the officer had reason to fear for his safety. Furthermore, reaching into the suspect's waist was a limited intrusion, necessary to insure the officer's safety. Id. at 146-48.

In separate dissents, Justices Brennan and Douglas took issue with the majority's extension of Terry to "possessory offenses."

47. 422 U.S. 873 (1975). The Brignoni-Ponce case concerned random stops of vehicles near the Mexican border by U.S. Border Patrol agents for the purpose of determining the citizenship of the vehicles' occupants. In this particular case the
INVESTIGATIVE DETENTION

States v. Cortez, 48 a process soundly criticized by Justice Stewart in his dissent, the Summers majority concluded

agents stopped the suspect's car because "its three occupants appeared to be of Mexican descent." Id. at 875. The agents arrested the occupants upon discovering they were illegal aliens. The Court held that the agent's observations did not furnish "reasonable grounds to believe the three occupants were aliens." Id. at 886.

In setting aside the stop as unreasonable, the Court set the parameters of a valid border stop stating:

[B]ecause of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we 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.

Id. at 881 (emphasis added).

Perhaps anticipating its decision in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court went beyond the facts before it and broadly concluded that "except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Brignoni-Ponce, 422 U.S. at 884 (emphasis added).

Within the year, the Court decided United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The case is distinguishable from Brignoni-Ponce in that Brignoni-Ponce involved roving patrol stops while Martinez-Fuerte dealt with stops at permanent checkpoints. In Martinez-Fuerte the Court held that a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens. Martinez-Fuerte, 428 U.S. at 562, 566-67. The Court viewed a roving patrol stop as a more ominous intrusion and observed that "the generating of concern or even fright on the part of lawful travelers . . . is appreciably less in the case of a checkpoint stop." Id. at 558. Cf. United States v. Ortiz, 422 U.S. 891, 896-97 (1975) ("at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause.") (emphasis added).

49. See Summers, 452 U.S. at 706-12 (Stewart, J., dissenting) (criticizing the escalation of limited exceptions to the probable cause requirement for arrest into a "general rule").

Justice Stewart could justify only two limited types of seizures warranting less than probable cause. See id. at 706. The first exception is the Terry line of cases which allows a limited stop to question an individual and perform a pat-down search for weapons if the officer has reason to believe the suspect may be armed. The second exception is a brief stop of vehicles near the United States border to question occupants about their citizenship, as in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). See Summers, 452 U.S. at 706 (Stewart, J., dissenting).

Stewart saw as a common element in the Terry and border checkpoint exceptions "[s]ome governmental interest independent of the ordinary interest in investigating crime and apprehending suspects . . . ." Id. at 707. In Terry it was the safety of the police officer, in the border checkpoint cases it was the "unique difficulty of patrolling a 2,000-mile long and virtually uninhabited border area . . . ." Id. at 708. Consistent with the special governmental interest inherent in these limited exceptions, Stew-
that there categorically exist some seizures admittedly covered by the Fourth Amend-
ment [which] constitute such limited intrusions on the per-
sonal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity.50

In Summers, the issue was whether the detention of the respondent during the search of his house violated his fourth amendment rights. Police officers had in their possession a validly authorized search warrant for respondent's house and were about to execute it when they encountered the respondent descending the front steps. They requested his assistance in gaining entry to the premises and detained him while they conducted their search.51 After finding narcotics in the basement of the house, the police arrested respondent, searched him, and found heroin in his coat pocket. Respondent was then charged with possession of the heroin found on his person.

Having determined early in the opinion that a limited governmental intrusion upon the rights of an individual could constitutionally survive a finding of less than probable cause,52 the Court proceeded by implication to invoke the Terry test. The Court thus initiated its discussion of the constitutionality of the limited intrusion at issue by balancing the justification for the intrusion, that is, the governmental interest, against the nature of the intrusion itself.53 The particular governmental interests at stake in Summers were typical of preventive law enforcement interests.54 They included: the law enforcement interest in preventing the owner's flight in the event incriminating evidence was found; the interest in minimizing the risk of harm to the officers in

50. 452 U.S. at 699.
51. Id. at 693.
52. See id. at 697, 699.
53. See id. at 701-05.
54. See supra note 22.
that a search warrant might precipitate violent or frantic efforts to conceal or destroy evidence; and finally, the interest in the orderly completion of the search, which would be facilitated by the presence of the owner.55

The Court noted that although the detention of a resident of the premises pursuant to a valid search warrant was admittedly a significant restraint on the resident's liberty,56 it was qualitatively less intrusive than the search of the premises, for which probable cause had already been found by a neutral and detached magistrate, and "substantially less intrusive" than an arrest.57 Proceeding, then, to assess the reasonableness of the police conduct and hence its constitutionality, the Court, consistent with the *Terry* test, required an articulable basis for justifying the detention of the resident.58 That basis existed by virtue of the validly authorized search warrant. The Court stated that if evidence that a citizen's residence is harboring contraband is sufficient to persuade a neutral and detached magistrate to issue a search warrant, thereby justifying an invasion of the resident's privacy in that respect, that same evidence must constitutionally justify the detention of that resident during the search of those premises:

The existence of a search warrant . . . provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.59

Thus, the existence of a validly authorized search warrant itself provided a reasonable and articulable suspicion that the resident or owner of the premises was involved in

55. *See Summer*, 452 U.S. at 702-03.
56. *Id.* at 701.
57. *Id.* at 702 (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).
59. *Id.* at 703-04 (footnote omitted).
criminal activity just as did the defendant's meeting the drug courier profile in *United States v. Mendenhall*.\(^6\) Once again, however, the Court omitted any discussion of the *scope* of the detention — its purpose or length — as affecting the constitutionality of the detention under *Terry*, except to comment in a footnote that a "prolonged detention" or other "special circumstances" might render the detention constitutionally unreasonable.\(^6\)\(^1\) A detention for the duration of the search of the premises, however, was presumably not unconstitutional as to scope, at least insofar as scope involved the element of length of time.

**IV. Royer: Scope Limitations**

The importance of *Florida v. Royer*\(^6\)\(^2\) lies, to some extent, in the fact that for the first time the Supreme Court attempted to assess the impact of the third prong of the *Terry* test — that the officer's conduct must be reasonably related in scope to the circumstances which justified the intrusion on the citizen's liberty in the first place — to the newly-acknowledged category of investigative or police detentions which fall short of arrest. In *Royer*, as in *United States v. Mendenhall*,\(^6\)\(^3\) there existed three distinct police-citizen confrontations, each of which was subject to judicial review. The first encounter occurred on the airport concourse. Detectives, believing Royer met the drug courier profile by his appearance, mannerisms, luggage, and actions, approached him, identified themselves as police officers, and asked whether he had a moment to speak with them. Royer replied that he did.\(^6\)\(^4\) At the detectives' request, Royer produced his airline ticket and driver's license, which bore different names. When questioned about the discrepancy, Royer explained that a friend had made the plane reservations for him. He became noticeably nervous, whereupon

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60. 446 U.S. 544 (1980).

61. "Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case." 452 U.S. at 705 n.21.


63. 446 U.S. 544 (1980).

64. *Royer*, 460 U.S. at 494.
the detectives identified themselves as narcotics investigators and told Royer they suspected him of trafficking in narcotics.

The second encounter occurred when the detectives, instead of returning Royer’s airline ticket or driver’s license, asked him to accompany them to a large storage closet. Royer said nothing, but accompanied the detectives. Then, without Royer’s consent, the detectives used Royer’s baggage stubs to retrieve his luggage.\textsuperscript{65}

The third and final encounter occurred when detectives asked Royer if he would consent to the search of his suitcases. Royer did not orally respond but instead produced a key and unlocked one of the suitcases, which a detective then opened. Detectives found drugs in that suitcase, whereupon Royer stated that he did not know the combination to the second suitcase. When asked if he objected to detectives forcibly opening the second suitcase irrespective of damage, Royer replied, “No, go ahead.” The second suitcase was thereupon pried open, marijuana was found, and Royer was arrested.\textsuperscript{66} The Florida intermediate appeals court, on motion for rehearing en banc, reversed Royer’s conviction, citing Royer’s removal to the storage closet as an involuntary police confinement which exceeded the “limited restraint of a Terry investigatory stop” and was unsupported by probable cause, thus vitiating any consent manifested by Royer to the search of his luggage.\textsuperscript{67}

Agreeing with the Florida court’s determination, the United States Supreme Court undertook a summarization of police-citizen confrontation. Of some significance was the attempt by the Court to define the parameters of an encounter which did not constitute a seizure or an investigative detention: “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . .”\textsuperscript{68} Nor does

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} 389 So. 2d 1007, 1019 (Fla. Dist. Ct. App. 1980).

\textsuperscript{68} Royer, 460 U.S. at 497 (citing Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979)).
the fact that the officer first identifies himself or herself as a police officer raise the simple encounter to the level of a seizure.69 Thus, at this stage of the simple encounter, the person approached “need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way.”70 More important, however, is the Court’s statement that the citizen’s refusal to listen to the officer or answer his or her questions does not, “without more,” furnish an articulable basis to support a suspicion of criminal activity.71 Thus, a citizen is clearly entitled to tell police officers that he or she has nothing to say, does not wish to talk or will not answer questions, and this refusal alone will not translate into an articulable basis for police suspicion of criminal activity so as to warrant any kind of seizure or forcible stop of that person by police. The refusal to listen to police questions will not justify any further detention by police who have no choice but to either allow the citizen to leave or undertake a formal arrest, for which the police must then have probable cause.

There remains unanswered, however, the question of what conduct on the part of the citizen constitutes “something more” so as to support an investigative detention once the citizen refuses to converse with police. For example, does a refusal to answer questions followed by flight from the officer’s presence in and of itself provide an articulable basis giving rise to a suspicion of criminal activity?

Perhaps the greatest significance of the Royer opinion, however, is in its stated application of the “scope” limitations of Terry to investigative detentions:

The scope of the search must be “strictly tied to and justified by the circumstances which rendered its initiation permissible.” The reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement interests. The scope of the de-

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69. 460 U.S. at 497 (citing United States v. Mendenhall, 446 U.S. 544, 555 (1980)).
70. 460 U.S. at 498 (citing Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring)).
71. 460 U.S. at 498 (citing United States v. Mendenhall, 446 U.S. 544, 556 (1980)).
tention must be carefully tailored to its underlying justification.\textsuperscript{72}

The Court went on, however, to articulate a constitutional limitation upon the scope of an investigative detention that had previously been suggested only by way of a footnote: an investigative detention must be "temporary."\textsuperscript{73} Although that condition is clearly reflective of the limiting footnote in the \textit{Michigan v. Summers}\textsuperscript{74} opinion, it is a term which the \textit{Royer} Court at last defined to mean "no longer than is necessary to effectuate the purpose of the stop."\textsuperscript{75} To this first criterion in analyzing the scope of the detention, the Court then added a second: the investigative means employed to effectuate the purpose of the stop must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."\textsuperscript{76}

Applying these stated criteria to the investigative detention at issue in \textit{Royer}, the Court apparently determined that at the time of the first confrontation — when Royer was initially approached on the concourse and agreed to speak with police officers — there existed nothing more than a simple encounter, or, as the Court termed it, "a consensual inquiry in a public place,"\textsuperscript{77} which was not subject to fourth amendment scrutiny. However, when police officers entered upon the second encounter — withholding Royer's ticket and removing him to a storage closet — a seizure had occurred:

Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that "a reasonable person would have be-

\textsuperscript{73} 460 U.S. at 500.
\textsuperscript{74} 452 U.S. 692, 705 n.21 (1981). See \textit{supra} note 61 for the text of the footnote.
\textsuperscript{75} \textit{Royer}, 460 U.S. at 500.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} \textit{Id}. at 503.
lieved he was not free to leave.”

Having thus determined that a seizure occurred, it became necessary for the Court to undertake an analysis of whether the police had a reasonable and articulable basis for suspecting that Royer was engaged in criminal activity. The Court concluded that such a basis in fact existed when the officers discovered that, coupled with Royer’s general conduct and appearance, he was traveling under an assumed name and had paid cash for a one-way ticket. Such factors constituted “adequate grounds for suspecting Royer of carrying drugs” and justified a temporary detention of him and his luggage while police “attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention.” Yet, despite these findings, the Supreme Court reversed Royer’s conviction because at some point the permissible scope of the investigative detention had been exceeded, resulting in a constructive arrest for which there existed no probable cause.

The issue which remained, therefore, was the manner in which the scope of Royer’s detention was exceeded such that police had in fact subjected him to a constructive arrest. In its discussion of the issue, the Court once again suggested that, under Terry, the scope of an investigative detention must be limited in the two ways noted earlier. First, the investigative detention must be temporary; that is, it must last “no longer than is necessary to effectuate the purpose of the stop.” Second, the investigative means employed to effectuate the purpose of the stop must be “the least intrusive means reasonably available to verify or dispel the officer’s

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78. Id. at 501-02 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
79. 460 U.S. at 501-02.
80. Id.
81. Id.
82. For a discussion of what constitutes a traditional legal arrest, see generally 2 W. LAFAVE, supra note 4, § 5.1. However, as distinguished from the traditional arrest, a constructive arrest occurs by operation of law when the actions of police, during the course of an investigative detention, exceed the purpose or scope limitations. Such seizures must then be founded upon probable cause rather than simply a reasonable suspicion of criminal activity in order to be constitutional under the fourth amendment.
83. Royer, 460 U.S. at 500.
INVESTIGATIVE DETENTION

suspicions in a short period of time."\textsuperscript{84} However, implicit in the Court's discussion of the second limitation is the suggestion that once a citizen has been legitimately stopped on a reasonable suspicion of criminal activity, the only purpose for which he or she may be further detained is to verify or dispel the officer's particular suspicion of criminal activity.

Thus, the \textit{Royer} Court concluded that "at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity."\textsuperscript{85} In short, a constructive arrest had evolved from what had begun as an investigative detention because at the moment Royer produced his key, both the purpose of the investigative detention and the means utilized to effectuate its purpose had been exceeded.

As noted earlier, once a suspect has been legitimately stopped on suspicion of criminal activity, the only justifiable purpose for detaining the suspect further is to verify or dispel the officers' suspicions that he or she is involved in criminal activity. That purpose was apparently exceeded in \textit{Royer} because when the officers transferred the site of the encounter from the concourse to the DEA offices, their primary interest was not in having an extended conversation with Royer about his activities, "but in [determining] the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated to the police room."\textsuperscript{86} Thus, the Court concluded that "[t]he record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room . . . ."\textsuperscript{87}

The entire rationale adopted here by the Supreme Court makes no sense unless one assumes that the Supreme Court at some point concluded that the suspicion upon which DEA officials stopped Royer in the first place on the concourse was that he carried drugs \textit{on his person}. Therefore, to be

\textsuperscript{84.} \textit{Id.}
\textsuperscript{85.} \textit{Id.} at 502.
\textsuperscript{86.} \textit{Id.} at 505.
\textsuperscript{87.} \textit{Id.}
constitutional, the removal to the DEA offices could only properly have been necessary to confirm or deny that suspicion. Since DEA officials here removed him to verify or dispel a suspicion that his luggage contained contraband, however, the original purpose for which Royer was detained was exceeded, resulting in the finding that his removal was unconstitutional.

One is left to conclude that had police officers simply been savvy enough to question Royer about the contents of his luggage before they removed him from the concourse, the scope of the investigative detention would not have been exceeded by his removal to the DEA offices. In the alternative, the Court noted, had the police removed Royer for purposes of “security and safety,” and thereafter obtained his consent to the search of his luggage, the search might also have been permissible. To remove him for the purpose of obtaining his consent to search his luggage, however, was clearly improper under the circumstances. All of this suggests, of course, that the scope of the investigative detention, at least in terms of the purpose restriction, is almost exclusively within the control of the police officers initiating the stop, so long as they have a “reasonable and articulable basis” for suspecting some type of criminal activity.

Following its discussion of the “purpose” aspect of the scope of an investigative detention, the Court on its own initiative took up an additional issue. Perhaps anticipating its later decision in United States v. Place, which had already been argued, the Court determined that the scope of the investigative detention in Royer was also exceeded because the means utilized by police were not the least intrusive means available. Inasmuch as there was no suggestion in the record that trained sniff dogs were “not feasible and available,” the Court concluded that the contents of Royer’s luggage could have been legally investigated in a more expeditious and less intrusive manner.

88. Id.
89. 103 S. Ct. 2637 (1983).
90. Place was argued on March 2, 1983, which was after oral arguments in Royer but before the March 23rd Royer decision.
91. Royer, 460 U.S. at 506.
92. Id. at 506.
Although never directly decided in Royer, there is implicit in this conclusion the suggestion that Royer's luggage as well as his person could have been momentarily detained and subjected to an "investigation" upon the same suspicion of criminal activity that justified the investigative detention of his person:

[T]he State has not touched on the question of whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out . . . .93

The issue of the investigative detention of personalty was not specifically addressed by the Court until Place. Yet it is clear from the Royer decision that the police officers had two options at the point of the "seizure" of Royer on the concourse. First, they could have obtained Royer's consent to search his luggage during the investigative detention on the concourse. In the alternative, they could have momentarily detained his luggage upon the same suspicion of criminal activity that justified the detention of his person and then verified or dispelled their suspicions as to his luggage by the least intrusive means possible — the use of trained dogs.

Once again, however, there remains the issue footnoted by Justice Brennan in his concurring opinion: whether it will ever be constitutional to pry luggage open pursuant to a suspicion that such luggage contains contraband, simply because of the unavailability of trained dogs or any other less intrusive means.94 Brennan's concern was that an investigative detention which is otherwise unreasonable could become reasonable simply because of the unavailability of a less intrusive means. The plurality opinion omits any response to this issue, relying instead upon the necessity of a case-by-case analysis: "We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter

93. Id. (emphasis added).
94. See id. at 511 (Brennan, J., concurring) (asterisked material).
from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. However, it appears that without such a litmus-paper test or at least some indication of a bottom line for ascertaining the “least intrusive means,” this prong of the investigative detention test is fraught with constitutional infirmities not unlike those suggested in Kolender v. Lawson. In Kolender the Supreme Court ruled unconstitutionally vague a state statute which criminalized the failure of a person stopped on suspicion of criminal activity under Terry to provide “'credible and reliable' identification when requested by a police office.” As noted by the Court, the statute at issue contained “no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification. As such the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.”

So, too, without some further delineation of the parameters of “least intrusive means,” this standard vests almost complete discretion in the hands of police to determine what means and indeed how much information is necessary to confirm or dispel their suspicions of criminal activity. The implication in Royer clearly exists that had police officers inquired on the concourse about Royer’s luggage and been unable thereafter to secure the trained sniff dogs, they might well have been constitutionally permitted to pry open his luggage without ever securing a warrant.

V. IMPACT OF PLACE

As Michigan v. Summers categorically extended Terry

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95. 460 U.S. at 506.
96. 103 S. Ct. 1855 (1983).
97. Id. at 1857-58. Although the constitutional issues necessarily differed in view of the attack upon the statute in Kolender, the fact remains that the standard promulgated in Royer allows police virtually unfettered discretion in ascertaining the quantity and means of securing whatever information is necessary to confirm or dispel their suspicions of criminal activity.
98. 103 S. Ct. at 1859.
principles, so *United States v. Place* perverts them. The *Place* decision, as Justice Brennan stated, "finds no support in *Terry* or its progeny and significantly dilutes the Fourth Amendment’s protections against government interference with personal property."\(^\text{101}\)

In *United States v. Place* the Supreme Court addressed the question of whether officers can seize and investigatively detain the luggage of a person about whom they have a reasonable and articulable suspicion of criminal activity. As in *United States v. Mendenhall*\(^\text{102}\) and *Florida v. Royer*,\(^\text{103}\) the *Place* Court was concerned with an airport investigative detention of an individual suspected of trafficking in narcotics. *Place* was observed by law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to La Guardia Airport in New York. As he proceeded to the gate to board his flight, officers approached him and asked for his airline ticket and identification.\(^\text{104}\) *Place* complied with the request and consented to the search of his two pieces of checked luggage, but because his flight was about to depart, the officers declined to detain him further or search his luggage. Nevertheless, the officers did inspect the

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\(^{100}\) 103 S. Ct. 2637 (1983). *See generally* 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 (1982) (contending that Supreme Court precedent does not permit a court to construe the fourth amendment reasonableness clause as allowing warrantless seizures of luggage in airport narcotics investigations based upon a mere reasonable suspicion).

\(^{101}\) *Place*, 103 S. Ct. at 2649 (Brennan, J., concurring). The majority ignores the cogent argument of Justice Brennan. Although *Terry* stops may involve seizures of personality incidental to the seizure of the person, since an officer cannot seize the person without also seizing the personality in that person’s possession at the time, there remains a constitutional distinction between such incidental seizures and seizures of property which are independent of the seizure of the person. Since the fourth amendment protects both an interest in retaining possession of property and an interest in maintaining personal privacy, the seizure of property, irrespective of a search, implicates a protected fourth amendment interest. Thus, seizures of property must likewise be premised upon probable cause. *Id.* at 2649.

The decision in *Place*, therefore, significantly expands the scope of a *Terry* stop in that it permits a seizure of luggage, independent of the seizure of the person, upon a showing of something less than probable cause. In this respect, the *Place* decision also represents a radical departure from well-established fourth amendment principles.

\(^{102}\) 446 U.S. 544 (1980).

\(^{103}\) 103 S. Ct. 1319 (1983).

\(^{104}\) *Place*, 103 S. Ct. at 2639-40.
address tags on respondent's checked luggage and noted discrepancies in the two street addresses. Their further investigation revealed that neither address existed and that the telephone number Place had given them was likewise fictitious. On the basis of this information, the Miami agents contacted DEA authorities in New York who then waited for Place at La Guardia.

After Place had claimed his bags, the New York agents stopped him and identified themselves as federal narcotics agents. They informed him that from their observations of him and information relayed to them by Miami agents, they believed he might be carrying narcotics. They then requested and received identification from Place. When he refused to consent to a search of his luggage, however, one of the agents took the luggage, informing Place that he intended to request a search warrant and that Place was free to accompany them. Place declined. The agents then took his luggage to Kennedy Airport where it was subjected to a sniff test by a trained narcotics detection dog. This procedure worked to deprive Place of his luggage for approximately ninety minutes. The dog reacted positively to one of the bags and ambiguously to the other. Since the event transpired late Friday afternoon, however, the agents retained the luggage until Monday morning, at which time they secured a warrant to search the other bag. Upon opening that bag, the agents discovered cocaine.

Writing for the majority, Justice O'Connor framed the issue so as to come precisely within the situation suggested by the Royer Court: "[W]hether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics." In responding negatively to this issue, though ultimately finding a constitutionally impermissible detention, the Supreme Court made an unqualified leap in the application of Terry. What was originally contemplated as a test for the reasonableness of a seizure of the person under very limited circumstances had evolved

105. Id. at 2640.
106. Id. at 2639.
into a test for the independent investigative seizure of property — a matter which finds no support in Terry or its progeny, save for the dicta in Royer.

The Court began its analysis, therefore, not with a consideration of the language of Terry, but with a citation to the language of Michigan v. Summers, which, as previously indicated, had categorically broadened the limited exception to the probable cause requirement stated in Terry. Thus, O'Connor's initial premise in Royer, that "[i]n Terry the Court first recognized 'the narrow authority of police officers who suspect criminal activity to make limited intrusion on an individual's personal security based on less than probable cause,'" is not a reflection of Terry at all, but is instead a Summers statement justifying the extension of Terry principles.

The Place Court noted that ownership of property, like "personal liberty," is susceptible to varying degrees of intrusion. It observed that, just as there are some seizures of the person which are significantly less intrusive than arrest, there may be some seizures of personalty which are significantly less intrusive than a complete loss of custody and control. Thus, the court reasoned that the fourth amendment rationale for a Terry stop is likewise applicable to investigative detentions of personalty. It concluded:

Given the fact that seizures of property can vary in intrusiveness, some brief detentions 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.

108. Place, 103 S. Ct. at 2642 (quoting Michigan v. Summers, 452 U.S. 692, 698 (1981)).
109. 103 S. Ct. at 2643 ("The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent.").
110. Place had argued the inapplicability of the Terry rationale to his facts because, unlike a seizure of the person, there existed no degrees of intrusion with respect to the seizure of personalty. He argued that "[o]nce the owner's property is seized, the dispossession is absolute." Id. The Court, however, apparently turned the argument to that argument into one of the bases for extending Terry to personalty. Absent this discussion, it is difficult to ascertain any basis at all upon which the Court extended Terry.
111. Id. at 2644.
Such "strong countervailing governmental interests" were, of course, found to be present in *Place*, just as in *Mendenhall*, because of the compelling governmental need to apprehend persons who traffic for profit in contraband. In making that determination, the Court specifically rejected the argument of Justice Stewart in his dissent in *Summers*, which was echoed by *Place*, that "a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause." The Court emphasized that the balancing test is between the individual's fourth amendment rights and those governmental interests which are "sufficiently substantial," not governmental interests which are "independent of the interest in investigating crimes effectively and apprehending suspects."

The second phase of the *Terry* reasonableness test as applied to the luggage required, as indicated, "specific articulable facts that the property contains contraband." In this respect, as in others noted earlier, an important question remains unanswered by the Court: that is, whether a reasonable suspicion that an individual is trafficking in narcotics will be sufficient to constitute a reasonable suspicion that his or her luggage likewise contains narcotics. For example, if a traveler meets the drug courier profile and there exists a reasonable suspicion that the person is trafficking in narcotics, does there then necessarily exist a reasonable suspicion to detain his or her luggage? There appears to be little doubt under the facts in *Place*. The Court undertook no discussion of whether there existed a reasonable suspicion that *Place*'s luggage contained narcotics. Such an omission is understandable if in fact the issues are identical, since the Court had previously denied certiorari on the issue of reasonable suspicion to believe *Place* was engaged in criminal activ-

112. *Id.* at 2643. See also *Michigan v. Summers*, 452 U.S. 692, 707 (1981) (Stewart, J., dissenting), in which Stewart stated: "The common denominator of the *Terry* cases . . . is the presence of some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, an interest important enough to overcome the presumptive constitutional restraints on police conduct."

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

114. *Id.* at 2644.
INVESTIGATIVE DETENTION

ity. The question nevertheless remains, particularly where, as here, the suspect is then released.

The investigative detention of Place's luggage ultimately failed the constitutional test of reasonableness because the scope of the investigative detention of his luggage had been exceeded, resulting in the constitutional necessity of probable cause. The Government had argued for a broader scope to the investigative detention of luggage or personalty than that employed to test the investigative detention of a person, reasoning that "seizures of property are generally less intrusive than seizures of the person." Acknowledging that the Government's premise might be true in some cases, the Court nonetheless rejected that argument in cases involving detention of luggage seized from a suspect's custody because "such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return."

Therefore, the Court concluded that "when the police seize luggage from the suspect's custody" the limitations which define the scope of investigative detentions of the person must necessarily define the scope of an investigative detention of luggage based on less than probable cause. Applying the criteria established by the Terry decision and clarified in the Royer decision, the Court determined first that the canine sniff was, because of its unique nature, a constitutionally proper investigative procedure:

[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the

115. *Id.*
116. *Id.* at 2645.
117. *Id.* at 2645.
118. *Id.*
119. *Id.*
meaning of the Fourth Amendment. Thus, what was implied in the Royer decision became law in the Place decision.

The detention of Place's luggage, however, exceeded the scope of an investigative detention because of the length of time the luggage had been detained by the New York agents. Although the Court specifically declined to adopt any outside time limitation for a permissible Terry stop, it nevertheless concluded that the ninety-minute period of time at issue in Place was unreasonable under the circumstances presented: "[W]e have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case." The Court pointed out that the New York agents knew the time of Place's scheduled arrival at La Guardia and had ample time to have arranged for the canine sniff test at that location, rather than removing his luggage to Kennedy Airport. They could therefore have minimized the intrusion upon Place's fourth amendment interests. Moreover, the Court determined that the violation of Place's fourth amendment rights was exacerbated in this instance by the DEA agents' failure to accurately inform respondent of the place to which they were transporting his luggage, the length of time he might be dispossessed, and the arrangements that would be made for the return of the luggage if the investigation dispelled their suspicion. The impact of these additional criteria upon the scope limitation is, of course, critical if the issue becomes whether police planted the contraband.

VI. CONCLUSION: THE CONSTITUTIONAL TEST

A study of the investigative-detention evolution discloses that since 1968 there have emerged three types of police-citizen confrontation, each requiring different constitutional protections. At one end of the spectrum there is the simple

120. Id.
121. Id. at 2644-45.
122. Id. at 2646. For comparison, the Court noted that the A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975), recommends a maximum of twenty minutes for a Terry stop. 103 S. Ct. at 2646 n.10.
123. 103 S. Ct. at 2646.
124. Id. at 2645-46.
encounter which does not constitute a seizure and carries with it no constitutional protection. At the other end of the spectrum there exists an arrest which requires probable cause. The remaining encounters which have categorically achieved Supreme Court recognition are "seizures" which fall short of an arrest — artfully termed "investigative detentions." These are identified as situations in which a reasonable person, in view of all the circumstances, believes that he or she is not free to leave because of some identifiable conduct on the part of law enforcement officers. Whether such seizures are constitutional is dependent upon whether they qualify as "reasonable" under the fourth amendment.

The constitutional test of reasonableness requires at its threshold a balancing of the legitimate governmental interests against the nature of the intrusion. It appears here that the Court is most liberal in its assessment of the weight of preventive law enforcement interests. If that balance weighs in favor of the government, the next step is to assess the reasonableness of police conduct. There are two phases for ascertaining the reasonableness of the police conduct. First, the officer's action must be justified at its inception; there must exist a reasonable and articulable basis giving rise to a suspicion of criminal activity on the part of the suspect. Second, the scope of the officer's conduct must be reasonably related to the justification for the detention.

The scope of the detention is in turn reasonably related to the justification for the detention if: (1) it is confined to the purpose for which the suspect was originally stopped (a matter largely within the discretion of law enforcement officers); (2) it is temporary and lasts no longer than is necessary to either effectuate the purpose of the stop or dispel the officer's initial suspicion; and (3) the methods used to either effectuate the purpose of the stop or dispel the officer's initial suspicion are the least intrusive means reasonably available. If the scope of the detention is exceeded in any of these respects, there is no longer merely an investigative detention but a constructive arrest, for which probable cause must exist.

Although the test is capable of delineation at least to this extent, it far from insures legitimate constitutional limitation upon preventive law enforcement practices. Furthermore, as
indicated by the *Place* opinion, the same test is ostensibly applicable to the seizure of luggage or like personalty within the possession of a suspect if there exists a reasonable and articulable basis for suspecting that such personalty contains contraband.