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WARRANTLESS INVESTIGATIVE SEIZURES OF REAL AND TANGIBLE PERSONAL PROPERTY BY LAW ENFORCEMENT OFFICERS

Steven G. Davison*

I. INTRODUCTION

The fourth amendment of the United States Constitution\(^1\) protects two types of expectations—expectations involving "seizures" and expectations involving "searches."\(^2\) The protections of the fourth amendment do not apply to a par-

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1. The fourth amendment of the United States Constitution 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.

Although the fourth amendment regulates only the conduct of federal officials, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), the conduct of state and local government law enforcement officers is regulated by the fourteenth amendment in exactly the same manner as that of their federal law counterparts. Ker v. California, 374 U.S. 23, 33 (1963).

2. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Neither the interest protected by the fourth amendment injunction against unreasonable searches nor its injunction against unreasonable seizures "is of inferior worth or necessarily requires only lesser protection." Arizona v. Hicks, 107 S. Ct. 1149, 1154 (1987). The Court in Hicks asserts that the Supreme Court has never "drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action." Id.

"In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the fourth amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, 462 U.S. 696, 701 (1983) (footnote and citation omitted). However, some exceptions to this general rule requiring a warrant for a seizure of property have been recognized. Id. at 701-02; see Segura v. United States, 468 U.S. 796 (1984) (discussing "securing-of-the-premises" exception to this general rule); United States v. Jacobsen, 466 U.S. 109 (holding fourth amendment's protection inapplicable to search or seizure effected by private individual). An exception to this general rule may be recognized either when there are exigent circumstances, or when the importance of the governmental interests are found to outweigh the nature and quality of the intrusion. See United States v. Jacobsen, 466 U.S. at 123 (chemical test that merely discloses whether or not substance is cocaine does not compromise fourth amendment interest); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (exigent circumstance may present exception to warrant requirement). This balancing test for measuring the reasonableness of a particular warrantless practice "usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

The fourth amendment also ordinarily requires law enforcement officers to have probable cause...
ticular method of criminal investigation unless the method is either a "search" or a "seizure." Furthermore, an item of evidence obtained by police will not be excluded under the fourth amendment at a defendant's trial unless the item was obtained by means of an unreasonable search or seizure, was the fruit of an unlawful arrest, or was otherwise the fruit of a violation of the defendant's constitutional rights. A particular investigatory method may be held to be a seizure but not a search under the fourth amendment.

In a number of cases decided in the last twenty years, the United States Supreme Court has addressed the issue of when a fourth amendment search occurs. In addition, the Supreme Court has over the years given considerable attention to the issue of when a fourth amendment seizure of a person occurs in cases dealing with arrests, stops and frisks, and other investigative deten-
tions of a person. But not until 1984, in *United States v. Jacobsen*, did the Supreme Court provide, within the meaning of the fourth amendment, a definition of a seizure of property. Furthermore, except for cases addressing warrantless "plain view" seizures and one case involving the temporary detention of mail, only since 1983 has the Supreme Court decided cases involving warrantless seizures of property.

In these recent cases, the Supreme Court has recognized a number of situations where warrantless seizures of real and tangible personal property do not violate the fourth amendment. "Permanent" seizures of personal property

15. The Court has not addressed the issue of whether intangible personal property can be subject to a seizure within the meaning of the fourth amendment. This Article will not analyze this issue since criminal cases involving the admissibility of intangible personal property are unlikely to arise because such property rarely would seem to have a nexus to criminal activity. See *Warden v. Hayden*, 387 U.S. 294, 307 (1967) ("There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior").
16. The term "permanent" seizure is used in this Article to refer to: (1) situations when the government obtains title to part or all of an item that has been seized (or the right to deny title to or possession of part or all of the item to a particular person or persons), (2) situations when the government destroys the item or a part thereof, (3) and situations when the state retains possession of the item seized until the termination of the criminal proceedings in which the item has been introduced in evidence.

Examples of the first type of permanent seizure include the seizure of contraband (property the possession of which is a crime), the seizure of stolen property, the seizure of instrumentalities of crime and the seizure of items which transported contraband or which were purchased with income generated by crime. *In re* Special Investigation No. 228, 54 Md. App. 149, 170-74, 458 A.2d 820, 831-33 (1983). An example of the second type of permanent seizure is when government agents conduct a "field" test on a substance, such as a process involving a chemical test that destroys a small amount of a substance and identifies the substance. United States v. Jacobsen, 466 U.S. 109, 124-25 (1984). Examples of the third type of permanent seizure involve items eventually returned to the person from whom they were seized. They include items such as evidence of a crime and lawfully possessed weapons taken from an arrested person to protect police or the public from harm or a potential escape. United States v. Robinson, 414 U.S. 218, 226 (1973).

Such items may be recoverable pursuant to statutory procedures when the government has no further need for the property, such as when criminal charges are dismissed, the person is acquitted of criminal charges, or the time for appeal of a criminal conviction by a defendant has expired. See *In re* Special Investigation No. 228, 54 Md. App. 149, 458 A.2d 820 (discussing statutory scheme addressed to circumstances under which property seized should be restored to
without a search warrant have been authorized by the Court in several situations.\textsuperscript{17} The Court also has authorized "temporary" seizures\textsuperscript{18} of personal property without a search warrant in other circumstances.\textsuperscript{19}

This Article analyzes the Supreme Court's decisions with respect to the lawfulness under the fourth amendment of warrantless seizures of real and personal property by law enforcement officers during criminal investigations.\textsuperscript{20} Part II of the Article analyzes general principles under the fourth amendment governing "seizures" of property used as evidence in criminal trials. This part of the Article first analyzes the types of real and personal property that are protected under the fourth amendment's prohibition of unreasonable seizures. The types of property that law enforcement officers are authorized to seize under the fourth amendment, with or without a warrant, are discussed in Part II.B of the Article. Part II.C analyzes the Supreme Court's definition of a seizure of property under the fourth amendment, which provides the fourth amendment's protection against unreasonable seizures of property only to persons with undefined "possessory" interests in that property. A thesis of this part of the Article is that the definition of a seizure of property should be expanded to provide fourth amendment protection to persons who have non-possessory interests in property. In Part II.D of the Article, the uncertain is-

\begin{footnotesize}
\item[18.] The term "temporary" seizure is used in this Article to refer to situations when property is seized for the time necessary to obtain a search warrant authorizing police to seize permanently the property or an item of property located within that property. \textit{E.g.}, Segura v. United States, 468 U.S. 796; United States v. Jacobsen, 466 U.S. at 121 (discussing various cases addressing this issue). The term also refers to situations in which an item is seized for a period of time necessary to investigate whether the item or its contents provide a nexus to criminal activity. \textit{See, e.g.}, United States v. Place, 462 U.S. 696 (police possessed authority to briefly detain luggage reasonably suspected to contain narcotics). The results of an investigation during the latter type of temporary seizure may cause the police to make a permanent seizure of an item of property or to continue the seizure of the item of property for the period of time necessary to obtain a search warrant authorizing a permanent seizure of an item. \textit{Id} at 702-03.
\item[20.] This Article will not analyze warrantless seizures that are incident to the seizure of a person for investigatory purposes, nor those incident to the seizure of property for the collection of taxes or the enforcement of liens, nor those incident to seizure of property by prison officials from inmates. \textit{E.g.}, Hudson v. Palmer, 468 U.S. 517 (1984); G.M. Leasing Corp. v. United States, 429 U.S. 338, 351-52 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976). This Article also does not analyze warrantless seizures of property by administrative agency inspectors during non-criminal code enforcement inspections. \textit{See} Davison, \textit{Fourth Amendment and Statutory Limitations on Entry and Inspection of Commercial Property in Environmental Enforcement}, 3 U.C.L.A. J. of ENVTL. LAW 75, 110-11, 113-17 (1982) (examining limitations that fourth amendment places upon inspections by government agents enforcing federal environmental statutes).
\end{footnotesize}
issue of when a person has the right ("standing") to seek to suppress property seized by law enforcement officers and offered as evidence at that person's criminal trial is analyzed. The Article proposes in this part that a person should have the right to seek to suppress an item of property offered as evidence at their criminal trial if law enforcement officers obtained the item through a seizure in violation of that person's own fourth amendment rights.

Parts II-VIII of the Article analyze Supreme Court decisions that have identified situations where warrantless seizures of property by law enforcement officers have been held not to be unreasonable and thus not in violation of the fourth amendment. Supreme Court decisions holding that a warrantless seizure of property in "plain view" does not violate the fourth amendment are analyzed in Part III. The Article concludes in this part that although precedents cited by the Court in support of this plain view doctrine do not support the doctrine, the policy considerations cited by the Court do support the Court's definition of the doctrine.

In Part IV, the Article analyzes the doctrine that authorizes a warrantless search of an item of property that does not support any justifiable expectation of privacy. The Article concludes that this doctrine, the exact contours of which remain uncertain, is supported by policy considerations even though the precedents cited by the Court do not authorize the doctrine.

Supreme Court decisions authorizing law enforcement officers to seize property without a warrant for investigative purposes are discussed in Parts V and VI of the Article. Part V discusses a Court decision authorizing a law enforcement officer, without a search warrant, to conduct a field test (a test which determines only whether or not a substance is cocaine) on a substance which the officer has lawfully seized and has reason to believe is cocaine. A Court decision discussed in Part VI.A authorizes a law enforcement officer, without a search warrant, to detain mail temporarily for investigative purposes when the officer has reasonable suspicion (short of probable cause) that the mail contains contraband. In Part VI.B, the Article discusses another Court decision that authorizes a law enforcement officer, without a search warrant, to seize temporarily luggage which is reasonably suspected to contain contraband narcotics, for the purpose of exposing it to a trained narcotics detection dog. The Article concludes the these decisions are supported by policy considerations.

The Article next analyzes, in Part VII, dicta in various Court decisions authorizing a warrantless seizure of property when necessary to prevent the property from being lost, removed, or destroyed. The Article finds that the Court has not made clear in this dicta whether such seizures can be made when police only have reasonable suspicion (short of probable cause) that the property in question will be lost, removed or destroyed. However, policy considerations might authorize a warrantless seizure of property by a law enforcement officer when he has only such reasonable suspicion. Part VIII analyzes a doctrine approved by the Court that authorizes a law enforcement officer, without a search warrant, to enter a person's residence and remain inside while other officers seek to obtain a search warrant to seize items of property in the resi-
dence, when the officers have the requisite probable cause for issuance of the warrant. The Article concludes that this "securing-of-the-premises" doctrine is bad law because the doctrine allows warrantless securing of a person's residence despite the fact that the warrantless entry required to secure the premises is assumed to be an unreasonable search. The doctrine is also bad law because it does not require the officers to establish that they had probable cause (or even reasonable suspicion) to believe that the property they sought to seize would be lost, removed or destroyed if the residence were not secured. Nor does it require the officers to show why the loss, removal or destruction of the property sought could not have been prevented by securing the premises from the outside rather than from within.

The Article finds that a number of the doctrines discussed in Parts III-VIII authorizing warrantless seizures of property present problems for law enforcement officers, courts and members of the public, because they fail to indicate whether they apply to factual situations that vary from the facts in the cases where the doctrines were recognized. The Article provides recommendations in the application of these Supreme Court doctrines to varied factual situations.

II. General Principles of the Fourth Amendment Governing Seizures

A. Types of Property Protected

The fourth amendment states that "the right of the people to be secure in their . . . houses, papers and effects against unreasonable seizures . . . shall not be violated." This proscription of unreasonable seizures arguably applies to some types of real property and personal property. However, determining what property enjoys fourth amendment protections and whether certain property will be treated as real or personal may be complicated.

On its face, the fourth amendment protects a person's house from unreasonable seizures. A person's house within the meaning of the fourth amendment appears to include a person's residence whether he owns or rents it. In Oliver v. United States, the Court held that the fourth amendment's protections that apply to the home also apply to the curtilage—"the land immediately surrounding and associated with the home." However, the Court chose

21. U.S. Const. amend. IV.
24. Id. at 180. "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." United States v. Dunn, 107 S. Ct. 1134, 1139 (1987) (citing Oliver v. United States, 466 U.S. at 180). The factors that are of particular importance in determining whether an area is within the curtilage are "the proximity of the area claimed to be curtilage to the home, whether the area is within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." Id.
not to extend these protections to "open fields." Although the Oliver Court focused on whether a trespass by government agents onto the open fields of a person's land was a search under the fourth amendment, the Court made no distinction between the proscriptions against unreasonable searches and unreasonable seizures. The majority in Oliver held that "the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields." The Court added that "the Framers would have understood the term 'effects' to be limited to personal, rather than real property."

Justice Marshall joined by Justices Brennan and Stevens dissented from the Oliver holding that "effects" within the meaning of the fourth amendment do not include real property. Justice Marshall argued that this holding was inconsistent with previous decisions applying the fourth amendment's protections to conversations conducted within public telephone booths and to offices and commercial establishments. Justice Marshall argued that those situations are not covered by the plain meaning of the fourth amendment terms "persons, houses, papers, and effects." Justice Marshall also questioned how the ma-

25. "Open fields" may include any unoccupied or underdeveloped area outside of the curtilage; "open fields' neither have to be 'open' nor a 'field' as those terms are used in common speech." Oliver v. United States, 466 U.S. at 180 n.11 (discussing law enforcement officers' trespass into areas defined as open fields and their observations that were introduced into evidence and used as basis of search warrant). See United States v. Dunn, 107 S. Ct. at 1141 (holding that barn sixty yards from home was outside curtilage).


27. Id. The Court noted that James Madison's proposed draft of the fourth amendment referred to "other property" rather than to "effects" as the fourth amendment does. Id. (citing N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100 n.77 (1937)).

28. Id. at 177 n.7 (citing Doe v. Dring, 2 M. & S. 448, 454 (1814) and 2 Blackstone, Commentaries *16, 384-85). In Doe v. Dring, 2 M. & S. at 454, Lord Ellenborough, Chief Justice, concluded that the term "effects" applied only to personalty and not to real estate. Blackstone's Commentaries distinguishes things real from things personal, but does not refer to the term "effects" in its passages discussing what constituted things personal or personal property. Blackstone, supra, at **384-85. The Oliver Court buttressed its holding on the alternative ground that people do not have a fourth amendment reasonable expectation or privacy in open fields. Oliver v. United States, 466 U.S. at 179. However, this part of the opinion appears to be addressing only the issue of whether a trespass onto open fields is a search within the meaning of the fourth amendment. A search is defined as occurring "when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in the property." Id. A trespass by police officers onto an open field might constitute a seizure if they remained for a significant period of time and denied the owner use and enjoyment of his field.

29. Oliver v. United States, 466 U.S. at 184.


32. Oliver v. United States, 466 U.S. at 185. Justice Marshall noted that although "an automobile surely does constitute an 'effect' . . . [and] should therefore stand on the same constitu-
majority's holding that the curtilage is entitled to fourth amendment protection could be reconciled with its interpretation of the term "effects." He noted that the majority did not explain whether the curtilage is a house or an effect, or why the curtilage, but not an open field, can be protected by the fourth amendment.33

Justice Marshall challenged the majority's holding in Oliver on a second ground. He argued that the majority failed to interpret the fourth amendment in a way that effected the purposes of the Bill of Rights.34 He believed that the majority's holding was inconsistent with the Court's earlier decisions which held that the fourth amendment protects persons "from unreasonable governmental intrusions into . . . legitimate expectations of privacy."35 Justice Marshall argued that the majority's interpretation of the term "effects" was inconsistent with the proposition, adopted earlier in Katz v. United States,36 that the fourth amendment " 'protects people, not places.' "37

The holding in Oliver that the term "effects" does not apply to open fields limits the seizure clause as well as the search clause of the fourth amendment. The fourth amendment right to be secure in one's effects applies to both unreasonable searches and unreasonable seizures.38 Since the fourth amendment's protection against unreasonable seizures does not apply to governmental trespass onto open fields, evidence acquired by government officials while trespassing onto and occupying open fields would not be subject to the exclusionary rule at a criminal trial of the landowner.39 The landowner in such a case, however, may have a claim for damages under the fifth or fourteenth amendments if such a trespass and occupation constitutes a taking of the property.40 He also may claim damages if the governmental trespass and occu-
The open field violates the due process clause of the fifth or fourteenth amendments.\textsuperscript{41}

As noted earlier, the Supreme Court in \textit{Oliver} held that the term "effects" within the meaning of the fourth amendment includes personal property, but not real property or open fields. The Court has also stated, without citation to supporting authority, that footlockers and automobiles are effects under the fourth amendment\textsuperscript{42} and that a parcel "was unquestionably an 'effect' within the meaning of the Fourth Amendment" at the time it was delivered to a private freight carrier.\textsuperscript{43} However, the Court has not otherwise defined or limited the types of personal property that are included within the terms "papers" and "effects." The Court has held that the fourth amendment's protection against unreasonable searches does not extend to a person's personal property, the contents of which are not concealed from plain view,\textsuperscript{44} or which have otherwise lost a legitimate expectation of privacy.\textsuperscript{45} However, the Court has not held that the fourth amendment's protection against unreasonable seizures is inapplicable to such property.\textsuperscript{46} Since the Court has referred to Blackstone's \textit{Commentaries} and early nineteenth century court decisions in interpreting "effects" in the case of a search,\textsuperscript{47} the Court may also look to these or similar sources in defining what personal property constitutes papers and effects in the case of a fourth amendment seizure. If this approach was followed, the term "effects" would encompass tangible items of personal property such as money, goods and movables,\textsuperscript{48} but not intangible items such


\textsuperscript{42} \textit{United States v. Chadwick}, 433 U.S. 1, 12 (1977).

\textsuperscript{43} \textit{United States v. Jacobsen}, 466 U.S. at 114. In dictum, the Court in \textit{Jacobsen} also indicated that "letters and other sealed packages" are "effects" within the meaning of the fourth amendment. \textit{Id}.


\textsuperscript{46} No such limitation is appropriate because the fourth amendment's protection against unreasonable searches is designed to protect legitimate privacy interests, \textit{Katz v. United States}, 389 U.S. 347, while the fourth amendment's protection against unreasonable seizures is designed to protect possessory interests in property. \textit{United States v. Jacobsen}, 466 U.S. at 125; see infra text accompanying notes 64-67 and accompanying text (discussing differences in definition of what constitutes search and what constitutes seizure under fourth amendment). Although the nature of a container may be such that a person has no legitimate expectation of privacy in that item of personal property, the person may still have sufficient possessory interests in such item through ownership or leasehold interests to be entitled to the fourth amendment's protection against unreasonable seizures. \textit{See United States v. Jacobsen}, 466 U.S. at 122 n.22 (quoting \textit{Rakas v. Illinois}, 439 U.S. 128, 143-44 n.12 (1978) (legitimization of privacy expectation must have source outside fourth amendment, such as by reference to concepts of real or personal property law)).

\textsuperscript{47} \textit{Oliver v. United States}, 466 U.S. at 177 n.7; see supra note 28 (discussing sources cited by \textit{Oliver Court}).

\textsuperscript{48} See \textit{generally 2 BLACKSTONE, COMMENTARIES **15-16, 384-85} (defining personal property to include goods, money, and all other moveables).
as debts, corporate stock and copyrights. The term “papers” would encompass letters, diaries and personal and business documents.

B. Items Subject to Seizure Under the Fourth Amendment

“[H]istorically the right to search for and seize property depended upon the assertion by the Government [or complainant] of a valid claim of a superior interest, and . . . it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals.”

Under this approach, the government, even under the authority of a valid search warrant, could seize only stolen property, instrumentalities of crime and contraband. Under this historical rule, objects that were “mere evidence” of a crime could not be seized because the government had no recognized property interest in such items and also because there was “[n]o separate governmental interest in seizing evidence to apprehend and convict criminals.” In 1967, this rule was overturned by the Court in Warden v. Hayden, which noted that the rule prohibiting the government from seizing mere evidence of a crime was not supported by the language of the fourth amendment. The Court also noted that privacy is disturbed no more by a search for mere evidence than by a search for other seizeable items. Furthermore, the nature of other seizeable items are not necessarily more private than the nature of items that are mere evidence. The Warden Court also argued that the distinction between evidence and other seizeable items “is wholly irrational, since, depending on the circumstances, the same ‘papers and effects’ may be ‘mere evidence’ in one case and ‘instrumentality’ in another.” The prohibition on the seizure of mere evidence was also rejected because it was based on the premises “that property interests control the right of the Government to search and seize,” and that the government may not seize evidence “simply for the pur-

49. See R. BROWN, PERSONAL PROPERTY 9-12 (3d ed. 1975) (distinguishing choses in action from choses in possession, such as personal property).
50. See Boyd v. United States, 116 U.S. 616, 624-29 (1886) (court order to produce invoice or other private papers for court inspection held to be unreasonable search and seizure).
51. Warden v. Hayden, 387 U.S. 294, 303 (1967); see e.g., Gouled v. United States, 255 U.S. 298, 310 (1921) (rejecting government seizure of papers as evidence where government lacked “legitimate and important interest in seizing such paper in order to prevent further frauds”).
52. Warden v. Hayden, 387 U.S. at 303. Police were also permitted to seize weapons which could be used by the arrestee to effect an escape, apparently even if the weapon was lawfully possessed by the arrestee. Id. at 296 (quoting Harris v. United States, 331 U.S. 145, 154 (1947)); see United States v. Robinson, 414 U.S. 218 (1973) (permitting seizure of contraband found as result of search incident to arrest).
54. Id. at 301.
55. Id. at 301-02.
56. Id. at 302.
57. Id. (citation omitted).
58. Id. at 304.
pose of proving crime"—premises that the Court found to be discredited. The Warden Court concluded that the only fourth amendment limitation on what items can be seized by the government is that there must be a nexus between the item to be seized and criminal behavior. In the case of items of mere evidence, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."61

C. Definition of a Fourth Amendment Seizure

The Supreme Court did not explicitly define what constitutes a seizure of property within the meaning of the fourth amendment until the decision in United States v. Jacobsen.62 The Court in Jacobsen held that for purposes of the fourth amendment "a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property."63

The Jacobsen Court's definition of a seizure was stated to follow "from [the] oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement."64 This definition of a seizure of property was

59. Id. at 306.
60. Id. at 304-08. The Court noted that the most frequently suggested rationale for the rule prohibiting the seizure of "mere evidence" was that the rule limited the scope of searches, but the Court argued that privacy could be equally served by limiting searches to certain days of the month. Id. at 309.
61. Id. at 307. The Court also noted that intrusions under search warrants to seize evidence would be subject to the particularity requirements of the fourth amendment and the intervention of a neutral and detached magistrate. Id. at 309-10. Justice Douglas argued that the Framers intended the fourth amendment to prohibit the seizure of mere evidence in order to protect an individual's privacy in his personal effects (apart from contraband and the like). Id. at 312-25 (Douglas, J., concurring). Justice Fortas argued that the case should have been decided on alternative grounds to avoid "gratuitously striking down the 'mere evidence' rule." Id. at 312 (Fortas, J., concurring).
62. United States v. Jacobsen, 466 U.S. 109, 109-26 (1984). In Jacobsen, a cardboard box addressed to respondents was damaged while under bailment with the Federal Express delivery service. In examining the box, Federal Express employees observed a white powdery substance concealed in the box and summoned the Drug Enforcement Administration ("DEA"). The DEA, without a search warrant, removed an amount of the powder and conducted a chemical test that identified the powder as cocaine. Id. at 111-12. The DEA agents then rewrapped the box, obtained a warrant to search the place to which it was addressed, executed the warrant, and arrested the respondents. Id. at 112. The respondents filed a motion to suppress use of the contents of the box as evidence on the grounds that the warrant was the product of an illegal search and seizure. Id. The Supreme Court upheld the trial court's denial of the motion to suppress.
63. Id. at 113 (footnote omitted) (cited with approval in United States v. Karo, 468 U.S. 705, 712 (1984) and Maryland v. Macon, 472 U.S. 463, 469 (1985)).
64. United States v. Jacobsen, 466 U.S. at 113 n.5. None of the cases cited by Jacobsen in support of its definition of a seizure of a person, however, actually use the exact or similar language in defining a seizure of a person. See infra notes 76-87 and accompanying text (discussing "meaningful interference" in context of detention cases in which reasonable person would not believe he was free to leave). The cited case of Hale v. Henkel, 201 U.S. 43 (1906), how-
not supported, however, by any analysis of the intent of the Framers since historical sources of the fourth amendment are silent as to how the term seizure should be defined.65

The Jacobsen decision’s definition of a fourth amendment seizure of property differs from the Court’s definition of a fourth amendment search. A search occurs when the government invades an individual’s actual (subjective) expectation of privacy that is recognized by society, on an objective basis, as justifiable, reasonable or legitimate.66 The Jacobsen Court did not explain explicitly why a seizure is defined differently than a search for fourth amendment purposes. However, the reason for the difference in definitions is that the purpose of the fourth amendment’s prohibition of unreasonable searches is to protect privacy expectations, while that of unreasonable seizures is to protect possessory interests in property.67

The Jacobsen Court did not state explicitly what types of interest in property constitute the “possessory interests” with which there must be some meaningful interference for a seizure to occur. By using the term “possessory interests,” the Jacobsen decision might be interpreted as holding that the fourth amendment protects only those interests that involve the possession of the property in question.68 Under this analysis of Jacobsen, interests in prop-
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Property that do not involve possession, including reversions, rights of the inheritance easements and equitable servitudes, would be excluded from fourth amendment protection.69

If Jacobsen limits the fourth amendment's protection against unreasonable seizures to persons who have possession of property, an issue that still must be addressed is whether possession of property must involve actual, physical possession or only constructive possession at the time of the governmental interference.70 The Jacobsen Court held that a seizure occurred both when a Drug Enforcement Administration ("DEA") agent asserted dominion and control over a cardboard box in the actual physical possession of a freight carrier and when the DEA agent destroyed a trace amount of powder found in the box while making a field test on the powder. Thus, since the respondents were not in actual physical possession of the box in question, the Court in Jacobsen implicitly held that a fourth amendment seizure can occur when the owner of the property does not have actual possession of the property.71

recognize a number of situations where a person who does not have actual physical possession of an item of personal property is considered to have constructive possession of that property. See R. Brown, supra note 49, at 19-23 (discussing distinctions between actual and constructive possession); W. LaFave & A. Scott, Jr., Criminal Law 703-04 (2d ed. 1986) (same). For example, under criminal law the owner of a lost article of personal property is considered to be in constructive possession of that item. Id. at 711. In the context of real property, a person is considered to have actual "possession" of residential real property if the person resides on the real property. J. Cribbet, Principles of the Law of Property 13 (2d ed. 1975). The determination of what constitutes actual possession of real property as opposed to constructive possession is unclear because rights in real property generally are determined on the basis of "seisin" rather than possession. Id. at 14-16.

Under the common law of personal property and criminal law, the respondents who owned the box in question in Jacobsen may not have had either actual physical possession or constructive possession of the box in question. Federal Express would be considered to have been in possession of the box when the DEA agent took custody of it because Federal Express apparently had entered into a contract of bailment with respect to the box and had physical control over it with intent to exercise that control. See R. Brown, supra note 49, at 209-28 (discussing different types of bailments). The respondents, even if they were bailors of the box rather than only the intended recipient of the bailed box, would only have been considered to have been in constructive possession of the box if the bailee had "broken the bulk" and converted the contents to their own use. W. LaFave & A. Scott, Jr., supra, at 703. The Court in Jacobsen does not explain how possessory interests—as opposed to respondents' other property interests in the box—were interfered with by the actions of the DEA agent.

69. Property which has been abandoned also would not be protected. "Abandonment occurs when there is a 'giving up, a total desertion, and absolute relinquishment' of private goods by the former owner." R. Brown, supra note 49, at 9. Consequently, a person who abandons property should no longer be considered to retain possession of the property. Therefore, the exertion of dominion and control over abandoned property by police should not constitute a seizure because such police action would not meaningfully interfere with anyone's possessory interests in the property. See Hester v. United States, 265 U.S. 57, 59 (1924) (no seizure where officers examined abandoned items).

70. See supra note 68 (explaining that fourth amendment seizure occurs when there is meaningful interference with individual's possessory interest, regardless of whether claimant alleges ownership).

71. See Garmon v. Foust, 741 F.2d 1069, 1072 (8th Cir. 1984) (officer's assertion of domin-
If *Jacobsen* limits the fourth amendment's protection only to persons in actual physical possession of the property at the time of governmental interference, the fourth amendment would only protect the right of present use and enjoyment of the property and the right to transfer possession through sale, lease, bailment, bequest or gift. Such an interpretation of the *Jacobsen* holding would not provide protection for the right to the future use and enjoyment of property held by persons with constructive possession or by persons with reversion. In addition, such an interpretation would provide no protection to persons who are not in actual physical possession of property but who are nevertheless adversely affected by governmental control or custody of their real or personal property. For example, the temporary securing of real property by government officials may prevent a holder of an easement from exercising his right of easement.

Even if *Jacobsen* broadens the fourth amendment's protection to persons with constructive possession of property, as well as those with actual possession, this interpretation would still permit government agents to affect adversely the recognized non-possessor property interests of many persons. Government control or custody of property may decrease the economic value of non-possessor interests in property because the control makes the property less attractive to potential purchasers. Furthermore, if government agents took permanent control of a piece of property, all persons with recognized property interests in that property—possessor or non-possessor—would be adversely affected. Although persons without actual or constructive possession may receive just compensation, if such adverse effects are a taking under the fifth and fourteenth amendments, such an award of just compensation does not undo the adverse effects that are suffered as a result of the governmental control of the property.

The *Jacobsen* decision contains no reasoning that supports giving fourth amendment protection only to persons in actual physical possession of property while excluding the recognized rights or interests of others in that property. A broader interpretation of the protection against seizures that gives protection to all persons with rights or interests in property would be consistent with the modern trend. This trend is to protect a broad range of property rights and interests through criminal law theft offenses and to prohibit the taking of property without just compensation.

72. Such an interpretation also might limit the persons who have "standing" to challenge the admissibility of evidence in a criminal trial on the grounds that the evidence was obtained directly or indirectly as the result of an unreasonable seizure in violation of the fourth amendment. See infra text accompanying notes 123-30 (discussing principle of standing in relation to exclusionary rule).

73. The Supreme Court has held that "the wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).

74. MODEL PENAL CODE, § 223.2 comment 3 at 166-68 (proposed Official Draft 1962) (comments revised 1980).

75. See Rickelshaus v. Monsanto Co., 467 U.S. 986, 1000-04 (1984) (discussing whether per-
The *Jacobsen* Court also did not explain why a fourth amendment seizure only occurs if there is a "meaningful" interference with possessory interests in property. In addition, the Court did not explain why the criterion of "meaningful" is relevant to the issue of whether a seizure has occurred, and not to the issue of whether a seizure was unreasonable. The *Jacobsen* decision did not provide a definition of "meaningful" or any relevant factors for determining when a "meaningful" interference occurs. The decision also did not state whether "meaningful" is defined on a subjective basis (from the standpoint of the possessor), on an objective basis (from a normative perspective), or on both a subjective and an objective basis. The *Jacobsen* Court might have intended its "meaningful" interference test to be a two-prong test (subjective and objective), similar to the subjective two-prong test (actual and legitimate expectations of privacy) used to determine whether a search has occurred.

To support its definition of a seizure, the *Jacobsen* Court cited to some of the cases that, in the Court's estimation, define the seizure of a person as a "meaningful interference, however brief, with an individual's freedom of movement." These cases variously define a seizure of a person in view of all the circumstances as occurring: when a reasonable person would not believe he is free to leave; when a person is detained against his will; when a police officer accosts an individual and restrains his freedom to walk away; or when a police officer, by means of physical force or show of authority, restrains the liberty of that person; or when there is any curtailment of a person's liberty.

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76. See United States v. Jacobsen, 466 U.S. 109, 125 (1984) (warrantless field test of powder was reasonable under fourth amendment because substantial law enforcement interests justified the seizure and only de minimis impact on property interest incurred since only trace amounts of powder destroyed); see also United States v. Place, 462 U.S. at 706 (detention of luggage for exposure to narcotics detection dog was reasonable when officer had reasonable belief that luggage contained narcotics since brief seizures are minimally intrusive when balanced against strong governmental interest in preventing drug trafficking).

77. See supra notes 66-69 and accompanying text (discussing case law regarding actual and legitimate expectations of privacy).

78. See United States v. Jacobsen, 466 U.S. at 113 n.5 (listing cases as supporting authority).


82. United States v. Mendenhall, 446 U.S. at 553.

83. Reid v. Georgia, 448 U.S. 438, 440 (1980). On the other hand, some of the cases involving seizure of a person, cited by *Jacobsen* in support of its definition of a seizure of property, state that a policeman who merely addresses questions to a citizen has not seized that person within the meaning of the fourth amendment. United States v. Mendenhall, 446 U.S. at 553 (quoting Terry v. Ohio, 392 U.S. at 31, 32-33, 34 (1968) (White, J., concurring)). Further, no seizure of a person occurs if, when questioned by police, a person remains free to walk away, id. at 554, or when there is a brief detention of a person short of a traditional arrest. Reid v. Georgia, 448 U.S. at 440; United States v. Mendenhall, 446 U.S. at 554; Brown v. Texas, 443 U.S. at 50; United States v. Brignoni-Ponce, 422 U.S. at 878; see Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) (stating in dictum that detention for sole purpose of obtaining fingerprints constitutes less serious intrusion upon personal security than other types of detentions and therefore may not require probable cause) (cited in United States v. Jacobsen, 466 U.S. at 113 n.5.).
These general definitions of a seizure of a person unfortunately provide no assistance in defining what constitutes a "meaningful" interference with an individual's possessory interest in property. The standard of whether a "reasonable person would not believe he is free to leave" suggests, however, an objective rather than subjective standard. Justice Stewart's plurality opinion in United States v. Mendenhall, which is among the cases cited in Jacobsen, identifies specific criteria to be considered in determining whether a seizure of a person has occurred. Justice Stewart stated that a person would be seized, even when he did not attempt to leave, when there was the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. On the other hand, Justice Stewart also stated that an officer's subjective intent to detain a person if he had attempted to leave is irrelevant except insofar as it may have been conveyed to that person.

As applied to seizures of property, Justice Stewart's criteria of the threatening presence of police or the display of weapons would constitute a seizure of property only if such police conduct was directed at the person with a possessory interest in that property and such conduct "meaningfully" interfered with the person's possessory interests. Such conduct, although not involving actual physical touching of the property in question, arguably might constitute a meaningful interference with a person's possessory interests if the conduct prevented the person from using, entering, or transporting the property in question. Examples of such conduct might be police officers' preventing a person from entering his or her apartment, home, or automobile. Furthermore, Justice Stewart's criterion of a physical touching is clearly relevant to the determination of whether a seizure of personal property has occurred. If the physical touching of the property gives government officials exclusive possession or dominion and control over an item, their conduct constitutes a "meaningful interference" by preventing that person from possession, use, enjoyment and transfer of that property.

The Jacobsen decision's definition of a seizure of property does not include the term "however brief" that the Court uses in its definition of a seizure of a person. The absence of this phrase in the definition of a seizure of property might imply that a "brief" interference with an individual's possessory interests in an item of property is not a "meaningful interference" and thus is not a seizure of that property.

This interpretation is supported by the Jacobsen Court's later statement that a chemical "field test did affect respondents' possessory interests protected by

84. 446 U.S. 544 (1980) (plurality opinion).
85. Id. at 554.
86. Id. at 554 n.6.
87. See infra text accompanying notes 90-94 (providing as another example DEA agents asserting dominion and control over wrapped cardboard box).
88. United States v. Jacobsen, 466 U.S. at 113 n.5.
the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one." This statement indicates that the discussion of a temporary deprivation as opposed to a permanent one was relevant to the issue of whether there was a seizure, and not to the issue of whether a seizure was unreasonable. Under this interpretation of Jacobsen, a police officer's act of picking up an item of personal property for several seconds to inspect its characteristics might not constitute a fourth amendment "seizure." Such an interpretation, however, is arguably rebutted by other holdings in Jacobsen. The Jacobsen Court held that the assertion by DEA agents of dominion and control over a cardboard box in taking custody of it for their own purposes constituted a seizure. In reaching this holding, the majority in Jacobsen did not refer to how long a period of time the DEA agents asserted dominion and control. In fact, less than a minute may have passed between the time that the first DEA agent on the scene picked up and inspected the contents of the box and the time that a DEA agent conducted the field test on the white powder found in the box. Consequently, this part of the Jacobsen decision might be interpreted as holding that a seizure occurs when a government official asserts dominion and control over an item of personal property for even a brief period of time.

While holding that the DEA agents' exercise of dominion and control over the package was a seizure, the majority in Jacobsen did not define what types of governmental conduct constitute dominion and control over or custody of personal property. In his statement of the facts, Justice Stevens stated that the box was placed on a desk after a DEA agent arrived. The DEA agent removed four plastic bags from a tube in the box whose end had already been opened by the transporter. The DEA agent then removed a trace amount of white powder from the bags to use in the field test. Justice Stevens did not state which of the actions by the DEA agent were determinative in his holding that the package had been seized. He did not make clear whether a seizure of an item can only take place if a government agent physically picks up and holds an item in his hands or whether a fourth amendment seizure also occurs if a government agent prevents an item from being moved or prevent other persons from taking custody or possession of the item.

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89. *Id.* at 124-25. The field test involved taking a small amount of the white powder and placing it in three test tubes containing liquids which would take on a certain sequence of colors if the powder was cocaine. *Id.* at 112 n.1.

90. *Id.* at 120 n.18.

91. *Id.* at 111. The facts do not state whether it was a government agent or an employee of Federal Express who moved the box.

92. *Id.*

93. *Id.* at 111-12.

94. See supra text accompanying notes 79-86 (subjective intent of officer to detain individual is only relevant insofar as that intent was conveyed to detainee); *see also* Segura v. United States, 468 U.S. 796, 798 (1984) (assuming seizure of contents of petitioner's apartment when contents secured from within); United States v. Licata, 761 F.2d 537, 540, 544 (9th Cir. 1985)
Under the common law of personal property, a governmental agent who does not acquire physical possession of an item of personal property might be considered to have dominion and control—constructive possession—over the item by preventing it from being moved, transported or accessible to other persons. However, although the common law of property may be relevant to determining whether a fourth amendment seizure has occurred, it is not determinative.

The Court in United States v. Karo concluded that the transfer of a can to which an electronic "beeper" had been attached did not constitute a seizure on the grounds that "it cannot be said that anyone's possessory interest was interfered with in a meaningful way." Although the presence of the beeper in the can may have constituted a technical common law trespass on the space occupied by the beeper, the Karo Court stated that "the existence of a physical trespass is only marginally relevant to the question of whether the fourth amendment has been violated." For an actual trespass, it is neither "necessary nor sufficient to establish a constitutional violation."

The Supreme Court also has made clear that in most cases the purchase of an item of property by a police officer does not constitute a seizure within the

(suggesting that seizure of package may have occurred when federal agents demanded that airline employee hold passenger's checked package); cf. United States v. Beale, 736 F.2d 1289, 1292 (9th Cir.) (holding that no seizure of suspect's luggage occurred when trained narcotics detection dog sniffed luggage in checked baggage area since suspect "was not detained or otherwise inconvenienced, nor were his travel plans interfered with in the slightest"), cert. denied, 469 U.S. 1072 (1984).

95. See W. LAFAVE & A. SCOTT, JR., supra note 68, at 201.
98. "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." United States v. Knotts, 460 U.S. 276, 277 (1983).
100. Id.
101. Id. at 712-13.
102. Id. at 713. The Court in Karo also stated, "[o]f course, if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment." Id.

The Court in Arizona v. Hicks, 107 S. Ct. 1149 (1987), concluded that the mere recording by a police officer of the serial numbers on stereo components was not a seizure because it did not "[i]n and of itself . . . 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment . . . [even though it] was the first step in a process by which respondent was eventually deprived of the [stolen] stereo equipment." Id. at 1152. Although the police officer had to move some of the stereo components in question to record their serial numbers, id., the Court in Hicks did not address the issue of whether moving the equipment constituted a seizure. Moving the stereo components might be held to be a seizure because such movement involved the assertion of dominion and control over the stereo components. Cf. United States v. Jacobsen, 466 U.S. at 120 (agents' dominion and control over package constituted reasonable seizure).
meaning of the fourth amendment. In *Maryland v. Macon*, the Court held that no seizure, as defined by *Jacobsen*, occurred when a police undercover officer purchased two allegedly obscene magazines at a book store. The *Macon* Court reached this conclusion on the grounds that the sales clerk who sold the officer the magazines "voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds." Furthermore, the police officer who purchased the magazines "did not 'interfere' with any interest of the seller." Rather the officer took only "that which was intended as a necessary part of the exchange." The Court added in *Macon* that "the use of undercover officers is essential to the enforcement of vice laws" and that "an undercover officer does not violate the fourth amendment merely by accepting an offer to do business that is freely made to the public."

The Court in *Macon* argued that "the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials" was not present.

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104. This holding is in accordance with the prior holdings of a majority of state courts. *Id.* at 467. The *Macon* Court in also concluded that the officer's entry into the store and examination of the magazines that he purchased did not constitute a fourth amendment search. *Id.* In addition, even if the warrantless arrest of the sales clerk was an unreasonable seizure, the magazines were not inadmissible as evidence because they were not the fruit of the arrest and the officer did not obtain possession by means of the arrest. *Id.* at 471. The Court reasoned that the seller's arrest "yielded nothing of evidentiary value that was not already in the lawful possession of the police" and that the exclusionary rule "does not reach backward to taint information" that was in possession of the government prior to any illegality. *Id.*

Justice Brennan dissented in *Macon* on the grounds that the purchased magazines should have been suppressed and the seller's conviction reversed because of the warrantless arrest of the seller of the magazines. *Id.* at 473-75 (Brennan, J., dissenting). Justice Brennan first noted that the Court requires a search warrant and a magistrate's prior determination of obscenity for a seizure of allegedly obscene material. See *id.* at 473 (without authority of constitutionally sufficient warrant, prior restraint occurs, which is unreasonable under fourth amendment). He then argued that a warrantless arrest of a seller of allegedly obscene material poses the same risks involved in warrantless seizures of such material. These risks are erroneous police determinations of obscenity and prior restraints on first amendment freedoms. *Id.* at 473-74. He contended that prior restraint occurs through the arrest of a seller because the arrest may force him to close his business, or otherwise stop distribution or exhibition of the materials. *Id.* at 474. Justice Brennan noted that the Court left the respondent-seller without a remedy for his illegal arrest, such as invalidation of the conviction or suppression of the magazines. *Id.* at 475. He contended that the "countervailing public interest in ensuring the broad exercise of First Amendment freedoms" required an exception to the normal rule that the illegality of an arrest in itself is not grounds for reversal of a conviction or for suppression of evidence lawfully obtained prior to an arrest. *Id.* at 476.

105. *Id.* at 469.
106. *Id.*
107. *Id.*
108. *Id.* at 470.
109. "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.* (quoting Lewis v. United States, 385 U.S. 206, 211 (1966)).
110. *Id.*
where police purchased a few of a large number of magazines and other materials offered for sale.\textsuperscript{111} Such a purchase is analogous to a lawful police purchase of other unlawful substances, which has previously been found not to violate the fourth amendment.\textsuperscript{112} This holding will allow police to avoid the Supreme Court’s rulings that books, magazines and films presumptively protected by the first amendment normally cannot be seized lawfully under the fourth amendment, unless the seizure is pursuant to a search warrant meeting the requirements of the fourth amendment.\textsuperscript{113}

The Macon Court did not explicitly address the issue of whether a fourth amendment seizure would occur if police engaged in a mass purchase of materials that removed all or most of the allegedly obscene materials from the seller’s premises. However, the Court implied that such action would not be upheld in stating that “a police officer may not engage in a ‘wholesale search and seizure’ ” when he enters a business premises to purchase an item offered to the public.\textsuperscript{114} In addition the Court explicitly approved only the purchase of “a few of a large number of magazines and other materials offered for sale.”\textsuperscript{115}

A mass purchase of allegedly obscene materials might be held to be analogous to a mass seizure of such materials for the purpose of their destruction. Such a seizure is not permitted without a warrant issued after a prior adversary proceeding and a judicial determination of obscenity.\textsuperscript{116} A rule allowing police to avoid these requirements by purchasing mass amounts of the materials would give police unfettered discretion to prevent public distribution of materials presumed to be protected by the first amendment. Such a rule would be contrary to both the general fourth amendment rule that a neutral and

\textsuperscript{111} Id.
\textsuperscript{112} Id. (citing Lewis v. United States, 385 U.S. at 210 (holding fourth amendment was not violated where undercover police officer accepted defendant’s offer to purchase narcotics in defendant’s home)).
\textsuperscript{113} Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979); Roaden v. Kentucky, 413 U.S. 496, 504 (1973). A search warrant arguably may not be required to seize an allegedly obscene film when exigent circumstances exist. See id. at 505 & n.6 (taking judicial notice that films can be destroyed, removed from jurisdiction, or altered before trial). Exigent circumstances do not exist in the case of a film exhibited in a commercial theater open to the public with regularly scheduled performances. Id. at 505-06.

There is no right to an adversary hearing prior to seizure of one copy of an allegedly obscene film when the copy is seized pursuant to a valid warrant in order to preserve it as evidence in a criminal prosecution, and when following the seizure a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party. Heller v. New York, 413 U.S. 483, 492 (1973). The holding in Heller would probably apply to the seizure of a single copy or several copies of allegedly obscene books or films. See id. at 492-93 (when single copy of film has been seized and other copies of film are not available to owner, court must either permit copying of seized film or return film to owner so that its exhibition can continue pending obscenity determination).
\textsuperscript{114} Macon v. Maryland, 472 U.S. at 470 (quoting Lo-Ji Sales, Inc. v. New York, 442 U.S. at 329).
\textsuperscript{115} Id.
detached magistrate should authorize searches and seizures in advance through a search warrant\textsuperscript{117} and the general first amendment rule prohibiting prior restraint of expression.\textsuperscript{118}

The \textit{Macon} Court also held that the officer’s purchase of the magazines “is not retrospectively transformed into a warrantless seizure by virtue of the officer’s subjective intent to retrieve the purchase money to use as evidence.”\textsuperscript{119} The Court reasoned that the determination of “[w]hether a Fourth Amendment violation has occurred ‘turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time,’”\textsuperscript{120} not on the actual subjective state of mind of the officer.\textsuperscript{121} The Court concluded that if the officer’s warrantless retrieval of the money used to purchase the magazines violated the fourth amendment, the remedy for such violation would be the suppression of the money, not the exclusion of the previously purchased magazines.\textsuperscript{122}

\textit{D. Standing to Invoke the Exclusionary Rule}

Related to the issue of what constitutes a fourth amendment seizure is the issue of which persons have “standing” to challenge the admissibility of evidence on fourth amendment grounds. The exclusionary rule prohibits evidence obtained by a search or seizure in violation of the fourth amendment from admission in a criminal case in state court\textsuperscript{123} or in federal court,\textsuperscript{124} unless one of the exceptions to the exclusionary rule applies.\textsuperscript{125}

\textsuperscript{117} Johnson v. United States, 333 U.S. 10, 14 (1948).
\textsuperscript{118} See Roaden v. Kentucky, 413 U.S. at 504 (seizing film exhibited to general public without search warrant constitutes form of prior restraint unreasonable under fourth amendment; bookstore and commercial theater are each presumptively protected by first amendment and fourth amendment warrant requirements are thereby invoked).
\textsuperscript{119} Macon v. Maryland, 472 U.S. at 471.
\textsuperscript{120} \textit{id.} at 470 (quoting Scott v. United States, 436 U.S. 128, 136 (1978)).
\textsuperscript{121} \textit{id.} at 470-71.
\textsuperscript{122} \textit{id.} at 471.
\textsuperscript{125} The exclusionary rule is not applied when the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint of the lawless conduct. Wong Sun v. United States, 371 U.S. at 487; Nardone v. United States, 308 U.S. at 341. The exclusionary rule also does not require the suppression of evidence obtained after the police have violated a defendant’s fourth amendment rights if the evidence was acquired as a result of an independent act of free will by the defendant. Rawlings v. Kentucky, 448 U.S. 98, 106 (1980). Evidence also will not be suppressed under the exclusionary rule when the police had an independent source for the discovery of the evidence. Murray v. United States, 108 S. Ct. 2529 (1988); Segura v. United States, 468 U.S. at 805 (quoting Wong Sun v. United States, 371 U.S. at 487). When the prosecutor establishes that the evidence in question inevitably would have been discovered if the police had not acquired the evidence ille-
However, only a person whose own personal constitutional rights have been violated has standing to have evidence suppressed under the exclusionary rule.\textsuperscript{126} A defendant, seeking to suppress evidence on the grounds of an illegal search, must establish that the governmental conduct in obtaining the evidence violated his own actual and legitimate expectations of privacy in the premises where the evidence was discovered.\textsuperscript{127}

The Supreme Court has not stated whether this standing rule, which has been applied only to cases alleging illegal searches, also applies where a seizure is allegedly in violation of the fourth amendment. In United States v. Salvucci,\textsuperscript{128} the Court stated in dictum that "legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal."\textsuperscript{129}

A meaningful interference with a person's possessory interests in property should alone be sufficient to give a defendant standing to object to the admissibility of evidence. The defendant should not be required to show an actual or legitimate expectation of privacy in the premises where the item was discovered. The purpose of the fourth amendment's protection against unreasonable

gally, the exclusionary rule is also not applied. Nix v. Williams, 467 U.S. 431, 448 (1984).

The "good faith" exception to the exclusionary rule established by United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), applies only when police have acted in objective good faith and in compliance with a search warrant or statute later held unconstitutional. Illinois v. Krull, 107 S. Ct. 1160 (1987). The good faith exception therefore is not applicable when there has been a warrantless seizure of property that was not authorized by statute.

\textsuperscript{126} See United States v. Salvucci, 448 U.S. 83, 95 (1980) (overruling "automatic standing rule" of Jones v. United States, 362 U.S. 257 (1960), and limiting availability of exclusionary rule to defendants whose fourth amendment rights were violated); Rakas v. Illinois, 439 U.S. 128, 138-40 (1978) (favoring reference to whether criminal defendant's own fourth amendment rights were violated, rather than to term "standing," in determining whether defendant is permitted to object to admissibility of evidence).

\textsuperscript{127} See Rawlings v. Kentucky, 448 U.S. at 100 (petitioner denied standing to challenge illegality of search of friend's purse in which he had no expectation of privacy); United States v. Salvucci, 448 U.S. at 95 (respondent must establish that he had legitimate expectation of privacy in mother's home where evidence was seized in order to challenge its admissibility); Smith v. Maryland, 442 U.S. 735, 740 (1979) (search within meaning of fourth amendment occurs when there is violation of actual and legitimate expectation of privacy); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (petitioners denied standing to challenge illegality of search of areas of car in which they were passengers).

\textsuperscript{128} See United States v. Salvucci, 448 U.S. 83 (1980).

\textsuperscript{129} Id. at 91 n.6. (citing United States v. Lisk, 522 F.2d 228 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976)). The Salvucci Court did not directly address this issue because the respondents did not challenge the constitutionality of the seizure. The Lisk court held that an owner had standing to challenge the seizure of his chattel while it was in the possession of a third party. United States v. Lisk, 522 F.2d at 230-31. In denying a petition for rehearing, the Lisk majority rejected the defendant's argument that United States v. Jeffers, 342 U.S. 48 (1951), grants a person with an interest in the seized property standing to challenge the search that led to the seizure as well as the seizure itself. United States v. Lisk, 522 F.2d at 232-33.
III. PLAIN VIEW SEIZURE DOCTRINE

The so-called "plain view seizure" doctrine was the first doctrine adopted by the Supreme Court that explicitly authorized warrantless seizures of property. The doctrine was stated for the first time in 1968 in *Harris v. United States*.131 The Court reasoned that "it has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."132 In authorizing such plain view seizures, *Harris* authorizes "permanent seizures" of items in plain view.133 Warrantless plain view seizures are distinguishable from cases where a court holds that no search occurred when an officer merely observed an item in plain view.134

In 1971 a plurality of the Supreme Court characterized the plain view seizure doctrine as an exception to the warrant requirement.135 However, in 1983, a plurality of the Court argued that "at least from an analytical perspective" characterizing the plain view seizure doctrine "as an independent exception to the warrant requirement . . . may be somewhat inaccurate" and that the plain view seizure doctrine "is perhaps better understood . . . not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be."136

130. See *supra* notes 64-67 and accompanying text (explaining differences between search and seizure). If the definition of a fourth amendment seizure is expanded to protect recognized interests in property other than possessory interests, the persons who are accorded standing should be expanded to the same extent.

131. 390 U.S. 234 (1968) (upholding warrantless seizure of registration card observed in an automobile's passenger compartment).

132. *Id.* at 236. However, the cases cited by the *Harris* Court in support of its proposition do not support it. The decision in *Ker v. California*, 374 U.S. 23 (1963), only addressed the issue of whether a warrantless entry constituted a violation of the fourth amendment. The decision in *United States v. Lee*, 274 U.S. 559 (1927), upheld a warrantless seizure and search of a vessel by the Coast Guard only on the grounds of the Coast Guard's statutory authority to do so.

133. See *supra* note 16 (defining "permanent seizures").

134. As the Court stated in another case:

It is important to distinguish 'plain view,' as used in *Coolidge* to justify seizure of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, . . . the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, . . . justify police conduct affording them access to a particular item.


136. *Texas v. Brown*, 460 U.S. at 738-39 (plurality opinion). In support of these arguments, Justice Rehnquist noted that on the basis of probable cause police may seize objects found in a public place without a warrant because such a seizure involves no invasion of privacy. *Id.* at
Justice Stewart supported the plain view seizure exception to the general rule that requires a search warrant for a seizure because the doctrine provides a "major gain in effective law enforcement" but presents only a "minor peril to Fourth Amendment protections." He argued that the plain view seizure doctrine does not conflict with the two objectives of the fourth amendment's general warrant requirement: (1) the elimination of searches not based on

738. Justice Rehnquist noted in his opinion for the Court that "our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." Id. at 739 (citing Frazier v. Cupp, 394 U.S. 731 (1969); Harris v. United States, 390 U.S. 234, 236 (1968); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Marron v. United States, 275 U.S. 192 (1927)).

However, the Marron Court made no reference to the authority of law enforcement officers who are executing a search warrant to seize items, not authorized to be seized by the warrant, if they are in plain view. The Marron Court rather concluded that the evidence in question was lawfully seized as incident to an arrest. Marron v. United States, 275 U.S. at 199. The Go-Bart Import Co. decision also makes no reference to the seizure of items in plain view. Rather, the Court held that the false claim by police that they had a warrant made the search "a lawless invasion of the premises and a general exploratory search in the hope that evidence might be found." Go-Bart Importing Co. v. United States, 282 U.S. at 358. The Lefkowitz Court held that a warrantless search of an office, which followed a lawful arrest, violated the fourth amendment on the grounds that "an arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. at 465, 467.

In Arizona v. Hicks, 107 S. Ct. 1149 (1987), the Supreme Court rejected an argument that a warrantless plain view seizure by police is "ipso facto unreasonable" in violation of the fourth amendment when the officer's action directed to the seized item is unrelated to the justification for the officer's entry into the premises. "[L]ack of relationship always exists with regard to action validated under the 'plain view' doctrine; where action is taken for the purpose justifying the entry, invocation of the doctrine is superfluous." Id. at 1153 (emphasis in original).

The Hicks Court also ruled that the statement in Mincey v. Arizona, 437 U.S. 385 (1978) that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," id. at 393 (citation omitted), "was addressing only the scope of the primary search itself, and was not overruling by implication the many cases acknowledging that the 'plain view' doctrine can legitimate action beyond that scope." Arizona v. Hicks, 107 S. Ct. at 1153. The Hicks Court also held that when police seize an item under the plain view doctrine, they may also make a warrantless search of the item by moving it to examine any parts that are concealed from plain view. Id. at 1153-54. The Hicks Court also rejected arguments that a search of an object in plain view could be sustained on less than probable cause. "[A] dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality why application of the plain-view doctrine would supplant that requirement." Id. at 1154-55; see infra note 209 (discussing facts and holding in Hicks case).

137. Coolidge v. New Hampshire, 403 U.S. at 467. Justice White stated in Coolidge that he took this argument of Justice Stewart to mean that both the possessory interest of the defendant and the importance of having a magistrate confirm that what the officer saw with his own eyes is in fact contraband or evidence of crime are not substantial constitutional considerations. Officers in these circumstances need neither guard nor ignore the evidence while a warrant is sought. Immediate seizure is justified and reasonable under the Fourth Amendment.

Id. at 516 (White, J., concurring and dissenting).
probable cause; and (2) the limitation on the scope of searches.\textsuperscript{138} He asserted that the plain view seizure doctrine does not conflict with this first objective since it does not allow a warrantless seizure of property in a person’s home or automobile without an “extraneous valid reason” justifying the initial intrusion.\textsuperscript{139} Nor does the seizure of an object in plain view frustrate the second objective, since it does not convert the search into a general or exploratory one.\textsuperscript{140} He also contended that during an otherwise lawful search when “the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.”\textsuperscript{141}

In 1983, Justice Rehnquist presented a different argument in \textit{Texas v. Brown}\textsuperscript{142} in support of the plain view seizure doctrine. Arguing “that the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests,” \textsuperscript{143} he deemed warrantless plain view seizures permissible. The plain view seizure rule “reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a ‘needless inconvenience’ . . . that might involve danger to the police and public.”\textsuperscript{144} On the other side of the balance, the remaining interests of an object that a police officer has observed in plain view “are merely those of possession and ownership.”\textsuperscript{145}

In \textit{Payton v. New York},\textsuperscript{146} the Court indicated that a warrantless plain view seizure in a public place is valid if the police, at the time of the seizure, had probable cause to associate the property with criminal activity.\textsuperscript{147} The Court

\textsuperscript{138} Id. at 467.
\textsuperscript{139} Id.; see infra text accompanying notes 150-64 (discussing “prior valid intrusion” doctrine).
\textsuperscript{140} Coolidge v. New Hampshire, 403 U.S. at 467.
\textsuperscript{141} Id. at 467-68; see Arizona v. Hicks, 107 S. Ct. 1149 (holding that plain view doctrine spares police, who legitimately see object in first place, inconvenience and risk of obtaining warrant).
\textsuperscript{142} 460 U.S. 730 (1983).
\textsuperscript{143} Id. at 739 (quoting from Delaware v. Prouse, 440 U.S. 648, 654 (1979)).
\textsuperscript{144} Id. (quoting from Coolidge v. New Hampshire, 403 U.S. at 468).
\textsuperscript{145} Id.; see Illinois v. Andreas, 463 U.S. 765, 771 (1983) (“[t]he plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner’s privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy”); Coolidge v. New Hampshire, 403 U.S. at 515 (White, J., concurring and dissenting) (“[i]t is apparent that . . . only the possessory interest of a defendant in his effects is implicated in a plain view seizure”).
\textsuperscript{146} 445 U.S. 573 (1980).
\textsuperscript{147} Id. at 587. The Court stated in dictum that “objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view . . . is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.” Id. Justice Rehnquist quoted this statement favorably in \textit{Texas v. Brown}, 460 U.S. at 738. Justice Stevens, concurring in \textit{Brown}, added that “if an offi-
reasoned that the seizure does not violate the fourth amendment since it involves no invasion of privacy and is based on probable cause.148 The risk of the item’s disappearance or illegal use before the warrant arrives outweighs a person’s interest in possession of the item.149

The Supreme Court has not explicitly defined what constitutes a “public place” for purposes of this rule. However, Justice White has stated that no warrant is needed to seize items found on public property such as parks, streets, or parking lots.150 A public place for purposes of the plain view doctrine may refer to a situation where a fourth amendment search does not occur when the police enter the place. Under this definition, since the police’s entry into that place is lawful, a public place would be a place where a defendant has no actual and legitimate expectation of privacy.151

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149. See United States v. Place, 462 U.S. 696, 701-02 (1983) (“objects such as weapons or contraband found in a public place may be seized by the police without a warrant,” . . . because, under these circumstances, the risk of the item’s disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession”) (citation omitted); Texas v. Brown, 460 U.S. at 748 (“[i]f an officer has probable cause to believe that a publicly situated item is associated with criminal activity, the interest in possession is outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained. The officer may therefore seize it without a warrant.”).

150. Coolidge v. New Hampshire, 403 U.S. at 513 (White, J., concurring and dissenting). The Supreme Court has stated that the threshold of a person’s dwelling and the yard surrounding a person’s dwelling are a public place for purposes of the fourth amendment. United States v. Santana, 427 U.S. 38, 42 (1976). However, this statement was made in a case concerning a warrantless arrest in a public place based upon probable cause. Justice Scalia, in Arizona v. Hicks, 107 S. Ct. 1149, referred to the plain view doctrine as extending Payton v. New York’s public place rule to “nonpublic places such as the house, where searches and seizures without a warrant are presumptively unreasonable.” Id. at 1153.

151. If this former premise is correct, the latter conclusion follows from the definition of a fourth amendment search as “when an expectation of privacy that society is prepared to consider reasonable is infringed.” United States v. Jacobsen, 466 U.S. 109, 113 (1984). As further support for this definition of a “public place,” the Court has stated that a threshold of a dwelling is a “public place” because a person has no expectation of privacy in this area. United States v. Santana, 427 U.S. at 42. The implication of this statement is that no fourth amendment search occurs when police enter a “public place” and vice versa. The Court has also stated that an “open field” is a “public place” because a person has no reasonable expectation of privacy in “open fields.” Oliver v. United States, 466 U.S. 170, 179 (1984); see supra notes 22-41 and accompanying text (explaining that only curtilage, not “open fields,” is protected by the fourth amendment). However, the Court indicated that a person has a reasonable expectation of privacy in his dwelling and its curtilage. Oliver v. United States, 466 U.S. at 180. Consequently, a person’s home and the curtilage of his home are not “public places” under the plain view seizure doctrine. See infra notes 150-57 and accompanying text (discussing plain view seizures in “nonpublic places”).

It is unclear whether a person’s office or place of business is considered a public place or is considered analogous to a person’s home. An office worker, however, has been held to have a
The rule that authorizes plain view seizures in public places apparently requires no police justification for their presence at the place of the seizure.\textsuperscript{152} This approach can be justified because police intrusion into a public place does not violate any actual or legitimate expectation of privacy of the defendant.\textsuperscript{153} Moreover, the intrusion does not meaningfully interfere with the defendant's possessory interests in property. Therefore, the police's action would not be subject to the fourth amendment's prohibition against unreasonable searches and seizures.

Police apparently can make a warrantless seizure in a public place regardless of whether there existed either probable cause sufficient to authorize the issuance of a search warrant\textsuperscript{154} or exigent circumstances.\textsuperscript{155} The failure of the police to obtain a warrant to seize an item in a public place when they have probable cause would not violate the owner's fourth amendment rights against unreasonable searches. The police entry into a public place does not violate the defendant's expectation of privacy.\textsuperscript{156} However, the warrantless seizure of an item arguably might be unreasonable if the police acquired probable cause before going to the public place and had the opportunity to obtain a warrant. In this situation, a magistrate's determination of probable cause prior to the seizure, rather than after the seizure, would provide greater protection of fourth amendment rights without adversely affecting law enforcement interests.\textsuperscript{157} On the other hand, the property located in a public place might be removed, tampered with, or destroyed during the time required to obtain a search warrant. Therefore, it is reasonable for police, based upon probable

\textsuperscript{152}Police may need no justification under the Fourth Amendment for their access to an item, such as when property is left in a public place.' Texas v. Brown, 460 U.S. 732, 738 n.4 (quoting Payton v. New York, 445 U.S. at 587); cf. infra notes 150-65 and accompanying text (discussing legality of plain view based on legality of officer's presence in place where seizure occurred).

\textsuperscript{153}See supra notes 60-69 and accompanying text. (explaining that fourth amendment is implicated only when reasonable expectations of privacy are invaded).

\textsuperscript{154}See Coolidge v. New Hampshire, 403 U.S. at 513, 520 (White, J., concurring and dissenting) (indicating that no warrant is required despite presence of probable cause).

\textsuperscript{155}See infra notes 373-81 and accompanying text (explaining that police may seize property to prevent destruction of evidence).

\textsuperscript{156}See supra text accompanying notes 66-69 (fourth amendment search does not occur unless reasonable expectation of privacy is invaded).

\textsuperscript{157}This argument is supported by the following statement by Justice Jackson:

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

cause, to seize property located in a public place without a search warrant to prevent such an occurrence.

The Court has judged differently the legality of plain view seizures that occur in private places. In *Texas v. Brown*, the Court stated that its review of the police action changes "when the property in open view is 'situated on private premises to which access is not otherwise available for the seizing officer.'" In determining whether such a warrantless seizure of property is valid under the plain view doctrine, three criteria have been applied by a plurality of the Supreme Court and by a majority of the lower courts.

The first criterion, which is sometimes labeled the "prior valid intrusion" requirement, consists of two components that require the police to lawfully enter both the private premises where the item in question was seized and the particular area of the premises where the item was in plain view. "The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question." The prior valid intrusion requirement may be met where "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating nature." It is also satisfied "where the initial intrusion that brings the police within plain view of such article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement." When police are in compliance with the prior valid intrusion require-


159. *Coolidge v. New Hampshire*, 403 U.S. 445, 464-73 (1971) (plurality opinion); *Texas v. Brown*, 460 U.S. at 737 (plurality opinion) ("In the *Coolidge* plurality view, the 'plain view' doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied" (footnote omitted)); see *Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982) (applying plain view doctrine without specifically referring to three criteria). In *Coolidge, Brown*, and *Chrisman*, none of the Justices addressed the issue of whether they should judge the validity of the warrantless seizures in question by the rules applicable to such seizures in public places. See *supra* text accompanying notes 150-57 (discussing warrantless plain view seizures in public places).

160. See *Texas v. Brown*, 460 U.S. at 746 n.2 (Powell, J., concurring) (citing seven circuit court of appeal decisions which generally accept *Coolidge* plurality's articulation of plain view doctrine).

161. This two-part requirement follows from two sources. First, the *Coolidge* Court held that "what the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge v. New Hampshire*, 403 U.S. at 46. Second, Justice Rehnquist stated in *Texas v. Brown*, that "'plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment" and that "police may perceive an object while executing a search warrant, or they may come across an item while acting pursuant to some exception to the Warrant Clause." *Texas v. Brown*, 460 U.S. at 738 & n.4 (citation omitted).


164. *Id.* Such exceptions to the warrant requirement include "hot pursuit" of a fleeing suspect, a search incident to a lawful arrest, an automobile inventory search, a search pursuant to a lawful consent, or a frisk of a lawfully stopped suspect for the purpose of discovering weapons.
ment, they are allowed to proceed to the area where that object is located and seize the object. This is true even when the warrant or the exception to the warrant requirement justifying the intrusion does not authorize police to enter the area where the seized object was located.165

The second criterion for a lawful plain view seizure is that the discovery must have been inadvertent. In other words, the police cannot know the item's location in advance and cannot intend to seize it by "relying on the plain-view doctrine only as a pretext."166 The majority of lower courts have held that for the discovery of an item to be inadvertent, the police must not have had probable cause sufficient to have authorized issuance of a search warrant for the item prior to intruding into the premises where the item was discovered and seized.167

165. The Coolidge Court supported this conclusion in dictum stating that although only the area within an arrestee's immediate control may be searched incident to a lawful arrest, an arresting officer may seize evidence in plain view outside of this area "so long as the plain view was obtained in the course of an appropriately limited search of the arrestee." Id. at 465 n.24. One issue that remains unclear is the standing that is required to challenge a seizure that does not satisfy the inadvertence requirement. The Supreme Court has not addressed the issue of whether a defendant must establish that the police violated his fourth amendment right against unreasonable searches in order to have standing to raise such a challenge. Although the plain view doctrine authorizes warrantless seizures of objects, the purpose of its prior valid intrusion element is to protect a person's private premises from unreasonable searches. See id. at 467-68 (discussing the importance of protection from both intrusion per se, and from uncontrolled rummaging through a person's belongings). Consequently, a defendant might arguably have to establish that the intrusion interfered with his actual and legitimate expectations of privacy and thus constituted an unreasonable search in order to have standing to argue that a warrantless seizure violated the prior valid intrusion requirement.

166. Texas v. Brown, 460 U.S. at 737 (citing Coolidge v. New Hampshire, 403 U.S. at 470). In Coolidge the Court asserted that it had never permitted the legitimization of a planned warrantless seizure on plain-view grounds. Coolidge v. New Hampshire, 403 U.S. at 471 n.27. On the other hand, it did not cite any precedent by the Court in support of the inadvertent discovery requirement. Id. at 469 n.26.

167. See generally C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 255-58 (2d ed. 1986). One court has held that the inadvertence requirement is not violated if police unintentionally omit an item from a search warrant since the police are not using the plain view doctrine as a pretext for seizing the item. State v. Oliver, 341 N.W.2d 744 (Iowa 1983); see United States v. Wright, 641 F.2d 602, 605 (8th Cir.) (discussing seizure of shotgun made pursuant to search for controlled substances as valid, although not specifically listed on warrant), cert. denied 451 U.S. 1021 (1981); United States v. Johnson, 707 F.2d 317, 321 (8th Cir. 1983) (discussing seizure of firearm, which was not listed on warrant, but was considered a valid seizure).

In Coolidge, the Court indicated that the seizure did not satisfy the inadvertence requirement by explaining that "[t]he police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property." Coolidge v. New Hampshire, 403 U.S. at 472. The Coolidge plurality noted that the case did not involve contraband, stolen goods or objects dangerous in themselves, which the Coolidge plurality implied could be seized under the plain view exception without complying with the inadvertent discovery requirement. Id.; see infra text accompanying notes 187-92 (discussing seizure of contraband as exception to inadvertence requirement).

In Texas v. Brown, 460 U.S. 730, the Court did not define an inadvertent discovery. However, they held that the seizure of certain evidence from the respondent's automobile was not barred
In support of the inadvertent discovery element, the Coolidge plurality argued that when police know in advance the location of an item and intend to seize it, the warrantless seizure is contrary to “the basic rule that, no amount of probable cause can justify a warrantless seizure.” In addition, the requirement of a warrant “imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as ‘per se unreasonable’ in the absence of ‘exigent circumstances.’” The Court also argued that when the initial intrusion is based upon a warrant that fails to mention a particular item that police know is on the premises and intend to seize, “there is a violation of the express constitutional requirement of ‘Warrants . . . particularly describing . . . [the] things to be seized.’” Justice Stewart asserted that anticipated discoveries are distinguishable from the situations covered by the plain view doctrine because plain view seizures do not turn an initially valid and limited search into a general one. In addition, the inconvenience of procuring a warrant to cover an inadvertent discovery is great.

Justice White disagreed with the plurality’s inadvertent discovery criterion for plain view seizures for a number of reasons. First, he argued that in the seizure of an item whose discovery was anticipated, the interference with an individual’s possession and the reliability of the police officer’s appraisal of the item are the same as the seizure of an item whose discovery was inadvertent. There is no difference between the two situations in terms of the “minor” peril to fourth amendment values. Similarly, he maintained that the inadvertent discovery requirement is unnecessary to further any fourth amend-
ment ends because the rule "will in no way reduce the number of places into which [police] may lawfully look."174 Second, he argued that in both the anticipated discovery and the inadvertent discovery, the "actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant."175 Third, Justice White argued that when the police proceed to obtain a warrant for a particular premises when they have probable cause to search for several items, they "could have no possible motive" for including one item but not the other in their application for the warrant.176 He asserted that "[q]uite the contrary is true" and that police, if they are convinced they have probable cause to search for an item, will omit the item only because of "oversight or careless mistake."177

174. Id. at 517. Justice White argued that "[i]f the police stray outside the scope of an authorized Chimel search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle." Id. Justice White postulated that the plurality might be concerned that police, having the right to intrude upon private property to make arrests, will use that right as a pretext to obtain entry to search for objects in plain sight. However, he noted that under Chimel v. California, 395 U.S. 752 (1969), police can only enter those portions of the property where entry is necessary to effect the arrest. Thus, police face a substantial risk that in making an arrest on the premises they will not enter into those portions of the property from which they can plainly see the items for which they are searching. Coolidge v. New Hampshire, 403 U.S. at 517-18; see Welsh v. Wisconsin, 466 U.S. 740 (1984) (limiting right of police to enter property to make arrest); Steagald v. United States, 451 U.S. 204 (1981) (same); Payton v. New York, 445 U.S. 573 (1980) (same).

Justice White made no reference to the importance under the fourth amendment of having a magistrate make a prior determination of probable cause before police seize an item of property. When police seize an item of property whose discovery was anticipated, absent the presence of exigent circumstances, they may have had an opportunity to have had a magistrate determine whether there was probable cause. See infra notes 184-86 and accompanying text (discussing possible exigent circumstances that would excuse compliance with inadvertent discovery). Justice Stewart's plurality opinion in Coolidge stated that the "accepted" principle is "that a search or seizure carried out on suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" Coolidge v. New Hampshire, 403 U.S. at 474-75 (footnote omitted). Furthermore, it criticizes Justice White's view that any search or seizure may be carried out without a warrant so long as probable cause exists because this position would "read the Fourth Amendment out of the Constitution." Id. at 480.

176. Id. at 517.
177. Id. Justice Black also noted that police may not include an item in a warrant application because they may misjudge the facts and not realize they have probable cause for the item. Id.

Justice Black argued that seizures of evidence in open view at the time and place of an arrest do not have to be inadvertent in order to be lawful. Id. at 505-06 (Black, J., dissenting). In addition, he argued that the plurality was confusing "the historically justified right of the police to seize visible evidence of the crime in open view at the scene of arrest with the 'plain view' exception to the requirement of particular description in search warrants." Id. at 506. Justice Black asserted, without citation, that "the right to seize items properly subject to seizure because in open view at the time of arrest is quite independent of any power to search for such items pursuant to a warrant." Id. at 509. He added that the plurality's inadvertent discovery requirement, "for all practical purposes, abolishes seizure incident to arrest" because "[o]nly rarely" would weapons, contraband, or other evidence seized incident to arrest be "truly unexpected" or
The majority in *Coolidge* suggested in dictum that the inadvertent discovery requirement does not apply to the seizure of items discovered during a search incident to a lawful arrest. Regarding such a search, the majority stated that it did not mean to suggest "that the police must obtain a warrant if they anticipate that they will find specific evidence." However, the majority held that "the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest." The *Coolidge* majority then cited to the dictum that the plain view doctrine authorizes police to seize weapons, destructible evidence, and other evidence that came to light during such an appropriately limited search. The majority argued that plain view warrantless searches and seizures incident to a lawful arrest are authorized by the exigency arising "from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee." The *Coolidge* majority then cited to the dictum that the plain view doctrine authorizes police to seize weapons, destructible evidence, and other evidence that came to light during such an appropriately limited search. The majority argued that plain view warrantless searches and seizures incident to a lawful arrest are authorized by the exigency arising "from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee." The *Coolidge* majority did not explain this distinction in the application of the inadvertence requirement. However, the majority suggested that neither the exigency of danger of harm to the arresting officer nor the exigency of destruction of evidence exists when a weapon or evidence is outside the reach of the arrestee—that is, outside the area of immediate control of the arrestee. Justice White noted that under the plurality's approach, "[i]f the police ... fully anticipate that, when they arrest a suspect as he is entering the front door of his home, they will find a credit card in his pocket and a picture in plain sight on the inadvertent and because a police officer would not make a search incident to an arrest if he had no expectation of discovering such items. *Id.*; see infra notes 178-83 and accompanying text (discussing majority's dictum in *Coolidge* that inadvertent discovery requirement does not apply to seizures of items during course of valid search incident to arrest).

Justice Black also argued that the cases cited by the plurality did not support its rule prohibiting police who are executing a search warrant from seizing items not named in the warrant unless their discovery was unanticipated or inadvertent. *Coolidge v. New Hampshire*, 403 U.S. at 508 n.5. The plurality argued, however, that none of the cases cited by Justice Black in this part of his opinion "casts any doubt" upon their conclusion that the discovery of evidence in plain view must be inadvertent. *Id.* at 469 n.26. Finally, Justice Black argued that the relevant test under the Fourth Amendment is not the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances and facts of each case. *Id.* at 509-10 (Black, J., dissenting).

178. *Id.* at 482; see *Chimel v. California*, 395 U.S. 752, 763 (1969) (police, incident to lawful arrest of person, may conduct warrantless search of arrestee's person and area within his immediate control—the area from within which he may gain possession of a weapon or destructible evidence).


180. *Id.* at 465 n.24.

181. *Id.* at 478.

182. *Id.* "Where ... the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee." *Id.* Justice White interpreted this statement as permitting seizure only if the plain view was inadvertently obtained. *Id.* at 519 (White, J., concurring and dissenting).
wall opposite the door, both of which will implicate him in a crime, they may . . . seize the credit card but not the picture." 183

The Coolidge plurality also suggested that the inadvertent discovery requirement would not apply when there are exigent circumstances.184 The plurality did not define the exigent circumstances that would excuse compliance with the inadvertent discovery requirement. It may have had in mind the exceptions to the general warrant requirement such as the probability that the item may disappear or be destroyed before a warrant can be obtained,185 or where the police are in hot pursuit of a fleeing suspect.186

The Coolidge plurality also suggested that the inadvertent discovery requirement would not apply to the seizure of contraband, stolen or dangerous materials where the initial intrusion was authorized by one of the exceptions to the warrant requirement.187 The plurality offered no rationale for such an exception. It might have believed the exception was justified because the governmental interests in seizing such items are great and because persons have no right to possess contraband or stolen items and have limited, if any, rights to possess dangerous items. Although warrantless seizures of contraband, stolen and dangerous items may not involve meaningful interference with possessory interests,188 the warrantless intrusion of private premises to seize such items

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183. Id. at 519 (White, J., concurring and dissenting).
184. "The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'" Id. at 470-71. In Coolidge, there was no "'exigent circumstance'" because "the police knew of the presence of the automobile and planned all along to seize it." Id. at 478.
185. See United States v. Santana, 427 U.S. 38 (1976) (recognizing concern that item to be seized may disappear before police obtain warrant); Schmerber v. California, 384 U.S. 757 (1966) (same); infra notes 373-81 and accompanying text (discussing seizures of property to prevent loss of evidence).
187. The plurality stated:

The initial intrusion may . . . be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Coolidge v. New Hampshire, 403 U.S. at 471 (footnote omitted). According to Justice White, the plurality "apparently" held that "contraband, stolen or dangerous materials may be seized when discovered in the course of an otherwise authorized search, even if the discovery is fully anticipated and a warrant could have been obtained." Id. at 519 (White, J., concurring and dissenting). The plurality held that the warrantless seizure of petitioner's automobile at issue did not involve contraband or stolen goods or objects dangerous in themselves. Id. at 472; see United States v. Johnson, 707 F.2d 317, 322 (8th Cir. 1983) (firearms held to be in plain view, even though hidden and under bed, since they were in place where officers executing search warrant had right to be).

188. See supra notes 62-122 and accompanying text ("meaningful" interference with possessory interest in property necessary for fourth amendment seizure).
might be an unreasonable search when no exigent circumstances are present.\textsuperscript{189} However, the plurality indicated that this exception to the inadvertence requirement would apply only when the initial intrusion was made without a warrant. Thus, exigent circumstances would have to exist to make the search involved in the intrusion reasonable.\textsuperscript{190} According to Justice White, the plurality’s distinction between contraband and mere evidence of crime is “reminiscent of the unworkable approach that I thought \textit{Warden v. Hayden}\textsuperscript{191} . . . had firmly put aside.”\textsuperscript{192}

Another situation that might give rise to an exception to the inadvertent discovery requirement is where the police have the authority to enter a private premises, but exercise that authority only after observing an item that gives them probable cause to seize or investigate further. These facts were presented by \textit{Washington v. Chrisman},\textsuperscript{193} where the Supreme Court held that police can accompany a lawfully arrested person into his residence. In \textit{Chrisman}, a police officer lawfully arrested a student for the offense of illegal possession of alcoholic beverages by a minor. The officer accompanied the student to his residence in a university dormitory to retrieve his identification. The student’s roommate, the respondent in this case, was present in the dormitory room. The arresting officer initially remained in the open doorway of the room while the student went inside. Soon thereafter, however, the officer entered the room because he observed on a table what he believed to be marijuana seeds and a pipe used to smoke marijuana. The respondent waived his \textit{Miranda} rights. The arresting officer then asked the respondent if he had any other marijuana, and the respondent handed over additional bags of marijuana. The respondent and his roommate then consented to a search of their room, which resulted in the seizure of additional quantities of marijuana and a quantity of LSD.\textsuperscript{194}

The Washington Supreme Court reversed the respondent’s convictions for the offenses of illegal possession of marijuana and illegal possession of LSD. The court held that the marijuana seeds and pipe should have been suppressed because they were the result of an illegal entry of the respondent’s residence by the arresting officer.\textsuperscript{195} Furthermore, the court stated that the additional quantities of marijuana and the quantity of LSD should be suppressed because they were the fruits of the arresting officer’s illegal entry of the respondent’s residence.\textsuperscript{196}

The United States Supreme Court reversed the Washington Supreme Court’s decision and held that the arresting officer’s entry was lawful and that the

\textsuperscript{189} See \textit{supra} notes 166-68 and accompanying text (discussing relevance of probable cause to inadvertent discovery).

\textsuperscript{190} \textit{Coolidge v. New Hampshire}, 403 U.S. at 471.

\textsuperscript{191} 387 U.S. 294 (1967); see \textit{supra} notes 51-61 and accompanying text (discussing items subject to seizure under fourth amendment).

\textsuperscript{192} \textit{Coolidge v. New Hampshire}, 403 U.S. at 519 (White, J., concurring and dissenting).

\textsuperscript{193} 455 U.S. 1 (1982).

\textsuperscript{194} \textit{id. at} 7.

\textsuperscript{195} \textit{id. at} 5.

\textsuperscript{196} \textit{id.}
warrantless seizure was lawful under the plain view doctrine. Although the Court did not address explicitly the inadvertent discovery requirement, the Chrisman holding might be interpreted as making that requirement inapplicable to certain situations. Those situations would be where the police have legal authority, unrelated to the seizure of the evidence in question, to enter private premises and acquired probable cause to seize the item from observations of the premises just prior to the intrusion. The Chrisman Court held that an officer who has lawfully arrested a person may, as a matter of routine, monitor the movements of the arrested person and accompany him wherever he goes after the lawful arrest. Furthermore, an officer who does not initially accompany an arrestee into his residence does not abandon this right. The Court reasoned that to hold the entry illegal "would have the perverse effect of penalizing the officer for exercising more restraint than was required under the circumstances." If an exception to the inadvertent discovery requirement was not recognized, an officer in this situation would be in a predicament. If he abandoned his lawful intrusion for purposes other than seizure of the item in order to obtain a warrant authorizing seizure of the item, successful accomplishment of the original purpose for the intrusion may be jeopardized. Specifically, the officer's earlier presence might alert occupants to the police interest in the premises and result in disappearance of potential arrestees or seizeable evidence. On the other hand, if the officer intruded onto the premises without seizing the item and later sought a warrant for the item, it might disappear or be destroyed by persons alerted by the earlier police intrusion.

The third requirement for a plain view seizure under the Coolidge plurality's view is that it must be "immediately apparent to the police that they have evidence before them." The Court subsequently referred to the plain view exception as permitting police to seize "what clearly is incriminating evidence." A lower court interpreted this "immediately apparent" criterion as requiring the police to possess "near certainty as to the seizeable nature of the evidence.

197. Id. at 9. The Court, in finding the seizure legal, stated that the case was "a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy." Id. Although the reference to "unrelated reasons" may have been intended to refer to the Coolidge inadvertent discovery requirement, the Court in Chrisman made no explicit reference to it. The Court only stated that "[t]he 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." Id. at 5-6 (citing Coolidge v. New Hampshire, 403 U.S. 443).

198. Id. at 7. The purpose of this per se rule is to protect the arresting officer from potential danger if the arrestee gains access to an available weapon and to prevent against the possibility of an escape attempt by an arrestee who is not properly supervised. Id. at 6-7.

199. Id. at 9.

200. Id. at 8. The Court noted that had the arresting officer "exercised his undoubted right to remain at [the arrestee's] side, he might well have observed the contraband sooner" Id. at 7.


items.  

However, the Supreme Court rejected this interpretation in 1987 in *Arizona v. Hicks*. The Court instead held that an item can be seized under the plain view doctrine when the police have probable cause to associate it with criminal activity.  

Justice Scalia's majority opinion in *Hicks* rejected the contention that the seizure of an item in plain view may be permitted on less than probable cause. He reasoned that the "practical justification" for the plain view doctrine "is the desirability of sparing police . . . the inconvenience and the risk . . . of going to obtain a warrant." Moreover, "[n]o reason is apparent why an object should routinely be seizeable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant." Justice Scalia conceded that a seizure can be "justified on less than probable cause . . . where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime." Consistent with this, he concluded that no special operational necessities were relied upon in the case at hand, only "the mere fact that the items in question came lawfully within the officer's plain view." He asserted that this was insufficient to supplant the requirement.  

Under the plain view seizure doctrine, the information that gives police probable cause to believe that an item has a nexus to criminal activity cannot be based upon a search or seizure that is not authorized by the doctrine that originally permitted the entry and search of the premises or by some other doctrine providing police with "independent power to search certain objects in plain view."  

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203. See *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion) (rejecting "near certain" requirement imposed at appellate level). Justice Rehnquist found in *Brown* that probable cause was sufficient to allow police to seize items under the plain view seizure doctrine. *Id.* at 742-43.  
205. *Id.* at 1153.  
206. *Id.* at 1153-54.  
208. *Arizona v. Hicks*, 107 S. Ct. at 1154. Justice O'Connor, although dissenting in *Hicks*, agreed with the majority that probable cause is required before the police can seize an item under the plain view doctrine. *Id.* at 1157 (O'Connor, J., dissenting).  
209. *Id.* at 1154. The police officer made a lawful warrantless search of an apartment for the person and weapon that had fired a bullet through the floor, thereby injuring a man in the apartment below. *Id.* at 1152. The police moved a stereo turntable and some other components to record their serial numbers. *Id.* Although holding that "the mere recording of the serial numbers" was not a seizure, the Court held that the police officer's moving of the equipment constituted a search. *Id.* The Court then found that the search of the stereo equipment was not reasonable.  

Justice Scalia's majority opinion stated that when police have the right to seize an item under the plain view doctrine they have the right to search the item by moving it for closer examina-
IV. WARRANTLESS SEIZURES OF EFFECTS NOT SUPPORTING ANY EXPECTATIONS OF PRIVACY

In United States v. Jacobsen, the Supreme Court held that no unreasonable seizure occurred when Drug Enforcement Administration ("DEA") agents asserted dominion and control over a package. The Court first reasoned that the package could no longer support any expectation of privacy and that such containers may be seized, at least temporarily, without a warrant. Moreover, the Court also reasoned that "it was apparent that the tube and plastic bags contained contraband and little else" and that police may make a warrantless seizure. Id. at 121. The Court referred to a number of circumstances that led them to conclude that the box in question could no longer support any expectation of privacy. The Court initially noted that it was "highly relevant to the reasonableness of the agents' conduct" in asserting dominion and control over the box that the respondent's privacy interest in the contents of the box "had been largely compromised." Id. The Court then explained that "the agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents." Id. The Court analogized the package in question to a balloon whose "distinctive character spoke volumes as to its contents, particularly to the trained eye of the officer," or the hypothetical gun case whose contents can be inferred from its outward appearance. Id. (citing Texas v. Brown, 460 U.S. 730, 743 (1983) and Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979)).
seizure of "effects" that have no justifiable expectation of privacy when they have probable cause to suspect contraband.\textsuperscript{212}

Although these two reasons may appear to state two different and alternative principles, they may also be interpreted as stating only one legal rule. The rule under this latter interpretation is that a container or other "effect" may be seized without a warrant, at least temporarily, when it does not support a justifiable expectation of privacy and when there is probable cause to believe that it contains contraband or another seizeable item. This interpretation of \textit{Jacobsen} equates the Court's reference to containers whose character or appearance reveal their contents with the Court's other reference to probable cause. In other words, police may have probable cause to believe a container holds a specific item when the container's distinctive character or outward appearance causes the police to infer that the contents of the container include that specific item. Such an interpretation of \textit{Jacobsen} might be based upon the language that the Court used in expressing its holding.\textsuperscript{213} An examination of the language would indicate that the latter principle is a rephrasing of the earlier statement that, at least temporarily, containers whose contents are apparent no longer support any expectation of privacy with respect to the police's right to seize.

However, there are a number of differences in these two principles that might lead to a conclusion that they are expressing two different rules. First, the former principle makes reference to the right to seize "containers," while the latter principle refers to seizure of "effects;" effects might connote a broader class of objects than containers.\textsuperscript{214} Second, the latter principle refers to seizure of effects based on probable cause to believe they contain contraband and little else, this warrantless seizure was reasonable, for it is well-settled that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband.\textsuperscript{212} United States v. Jacobsen, 466 U.S. at 121-22. The Court referred only to a seizure when there is probable cause to believe contraband is present, and not to a seizure when there is probable cause to believe any seizeable item is present. See \textit{supra} notes 51-61 and accompanying text (discussing general history of judicially recognized seizures). However, the Court was dealing with a case involving the seizure of contraband and therefore may not have intended to limit this latter statement to the seizure of effects containing contraband.

Since the respondents conceded that the DEA agents had probable cause to believe that the box contained narcotics, the Court did not decide whether the agents could have seized the package in question based on something less than probable cause. United States v. Jacobsen, 466 U.S. at 121 n.20. The Court noted that some seizures can be justified by an articulable suspicion of criminal activity. \textit{Id.} (citing United States v. Place, 462 U.S. 696 (1983)); see \textit{infra} notes 267-372 and accompanying text (discussing temporary seizures for investigative purposes based on reasonable suspicion).

213. The Court stated:

Accordingly, since it was apparent that the tube and plastic bags contained contraband and little else, this warrantless seizure was reasonable, for it is well-settled that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband.

United States v. Jacobsen, 466 U.S. at 121-22 (footnote omitted).

214. See \textit{supra} notes 21-50 and accompanying text (discussing types of property that may be protected under fourth amendment).
band, while the former principle makes no explicit reference to probable cause as a basis for such seizures. Third, the former principle refers to the right to seize containers, "at least temporarily," whereas the latter principle does not suggest that such seizures can only be temporary seizures and not permanent seizures. 215

If these two principles in Jacobsen are interpreted as stating two alternative rules regarding warrantless seizures, the former principle might be interpreted as authorizing at least a temporary warrantless seizure of a container, but not any other type of effect, that does not support any expectation of privacy due to its distinctive character or outward appearance. This would be permitted even though there is no probable cause to believe it contains contraband or other seizeable items. Under this analysis, the latter principle would authorize a warrantless permanent seizure of any effect not supporting a justifiable expectation of privacy when there is probable cause to believe that the effect contains narcotics or other seizeable items. 216

However, since the Court in Jacobsen included the phrase "at least temporarily" in its first reason supporting its holding but not in its second, it is unclear whether the Jacobsen decision authorized permanent seizures of containers or effects not supporting an expectation of privacy, or only temporary seizures of such containers or effects. Since the Court's focus in both of its stated reasons was on the contents of a container or an effect (and not on the container or effect itself), Jacobsen might be interpreted as authorizing only temporary seizures of containers or effects for the purpose of investigating, seizing, or testing their contents. 217

215. See supra note 16 (discussing permanent seizures and giving examples). Finally, the former principle refers to a container or package that could no longer support any expectation of privacy. United States v. Jacobsen, 466 U.S. at 121. It does not make clear whether the Court is referring to an actual, subjective expectation of privacy by the respondent or an objective, justifiable expectation of privacy. See supra note 66 and accompanying text (discussing whether there must be subjective expectation of privacy in fourth amendment search). The latter principle, however, refers to effects that cannot support a justifiable expectation of privacy. United States v. Jacobsen, 466 U.S. at 121-22. There is no difference between these two principles if the former principle is also referring to a justifiable expectation of privacy.

216. Both of these interpretations of the Jacobsen Court's two stated principles differ from the plain view seizure doctrine in several respects. First, none of the Supreme Court's decisions interpreting the plain view seizure doctrine have ever stated or suggested that the doctrine is limited to containers or effects that do not support any expectation of privacy. Second, neither of the two interpretations require a prior valid intrusion or an inadvertent discovery as required in plain view seizures not made in a public place. See supra notes 159-92 and accompanying text (discussing Coolidge and plain view doctrine).

Furthermore, the interpretation of the earlier principle may not require a warrantless seizure of a container to be based upon probable cause, as is required under the plain view seizure doctrine. See supra notes 146-49, 201-04 and accompanying text (discussing presumption of reasonable search under plain view doctrine when there is probable cause to associate property with criminal activity). Under the latter principle, there must be probable cause that the container or effect being seized contains contraband or an item that is seizeable. Under the plain view seizure doctrine, there must be probable cause to believe that the container or effect itself is contraband or otherwise is associated with criminal activity.

217. Such an interpretation is consistent with the facts in Jacobsen since law enforcement offi-
If either of these two interpretations of Jacobsen only permits warrantless temporary seizures of containers not supporting any expectation of privacy, courts will have to determine what kinds of inspection, investigation, or testing of a container or effect and its contents are permitted to be performed by police without a search warrant during such a lawful temporary seizure. The Court in Jacobsen held that the field test\textsuperscript{218} that DEA agents performed on the white powder in the zip-lock plastic bags after seizing the box and its contents was not a search regulated by the fourth amendment\textsuperscript{219} and was a reasonable seizure that did not violate the fourth amendment.\textsuperscript{220} However, the Jacobsen decision did not indicate whether any other types of tests can be performed on a container and its contents during a temporary seizure of a container not supporting an expectation of privacy.\textsuperscript{221} 

\textsuperscript{218} See infra note 221 (discussing field test in Jacobsen). Officers then rewrapped the package, obtained a warrant to search the place to which the package was addressed, executed the warrant, and arrested respondents. United States v. Jacobsen, 466 U.S. at 112.

Law enforcement officers may be authorized by the plain view seizure doctrine to make a warrantless permanent seizure of a container that does not support an expectation of privacy and that police have probable cause to believe contains contraband. In such a situation, the officers may have probable cause to believe that the container is evidence of the constructive possession of the contraband by the addressee or bailor of the package (or both) and thus may seize the package if the other requirements of the plain view seizure doctrine are satisfied. See supra notes 131-209 and accompanying text (discussing plain view seizure doctrine).


\textsuperscript{220} Id. at 124-25; see infra text accompanying notes 244-66 (discussing implications of field test in Jacobsen).

\textsuperscript{221} Cf. United States v. Place, 462 U.S. 696 (1983) (indicating that exterior “sniffing” of luggage by trained narcotics detection dog is only test which police can perform on luggage without a warrant when container has been temporarily seized because police have reasonable suspicion (but not probable cause) to believe that container contains narcotics); see infra text accompanying notes 304-72 (discussing details of Place decision).

No search within the meaning of the fourth amendment occurs when police open and inspect the contents of a container whose effects do not support any reasonable or justifiable expectation of privacy. Texas v. Brown, 460 U.S. 730, 748-49 (1983) (Stevens, J., concurring in the judgment); United States v. Ross, 456 U.S. 798, 822-23 (1982); Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979). However, as the Jacobsen Court made clear, a fourth amendment “seizure” may occur when police assert dominion and control over such a container and its contents while investigating them, see supra text accompanying notes 91-94, and when police destroy a small amount of an item in conducting a test upon it. See supra text accompanying notes 89-90. The general rule is that any search or seizure conducted without a warrant is unreasonable and in violation of the fourth amendment. See supra note 2 (discussing general requirements for searches and seizures).

In order for law enforcement officials to make a permanent seizure of an item discovered during the course of an inspection of the contents of such a container or effect during such a temporary seizure, they would have to meet the requirements of the plain view seizure doctrine, the field test doctrine or another doctrine authorizing a warrantless permanent seizure of property. See supra text accompanying notes 131-209 (discussing plain view seizure doctrine); infra
Furthermore, if *Jacobsen* authorizes only temporary warrantless seizures of containers not supporting any expectation of privacy, courts also will have to determine the permissible period of time that such containers may be seized without a warrant. The factors that should be considered in determining whether such a temporary seizure was unreasonable and thus in violation of the fourth amendment are the period of time that the container was seized by the police, the extent to which possessory interests protected by the fourth amendment were adversely affected by the seizure, and whether the police seized the container for a longer period of time than was reasonably necessary to carry out their investigation (that is, whether the police diligently pursued their investigation).

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text accompanying notes 244-66 (discussing field test doctrine).

In a case involving a warrantless temporary seizure of a container which the police had reasonable suspicion (but not probable cause) to believe contained narcotics, the Supreme Court has held that "the brevity of the invasion of the individual's interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." United States v. Place, 462 U.S. 696, 709 (1983); see United States v. Sharpe, 470 U.S. 675, 685 (1985) (stating in dictum that if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop).

In *Jacobsen*, the warrantless seizure of the box and its contents was for an apparently short but unspecified period of time, during which period of time federal DEA agents removed the plastic bags from the tube inside the package, removed a trace of white powder from each of the four bags, and performed a field test on the white powder removed from the bags. United States v. Jacobsen, 466 U.S. at 111-12.

222. See United States v. Johns, 469 U.S. 478, 487 (1985) (suggesting in dictum that delay by police in completing a warrantless search of an automobile, under the so-called "automobile exception" to the general rule requiring a warrant for a search, during which time the police retained possession of the automobile and its contents, may be unreasonable if it adversely affects a privacy or possessory interest); United States v. Place, 462 U.S. 696, 708 (1983) (90-minute detention of luggage being carried by a person when seized based on reasonable suspicion that it contained narcotics, held to be unreasonable seizure under fourth amendment, with Court stressing in part that seizure intruded on the person's possessory interest in his luggage as well as effectively restrained him from proceeding with his itinerary by subjecting him to possible disruption of travel plans in order to remain with luggage or arrange for its return).

223. See United States v. Sharpe, 470 U.S. 675, 686 (1985) (in determining whether detention of a person is too long in duration to be justified as investigative stop based on reasonable suspicion of criminal activity, court should examine whether police diligently pursued means of investigation that was likely to confirm or dispel their suspicion quickly); United States v. Place, 462 U.S. at 709 (90-minute detention of a person's luggage, based on reasonable suspicion that it contained narcotics, held to be unreasonable seizure under the fourth amendment, with the Court stressing, in part, that the police did not diligently pursue its investigation); Florida v. Royer, 460 U.S. 491, (1983) (plurality opinion) (in determining that person suspected of carrying contraband narcotics in his luggage was under arrest rather than merely stopped when he and his luggage were involuntarily moved from airport concourse to DEA office, the plurality noted it would have been feasible to have investigated contents of luggage by more expeditious method of using trained canine while luggage was momentarily detained); Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (indicating in dictum that in some situations police must be able to detain persons for more than a brief period in order to investigate criminal activity, but noting that doubt may be cast on reasonableness of detention if method of investigation makes the period of
The cases cited by the Jacobsen Court in support of its two stated principles with respect to the right of law enforcement officials to seize, without a warrant, containers that do not support any expectation of privacy, or a justifiable expectation of privacy, do not support these statements. The portion of United States v. Ross cited in footnote 19 of Jacobsen states only that the fourth amendment provides protection to the owner of every container that conceals its contents from plain view. However, the Ross Court made this statement in addressing the issue of whether the opening and inspection of the contents of a container violates the fourth amendment's prohibition of unreasonable searches. The Ross decision at no point addressed the issue of whether the dominion and control involved in opening and inspecting the contents of a container, the distinctive configuration or outward appearance of which reveals its contents to plain view (and therefore does not support any expectation of privacy), constitutes an unreasonable seizure in violation of the fourth amendment. The portion of Robbins v. California cited in footnote 19 of Jacobsen refers to a container that so clearly announces its contents, whether by distinctive configuration, transparency, or otherwise, that its contents are obvious to the observer. But as is the case in the portion of the Ross decision cited by the Jacobsen Court, this statement in Robbins was made only in the context of whether the opening and inspection of a container by law enforcement officials violates rights of privacy in contravention of the fourth amendment's prohibition of unreasonable searches, not in the context of whether the opening and inspection of a container violates the fourth amendment's prohibition of unreasonable seizures.

Furthermore, the cases cited in footnote 21 of Jacobsen, as supporting authority for the court's statement that "it is well-settled that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband," do not in fact support this

detention unduly long).

When a container not supporting any expectation of privacy is seized from a person's presence, a court, in determining whether a temporary seizure of the container is unreasonable in violation of the fourth amendment, also might consider whether the police informed the person of the place to which they were transporting the container, the length of time he might be dispossessed of the container, and what arrangements would be made for return of the container if the investigation dispelled the police's suspicion. United States v. Place, 462 U.S. at 710.

225. United States v. Jacobsen, 466 U.S. at 121 n.19 (citing cases as supporting authority for principle that containers no longer supporting any expectation of privacy may be seized, at least temporarily, without a warrant).
227. Id. at 800, 817, 825.
230. Id. at 428.
231. Id. at 423-24.
233. Id. at 121-22.
statement. The cited portion of *United States v. Place*\(^{234}\) states in dictum that law enforcement authorities, when they have probable cause to believe a container holds contraband or evidence of a crime, may seize the container without a warrant pending issuance of a warrant to examine its contents, if exigencies demand it or some other exception to the warrant requirement is present (such as when police observe weapons or evidence in a public place).\(^{235}\) The cited portion of *Place* does not state that a warrantless seizure of "effects" that cannot support a justifiable expectation of privacy is not prohibited if there is probable cause. The portions of the other cases\(^{236}\) cited in footnote 21 of *Jacobsen* refer only to warrantless seizures of property under the plain view seizure doctrine.\(^{237}\) Thus none of the cases cited in *Jacobsen* support the Court's stated principles with respect to the right of law enforcement officers to make warrantless seizures of property not supporting any expectation of privacy. Furthermore, no policy arguments are provided by the *Jacobsen* Court in support of these principles.

The determination of whether a warrantless temporary seizure of a container or an effect whose contents do not support a justifiable expectation of privacy violates the Fourth Amendment's prohibition against unreasonable seizures should be based upon a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.\(^{238}\) Under this balancing approach, a warrantless temporary seizure of a container not supporting a justifiable expectation of privacy usually should be held to be reasonable when the seizure is based upon probable cause.\(^{239}\) This conclusion is based in part


\(^{235}\) Id. at 701-02; see text accompanying notes 150-65 supra and notes 373-77 infra (discussing exceptions to warrant requirement).


\(^{237}\) The cited portions of these cases variously refer to warrantless seizures of items observed in plain view when the items are abandoned, publicly situated or discovered by a police officer executing a valid search, Texas v. Brown, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment), or when the items are seized by a police officer who has a right to be in the position to have that view, Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam), is in a public place, Payton v. New York, 445 U.S. 573, 587 (1980), or is in an open area. G.M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977). The cited portion of Texas v. Brown, 460 U.S. at 741-42 (plurality opinion), simply refers to the seizure of property in plain view, involving no invasion of privacy, when there is probable cause to associate the property with criminal activity. See supra notes 131-209, 217 and accompanying text (discussing plain view doctrine).

\(^{238}\) See United States v. Jacobsen, 466 U.S. at 125 (field test of contents of seized package represented minimal intrusion when police destroyed trace amount of suspicious material to determine whether such material was contraband); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (police officer stopped automobile and detained its occupants during spot check held unreasonable in absence of articulable and reasonable suspicion of wrongdoing).

\(^{239}\) This balancing approach for measuring the reasonableness of a particular law enforcement
on the fact that no "search" within the meaning of the fourth amendment occurs when a container or an effect not supporting a justifiable expectation of privacy is opened and its contents inspected. Consequently, a seizure of such a container or effect implicates only the fourth amendment's prohibition against unreasonable seizures. When no search is involved in investigating the contents of a container or effect, and there is probable cause to believe that such a container or effect contains a seizable item, the law enforcement interests in a warrantless temporary seizure for purposes of inspecting the contents of the container or effect generally should outweigh the adverse effects caused by the interference with possessory interests that occur as a result of such a seizure. If a warrant was required before seizing temporarily such a container or effect, the container or effect might be moved from its original location while a warrant was sought and police might not be able to monitor the movement nor determine the new location of the container or effect. If, however, such a container or effect is seized without a warrant for more than a few minutes without a showing that law enforcement interests necessitated a lengthy delay for investigatory purposes, and such delay adversely affects a person's possessory interests in the container or effect or disrupt's a person's travel plans by requiring him to make inquiries and arrangements for return of the container or effect, such a warrantless temporary seizure should be held to constitute an unreasonable seizure in violation of the fourth amendment.

practice "usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent standard." Delaware v. Prouse, 440 U.S. at 654 (footnotes omitted).

240. See Arkansas v. Sanders, 442 U.S. at 764 n.13 (not all containers found by police deserve full protection of fourth amendment).

241. See United States v. Jacobsen, 466 U.S. at 125 (balancing nature and extent of intrusion against governmental interest alleged to justify the intrusion); United States v. Place, 462 U.S. 696, 703 (1983) (same).

242. An alternative to temporary seizure of such a container or effect would be for police to engage in a controlled delivery, allowing a container or effect under bailment, or otherwise in the process of shipment, to be delivered to the addressee so that police may obtain evidence that would support the arrest and conviction of the addressee and, possibly, other persons. See Illinois v. Andreas, 463 U.S. 765, 769 (1983) (rather than seizing contraband, police delivered package to consignee in order to identify that consignee). A court, however, should not dictate how law enforcement officials should conduct an investigation of criminal activity when those officials follow a method of investigation that is not unreasonable under the fourth amendment. See Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (when there was probable cause to search automobile both in dark parking lot and subsequently at police station, court allowed the subsequent search). Furthermore, the governmental action involved in resealing a container or effect that, as in Jacobsen, had been opened, arguably would be sufficient dominion and control over the container or effect to constitute a seizure under the fourth amendment, and the time required to reseal the container or effect might be a longer period of time than that involved in a temporary seizure for purposes of investigating the contents of the container or effect.

243. See United States v. Place, 462 U.S. at 708-10 (ninety minute warrantless detention of luggage held unreasonable).
V. FIELD TESTS

In United States v. Jacobsen,²⁴⁴ the Supreme Court held that a warrantless field test by federal Drug Enforcement Administration ("DEA") agents of a trace amount of a white powder,²⁴⁵ which the agents had probable cause to believe was contraband,²⁴⁶ was a reasonable seizure under the fourth amendment.²⁴⁷ The Court stated that the determination of whether this field test, which the Court characterized as a seizure subject to the fourth amendment,²⁴⁸ was reasonable required it to "'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"²⁴⁹ Applying this

²⁴⁵. The Jacobsen Court described the field test in question as involving "the use of three test tubes. When a substance containing cocaine is placed in one test tube after another, it will cause liquids to take on a certain sequence of colors. Such a test discloses whether or not the substance is cocaine, but there is no evidence that it would identify any other substances." Id. at 112 n.1.
²⁴⁶. Id. at 121 n.20.
²⁴⁷. Id. at 125. The Court also held that the field test did not constitute a search subject to the fourth amendment. Id. at 124. Justice White agreed with the Court's conclusion in Part III of its opinion that the field test in question did not violate the fourth amendment. Id. at 127, 133 (White, J., concurring in part and concurring in the judgment). Justice Brennan, although dissenting in Jacobsen, agreed that the field test in question was not a search within the meaning of the fourth amendment, id. at 135, 143 (Brennan, J., dissenting, joined by Marshall, J.), but did not discuss the issue of whether the field test was an unreasonable seizure in violation of the fourth amendment.
²⁴⁸. United States v. Jacobsen, 466 U.S. at 125; see supra text accompanying notes 88-90 (discussing relevance of duration in determining whether "seizure" took place).
²⁴⁹. United States v. Jacobsen, 466 U.S. at 125 (quoting United States v. Place, 462 U.S. at 703). The Jacobsen Court cited a number of cases as examples of authority directly supporting this quoted statement. Id. at 125 n.26 (citing Michigan v. Long, 463 U.S. 1032, 1046-47 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). The cited portions of each of these state, although in varying terminology, that the reasonableness of warrantless conduct by a law enforcement officer (constituting a search or seizure) is to be determined by balancing the intrusion on a person's fourth amendment rights against the importance of the governmental interests asserted as justification for such warrantless conduct.

A warrantless seizure may be held to be reasonable because of the presence of exigent circumstances, but when this approach is taken, a court usually does not also apply the type of balancing test applied by the Court in Jacobsen to determine the lawfulness of the field test. See supra text accompanying notes 373-81 (discussing justification of warrantless search due to exigent circumstances). The Court in Jacobsen did not argue that the warrantless seizure involved in the field test could be upheld on the basis of exigent circumstances. In fact, near the end of its discussion of the field test issue, the Court stated that "'of course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances.'" United States v. Jacobsen, 466 U.S. at 126 n.28. The Court cited four cases to support its position. Two of these cases, Steagald v. United States, 451 U.S. 204 (1981) and Payton v. New York, 445 U.S. 573 (1980), held warrantless
balancing test to the facts, the Court in *Jacobsen* concluded that the destruction of powder during the field test, although affecting possessory interests protected by the fourth amendment, was reasonable.

In support of this conclusion, the Court stated that the law enforcement interests justifying the procedures were substantial because the suspicious nature of the material made it virtually certain that the substance tested was in fact contraband. Conversely, according to the Court, the seizure resulting from the field test “could, at most, have only a *de minimis* impact on any protected property interest” because “only a trace amount of material was involved, the loss of which appears to have gone unnoticed by the respondents, and since the property had already been lawfully detained.” Consequently, the Court concluded that “the safeguards of a warrant would only minimally advance Fourth Amendment interests” and that the warrantless seizure involved in the destruction of the powder during the field test was reasonable.

entries and searches of residences to be unreasonable. One cited case, *Dunaway v. New York*, 442 U.S. 200 (1979), held that a warrantless arrest of a person without probable cause was unreasonable. The final cited case, *United States v. Chadwick*, 433 U.S. 1 (1977), held that a warrantless search of luggage within the exclusive control of law enforcement officers was unreasonable.


251. *Id.* at 125.

252. The respondent conceded that the DEA agents had probable cause to believe the package holding the powder subjected to the field test contained contraband. *Id.* at 121 n.20.

253. *Id.* at 125 (citing as authority to be conferred *Cardwell v. Lewis* 417 U.S. 583, 591-92 (1974) (plurality opinion)). The *Jacobsen* Court stated that *Cardwell* held that an “examination of [an] automobile’s tires and [the] taking of paint scrapings was a *de minimis* invasion of constitutional rights.” *Id.* The plurality opinion in *Cardwell*, however, only made this statement in addressing the issue of whether such conduct by the police was a search under the fourth amendment. See *Cardwell v. Lewis* 417 U.S. at 588-92 (no expectation of privacy protected by fourth amendment was infringed when search was limited to examining tire and taking paint scrapings from automobile parked in public parking lot). The plurality opinion in *Cardwell* did not address the issue of whether the tire examination and taking of paint scrapings was a seizure or an unreasonable seizure within the meaning of the fourth amendment.


255. *Id.* The *Jacobsen* Court cited one case, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973), as authority directly supporting its conclusion that the warrantless field test was reasonable. The *Jacobsen* Court described *Murphy* as holding that a warrantless search and seizure limited to scraping a suspect’s fingernails was justified even when a full search may not be. *United States v. Jacobsen*, 466 U.S. at 125 n.28. In fact, the *Murphy* decision only addressed the issues of whether the warrantless fingernail scraping was a reasonable search under the fourth amendment, and whether the warrantless seizure of the respondent’s person while the fingernail scraping took place was a reasonable seizure under the fourth amendment. *Cupp v. Murphy*, 412 U.S. at 294-95. The *Murphy* Court did not address the issue of the reasonableness of the warrantless seizure of the material that was scraped from the respondent’s fingernails. *Id.* at 295 (only discussing fingernail scraping as a search). The *Jacobsen* Court also cited two cases as authority to be conferred regarding its conclusion that the warrantless field test was reasonable. *United States v. Jacobsen*, 466 U.S. at 125 n.28 (citing *United States v. Place*, 462 U.S. at 703-06 (described by *Jacobsen* Court as approving brief warrantless seizures of luggage for purposes of canine “sniff test” based on its minimal intrusiveness and reasonable belief that luggage contained contraband)); *United States v. Van Leeuwen*, 397 U.S. 249, 252-53 (1979) (described by *Jacobsen* Court
The Court's reference to the property already having been lawfully detained indicates that a prerequisite to a lawful warrantless field test is a finding that no unreasonable seizure in violation of the fourth amendment occurred when law enforcement officers exercised dominion and control over the package from which the trace amount of powder for the field test was removed.\textsuperscript{256}

Although concluding that the warrantless field test was a reasonable seizure under the fourth amendment, the \textit{Jacobson} Court made clear that a key fact was its finding that the agents were "virtually certain" that the powder tested was contraband. This conclusion is based upon the Court's statement that "we do not suggest, however, that any seizure of a small amount of material is necessarily reasonable. An agent's arbitrary decision to take the 'white powder' he finds in a neighbor's sugar bowl, or his medicine cabinet, and subject it to a field test for cocaine might well work an unreasonable seizure."\textsuperscript{257} However, the Court in \textit{Jacobsen} does not make clear whether probable cause that a substance is cocaine (or some other type of contraband)\textsuperscript{258} is a prerequisite for conducting a warrantless field test, or whether a warrantless field test of a substance can take place on a lesser amount of information, such as the reasonable suspicion that authorizes a warrantless stop and frisk.\textsuperscript{259}

\textsuperscript{256} See supra text accompanying notes 210-43 (discussing warrantless searches of effects not supporting any reasonable expectation of privacy).

\textsuperscript{257} United States v. Jacobsen, 466 U.S. at 126 n.28. The Supreme Court has stated that the balancing test applied by the majority in \textit{Jacobsen} to determine the lawfulness of the warrantless field test "usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

\textsuperscript{258} The Court does not make clear whether its holding is limited to the particular field test for cocaine involved in \textit{Jacobsen}, or is applicable to other chemical tests that simply reveal whether or not a substance is a particular type of controlled substance. In \textit{Jacobsen} the Court found that the field test was not a fourth amendment search because the field test only revealed whether or not a particular substance is cocaine and Congress had decided that the interest in privately possessing cocaine is illegitimate. United States v. Jacobsen, 466 U.S. at 123.

\textsuperscript{259} See Terry v. Ohio, 392 U.S. 1, 21 (1968) (to justify particular intrusion police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion). The \textit{Jacobsen} Court cited two cases as authority to be conferred regarding its conclusion that the warrantless field test was reasonable. United States v. Jacobsen, 466 U.S. at 125-26 n.28 (citing United States v. Place, 462 U.S. 696, 703-06 (1983) (approving brief warrantless seizures of luggage for purposes of canine "sniff test" based on its minimal intrusiveness and reasonable belief that luggage contained contraband); United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970) (detention of package based on reasonable suspicion justified because detention infringed no "significant Fourth Amendment interest"); see infra text accompanying notes 267-372 (discussing \textit{Place} and \textit{Van Leeuwen} decisions in detail). Since the \textit{Place} and \textit{Van Leeuwen} decisions are cited as authority to be conferred, this \textit{Jacobsen} Court citation might be interpreted as implying that a field test can be made when there is reasonable suspicion that the substance to be tested is contraband, not just when there is probable cause to believe the substance is contraband, such as was the cocaine in \textit{Jacobsen}. See United States v. Jacobson, 466 U.S. at 121 n.20 ("Respondents concede that the agents had
Justice White concurred with the majority's conclusion, in Part III of its opinion in *Jacobsen*, "that the Court of Appeals erred in holding that the type of chemical test conducted here violated the Fourth Amendment." 260 His reasons for concurring with this conclusion were "that the clear plastic bags were in plain view when the agent arrived and that the agent thus properly observed the suspected contraband." 261 Justice White noted that the respondents were only challenging the field test, 262 which expanded the private search by Federal Express employees. 263 He argued that the Court should not have addressed the question of whether federal agents could have duplicated the prior private search had that search not left the contraband in plain view. 264 However, Justice White did not discuss whether a fourth amendment seizure occurred when the agent picked up the tube and removed the bags in order to take a sample of the powder for the field test, nor whether any such seizure was unreasonable in violation of the fourth amendment.

In holding that the field test in question was not an unreasonable seizure in violation of the fourth amendment, the majority required that no unreasonable

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261. *Id.* Justice White did not agree with the majority's disregard of the finding by both the district court and court of appeals that when the first DEA agent arrived, the tube was in plain view in the box and the bags with the white powder were visible from the end of the tube. *Id.* at 126-27. Justice White also disagreed with the majority's determination in *Jacobsen* that the agent's removal of the tube from the box and the plastic bags from the tube, and his subsequent visual examination of the bags' contents, did not constitute a search even if the bags were not visible when the first DEA agent arrived on the scene. *Id.* at 127-33.

262. *Id.* Justice White noted that the respondents "argue here that whether or not the contraband was in plain view when the federal agent arrived is irrelevant and that the only issue is the validity of the field test." *Id.* at 127.

263. *Id.* at 128.

264. *Id.* Alternatively, Justice White argued in *Jacobsen* that if the majority found that the magistrate had erred in concluding that the white powder was in plain view when the first agent arrived and that the respondents had not abandoned their challenge to the agent's duplication of the prior private search, the better course would be to reverse the court of appeals' decision invalidating the field test as an illegal expansion of the private search and remand the case to allow the district court and court of appeals to review in the first instance the magistrate's findings on the plain view issue. *Id.* Justice Brennan, with whom Justice Marshall joined in dissent, agreed that the case should be remanded for this purpose. *Id.* at 134 (Brennan, J., dissenting, joined by Marshall, J.). Justice Brennan agreed with the majority in *Jacobsen* that the field test was not a fourth amendment "search" but on grounds different than those given by the majority, and he emphasized that the question involved consideration of the method used to search as well as the circumstances attending use of the field test. *Id.* at 139-41.
search or seizure occur while law enforcement officers exercise dominion and control over the package from which a sample is taken for a field test.\textsuperscript{265} Furthermore, the Court's conclusion that the warrantless seizure involved in a field test is reasonable under the fourth amendment is a proper one under the balancing test applied by the Court, because such a seizure must be based upon probable cause or reasonable suspicion and the law enforcement interests in eradicating contraband controlled substances substantially outweigh a field test's \textit{de minimis} impact upon the possessory interests protected by the fourth amendment's prohibition of unreasonable seizures.\textsuperscript{266}

VI. \textsc{Temporary Seizures for Investigatory Purposes Based on Reasonable Suspicion}

In addition to authorizing certain permanent seizures of property for investigatory purposes under the \textit{Jacobsen} decision's field test doctrine, the Supreme Court has held that in certain circumstances warrantless temporary seizures of personal property for investigatory purposes do not violate the fourth amendment.

A. \textit{United States v. Van Leeuwen}

In \textit{United States v. Van Leeuwen},\textsuperscript{267} Justice Douglas wrote the opinion for a unanimous Court in one of the earliest Supreme Court decisions to address the issue of when a warrantless "seizure" of personal property is reasonable under the fourth amendment. The \textit{Van Leeuwen} Court held that the fourth amendment was not violated when two suspicious packages, mailed at a United States post office, were detained for twenty-nine hours by a postal clerk while a policeman and customs agents investigated the respondent (who had mailed the packages), the return address, and addresses on the packages. The packages each weighed twelve pounds and were mailed at 1:30 p.m. in the afternoon at a post office in the town of Mt. Vernon, Washington, which is located approximately sixty miles from the Canadian border. One of the packages was addressed to a post office box in Van Nuys, California, and the other to a post office box in Nashville, Tennessee. The respondent, who mailed the packages, had declared that they contained coins and sent them air mail registered, with each package insured for $10,000.\textsuperscript{268} A postal clerk at the post office told a police officer who was present that he was suspicious of these packages. The police officer then noticed that the return address on each package was a vacant housing area located nearby (and therefore a fictitious

\begin{itemize}
\item \textsuperscript{265} \textit{Id.} at 124-25.
\item \textsuperscript{266} \textit{Id.} at 125.
\item \textsuperscript{267} 397 U.S. 249 (1970).
\item \textsuperscript{268} The parties in \textit{Van Leeuwen} agreed that this type of mailing was first class, making the packages not subject to discretionary inspection by postal authorities. \textit{Id.} at 250. The Court reiterated in \textit{Van Leeuwen} that first class mail cannot be inspected, except as to outward form and appearance, except with a search warrant. \textit{Id.} at 251 (quoting \textit{Ex parte} Jackson, 96 U.S. 727, 733 (1877)).
\end{itemize}
return address), and that the respondent's automobile had British Columbia license plates. The police officer then called Canadian police, who called United States customs in Seattle. An hour and a half after the packages had been mailed (3 p.m.), customs agents called Van Nuys and learned that the addressee of one package was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential between Seattle and Nashville, Seattle customs agents were unable to reach Nashville until the following morning. At that time, they were informed that the Nashville addressee of one of the packages in question also was being investigated for trafficking in illegal coins. A customs official in Seattle then filed an affidavit for a search warrant for both packages with a United States commissioner, who issued the search warrant at 4:00 p.m. that day (twenty-six and a half hours after the packages had been mailed). The search warrant was executed at 6:30 p.m. that day (twenty-nine hours after the packages had been mailed), at which time the packages were opened, inspected and resealed, and then promptly sent on their way. The respondent was convicted of illegally importing gold coins in violation of Section 545 of Title 18 of the United States Code at a trial at which gold coins in the two packages in question were offered into evidence, along with other evidence. The court of appeals reversed, holding that the gold coins were improperly admitted into evidence because a timely warrant had not been obtained. On writ of certiorari, the Supreme Court reversed the court of appeals.

The Supreme Court in Van Leeuwen first reiterated that first class mail cannot be examined and inspected, except for outward form and weight, without a search warrant. The Court stated that the flow of first class mail cannot be encumbered by inspecting it, appraising it, writing the addressee about it and awaiting a response, before dispatching it. However, the Supreme Court stated that even first-class mail is not beyond the reach of all inspection, and concluded that the conditions for detention and inspection of first class mail had been satisfied in the case. The Court held that the warrantless detention of the two packages while an investigation was made was justified because of the nature and weight of the packages, the fictitious return address and the British Columbia license plates of the respondent who made the mailing in a "border" town. Although stating that at the point of detention there was

269. Id. at 250.
271. United States v. Van Leeuwen, 414 F.2d 758 (9th Cir. 1969).
273. Id. at 252 (quoting Lamont v. Postmaster General, 381 U.S. 301, 306 (1965)). The Court indicated that newspapers, magazines, pamphlets and other printed matter were not subject to the protections afforded to first class mail, but did not discuss what procedures postal authorities or other law enforcement officers must follow before such printed matter can be opened and inspected. Id. at 251.
274. Id. at 252.
275. Although stating that the detention of the packages was on "the basis of suspicion," id., the Court did not explain what criminal acts the police could believe the respondent was commit-
“no possible invasion of the right ‘to be secure’ in the ‘persons, houses, papers, and effects’ protected by the Fourth Amendment against ‘unreasonable searches and seizures,’” the Court noted that at some point detention of mail could become an unreasonable seizure of “papers” or “effects” within the meaning of the fourth amendment.

The Van Leeuwen Court noted that the detention of the packages for one and a half hours after they were mailed for an investigation was not excessive. This investigation led to a finding of probable cause to believe that the California package “was part of an illicit project” and that a warrant could have been obtained for that one package that day. The Court noted that “the mystery of the other package remained unsolved and federal officials in Tennessee could not be reached because of the time differential.” After reviewing the chronology of the acts involved in contacting the Tennessee officials and in obtaining and transmitting the search warrant, the Court stated that there had been a “speedy transmission” of the search warrant “considering the rush-hour time of day and the congested highway.”

276. Id. What the Court appeared to be stating is that the respondent’s fourth amendment rights were not violated at the first moment that the packages were detained. See supra notes 88-90 (discussing definition of seizure of property in Jacobsen).


278. Id. The Court did not explain why this delay was not excessive. They may have believed that packages often stay in the post office where they were mailed for this length of time or longer before they begin their journey to the addressee, or that the suspicious nature of the packages justified this one and a half hour detention for investigative purposes even if the packages were detained for a period longer than normal.

279. Id. at 252-53.

280. Id. at 253.

281. Id. at 253.

282. Id. The Van Leeuwen decision thus suggests that when police have acquired probable cause to believe detained mail contains contraband narcotics or another item that is seizable because it has a nexus to criminal activity, see supra notes 54-61 (discussing definition of seizable items in Warden v. Hayden), the police may further detain the mail without a warrant for a reasonable period of time to obtain a search warrant authorizing them to open and inspect the contents of the mail. However, the police cannot open and inspect the contents of the mail without a warrant. See supra notes 268-73 (discussing need for search warrant to examine package beyond its outward appearance). This approach is consistent with the Court’s general rule that police may not search a container which is within their exclusive control even though they have probable cause to believe the container contains contraband or another seizable item, unless some exigency is present or some exception to the general warrant requirement is present. See United States v. Place, 462 U.S. 696, 701 (1983) (where law enforcement authorities have probable cause to believe container holds contraband or evidence of crime, but have not secured warrant, the fourth amendment permits seizure of property, pending issuance of warrant to examine its contents, if exigencies of circumstances demand it or some other recognized exception to warrant requirement is present); United States v. Chadwick, 433 U.S. 1 (1977) (defendant entitled to fourth amendment protection before privacy interests in contents of footlocker were invaded).
The *Van Leeuwen* Court concluded that the delay in forwarding the packages until the day after they were mailed, rather than the day they were mailed, invaded no interest protected by the fourth amendment, because the significant fourth amendment interest was in the privacy of this first class mail and that such privacy was not disturbed or invaded until the magistrate's approval was obtained. By stating that only significant privacy interests were involved (the interests protected by the fourth amendment's prohibition of unreasonable searches) and not referring to any possessory interest (significant or otherwise) as being invaded, *Van Leeuwen* might be interpreted as holding that the twenty-nine hour detention was not a seizure under the fourth amendment. Such an interpretation could be based upon the Court's interpretation of a fourth amendment seizure of property as a meaningful interference with an individual's possessory interests in that property, on the grounds that the twenty-nine hour detention of the two packages did not meaningfully interfere with respondent's actual possession of the packages. However, the *Van Leeuwen* decision should be interpreted as holding that the twenty-nine hour detention of the packages, although a "seizure" within the meaning of the fourth amendment, was not an unreasonable seizure in violation of the fourth amendment.

Such an interpretation of *Van Leeuwen* is supported by the concluding paragraph of the Court's decision. The *Van Leeuwen* Court there stated that "[t]he rule of our decision certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection," but that its holding is only that, on the facts of the case, the

283. United States v. Van Leeuwen, 397 U.S. at 253. In United States v. Place, 462 U.S. at 705 n.6, Justice O'Connor stated that the *Van Leeuwen* Court "[e]xpressly limited its holding to the facts of the case" and that one commentator has noted that "'Van Leeuwen was an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves.' " *Id.* (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6, at 71 (Supp. 1982)).

284. See supra notes 64-67 (discussing the difference between a seizure and a search).

285. If this detention was not a "seizure" within the meaning of the fourth amendment, the fourth amendment's prohibition against unreasonable seizures would not be applicable. See United States v. Karo, 468 U.S. 705 (1984) (transfer of container concealing locational "beeper" did not interfere with anyone's possessory interests and therefore involved no seizure). See supra notes 62-122 (discussing definition of fourth amendment seizure).

286. Cf. United States v. Place, 462 U.S. at 710 (ninety minute detention of luggage made seizure unreasonable); see infra notes 304-72 and accompanying text (discussing details of decision in *Place*).

287. The 29-hour detention of the two packages in *Van Leeuwen* probably would be held to be a "seizure" under current interpretations of the fourth amendment. See United States v. Jacobsen, 466 U.S. 109, 120-21 (1984) (holding assertion of dominion and control for brief period over package not in owner's actual possession constituted fourth amendment "seizure"); see supra notes 62-94 and accompanying text (discussing details of decision in *Jacobsen*).


289. The facts referred to by the Court at this point were "the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, [and] the distance between Mt. Vernon and Seattle." *Id.*
twenty-nine hour delay between the mailings and the service of the warrant was not "unreasonable" within the meaning of the fourth amendment.\textsuperscript{291} The former statement appears to recognize that such a lengthy detention constitutes a seizure, while the latter statement concludes that the warrantless seizure was not unreasonable in violation of the fourth amendment.

The Court in \textit{Van Leeuwen} also did not clarify whether the warrantless seizure involved in the twenty-nine hour detention was not unreasonable because there were exigent circumstances or because the governmental interests involved outweighed the interference with fourth amendment interests occurred.\textsuperscript{292} The \textit{Van Leeuwen} Court's concluding statement that "[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant,"\textsuperscript{293} might be interpreted either as being concerned with the exigent circumstances presented by the possible disappearance of the evidence in the two packages, or with the governmental interest in avoiding an extensive (and therefore costly) quest to locate the packages. Although exigent circumstances could justify a warrantless detention (seizure) of an article in the mail,\textsuperscript{294} a warrantless detention of a suspicious article\textsuperscript{295} in the mail for investigative purposes also should be held reasonable and lawful under the fourth amendment when police diligently pursue their investigation, the addressee's or addressor's possessory interests in the contents of the mail are not significantly adversely affected by the delay, and the period of time that the mail is detained is not excessive. In such circumstances, a warrantless detention of an article in the mail should be held to be reasonable under the fourth amendment because the law enforcement interests furthered by the detention outweigh any adverse effects upon protected fourth amendment interests caused by the detention.\textsuperscript{296}

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} \textit{See supra} note 2 (discussing general rule requiring search warrant and the exceptions to the rule).

\textsuperscript{293} United States v. \textit{Van Leeuwen}, 397 U.S. at 253.

\textsuperscript{294} \textit{See infra} notes 373-77 (discussing circumstances when warrantless seizure is valid).

\textsuperscript{295} \textit{See infra} notes 297-303 (discussing seizure based on reasonable suspicion).

\textsuperscript{296} \textit{See Garmon v. Foust}, 741 F.2d 1069 (8th Cir. 1984) (risk of package's disappearance before warrant could be obtained outweighed owner's interest in possession); United States v. Hillison, 733 F.2d 692 (9th Cir. 1984) (nine hour segregation and detention of package did not violate fourth amendment); \textit{see infra} text accompanying notes 304-72 (discussing details of decision in \textit{Place}). Significant adverse effects on such possessory interests might be present if the contents of the article in the mail were perishable and significantly deteriorated during the period of detention, or if such detention caused significant adverse economic effects on the addressee or addressor. The \textit{Van Leeuwen} decision implies that the permissible length of time for such a warrantless detention of mail should be determined by consideration of the type of investigation that is being pursued and the diligence with which law enforcement officers pursue their investigation. \textit{See supra} notes 287-91 and accompanying text (discussing reasonableness of 29-hour detention); \textit{cf.} United States v. Sharpe, 470 U.S. 675 (1985) (in determining reasonable length of investigative stop courts must consider purposes served by stop as well as time reasonably needed to effectuate those purposes); Michigan v. Summers, 452 U.S., 692, 700 n.12 (1981) (same).
Application of the Van Leeuwen decision to other factual situations involving warrantless detention of mail for investigative purposes is difficult because Van Leeuwen did not indicate what level of suspicion is necessary to justify the warrantless detention of mail. The Court in Van Leeuwen clearly does not require the probable cause necessary for issuance of a search warrant as a prerequisite to a detention of mail for investigative purposes, because the Court referred to the detention of the packages on "the basis of suspicion"297 and noted that probable cause justifying issuance of a search warrant for the two packages was obtained after the detention of the two packages.298 However, the Court in Van Leeuwen did not indicate whether the information necessary to justify a warrantless detention must give rise to a reasonable suspicion of criminal activity that would justify an investigative stop of the deliverer, addressee, or addressee of a package.299 Nor did the Court indicate whether the information must give rise to only a reasonable suspicion that the article contains contraband or some other seizable item.300 The Court held in another case that warrantless temporary detentions of luggage for investigative purposes are permitted when there is reasonable suspicion that the luggage contains contraband narcotics.301 Similarly, warrantless temporary detention of mail should be permitted when there is reasonable suspicion that the mail contains contraband narcotics or other seizable items.302

298. Id. at 252-53.
299. See United States v. Cortez, 449 U.S. 411, 417 (1981) (in determining what is sufficient for police to stop person, totality of circumstances must be taken into account); Adams v. Williams, 407 U.S. 143, 146 (1972) (informant's information sufficient to justify stop). See also United States v. Hensley, 469 U.S. 221, 229 (1985) (reasonable suspicion that person has committed a felony, based on specific and articulable facts, is sufficient for investigative stop).
300. Cf. United States v. Place, 462 U.S. at 703 (reasonable belief based on specific and articulable facts that luggage contains narcotics is necessary to justify seizure of luggage); infra notes 304-72 and accompanying text (discussing decision in Place).
301. United States v. Place, 462 U.S. at 703.
302. In Van Leeuwen, the Court did not state what the police initially suspected to be the contents of the two packages; the police ultimately learned that the packages contained illegally imported gold coins. The contents were therefore either contraband or evidence of crime, both of which are items that can be seized under the fourth amendment. See supra notes 54-61 and accompanying text (discussing definition of seizable items in Warden v. Hayden). In United States v. Place, the Court limited its holding to situations where police have reasonable suspicion to believe that luggage contains narcotics, because the method of investigation at issue was the sniffing of luggage by a trained narcotics detection dog which disclosed only the presence or absence of narcotics, but no other information. United States v. Place, 462 U.S. at 707. This method of investigation was held not to be a "search." Id. If this investigative procedure had been held to be a "search," probable cause would have been required. Id. at 706. The Court implied that any other type of investigative procedure would be a "search" (requiring probable cause), stating that it was unaware of any other investigative procedure that was so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Id. at 707; see infra notes 304-72 and accompanying text (discussing details of decision in Place). On the other hand, the investigative procedures followed by the police in Van Leeuwen did not constitute a search, because no fourth amendment search occurs when police examine the exterior of a mailed package or envelope, see Annotation, Validity Un-
However, the *Van Leeuwen* decision may not be interpreted as authorizing warrantless detention of any effects other than mail because in *Van Leeuwen* governmental agents already had lawful dominion and control of the mail, due to the addressee's consensual posting, when the detention commenced. To acquire effects other than mail for investigative purposes, governmental authorities would have to acquire dominion and control over the effects—conduct that would constitute a "seizure" requiring either the authorization of a search warrant or an exception to the general rule requiring a warrant for a seizure.

B. United States v. Place

In *United States v. Place*, the Supreme Court held that law enforcement authorities may temporarily detain personal luggage, without a search warrant, for the purpose of exposing it in a public place to a trained narcotics detection dog when there is reasonable suspicion to believe that the luggage contains narcotics. However, the Court in *Place* held that the ninety minute

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*303. See supra notes 62-96 and accompanying text (discussing elements of seizure in *Jacobsen* decision).


305. *Id.* at 697-98, 707. This "holding" actually may be dictum because the resolution of this issue was unnecessary to the Court's decision. *See United States v. Beale*, 735 F.2d 1289, 1290-91 (9th Cir. 1984) (en banc) (sniff of luggage by trained narcotics detection dog did not constitute search). Justice O'Connor's opinion for the *Place* Court does not explain what law enforcement officers are authorized to do if the trained canine gives a positive reaction after sniffing the luggage, indicating that the luggage contains narcotics. Although such a positive reaction probably gives law enforcement officers probable cause to believe that the luggage contains narcotics, see *Segura v. United States*, 468 U.S. 796, 813 n.8 (1984) (no possessory interest violated where possessors under arrest throughout search of items) (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.), officers probably still need to obtain a warrant before searching the luggage. A fourth amendment "search" generally occurs when officers open and inspect the contents of a container that conceals its contents from plain view. *See infra* note 352 (discussing cases that define search of containers). As a general rule, officers need a search warrant to search a container that is within their exclusive control even when they have probable cause to believe the container holds contraband narcotics or another seizable item. United States v. Chadwick, 433 U.S. 1, 15 (1977). As stated in *Place*:

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

United States v. Place 462 U.S. at 701. When a trained canine has given law enforcement offi-
detention of respondent Place’s personal luggage could not be upheld under this rule because the length of the detention of respondent’s luggage was unreasonable under the fourth amendment and because this violation was exacerbated by other conduct of the Drug Enforcement Administration (“DEA”) agents who seized respondent’s luggage. In Place, DEA agents seized without a search warrant two suitcases that respondent Place claimed after arriving at La Guardia Airport on a flight from Miami. Since the agents did not have a trained narcotics detection dog at La Guardia Airport, the agents took Place’s luggage to Kennedy Airport, where the luggage was subjected to a sniff test by a trained narcotics detection dog. Approximately ninety minutes after respondent’s luggage had been seized at La Guardia Airport, the narcotics probable cause to believe that a traveler’s luggage contains narcotics, the exigent circumstances presented by the possibility or probability that the narcotics in the luggage will disappear to an unknown location or be destroyed (because the traveler has been alerted to the officer’s suspicions) should authorize the officers to detain the luggage without a search warrant until a search warrant authorizing a search of the container has been obtained. See infra text accompanying notes 397-403 (discussing factors concerning securing of premises while obtaining search warrant).

307. Id. at 710; see infra text accompanying notes 361-65 and accompanying text (discussing conduct of DEA agents in Place). Although the district court concluded that the DEA agents had reasonable suspicion to believe that Place was engaged in criminal activity when he was stopped and the luggage at issue seized, United States v. Place, 498 F. Supp. 1217, 1225-26 (E.D.N.Y. 1980), the Supreme Court denied certiorari on this issue and did not address it in its review of the case. United States v. Place, 462 U.S. at 700 n.1.
308. DEA agents seized Place’s two suitcases because they suspected that Place was carrying narcotics. United States v. Place, 462 U.S. at 698-99. Place’s behavior at Miami International Airport had aroused the suspicion of law enforcement officers. The officers approached Place at the departure gate for his flight and asked him for his airline ticket and some identification. Place complied with this request and consented to a search of the two suitcases which he had checked, but the officers decided not to search his luggage because Place’s flight was about to depart. Since Place, in parting, had remarked that he had recognized the officers as police, the officers checked the address tags on Place’s checked luggage and noted discrepancies in the two street addresses on the tags. They determined by further investigation that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street listed on the address tags. These Miami officers then informed DEA agents in New York of the information they had acquired about Place.
Two DEA agents met Place at his arrival gate at La Guardia Airport. His behavior aroused their suspicion. After Place claimed his bags and called a limousine, these agents approached Place and identified themselves as federal narcotics agents. Place replied that he knew they were “cops” and had spotted them as soon as he had deplaned. One of the DEA agents then told Place that they believed that he might be carrying narcotics. Place replied that police had searched his baggage at Miami Airport, but the agents responded that their information was to the contrary. After requesting and receiving identification from Place (a driver’s license on which the agents ran a computer check that disclosed no offenses) and his airline ticket receipt, the agents asked Place for his consent to search his luggage. When Place refused to consent to search of his luggage, the agents told him they were taking his luggage to a federal judge to try to obtain a search warrant. The Supreme Court stated that a “seizure” of Place’s luggage for purposes of the fourth amendment occurred at this point. Id. at 707. The agents then told Place that he could accompany them, but Place declined to do so. The agents therefore gave him a telephone number where one of the agents could be reached.
ics detection dog at Kennedy Airport reacted positively to the smaller of respondent’s two suitcases but ambiguously to the larger suitcase. Since this happened late on a Friday afternoon, the agents detained the luggage until Monday morning, when they obtained a search warrant for respondent’s smaller suitcase. The agents found 1,125 grams of cocaine in the smaller suitcase. After Place was indicted for possession of the cocaine with intent to distribute in violation of Section 841(a)(1) of Title 21 of the United States Code, he moved to suppress the cocaine seized from his luggage on the ground, among others, that the warrantless seizure of his luggage violated the fourth amendment. His motion to suppress was denied by the district court, which held that the standard of Terry v. Ohio, justified the warrantless detention of respondent’s luggage because there was reasonable suspicion to believe that the luggage contained narcotics. Place then pled guilty to the charge, reserving the right to appeal the denial of the motion to suppress. Although assuming both that Terry principles could justify a warrantless seizure of baggage on less than probable cause and that reasonable suspicion existed to justify the investigatory stop of Place, the court of appeals reversed Place’s conviction on the grounds that the warrantless seizure of Place’s luggage exceeded the permissible limits of a Terry-type investigative stop and was a seizure without probable cause in violation of the fourth amendment. The Supreme Court affirmed.

The Place Court initially noted that as a general rule a seizure of personal property without a valid warrant is per se unreasonable under the fourth amendment. However, the Court stated:

Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circum-

310. 392 U.S. 1 (1968). The Terry decision provided that a law enforcement officer, without a warrant, may stop and frisk the person of a suspect when the officer has reasonable suspicion, short of probable cause, that there is criminal activity afoot and that the person is armed and presently dangerous to the officer or others. Id. at 30. A frisk is an exterior pat-down of a suspect’s clothing for the purpose of locating weapons; an officer may only go beneath the suspect’s exterior clothing to reach for what reasonably felt like a weapon during the exterior pat-down. Id. at 29-30.
311. United States v. Place, 498 F. Supp. 1217 (E.D.N.Y. 1980). The district court also held that the stops of Place at the two airports were lawful because the agents had reasonable suspicion that Place was engaged in criminal activity. Id. at 1225-26. The Supreme Court did not address this issue. 462 U.S. at 700 n.1. In addition, the district court rejected respondent Place’s contention that the sniff test of his luggage was conducted in a way that tainted the dog’s reaction. 498 F. Supp. at 1228.
313. United States v. Place, 462 U.S. at 700.
314. Id. at 701.
stances demand it or some other recognized exception to the warrant requirement is present.\textsuperscript{315}

The Court did not explain why this rule did not authorize the warrantless seizure of Place's luggage, but apparently it did not address this issue because the government did not contend that the DEA agents had probable cause to believe respondent's luggage contained contraband prior to the trained canine's positive reaction to the smaller of respondent's two suitcases.\textsuperscript{316} With probable cause absent in Place's case, the Court accepted the federal government's argument that the principles of \textit{Terry v. Ohio}\textsuperscript{317} should permit warrantless seizures of luggage from the custody of the owner on the basis of reasonable, articulable suspicions (less than probable cause).\textsuperscript{318} Such reasonable suspicion must be based on objective facts indicating that the luggage contains contraband or evidence of a crime, and the seizure must serve the purpose of conducting a limited investigation, without opening the luggage, that will quickly confirm or dispel such suspicion.\textsuperscript{319}

\textsuperscript{315} Id. (citing Arkansas v. Sanders, 442 U.S. 753, 761 (1979); United States v. Chadwick, 433 U.S. 1 (1977); Coolidge v. New Hampshire, 403 U.S. 443 (1971)); see infra text accompanying notes 373-81 (discussing search and seizure of containers). An example of such seizures cited by the Court in \textit{Place} is the warrantless seizure of objects such as weapons or contraband found in a public place by police. United States v. Place, 462 U.S. at 696. The Court has indicated that such seizures must be based on probable cause. See supra text accompanying notes 150-67 (discussing seizures in public places).

\textsuperscript{316} The Court stated that the government was asking it to recognize the reasonableness under the fourth amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause. United States v. Place, 462 U.S. at 702. The Court noted that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." Id. at 709.

\textsuperscript{317} 392 U.S. 1 (1968).

\textsuperscript{318} United States v. Place, 462 U.S. at 702.

\textsuperscript{319} Id. Although the \textit{Place} Court addressed the issue of whether a seizure based on less than probable cause is reasonable under the fourth amendment, it did not explicitly address the issue of whether the seizure of Place's luggage was unreasonable and in violation of the fourth amendment because of the absence of a search warrant. However, by implicitly authorizing seizures of luggage based on reasonable suspicion less than probable cause, the Court implicitly authorized such seizures to be made without a search warrant, since the fourth amendment on its face only allows search warrants to be issued on the basis of probable cause. The fourth amendment does not authorize the issuance of a search warrant on the basis of reasonable suspicion short of probable cause. See \textit{Terry v. Ohio}, 392 U.S. at 20 (law enforcement officers may stop and frisk suspect without warrant when they have reasonable suspicion that criminal activity exists and that suspect is presently armed and dangerous).

If the issue of the reasonableness of acting without a search warrant had been raised in \textit{Place}, the government might have argued that it was not unreasonable, in violation of the fourth amendment, to have seized Place's luggage and exposed it to a trained narcotics detection dog either because there were exigent circumstances, or because the governmental interests furthered by this intrusion of fourth amendment interests outweigh the nature and quality of the intrusion on Place's fourth amendment interests. See supra note 2 and accompanying text (discussing fourth amendment protections regarding searches and seizures).

Exigent circumstances justifying the warrantless seizure of Place's luggage might have been found to be present on the grounds that the narcotics that Place was suspected of carrying in his
The *Place* Court noted that *Terry* and subsequent cases authorize a police officer, without probable cause, to forcibly stop a person when the officer has a reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.\(^{320}\)

This "exception to the probable-cause requirement for limited seizures of the person in *Terry* and its progeny," and determination of the reasonableness of the type of seizure involved within the meaning of the fourth amendment's protections against unreasonable searches and seizures, was stated by the *Place* Court to rest on a balancing of the competing interests.\(^{321}\) The competing interests which *Place* requires to be balanced are "the nature and quality of the intrusion against the importance of the governmental interests alleged to justify the intrusion."\(^{322}\) *Place* states that "[w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause."\(^{323}\)

luggage might have disappeared to an unknown location if the agents had attempted to follow Place until they had probable cause (or had obtained a search warrant based on probable cause) instead of seizing the luggage at La Guardia Airport. Such a conclusion might have been based upon the facts that the address tags on Place's two suitcases were for two different addresses that were determined to be non-existent, Place had given a telephone number to the airline which belonged to a third address on the street, and Place had called for a limousine before DEA agents approached him at La Guardia Airport and seized his luggage. United States v. Place, 462 U.S. at 698-99; see supra note 308 (discussing facts of *Place*). Alternatively, the seizure of Place's luggage without a warrant might be upheld under the balancing approach (which weighs the governmental interest furthered by this warrantless intrusion against the nature and quality of the intrusion on Place's fourth amendment interests), on the grounds that the substantial governmental interest in preventing trafficking in drugs outweighs the minimal intrusions on a person's fourth amendment interests when luggage he is carrying is briefly detained and exposed to a trained narcotics detection dog. This argument is similar to Justice O'Connor's argument in United States v. Place, 462 U.S. at 702-07, supporting the holding that a person's luggage may be briefly detained when there is reasonable suspicion, less than probable cause, that the luggage contains contraband and narcotics.

\(^{320}\) United States v. Place, 462 U.S. at 702.

\(^{321}\) Id. at 703 (citing *Terry* v. Ohio, 392 U.S. at 20).

\(^{322}\) Id.

\(^{323}\) Id. Neither in *Place*, nor in any other case, did the Supreme Court address the issue of whether the presence of exigent circumstances (such as the possibility of the loss or destruction of evidence) could justify a seizure based on less than probable cause when the balancing test applied by the Court in *Place* would not justify such a seizure. The Court has implied that a warrantless seizure may be held to be reasonable under the fourth amendment because of exigent circumstances even though such a warrantless seizure would not be held to be reasonable under the type of balancing test applied by *Place*. See United States v. Jacobsen, 466 U.S. 109, 126 n.28 (1983); *supra* note 255 (discussing Jacobsen holding that field test of cocaine was reasonable); *infra* notes 373-81 and accompanying text (discussing seizures to prevent loss of evidence). If a seizure based on less than probable cause can be reasonable under the fourth amendment when exigent circumstances are present, the seizure of Place's luggage might have been held to be reasonable on the grounds that the narcotics that Place was suspected of carrying in his luggage might have disappeared to an unknown location if the agents had attempted to follow Place until they had probable cause (or had obtained a search warrant based on probable cause) instead of seizing the luggage at La Guardia Airport. *See* *supra* note 319 (discussing possible arguments of exigent circumstances existent in facts of *Place*).
Justice O'Connor argued for the majority in *Place* that the governmental interest in briefly seizing luggage when there is a reasonable belief that the luggage contains narcotics is substantial because “[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.”\(^324\) She reasoned that a sufficiently substantial law enforcement interest could justify an intrusion on fourth amendment interests,\(^325\) rejecting the respondent’s argument that only a special law enforcement interest, such as officer safety, and not a generalized interest in law enforcement, can justify an intrusion on an individual’s fourth amendment interests in the absence of probable cause.\(^326\) Justice O’Connor stated that such an intrusion requires only that the interests furthered by the intrusion be sufficiently substantial and that the interests furthered do not have to be “independent of the interest in investigating crimes effectively and apprehending suspects.”\(^327\) However, she noted that “[t]he context of a particular law enforcement practice, of course, may affect the determination of whether a brief intrusion on fourth amendment interests on less than probable cause is essential to effective criminal investigation.”\(^328\)

Turning to the other side of the balancing test, Justice O’Connor’s majority opinion in *Place* rejected the respondent’s argument that the rationale for a *Terry* stop of a person—“that a *Terry*-type stop of a person is substantially less intrusive of a person’s liberty interests than a formal arrest”—was “wholly inapplicable to investigative detentions of personalty.”\(^329\) The respondent’s argument was that in such cases “there are no degrees of intrusion” because dispossession is absolute once the owner’s property is seized.\(^330\) Justice O’Connor disagreed, asserting that “[t]he intrusion on possessory interests occasioned by a seizure of one’s personal effects can vary both in its nature and extent.”\(^331\) She noted that a seizure of personal effects “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.”\(^332\) In addition,

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324. United States v. Place, 462 U.S. at 703 (quoting United States v. Mendenhall, 446 U.S. 544, 561 (1980) (opinion of Powell, J.)). Justice O’Connor later added in *Place* that “[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels.” Id. at 704 (footnote omitted).

325. Id. at 704.


327. United States v. Place, 462 U.S. at 704.

328. Id.

329. Id. at 705.

330. Id.

331. Id.

332. Id. (footnote omitted). In a footnote to this statement, Justice O’Connor stated that “[o]ne need only compare the facts of this case with those in United States v. Van Leeuwen, 397 U.S. 249 (1970),” and then summarized the facts and holding of *Van Leeuwen*. She noted
she noted that "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."\(^{333}\) Justice O'Connor thus concluded that since 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."\(^{334}\)

Applying this general principle to the facts of Place's case, Justice O'Connor held that the principles of Terry and its progeny permit an officer, whose observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, to detain the luggage briefly to investigate the circumstances that aroused his suspicion by exposing the luggage to a narcotics detection dog.\(^{335}\) She stated that the initial seizure of respondent Place's luggage

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333. United States v. Place, 462 U.S. at 705 n.6 (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6, at 71 (Supp. 1982)); see supra text accompanying notes 267-303 (discussing details of Van Leeuwen decision).
334. Id. at 706.
335. Id. at 706-07. Justice O'Connor supported this holding by quoting a similar decision: "We agree with the State that [the officers had] adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention." Id. at 706 n.7 (quoting Florida v. Royer, 460 U.S. 491, 502 (1983) (plurality opinion) (emphasis added by Justice O'Connor in Place)).

The Court in Place held, however, that the length of detention of respondent Place's luggage, as exacerbated by other factors, made the seizure of his luggage unreasonable and thereby in violation of the fourth amendment in the absence of probable cause. Id. at 709-10. Justice Brennan, with whom Justice Marshall joined, concurred in the judgment in Place, but argued that the Court's resolution of the issues of the constitutionality of the seizure of Place's luggage on less than probable cause and the exposure of that luggage to a narcotics detection dog was unnecessary to its judgment. Id. at 711 (Brennan, J., with whom Marshall, J. joined, concurring in the judgment). Justice Brennan argued that the judgment should be based on the ground that the seizure of respondent's luggage exceeded the permissible scope of a mere investigative stop and amounted to a violation of respondent's fourth amendment rights. Id. at 710-11. Justice Brennan also argued that the Court's authorization of warrantless temporary seizures of personal luggage from the custody of the owner on less than probable cause, for the purpose of having the luggage sniffed by a trained narcotics detection dog, was not supported by Terry or its stop and frisk progeny. Id. at 715. He stated that the majority's holding "significantly dilutes the Fourth Amendment's protections against governmental interference with personal property," and represents "a radical departure from settled Fourth Amendment principles." Id. Justice Brennan noted that an officer cannot seize a person for a Terry stop without also seizing the personal effects that the individual has in his possession at the time and that a Terry stop therefore may involve seizures of personal effects incidental to the seizure of the person involved. Id. However, he argued that a seizure of property independent of, and not incidental to, the seizure of the person was not authorized by the Terry line of cases and must be based upon probable cause, since such a seizure significantly expands the scope of a Terry stop and the scope of the intrusion. Id. at 716-17. He argued that detention of respondent Place's luggage was a more severe intrusion
for the purpose of conducting this investigative procedure could not be justified on less than probable cause if this investigative procedure was itself a search requiring probable cause. However, Justice O'Connor concluded that

than a brief stop for questioning or even an on-the-spot pat-down search for weapons because it involved an independent dispossession of his personal effects: Id. at 717.

Justice Brennan also argued in Place that the Court's application of Terry's balancing test, in support of its holding authorizing temporary seizures of personal property based on reasonable suspicion, was inappropriate. He argued this was so because the type of intrusion involved was not the "narrow" one contemplated by the Terry line of cases and because those cases involved only seizures of a person or the seizure of both a person and property as in Place's case. Id. at 718. In conclusion, he asserted that "[t]he Terry balancing test should not be wrenched from its factual and conceptual moorings," and "should not be conducted except in the most limited circumstances." Id. The general rule is that seizures of property must be based upon probable cause, not just be "reasonable." Id. at 719.

Justice Blackmun, with whom Justice Marshall joined, concurring in the judgment, agreed with the majority in Place that because of the "significant law enforcement interest in interdicting illegal drug traffic in the Nation's airports," a temporary seizure of luggage for investigative purposes was authorized by Terry's balancing test when it involves a minimal intrusion. Id. at 722 (Blackmun, J., with whom Marshall, J., joined, concurring in the judgment). However, Justice Blackmun disagreed with the majority's conclusion that the diligence of the police in conducting their investigation should be a relevant factor in determining whether the extent of the intrusion has resulted in a fourth amendment violation. Id. at 722 n.2. He asserted that "it makes little difference to a traveler whose luggage is seized whether the police conscientiously followed a lead or bungled the investigation" and that "[t]he duration and intrusiveness of the seizure is not altered by the diligence the police exercise." Id. However, he did concede that "diligence may be relevant to a court's determination of the reasonableness of the seizure once it is determined that the seizure is sufficiently nonintrusive as to be eligible for the Terry exception." Id.

Justice O'Connor asserted that this conclusion would follow no matter how brief the seizure of respondent's luggage. Id. She offered no supporting analysis of why an investigative seizure of luggage, no matter how brief, could not be justified on less than probable cause if the sniffing of the luggage by a trained narcotics detection dog (or other investigative procedure) was a search requiring probable cause. She does not explain why a warrantless seizure of luggage based only upon reasonable suspicion is not lawful if the sniffing of the luggage by a trained canine (or other investigative procedure) is a "search" and is based only upon reasonable suspicion rather than probable cause. Justice O'Connor cited only four cases as authority directly supporting her holding. Id. (citing Terry v. Ohio, 392 U.S., at 20; United States v. Cortez, 449 U.S. 411, 421 (1981); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975); and Adams v. Williams, 407 U.S. 143, 146 (1972)). However, these cases cited by Justice O'Connor do not support the proposition that probable cause would be required to seize luggage and expose it to a trained narcotics detection dog if such exposure was held to be a fourth amendment "search." The Court in Terry, although stating that a search or seizure by police that is subject to the warrant requirement must be based upon probable cause, held that neither a warrant nor probable cause is required for a stop and frisk by police. Terry v. Ohio, 392 U.S. at 20. The grounds for this holding were that such procedures historically had not been, and as a practical matter could not be, subject to the warrant procedure. Id. In addition, the interest in effective crime prevention and detection authorizes police, in appropriate circumstances and in an appropriate manner, to approach a person for investigating possibly criminal behavior even though there is no probable cause to make an arrest. Id. at 22. By analogy, it might be argued that police, without a warrant, should be permitted to stop a traveler at an airport (or other transportation terminal) and expose his luggage to a trained narcotics detection dog when the police have reasonable suspicion that the
the exposure of respondent's luggage, located in a public place, to a trained narcotics detection dog was not a search within the meaning of the fourth amendment. Justice O'Connor thus indicated that the DEA agents' reasona-
ble suspicion that Place's luggage contained narcotics authorized a brief seizure of Place's luggage for the purpose of exposing it to a narcotics detection dog.

A number of questions need to be answered in determining how this holding in Place will be applied to other cases where police have reasonable suspicion that luggage contains a seizable item. One question is whether the Place Court's holding authorizes the seizure of any luggage which police have reasonable suspicion to believe contains narcotics, or applies only to luggage reasonably suspected of containing narcotics when such luggage is being carried by, or is in the immediate possession of, a traveler, or only applies narrowly to airline travelers at an airport. Place had just arrived at an airport after traveling on a commercial flight when his luggage was seized. Based on the facts, the Place decision might be narrowly interpreted as only applying to the seizure of luggage carried or possessed by airline travelers when the luggage is reasonably suspected to contain narcotics. The Court in Place stated that substantially enhancing the likelihood that police can prevent the flow of narcotics into distribution channels through the inherently transient nature of drug courier activity at airports was the strong governmental interest that justifies the police in briefly detaining luggage for the purpose of exposing it to a trained canine. However, Justice O'Connor's holding authorizing a brief detention of luggage based upon reasonable suspicion, referred to a traveler carrying luggage. This might lead a court to hold that Place should not be limited to persons traveling on commercial airplanes, but can be applied to a non-airplane traveler (any person who is about to travel, is traveling, or has just traveled on a commercial or private train, bus, ship, automobile or truck). However, for Place to be applied to persons traveling by means other than commercial air flights, a court might require a showing that a substantial amount of drug trafficking occurs by means of travelers utilizing such a method of non-airplane transportation. A court might also require a showing that authorizing police to make brief investigative stops of the luggage of such a non-airplane traveler substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels from such non-

338. United States v. Place, 462 U.S. at 704.
339. Id. at 706. Later in the opinion, Justice O'Connor noted the impact of detaining luggage within the immediate possession of a traveler to support her conclusion that the 90-minute detention of Place's luggage was unreasonable under the fourth amendment. Id. at 708; see infra text accompanying notes 358-60 (discussing impact of lengthy detention of luggage on traveler).
airplane travelers. If Place applies only to travelers (whether on airplanes or other transportation facilities), it is not clear whether Place authorizes seizure of a piece of luggage reasonably suspected of carrying narcotics only when the seizure takes place when the traveler is in an area that is located within or adjacent to a transportation facility or terminal (such as an airport, train station, or bus station). It is also unclear whether Place also authorizes such a seizure when the seizure takes place after a substantial amount of time has elapsed since the person carrying or in possession of the luggage was engaged in actual travel (or takes place a substantial period of time before the person in possession of the luggage will commence actual travel). In any of these situations, the person from whom the luggage was seized might not be considered a "traveler," thus making Place inapplicable.

The Place Court also did not indicate whether its holding applies to luggage carried by or in the possession of a person who is not a traveler. The Place decision should be extended to such luggage when the luggage is reasonably suspected to contain narcotics only if the governmental interest in preventing drug trafficking by non-travelers is as substantial as the governmental interest in preventing drug trafficking by travelers, and if the impact of the brief seizure of luggage carried by a non-traveler is less than or equal to the impact of the brief seizure of luggage carried by a traveler. Arguably, the impact of seizure of luggage on a non-traveler may be even less than the impact of seizure on a traveler because no disruption of travel plans occurs in the former situation.

The Place Court did not indicate whether a brief seizure of luggage reasonably suspected to contain narcotics must take place in particular locations. However, Justice O'Connor's statement that no search occurred when agents exposed respondent's "luggage, which was located in a public place, to a trained canine," suggests that in order to seize luggage under Place, the luggage must be located in a public place.

The Place decision is also unclear as to whether its holding applies only when a traveler or other person has the luggage in his immediate possession

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341. The Place Court did not define the term "public place," but it may have used the term to refer to a place to which police gain access without violating privacy interests that are protected under the fourth amendment. A "public place" under this approach would include a public concourse or lobby of an airport. In Place, DEA agents apparently seized Place's luggage in the lobby of an airport near a baggage claim and limousine rental counter. Id. at 698-99 (describing seizure in Place). If the luggage is not in a public place when it is seized, the seizure of the luggage might be held to be in violation of the fourth amendment because it was the direct result of an unreasonable search (the police entry of the place where the luggage was seized). See United States v. Dicesare, 765 F.2d 890, 899 (9th Cir. 1984) (acquisition of probable cause during an unlawful seizure does not cure illegality); id. at 901-03 (Reinhardt, J., concurring) (arguing that intrusion of canine into defendant's apartment is a search subject to fourth amendment restrictions); cf. Payton v. New York, 445 U.S. 573 (1980) (although a person may be arrested in a public place without an arrest warrant when police have probable cause to believe the person has committed or is committing a felony, police with such probable cause may not enter a person's home without an arrest warrant in the absence of exigent circumstances).
when it is seized (as was the case in Place),\textsuperscript{342} or can apply when the luggage is seized when it is not in the immediate possession of a person (such as when the luggage has been checked by the traveler at a baggage check-in counter). Justice O’Connor’s holding in Place refers to a “traveler carrying luggage,”\textsuperscript{343} but also refers favorably to the decision in United States v. Van Leeuwen,\textsuperscript{344} a case upholding a temporary seizure, based on reasonable suspicion, of mail not in the actual possession of the sender or addressee, as “an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves.”\textsuperscript{345} This description of Van Leeuwen implies that the Place decision should be interpreted as authorizing a seizure of luggage not in the immediate possession of the traveler when police have reasonable suspicion that the luggage contains narcotics.\textsuperscript{346}

The Place decision also seems to authorize seizure of luggage only when there is a reasonable suspicion that it contains narcotics, as opposed to reasonable suspicion that luggage contains other kinds of contraband or other types of seized items (such as evidence, fruits of crime, or instrumentalities of crime). Although Justice O’Connor stated in Place that some brief detentions of personal effects may be justified “based only on specific articulable facts that the property contains contraband or evidence of a crime,”\textsuperscript{347} the Court specifically held only that luggage may briefly be detained when “an officer’s observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics.”\textsuperscript{348}

342. United States v. Place, 462 U.S. at 708.
343. Id. at 706.
345. United States v. Place, 462 U.S. at 705-06 n.6 (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6, at 71 (Supp. 1982)); see supra text accompanying notes 267-303 (discussing details of decision in Van Leeuwen).
346. See United States v. Beale, 736 F.2d 1289 (9th Cir.) (holding investigation of drug suspect’s luggage at airport by detection dog’s sniffing does not constitute a “search” within meaning of fourth amendment when interference with suspect’s travel plans was de minimis), cert. denied, 469 U.S. 1072 (1984). Although Place explicitly authorizes seizure only of “luggage” reasonably believed to contain narcotics, the Court’s holding in Place probably authorizes the brief seizure of any container which is a “personal effect” protected by the fourth amendment’s prohibition against unreasonable seizures. See supra text accompanying notes 21-50 (discussing types of property protected under fourth amendment). Paper bags and plastic trash bags reasonably believed to contain narcotics therefore might be subject to seizure under Place.
347. United States v. Place, 462 U.S. at 706.
348. Id. The reasoning in support of Place’s holding, the strong governmental interest in substantially enhancing the likelihood that police will be able to prevent the flow of narcotics into distribution channels through the inherently transient nature of drug courier activity at airports, id. at 704, also indicates that Place authorizes only brief detention of luggage reasonably suspected of containing contraband narcotics.

Yet another question not answered by Place is whether reasonable suspicion to believe luggage contains narcotics can be based upon an officer’s own personal observations, or can be based, either wholly or in part, upon personal observations of other law enforcement officers relayed to the officer who actually seizes the luggage, or upon observations of an informant. In Place, the
The *Place* Court’s apparent holding that the only type of investigation that can be performed on such luggage is exposure of the luggage to a trained narcotics detection dog, for the purpose of disclosing only the presence or absence of narcotics, further supports a conclusion that *Place* authorizes a brief seizure of luggage only when there is reasonable suspicion that the luggage contains narcotics. Although the *Place* Court held that an officer with reasonable belief that luggage contains narcotics is permitted “to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope,” the Court only approved of exposing luggage to a trained narcotics detection dog. Justice O’Connor implied that no other type of investigation can be performed on luggage reasonably suspected to contain narcotics. First, Justice O’Connor stated that “the canine sniff is *sui generis*” both in the manner in which information is obtained (the luggage is not required to be opened and does not expose non-contraband items that otherwise would remain hidden from public view) and in the content of the information revealed by the procedure (the sniff discloses only the presence or absence of narcotics). Second, she stated that “[w]e 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.” Consequently, luggage that has been briefly seized on the basis of reasonable suspicion that it contains narcotics cannot be opened or exposed to an X-ray machine or magnetometer (metal detector), because such investigation might reveal non-contraband items otherwise hidden from public view and thus might reveal more than the presence or absence of narcotics. Justice O’Connor apparently believed that any type of investigation of luggage other than exposure to a trained canine is a “search” that can be conducted only when there is probable cause.

DEA agents who seized the luggage from respondent Place relied upon their own observations of Place in New York as well as observations made and information acquired by other law enforcement officers in Miami. See *supra* note 308 (describing the seizure in *Place*). The Court in *Place* did not address the issue of whether the officers who seized Place’s luggage had the requisite reasonable suspicion. United States v. Place, 462 U.S. at 700 n.1. However, Justice O’Connor’s holding refers to “an officer’s observations” leading him reasonably to believe that a traveler is carrying luggage that contains narcotics. *Id.* at 706. This reference might be interpreted as implying that the reasonable suspicion for a brief seizure of luggage under *Place* must be based upon the seizing officer’s personally observed or acquired information. The Supreme Court, however, has allowed a stop to be based upon information contained in a “wanted flyer” based on information obtained by other law enforcement officers from an informant, United States v. Hensley, 469 U.S. 221 (1985), or upon information acquired directly from a sufficiently reliable informant. Adams v. Williams, 407 U.S. 143 (1972).

349. United States v. Place, 462 U.S. at 706.

350. *Id.* at 706-07; see United States v. Licata, 761 F.2d 537, 540 (9th Cir. 1985) (stating *Place* does not authorize warrantless seizure of a suspect’s package by federal agents who did not seize the package for purposes of an investigation, but for the purpose of holding the package until they obtained the suspect’s consent to open it or a search warrant).

351. United States v. Place, 462 U.S. at 707.

352. Opening and inspecting the contents of a container which conceals its contents from plain
There might be situations, however, where strong governmental interests might justify the warrantless seizure of luggage or another container for a brief period. If the search is based on reasonable suspicion that it contains a seizable item other than contraband narcotics, it may be searched for the purpose of subjecting it to an investigation that is minimally intrusive of fourth amendment interests. An example of such a justifiable seizure would be where police have reasonable suspicion that a person has checked a suitcase containing a time bomb as luggage that will be loaded aboard an airplane. Since there are exigent circumstances in such a situation, such a reasonable suspicion should justify exposing such a suitcase to an X-ray machine, or even opening the suitcase, without a warrant and without probable cause.\textsuperscript{353}

Although holding that a brief seizure of luggage for the purpose of exposing it to a “canine sniff” is lawful when there is reasonable suspicion that the luggage contains narcotics, the Court in \textit{Place} held that the ninety minute detention of Place’s luggage could not be upheld under that principle.\textsuperscript{354} Justice O’Connor’s majority opinion in \textit{Place} first observed that the manner in which a seizure is conducted is “as vital a part of the inquiry as whether [it was] warranted at all,”\textsuperscript{355} and therefore the court had to examine the agent’s conduct to determine whether it “was such as to place the seizure within the general rule requiring probable cause for a seizure or within \textit{Terry’s} exception to that rule.”\textsuperscript{356} She then rejected the government’s argument that the point at which probable cause for seizure of luggage from a person’s presence becomes necessary is more distant than in the case of a \textit{Terry} stop of the person himself because seizures of property are generally less intrusive than seizures of the person.\textsuperscript{357} This premise was rejected on the grounds that it was faulty on the facts of Place’s case, even though it might be true in some circumstances, because the seizure of luggage in question had been from a traveler’s immediate possession and, particularly in such a case, intruded both on the traveler’s possessor interest in his luggage and his liberty interest in proceeding with his itinerary.\textsuperscript{358} Justice O’Connor explained that although a person whose luggage is detained is “technically still free to continue his travels or carry out other

\textsuperscript{353} See United States v. Place, 462 U.S. at 707 (holding “sniff” of luggage by narcotics detection dog was not fourth amendment search in view of its limited nature); \textit{supra} note 337 (discussing details of \textit{Place} decision).
\textsuperscript{354} United States v. Place, 462 U.S. at 710.
\textsuperscript{355} Id. at 707-08 (quoting \textit{Terry} v. Ohio, 392 U.S. 1, 28 (1968)).
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Id.
personal activities pending release of the luggage" and is "not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained," a person nevertheless "effectively" is restrained by such a seizure "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." Consequently, she concluded that "the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause" and that "the police conduct [in Place] exceeded the permissible limits of a Terry-type investigative stop" under this standard. 359

The Place Court held that "[t]he length of the detention of respondent's luggage alone" precluded the conclusion that the seizure was reasonable in the absence of probable cause, although Justice O'Connor declined to adopt any outside time limitation for a permissible Terry stop. 360 She explained that although seizures longer than the momentary ones involved in Terry and several subsequent cases had been recognized as reasonable, "the brevity of the invasion of the individual's fourth amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." 361 Turning to the facts of Place's case, Justice O'Connor observed that DEA agents knew the time when Place would arrive at La Guardia Airport and had ample time to arrange for their additional investigation at La Guardia. 362 Justice O'Connor noted that if the agents had done so, they "could have minimized the intrusion on respondent's Fourth Amendment

359. Id. In a footnote to this latter statement, the Court added: "At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police." Id. at 708 n.8 (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6, at 72 (Supp. 1982)).

360. United States v. Place, 462 U.S. at 709.

361. Id.; see United States v. Sharpe, 470 U.S. 675, 682-86 (1985) (declining to accept a per se rule that a 20-minute detention is too long to be justified under the Terry doctrine). While noting the desirability of providing law enforcement authorities with a clearly-defined rule, Justice O'Connor in Place questioned the wisdom of a rigid time limitation for a permissible Terry stop, stating that "[s]uch a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation." United States v. Place, 462 U.S. at 709 n.10; see Michigan v. Summers, 452 U.S. 692, 700-01 n.12 (1981) (asserting that police must under certain circumstances be able to detain an individual for longer than the brief time period involved in Terry).

362. United States v. Place, 462 U.S. at 709; see United States v. Sharpe, 470 U.S. at 686 (stating that in determining whether police diligently pursued their investigation a court "should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing"). The Sharpe Court also stated that "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." Id. at 687.

363. United States v. Place, 462 U.S. at 709.
interests"364 and "also would have avoided the further substantial intrusion on respondent's possessory interests caused by the removal of his luggage to another location."365

Justice O'Connor concluded that the Court had never approved a seizure of the person for the ninety-minute period involved in Place's case and could not do so on the facts of Place's case. She therefore held that the ninety-minute detention of respondent's luggage was sufficient to render the seizure unreasonable.366 As a final point, Justice O'Connor stated that "the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion."367 She consequently held that the detention of respondent's luggage went beyond the authority conferred upon the police earlier in the opinion to detain briefly luggage reasonably suspected to contain narcotics, that the evidence obtained from the subsequent search of Place's luggage was inadmissible, and that Place's conviction must be reversed.368 If, however, police detain luggage reasonably suspected to contain narcotics for no longer than twenty minutes and exercise reasonable diligence in exposing the luggage to a trained narcotics detection dog, the seizure of the luggage should be held to be reasonable under the fourth amendment.369

If the Place decision authorizes police to seize luggage which is neither carried by nor within the immediate possession of a person when police have reasonable suspicion that the luggage contains narcotics,370 police might be permitted to detain the luggage for more than the ninety-minute detention involved in the Place case if such detention did not significantly interfere with the traveler's travel plans371 and if police used reasonable diligence in pursuing

364. Id.
365. Id. at 709 n.9.
366. Id. at 709-10.
367. Id. at 710.
368. Id.; see Moya v. United States, 745 F.2d 1044, 1050 (7th Cir. 1984) (holding three-hour detention of defendant's shoulder bag violated fourth amendment); United States v. West, 731 F.2d 90, 92 (1st Cir. 1984) (holding time lapse of 45 to 60 minutes between seizure and sniff test was not unreasonable under fourth amendment). Justices Brennan and Blackmun, joined by Justice Marshall, although concurring in the Place Court's judgment, argued that the judgment should have been based solely on the ground that the 90-minute detention of Place's luggage exceeded the scope of a permissible investigative stop and amounted to a violation of Place's fourth amendment rights. United States v. Place, 462 U.S. at 710-11 (Brennan, J., with whom Marshall, J., joined, concurring in the judgment); id. at 720 (Blackmun, J., with whom Marshall, J., joined, concurring in the judgment).
370. See supra text accompanying notes 347-52 (discussing possible implications of Place).
371. Such interference might occur if the detention of luggage that had been checked at an airline baggage check-in counter by a commercial airline traveler caused the luggage not to be
their investigation.\textsuperscript{372}

\textbf{VII. Seizures of Property to Prevent Loss of Evidence}

The Supreme Court has indicated, albeit in dictum, that police acting without a search warrant may temporarily seize a particular premises or container, and any item located within such premises or container, when probable cause exists to believe that the item has a nexus to criminal activity, such as when the item constitutes contraband or fruit, instrumentality, or evidence of a crime,\textsuperscript{373} and when the item may disappear to an unknown location or be destroyed if police seek a warrant rather than immediately seize the item—that is, when exigent circumstances exist.\textsuperscript{374} However, the Court has not ruled di-

\textsuperscript{372} United States v. Place, 462 U.S. at 709 (courts must consider whether police diligently pursued their investigation in assessing the effect of the detention length). This conclusion is supported by the \textit{Place} Court's discussion of \textit{Van Leeuwen} v. United States, 397 U.S. 249 (1970), where the Court upheld a 29-hour detention of two packages after they had been posted (and were therefore not in the immediate possession of the sender or the addressee) based upon reasonable suspicion. The \textit{Place} Court described \textit{Van Leeuwen} as "an easy case for the Court because the defendant was unable to show that the invasion intruded upon either a privacy interest in the contents of the package or a possessory interest in the packages themselves." United States v. Place, 462 U.S. at 705 n.6 (citation omitted); see supra text accompanying notes 267-303 (discussing details of decision in \textit{Van Leeuwen}).

\textsuperscript{373} See supra text accompanying notes 51-61 (discussing historical origins of warrantless seizures of items with criminal nexus).

\textsuperscript{374} In \textit{Arkansas v. Sanders}, 442 U.S. 753 (1979), the Supreme Court held that police violated the fourth amendment by opening and inspecting, without a search warrant, the contents of a suitcase after it had been seized from the trunk of a taxicab stopped by police. Although the police had probable cause to believe that the suitcase contained marijuana, id. at 761, the Court in \textit{Sanders} held that the police violated the fourth amendment by searching the suitcase without a search warrant because they had the suitcase exclusively and securely within their control and there was no danger to themselves or risk that the evidence would be lost. Id. at 766. However, the Court in \textit{Sanders} stated that "'[h]aving probable cause to believe that contraband was being driven away in the taxicab, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained contraband.'" \textit{Id.} at 761 (citing Chambers v. Maroney, 399 U.S. 42, 52 (1970)). This statement in \textit{Sanders} technically was dictum because the respondent conceded at oral argument that the stopping of the taxicab and the seizure of the suitcase were constitutionally unobjectionable. \textit{Id.} at 761-62. In \textit{Sanders}, the police apparently had no idea where the taxicab was being driven.

In \textit{United States v. Chadwick}, 433 U.S. 1 (1977), the respondent did not contest the warrantless seizure of a footlocker by federal narcotics agents. The agents had probable cause to believe the footlocker contained contraband narcotics. \textit{Id.} at 11. The agents had seized the footlocker from the open trunk of an idle automobile, after the footlocker had been loaded into the trunk by recent travelers on a passenger train. The agents apparently had no idea where the automobile was about to be driven. However, as in \textit{Sanders}, the Court held that the agents violated the fourth amendment by conducting a warrantless search after they had exclusive control of the footlocker and where no exigency was shown to support the need for an immediate search. \textit{Id.} at 15. In \textit{United States v. Licata}, 761 F.2d 537, 541 (9th Cir. 1985), the court concluded after
rectly on whether there must be probable cause that the evidence will disappear or be destroyed before a warrant can be obtained, or if a mere possibility (reasonable suspicion sufficient for a *Terry* stop) that the evidence will disappear or be destroyed will be acceptable.375 A warrantless seizure reviewing *Sanders*, *Chadwick* and decisions of lower federal and state courts, that the warrantless seizure of personal property is unconstitutional unless there is both probable cause and exigent circumstances.

375. In *United States v. Licata*, 761 F.2d 537, the circuit court stated that the exigent circumstances which are a requisite for the warrantless seizure of property exist when "a reasonable person believes that prompt action is necessary to prevent the destruction of relevant evidence or prevent other consequences that may improperly frustrate legitimate law enforcement efforts." *Id.* at 543. The majority in *Licata* found that where "[t]he agents faced the possibility that contraband within their control would be lost or destroyed if they had not instructed the airline to hold the packages," *id.*, exigent circumstances existed because "it would not have been unreasonable for the government agents to have been concerned that Licata's friends might obtain the package," and because of "[t]he usual risk of loss of contraband left unsecured." *Id.* at 544. The dissent in *Licata* argued, however, that exigent circumstances were not present because a warrant could have been obtained to seize the checked packages upon their arrival at their destination, and because there was no showing that the agents who seized the packages without a warrant were concerned that a friend of *Licata* might remove the package. *Id.* at 545-56 (Norris, J., dissenting).

Lower courts have tended to hold that "[w]here a warrantless search is based upon the destruction or removal of evidence, the surrounding circumstances must present a specific threat to known evidence... To justify the warrantless search the officers must reasonably believe that a strong likelihood exists that the removal or destruction of the evidence is imminent... Several cases suggest that the requirement is that the destruction or removal be in progress." *Stackhouse v. State*, 298 Md. 203, 213-14, 468 A.2d 333, 339 (1983) (citations omitted). Although this passage discusses only the validity of a warrantless search to prevent destruction of evidence, the court in *Stackhouse* also refers to whether a warrantless search or seizure can be justified because of a threat of loss or destruction of evidence. *Id.* at 216, 468 A.2d at 340. Because the court mentions a reasonable belief of a "strong likelihood," it seems to support a requirement of probable cause rather than reasonable suspicion.

In *Arkansas v. Sanders*, 442 U.S. 753, where the Court in dictum approved of the warrantless seizure of a suitcase that was in a taxi being driven on a public road, the police were unaware of the taxicab's intended destination. However, the *Sanders* Court did not indicate whether there must be either probable cause or reasonable suspicion to believe that an item will disappear to an unknown location or be destroyed before a warrant could be obtained in order to justify an immediate warrantless seizure of the item. In *United States v. Chadwick*, 433 U.S. 1, the police did not know the intended destination of the automobile into which the footlocker had been loaded. The possibility or probability that the luggage in *Sanders* and *Chadwick* would have disappeared to an unknown location or been destroyed before a warrant could have been obtained depended upon the ability of the police to have followed the automobile in question, which was dependant upon such facts as traffic conditions, the timing of traffic lights and whether the persons in the automobile being followed suspected they were being followed.

Chief Justice Burger argued in *Segura v. United States*, 468 U.S. 796 (1984), that "just as there was no immediate threat of loss or destruction of evidence in [Chambers v. Maroney, 399 U.S. 42 (1970)]—since officers could have followed the car until a warrant issued—so too in *Sanders* officers could have followed the taxicab. Indeed, there arguably was even less fear of immediate loss of the evidence in *Sanders* because the suitcase at issue had been placed in the vehicle's trunk, thus rendering immediate access unlikely before police could act." *Segura v. United States*, 468 U.S. at 808 (Part IV of the opinion of the Court by Burger, C.J., joined
might be permitted on the basis of a reasonable suspicion that the item will disappear or be destroyed before a search warrant can be obtained, on the grounds that the substantial government interest in preventing the disappearance or destruction of the evidence outweighs the nature and extent of the intrusion upon the individual's fourth amendment rights. Whether a seizure to prevent a disappearance or destruction is based upon probable cause or reasonable suspicion, such seizures should be permitted without a search warrant because of either exigent circumstances (the probability or possibility of disappearance or destruction of the item before a search warrant can be obtained), or because the substantial governmental interest in preventing the disappearance or destruction of criminal evidence outweighs the nature and extent of such intrusions on fourth amendment interests.


377. See supra note 2 and accompanying text (fourth amendment interests limited to searches and seizures). In Segura v. United States, 468 U.S. 796 (1984), Chief Justice Burger asserted that underlying the decisions in Chambers v. Maroney, 399 U.S. 42 (1970), United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), "is a belief that society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in prop-
As a general rule, however, when police have probable cause to believe that contraband or a seizable item is located within a container and the container is within their exclusive control, they may not search the container without a search warrant. They may, however, temporarily seize the container pending authorization to search it. 378

In some cases, when police believe that evidence may disappear or be destroyed before a search warrant can be obtained, the may need to engage in a warrantless search, such as by entering a residence or an automobile, in order to seize that evidence. The Supreme Court has indicated in dictum that when police are faced with the exigency of imminent loss or destruction of evidence, they are excepted from the general rule requiring a search to be performed under a search warrant. 379

378. United States v. Chadwick, 433 U.S. 1, 13 (1977) (holding that a person's expectations of privacy in personal luggage are substantially greater than in an automobile); see Arkansas v. Sanders, 442 U.S. 753, 765 (1979) (holding that automobile exception to the warrant requirement does not apply to the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by police). Numerous exceptions to this general rule prohibiting warrantless searches of containers have been recognized. See Colorado v. Bertine, 107 S. Ct. 738, 742 (1987) (holding that police may open containers pursuant to valid inventory search of van); Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (holding that inventory search of "the personal effects of a person under arrest as part of routine administrative procedure at police station incident to booking and jailing" is permissible and absence of a warrant or probable cause is immaterial); United States v. Ross, 456 U.S. 798, 823 (1982) (holding that an "individual's expectation of privacy in an automobile and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband"); New York v. Belton, 453 U.S. 454, 462 (1981) (holding that search of jacket found in passenger compartment of automobile was lawful in that jacket had been "within the arrestee's immediate control").

379. Vale v. Louisiana, 399 U.S. 30 (1970). The Court in Vale held that a warrantless search of a house violated the fourth amendment. In support of this holding the Court noted, inter alia, that the goods that were seized in the house were neither in the process of destruction nor about to be removed from the jurisdiction. Id. at 35. Justice Black argued in dissent that "[i]n the cases cited by the Court supports the proposition that 'exceptional circumstances' exist only when the process of destruction has already begun. On the contrary we implied that those circumstances did exist when 'evidence or contraband was threatened with removal or destruction.'" Id. at 39 (Black, J., with whom Burger, C.J., joined, dissenting) (quoting Johnson v. United States, 333 U.S. 10, 15 (1948)); see 2 W. LaFave, supra note 377, § 6.5(a), at 653-55 (describing this reasoning of the Vale majority as "baffling").

In United States v. Jeffers, 342 U.S. 48 (1951), the Court, after holding that the warrantless search of a hotel room violated the fourth amendment, observed that there was no "imminent destruction, removal or concealment of the property intended to be seized." Id. at 52. In McDonald v. United States, 335 U.S. 451 (1948), the Court held that the warrantless search of petitioner's residence violated the fourth amendment, with the Court noting that the property
In some situations, police can prevent the destruction or disappearance of evidence simply by guarding the premises where the evidence is located while a warrant is sought to authorize seizure of the evidence. The Supreme Court, however, has not addressed the issue of whether the police are required in such situations to guard the premises to prevent the destruction or removal of evidence while the process to obtain a warrant is underway. However, the

was not in the process of destruction or as likely to be destroyed as the opium paraphernalia in the Johnson case. Id. at 455. In Johnson v. United States, 333 U.S. 10 (1948), the Court held that a federal agent violated the fourth amendment by making a warrantless, unconsented entry into the petitioner's hotel room, from which the officer had smelled opium fumes while standing in a hallway outside the room. The Court in Johnson stated that the case did not involve "exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, ... a magistrate's warrant for search may be dispensed with." Id. at 14-15. The Johnson Court explained that "[n]o evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at the time of being reduced to possession for presentation to the court. The evidence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant." Id. at 15. The Johnson Court's statement about no evidence or contraband being threatened with destruction was quoted approvingly in Chapman v. United States, 365 U.S. 610, 615 (1961), in support of a holding that a warrantless search of a tenant's leased house violated the fourth amendment. In United States v. Santana, 427 U.S. 38 (1976), the Court implied, as an alternative holding, that the warrantless search of the defendant's home was permissible because there was a "realistic expectation that any delay would result in destruction of evidence." Id. at 43.

However, in Mincey v. Arizona, 437 U.S. 385 (1978), where the Court held that the fourth amendment was violated when police conducted a warrantless search of premises where a criminal homicide had occurred, the Court noted that "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a warrant." Id. at 394.

In United States v. Rubin, 474 F.2d 262 (3d Cir.), cert. denied, 414 U.S. 833 (1973), the Court stated:

When government agents . . . have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances of the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant . . . ; (2) reasonable belief that the contraband is about to be removed . . . ; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought . . . ; (4) information indicating the possessors of the contraband are aware that the police are on their trail . . . ; and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.

Id. at 268-69 (citations omitted); see 2 W. LAFAVE, supra note 377, § 6.5(b), at 658-70 (discussing various federal circuit court decisions dealing with waiver of the warrant requirement due to the likely destruction of contraband or evidence).

380. In United States v. Jeffers, 342 U.S. 48 (1951), after holding that a warrantless entry of the defendant's hotel room violated the fourth amendment because there was no imminent destruction, removal, or concealment of the property intended to be seized, the Court added: "In
Court in *Segura v. United States* indicated that police under certain circumstances may, in their discretion, secure premises while simultaneously seeking a search warrant authorizing the seizure of items if they have probable cause to believe the items named in the warrant are on the premises.\(^{381}\)

**VIII. Securing of Premises Pending Issuance of a Search Warrant**

In *Segura v. United States*,\(^{382}\) the Supreme Court held that the fourth amendment's proscription against unreasonable seizures is not violated when

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\(^{381}\) fact, the officers admit they could have easily prevented any destruction or removal by merely guarding the door." *Id.* at 52.

In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court held that a warrantless search of premises where a criminal homicide had occurred violated the fourth amendment, and noted in its reasoning that "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained." *Id.* at 394. However, the Court did not hold explicitly in either *Jeppers* or *Mincey* that the fourth amendment was violated because the officers did not pursue less intrusive means such as guarding the door rather than entering the premises when that course of conduct might have prevented any destruction or removal of evidence.

Similarly, less intrusive options may be available to police than seizing an automobile that is being driven or is about to be driven away on a public road. Police officers might attempt to follow the automobile while other officers seek a search warrant authorizing seizure of the item. The Court noted in *Chambers v. Maroney*, 399 U.S. 42 (1970), that this may not be satisfactory because "[f]ollowing the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search." *Id.* at 51 n.9. Possibly for these reasons, the dictum in *Arkansas v. Sanders*, 442 U.S. at 761 (citing as directly supporting authority *Chambers v. Maroney*, 399 U.S. at 52), approving of the warrantless seizure of the suitcase in question appears to reject implicitly a requirement that the police attempt to follow an automobile when the police have probable cause to believe there is a seizable item in an automobile or within a container in the automobile.

Under the so-called "automobile exception" to the general warrant requirement, an automobile that is lawfully stopped while being driven on a public road can be searched without a warrant when there is probable cause to believe that the automobile contains a seizable item, *United States v. Ross*, 456 U.S. 798 (1982), because, "[f]or constitutional purposes, [the Court] sees no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *Chambers v. Maroney*, 399 U.S. at 52. Today, an automobile may be stopped and searched without a search warrant under the "automobile exception" when there is probable cause to believe that seizable items are located somewhere in the automobile, but not in specific containers, *United States v. Ross*, 456 U.S. 798 (1982); exigent circumstances may not be required to stop and search an automobile under the "automobile exception" provided such probable cause is present. *California v. Carney*, 471 U.S. 386 (1985); *United States v. Johns*, 469 U.S. 478 (1985); *Michigan v. Thomas*, 458 U.S. 259 (1982).

The type of situation presented in *Arkansas v. Sanders*, 442 U.S. 753 (1979), where police only have probable cause to believe that a specific container in an automobile contains a seizable item, is not considered to be a situation covered by the "automobile exception." *United States v. Ross*, 456 U.S. 798, 812-13 (1982); *United States v. Place*, 462 U.S. 696, 701 n.3 (1983); see 2 W. LaFAVE, *supra* note 377, § 6.5(c) (providing general discussion of impoundment alternative). 381. 468 U.S. 796 (1984).

382. *Id.*
law enforcement "officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved [approximately nineteen hours], secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant."\(^{383}\) In *Segura*, after receiving authorization from an Assistant United States Attorney to arrest petitioners Andres Segura and Luz Marina Colon, agents of the New York Drug Enforcement Task Force arrested Segura at 11:30 p.m. on February 12, 1981, when he entered the lobby of the New York city apartment building where he and Colon shared an apartment. Prior to entering and securing the apartment, the agents had probable cause to believe that petitioners Segura and Colon were trafficking in cocaine from their apartment.\(^{384}\) Agents had received their authorization to arrest Segura and Colon between 6:30 and 7:00 p.m. that same day. The Assistant United States Attorney who provided this authorization advised the agents that a search warrant for the petitioners' apartment probably could not be obtained until the following day because of the lateness of the hour, but that they should "secure the premises to prevent the destruction of evidence."\(^{385}\) After arresting Segura in the lobby of the apartment building where he resided, task force agents went to Segura's third floor apartment, which they entered, without requesting or receiving permission, after Colon opened the door to the apartment in response to the agents' knock on the door. After checking the apartment to see who was occupying it, the agents arrested Colon and then took Colon, Segura and three other occupants of the apartment (who had been discovered in the living room of the apartment) to Drug Enforcement Administration headquarters. Two task force agents remained in petitioners' apartment until a warrant for the apartment was issued and executed at approximately 6:00 p.m. on February 13, 1981, some nineteen hours after task force agents had initially entered the petitioners' apartment.\(^{386}\) Almost three pounds of cocaine, ammunition, records of narcotics transactions, and more than $50,000 cash were seized during the search pursuant to the warrant.\(^{387}\)

Petitioners Colon and Segura, who were charged with conspiring to distribute, and of distributing and possessing with intent to distribute, cocaine in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code,\(^{388}\) moved to suppress all of the evidence seized from their apartment. The district court granted this motion, holding that the evidence seized under the valid warrant was "fruit of the poisonous tree" of the illegal entry and "occupation" of the apartment because "Colon might have arranged to have the drugs removed or destroyed, in which event they would not have been in

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383. Id. at 798.
384. Id. at 799, 814.
385. Id. at 800.
386. Id. at 801. "Because of what is characterized as 'administrative delay' the warrant application was not presented to the Magistrate until 5 p.m. the next day." Id.
387. Id.
the apartment when the search warrant was made." The court of appeals reversed this ruling of the district court, which required suppression of the evidence seized under the valid warrant executed the day after the initial entry of the petitioners' apartment, on the grounds that the district court's decision to suppress the evidence simply because it could have been destroyed had the agents not entered was "prudentially unsound." The defendants were convicted of the crimes they were charged with committing and the court of appeals affirmed. The Supreme Court affirmed the judgment of the court of appeals that the cocaine, cash, records and ammunition were properly admitted into evidence.

389. Id. at 802. The district court also ordered the suppression of items which the agents had observed in plain view during the security check of the apartment on the night of February 12, which the agents had not seized until the search pursuant to the warrant. Id. at 801-02. The court of appeals affirmed this part of the district court's ruling. United States v. Segura, 663 F.2d 411 (2d Cir. 1981). The Supreme Court did not consider in Segura whether the items which were observed in plain view during the security check of the apartment, but which were not seized until the next day during execution of the warrant, should have been suppressed. Segura v. United States, 468 U.S. at 804.


391. Segura v. United States, 697 F.2d 300 (2d Cir. 1982).


The Court in Segura also held that the items seized from the premises in question, pursuant to a search warrant that was issued while law enforcement officers were securing the premises, were not inadmissible under the exclusionary rule as "fruit of the poisonous tree" of the (assumed) illegal entry (search) of the premises that enabled the officers to secure the premises, because the affidavit establishing probable cause for issuance of the warrant was obtained from an independent source and did not derive from the illegal entry of the premises. Id. at 813-15. The Court in Segura declined to adopt the speculative argument that if law enforcement officers had not entered the premises but instead secured the premises from the outside, one of the occupants of the premises or her friends could have removed or destroyed the evidence in question before the warrant was issued. Id. at 815-16. The Court rejected this speculative argument on the grounds that the exclusionary rule should not be extended "to further 'protect' criminal activity" and that there is no " 'constitutional right' to destroy evidence." Id. at 816.

Chief Justice Burger, in Part IV of his opinion for the Court, noted that the petitioners' argument that the entire contents of their apartment were "seized" when the agents entered and remained on the premises was advanced to avoid the independent source exception to the exclusionary rule, on the grounds that "if all the contents of the apartment were 'seized' at the time of the illegal entry and securing, ... the evidence now challenged would be suppressible as primary evidence obtained as a direct result of that entry." Id. at 806 (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.); see Dressler, supra, at 405 n.145 (noting theory that evidence must be suppressed as primary and not tainted secondary evidence). Chief Justice Burger avoided this issue by holding that even if the securing of the petitioners' apartment constituted a "seizure" of the contents of the petitioners' apartment within the meaning of the fourth amendment, that seizure was not unreasonable. Segura v. United States, 468 U.S. at 806.
In holding that the agents' warrantless securing of the premises was not an unreasonable seizure, \(^{393}\) the Court in *Segura* referred, without further explanation, to the agents having had "probable cause" when they entered the premises. \(^{394}\) The probable cause the Court was referring to in *Segura* apparently is the probable cause necessary for the issuance of a search warrant for the premises—probable cause to believe a seizable item (contraband, or fruits, instrumentalities, or evidence of a crime) \(^{395}\) will be found on the premises that officers are securing pending issuance of a search warrant authorizing seizure of such items on the premises. \(^{396}\)

However, *Segura* 's securing-of-the-premises holding does not require the presence of exigent circumstances in the form of probable cause or just reasonable suspicion to believe that the seizable items which police have probable cause to believe are on the premises will be removed from the premises or be destroyed while a search warrant is obtained unless the premises are secured from within. \(^{397}\) Rather, *Segura* 's holding authorizes law enforcement officers, who are seeking a search warrant authorizing the seizure of an item located on particular premises, to secure the premises from within to preserve the status quo \(^{398}\) in order to prevent the destruction or removal of evidence. \(^{399}\) Securing of the premises is authorized for the purpose of thwarting any possible attempts that might be made to remove or destroy the item sought to be seized, even in the absence of any facts providing the officers with probable cause or even reasonable suspicion to believe that such an attempt will be made. The *Segura* securing-of-the-premises holding is therefore distinguishable from the emergency destruction or disappearance-of-evidence exception to the general rule requiring a warrant for a seizure, since that exception requires law enforcement officers to have probable cause or reasonable suspicion to believe

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393. The Court in *Segura* assumed for purposes of this holding that "there was a seizure of all of the contents of the petitioners' apartment when agents secured the premises from within." *Segura* v. United States, 468 U.S. at 798 (emphasis in original).

394. *Id.*


396. In *United States v. DiCesare*, 765 F.2d 890 (9th Cir. 1985), the court held that in order to secure premises under *Segura*, police must, at the time of the securing of the premises, have probable cause to search the secured premises. Chief Justice Burger stated that the agents who entered the petitioners' apartment "had abundant probable cause to believe that there was a criminal drug operation being carried on in petitioner's apartment; indeed petitioners do not dispute the probable cause determination." *Segura* v. United States, 468 U.S. at 810.

397. The government did not seek review in *Segura* of the court of appeals' and district court's conclusion that the initial warrantless entry and the limited security search of the petitioners' apartment were not justified by exigent circumstances. *Id.* at 798, 802 n.4, 804. The government's concession that there were no exigent circumstances present in *Segura* justifying the warrantless entry and security search apparently was viewed by the Court as applicable to the securing-of-the-premises issue, because there is no reference to the presence of exigent circumstances in the discussion of the securing-of-the-premises issue in the opinion of the Court.

398. *Id.* at 798.

399. *Id.* at 810 (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.).
that the item will be destroyed or will disappear before a search warrant is obtained.400

The Segura securing-of-premises holding also does not require police to establish that any exigency (such as a threat of destruction or removal of evidence or a threat to the safety of law enforcement officers) or other law enforcement interest necessitated the securing of the premises from within rather than staking out and guarding the premises from the outside.401 A warrantless securing of premises is authorized under Segura, however, only when "the occupants who have legitimate possessory interests in its contents" are arrested based on probable cause and taken into custody.402 This formulation appears to require that all occupants of the premises with legitimate possessory interests in the premises' contents have been arrested and taken into custody.403

400. See supra text accompanying notes 373-81 (discussing emergency exception doctrine concerning prevention of loss of evidence). Both the Segura securing-of-the-premises holding and the emergency exception authorize the warrantless seizure of personal property. However, the Segura holding, unlike the emergency exception, also authorizes the warrantless seizure of the premises containing personal property for up to 19 hours. The emergency doctrine only authorizes seizure of an automobile or other premises containing seizable personal property for the period of time necessary to seize such personal property.


402. Id. at 798. The Court in Segura did not indicate whether the occupants must be under lawful arrest in order for its securing-of-the-premises holding to apply. The Segura Court's securing-of-the-premises holding refers to probable cause for arresting the occupants, which is a prerequisite for arresting a person, Dunaway v. New York, 442 U.S. 200, 216 (1979), but the arrest of Colon inside her residence without an arrest warrant in the absence of exigent circumstances violated the fourth amendment. See Payton v. New York, 445 U.S. 573, 590 (1980) (warrantless police entry to arrest defendant based on probable cause but without exigent circumstances or consent for entry violated fourth amendment); Dressler, supra note 392, at 400 n.119. Justice Stevens argued in dissent in Segura that:

While Segura was lawfully in custody during this period [when the premises were secured from within], Colon and her three companions were not. They were unknown to the agents prior to the illegal entry and, as the District Court noted, would have been able to remain in the apartment free from governmental interference had the unlawful entry not occurred.

Segura v. United States, 468 U.S. at 822 n.11 (Stevens, J., dissenting).

403. Chief Justice Burger did not state explicitly in Segura whether all of the occupants of the premises remained under arrest and in custody during the entire period that the premises in question were secured by government agents. Although in Part II of the opinion he stated that petitioners "Colon, Segura, and the other occupants of the apartment were taken to Drug Enforcement Administration headquarters," Segura v. United States, 468 U.S. at 801, he stated in Part IV only that "Segura and Colon, whose possessory interests were interfered with by the occupation, were under arrest and in the custody of the police throughout the entire period the agents occupied the apartment." Id. at 813. There is no statement whether the three other persons who were occupants of the apartment at the time petitioner Colon was arrested in the apartment were under arrest and in custody during the entire period that the apartment was secured from within; this omission may have occurred because these three occupants were not petitioners in the Segura case and therefore their personal rights were not at issue. Id. at 800-01.
Even if each arrested occupant is the victim of a seizure of some of their personal property that is within the premises that is secured from within, securing of the premises arguably causes very little, if any, interference with the occupants' possessory interests in the premises and its contents when they are under arrest and in the custody of the police for the entire period that law enforcement officers secure the premises from within. If not, all of the occupants of the premises that are secured from within are under arrest and in police custody for the entire period that police are inside the premises, the securing of the premises might be held to be an unreasonable seizure of the apartment and its contents, in violation of the fourth amendment rights of such occupants, if the occupation of the premises significantly interferes with such occupants' use and enjoyment of the premises and its contents. However, when the occupants of premises are not using and enjoying the premises while the premises are secured from within because they are away on travel or vacation or for other reasons, the securing of the premises would no more affect the occupants' possessory interests in the premises and its contents then is the case when all of the occupants are under arrest and in police custody while the premises are secured from within. Segura explicitly authorizes securing of the premises only when the occupants of the premises with legitimate possessory interests in its contents are under arrest and in police custody.

Segura explicitly authorizes a warrantless securing of premises only when the securing is for a period no longer than the approximate nineteen hours involved in Segura and when the officers seeking the search warrant for the premises have been acting in good faith. Segura does not state whether a warrantless securing of premises may ever be permitted for a period exceeding nineteen hours, or whether a warrantless securing of premises for a period of less than nineteen hours might ever be held to violate the fourth amendment. However, Segura's "good faith" criterion may be interpreted as implying that a securing of premises for more than the nineteen hours involved in Segura might be authorized by the fourth amendment if the officers seeking the warrant for the premises were acting in "good faith" during such a lengthy securing of the premises. In addition, this good faith criterion might be interpreted to imply that a securing of premises for less than nineteen hours violates the fourth amendment's proscription against unreasonable seizures if the police seeking the search warrant for the premises were not acting in good faith. But Segura does not indicate whether good faith is to be determined by the actual subjective state of mind of the officers seeking the search warrant for the secured premises or by an objective standard that determines whether police of-

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404. If the Segura Court's reference to "occupants with legitimate possessory interests in the contents of the premises" is interpreted as a reference to occupants who are the victim of a fourth amendment seizure—because the securing of the premises constitutes a meaningful interference with each occupant's possessory interests in personal property located in the apartment—the securing of the petitioners' apartment in Segura constituted a seizure of the contents of the apartment legitimately possessed by each occupant.

405. Id. at 813; see infra text accompanying notes 413-42 (discussing Part IV of Segura).

ficers who sought the search warrant for the secured premises acted as reasonably well-trained police officers should act. 407 Segura also does not indicate what factors a court should consider in determining whether police acted in good faith while seeking a warrant for the secured premises, although the primary focus may be on what actions police officers took in seeking to obtain the search warrant after the premises were secured and whether any delays in obtaining the search warrant were attributable to bad faith or unreasonable conduct by police officers. 408

Under this interpretation of Segura's good faith criterion, the permissible length of time of a warrantless securing of premises would be determined on a

407. The Supreme Court has stated, technically in dictum, that "almost without exception in evaluating alleged violations of the Fourth Amendment, the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him," Scott v. United States, 436 U.S. 128, 137 (1978), and that "[s]ubjective intent alone ... does not make otherwise lawful conduct ... unconstitutional." Id. at 136. However, the Scott Court also stated in dictum that "[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." Id. at 139 n.13. The Supreme Court's good faith exception to the exclusionary rule is determined by whether the police officers who obtained or executed the search warrant in question acted with objective good faith ("objective reasonableness"), United States v. Leon, 468 U.S. 897, 922 n.23 (1984), without regard to the subjective state of mind of the law enforcement officer who seized the evidence in question. Id. The Leon good faith exception focuses on "whether a reasonably well-trained police officer would have known that the search in question was illegal despite the magistrate's authorization." Id. The Supreme Court's inevitable discovery exception to the exclusionary rule, however, does not include a threshold showing of police good faith. Nix v. Williams, 467 U.S. 431, 445 (1984). Professor Dressler has noted that the Court in Segura offered no precedent for the good faith element of its securing-of-the-premises holding and that "there is none." Dressler, supra note 392, at 419.

408. Chief Justice Burger stated in Segura that "a seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its duration or for other reasons." Segura v. United States, 468 U.S. at 812. He noted that the "delay in securing the warrant in a large metropolitan center unfortunately is not uncommon; this is not, in itself, evidence of bad faith." Id. He later added that more than half of the delay in Segura in securing the search warrant was between 10:00 p.m. and 10:00 a.m. the following day, "when it is reasonable to assume that judicial officers are not as readily available for consideration of warrant requests." Id. at 812-13. Chief Justice Burger also added that there was "no suggestion that the officers, in bad faith, purposely delayed obtaining the warrant. The asserted explanation is that the officers focused first on the task of processing those whom they had arrested before turning to the task of securing the warrant. It is not unreasonable for officers to believe that the former should take priority, given, as was the case here, that the proprietors of the apartment were in custody of the officers throughout the period in question." Id. at 812. He also added that the agents "simply awaited issuance of the warrant" and did not "in any way" exploit their presence in the apartment. Id. Chief Justice Burger's analysis of the good faith issue in Segura thus focuses on both what police officers did during the period that a search warrant was sought for the secured premises and whether the officers' actions during this period were in good faith or were reasonable. Justice Stevens argued in dissent in Segura, however, that "as the Government candidly admits, the fault here lies not with the judiciary, but with the United States Attorney's office for failing to exercise due diligence in attempting to procure a warrant." Id. at 818 n.1 (Stevens, J., dissenting). Professor Dressler also has asserted that the delay in obtaining the search warrant in Segura "apparently ... resulted from the failure of the United States Attorney to apply in timely fashion for the warrant." Dressler, supra note 392, at 386-87.
case-by-case basis, taking into account the good faith (subjective or objective) of the police seeking the search warrant for the premises (and, possibly, the effect of the securing of the premises on the occupants' possessory interests in the premises and its contents). Interpretation of Segura as establishing a per se rule authorizing warrantless securing of premises for nineteen hours or less (if the other criteria of probable cause, arrest and custody of all occupants of the premises, and good faith, are satisfied) would serve the goals of giving the police, the courts and the public clear guidelines as to the authority of the police and the rights of the public. However, a maximum nineteen hour period for warrantless securing of premises might not be long enough in rural areas where a lengthy trip to a magistrate is necessary in order to obtain a search warrant for the premises, or in mass arrest situations where lengthy processing of arrestees is required, precluding any police officer from seeking a search warrant until such processing is completed. A per se rule permitting a warrantless securing of premises for a period of time much longer than the nineteen hours involved in Segura might not encourage police to fail to exercise diligence in seeking a search warrant for the premises if the good faith criterion was strictly interpreted. Yet, such a per se rule might cause police to delay in releasing arrested occupants of the premises from custody until they were notified that a search warrant for the premises had been obtained, in order to comply with Segura's requirement that all occupants of the premises be under arrest and in custody while the premises are secured. Consequently, a case-by-case determination of the reasonableness of the duration of a warrantless securing of premises is preferable.

One final uncertainty about Segura's securing-of-the-premises holding is whether police, when they satisfy the elements of Segura's holding, are authorized to guard the premises from the exterior and prohibit occupants of the premises from entering the premises while a search warrant for the premises is obtained, rather than securing the premises from within. Chief Justice Burger in Segura would apparently extend the securing-of-premises holding to such exterior stakeouts. He found that "both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners" and that a perimeter stakeout probably would have a lesser interference with the privacy interests protected by the "search" clause of the


410. Justice Stevens states in his dissent in Segura that "since these premises were impounded 'from the inside,' I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter." Segura v. United States, 468 U.S. at 824 n.15 (Stevens, J., with whom Brennan, Marshall, & Blackmun, J.J., joined, dissenting).

411. Id. at 811 (Part IV of the Opinion of the Court by Burger, C.J., joined only by O'Connor, J.).
fourth amendment because it does not expose the intimate details of the inside of a person's home to police observation. 412

Although a majority in Segura supported the securing-of-the-premises holding, only Chief Justice Burger, joined by Justice O'Connor, issued an opinion providing reasoning in support of this holding. This reasoning is provided in Part IV of the opinion of the Court by Chief Justice Burger. 413 Chief Justice Burger first noted in Part IV of Segura that a seizure affects only the person's possessory interests, while a search affects a person's privacy interests. 414 He then asserted that the Supreme Court, recognizing the generally less intrusive nature of a seizure, 415 has frequently approved warrantless seizures of property, on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been held impermissible. 416 He then argued that the Supreme Court had "focused on the issue notably" in Chambers v. Maroney, 417 which he argued had authorized the warrantless seizure of an automobile, on the basis of probable cause, "to protect the evidence from destruction even though there was no immediate fear that the evidence was in the process of being destroyed or otherwise lost." 418 He noted that the Court in Chambers had acknowledged that following the car until a warrant could be obtained was an alternative to seizure of the automobile, "albeit an impracticable one," but that the seizure had been authorized nonetheless because otherwise the occupants of the car could have removed the evidence in question. 419

412. However, as noted by Chief Justice Burger in Segura, "[s]ecuring of the premises from within, however, was no more an interference with the petitioners' possessory interests in the contents of the apartment than a perimeter 'stakeout'." Id. Consequently, there is no distinction between securing-of-premises from within and an exterior stakeout of premises (which involves preventing all of the occupants of the premises from entering and using the premises) in terms of interference with the possessory interests protected by the fourth amendment's prohibition of unreasonable seizures, because both types of police actions deprive the occupants of the use and enjoyment of the premises and its contents to the same extent.

413. Justice White, Justice Powell and Justice Rehnquist joined all but Part IV of the opinion of the Court by Chief Justice Burger. As noted earlier, Justice O’Connor joined all parts of the opinion of the Court.

414. Id. at 806 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.).

415. Id. (citing United States v. Chadwick, 433 U.S. 1, 13 n.8 (1977); Chambers v. Maroney, 399 U.S. 42, 51 (1970)). This proposition may have been abrogated implicitly by the majority's statements in Arizona v. Hicks, 107 S. Ct. 1149 (1987), that neither the interest protected by the fourth amendment injunction against unreasonable searches nor its injunction against unreasonable seizures "is of inferior worth or necessarily requires only lesser protection," and that the Court has never "drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action." Id. at 1154.


419. Id. (citing Chambers v. Maroney, 399 U.S. at 51 n.9). Chief Justice Burger failed to acknowledge that the Chambers Court's reference to removal of evidence from an automobile by
Chambers v. Maroney, which applied the "automobile exception" to the general rule requiring a search or seizure,420 should not be interpreted as authority for allowing warrantless seizures of residential premises for the time necessary to secure a search warrant, because the automobile exception's authorization of warrantless seizures and searches of automobiles on the basis of probable cause is based upon both the inherently mobile nature of functioning automobiles and the diminished expectation of privacy in automobiles due to the extensive regulation of the operation and maintenance of automobiles.421 Neither of these factors are present in the case of residential premises subject to Segura's securing of premises holding.

After discussing Chambers v. Maroney, Chief Justice Burger discussed United States v. Chadwick422 and Arkansas v. Sanders423 in Part IV of Segura.424 He asserted that there was no immediate threat of loss or destruction of evidence in either Chambers or Sanders because the vehicles containing the evidence in question in each case could have been followed until a search warrant was obtained.425 But Chadwick and Sanders should not be interpreted as authority justifying securing-of-premises when there is no probable cause or even reasonable suspicion to believe that the items in the premises will disappear or be destroyed. In Chadwick and Sanders there were exigent circum-

420. See Chambers v. Maroney, 399 U.S. at 52 (automobile lawfully stopped on public road may be searched upon probable cause).
424. Segura v. United States, 468 U.S. at 806 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.); see supra notes 374-75 (discussing details of decisions in Chadwick and Sanders).
425. Segura v. United States, 468 U.S. at 806 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.). Chief Justice Burger added in Segura that "there arguably was even less fear of immediate loss of the evidence in Sanders because the suitcase at issue had been placed in the vehicle's trunk, thus rendering immediate access unlikely before police could act." Id.
stances since the luggage that was seized was about to be taken to an unknown location.\textsuperscript{426} Segura's securing-of-the-premises holding, on the other hand, does not require that there be exigent circumstances.\textsuperscript{427} Chief Justice Burger failed to note that these key facts, present in Chadwick and Sanders, were not present in Segura. Despite the fact that Chambers, Chadwick and Sanders do not support Segura's securing-of-the-premises holding, Chief Justice Burger asserted in Part IV of Segura that "[u]nderlying these decisions is a belief that society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity."\textsuperscript{428}

After referring to two cases\textsuperscript{429} where the Supreme Court had suggested that the temporary securing of premises to preserve the status quo while a search warrant is sought does not violate the fourth amendment,\textsuperscript{430} Chief Justice Burger stated that the Court saw no reason, as suggested in those two cases, "why the same principle applied in Chambers, Chadwick, and Sanders should not apply where a dwelling is involved."\textsuperscript{431} He then stated that Segura's securing-of-the-premises holding did not violate the fourth amendment. Such a seizure, he argued, does not implicate the heightened protection accorded privacy interests. A seizure of premises affects only possessory interests, whereas the sanctity of the home in fourth amendment terms is based primarily on the occupants' privacy interests in the activities that take place within, not because of the occupants' possessory interests in the premises.\textsuperscript{432} Chief Justice Burger provided no authority in support of his categorization of the protections afforded by the fourth amendment's prohibition of unreasonable seizures as being inferior to the protections afforded by the fourth amendment's prohibition of unreasonable searches. Furthermore, in 1987 the Supreme Court made clear that these two prohibitions of the fourth amendment are to be accorded equal protection.\textsuperscript{433}

Chief Justice Burger next argued in Part IV of Segura that for purposes of the fourth amendment's prohibition of unreasonable seizures, there is no difference between securing the premises from within and securing the premises

\textsuperscript{426} See supra notes 374-75 (discussing details of decisions in Chadwick and Sanders).
\textsuperscript{427} See supra note 392 and accompanying text (discussing details of Segura holding).
\textsuperscript{428} Segura v. United States, 468 U.S. at 808 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.) (citing United States v. Place, 462 U.S. 696 (1983)).
\textsuperscript{430} Segura v. United States, 468 U.S. at 809 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.).
\textsuperscript{431} Id. at 810.
\textsuperscript{432} Id. The Court reaffirmed, he noted, "that absent exigent circumstances, a warrantless search—such as that invalidated in Vale v. Louisiana, 399 U.S. 30, 33-34 (1970)—is illegal." Segura v. United States, 468 U.S. at 810 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.).
from the outside by a "stakeout." He did not state that police must justify their decision to secure premises from within rather than from outside by exigent circumstances, such as probable cause or reasonable suspicion to believe that evidence will be removed or destroyed, or that the safety of police officers will be threatened if police secure the premises from the outside rather than from within. But he did state that the fact that the entry of the petitioners' apartment "may have constituted an illegal search, or interference with petitioners' privacy interests, requiring suppression of all evidence observed during the entry," did not "render the seizure any more unreasonable than had the agents staked out the apartment from outside." However, because the court assumed that the warrantless entry of the petitioners' apartment was illegal, since exigent circumstances were not present, neither Chief Justice Burger nor any of the other Justices in the majority in Segura discussed the issue of whether the right to conduct a warrantless securing of premises from within under its holding includes the right to make a warrantless entry of the premises. Since police must enter premises in order to secure the premises from within, the authority to secure premises from within without a warrant arguably should include the authority to enter the premises without a warrant in order to secure the premises from within. Chief Justice Burger also cited no authority in support of his assertion that it is irrelevant, in determining whether a warrantless securing of premises from within violates the fourth amendment's prohibition against unreasonable seizures, that police entered the premises illegally in violation of the fourth amendment's prohibition of unreasonable searches. He did, however, argue that the Court did not "heighten the possibility of illegal entries by a holding that the illegal entry and securing of the premises from the inside do not themselves render the seizure any more unreasonable than had the agents staked out the apartment from the outside."


435. He did state that "[a]rguably, the wiser course would have been to depart immediately and secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody were in the apartment," but "the method actually employed does not require a different result under the Fourth Amendment, insofar as the seizure is concerned." Id.

436. Id.

437. See Dressler, supra note 392, at 414 n.201.

438. Segura v. United States, 468 U.S. at 811 (Part IV of opinion of the Court by Burger, C.J., joined only by O'Connor, J.). Chief Justice Burger provided the following argument in support of this conclusion:

In the first place, an entry in the absence of exigent circumstances is illegal. We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course. Second, as a practical matter, officers who have probable cause and are in the process of obtaining a warrant have no reason to enter the premises before the warrant issues, absent exigent circumstances which, of course would justify the entry. Third, officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by
Chief Justice Burger then acknowledged in Part IV of *Segura* that "a seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its duration or for other reasons."439 However, he argued that this was not the case in *Segura* because there was no evidence that the delay in obtaining the warrant was due to bad faith by the officers.440 He argued that the agents in no way exploited their presence in the apartment,441 and the actual interference with the petitioners' possessory interests in their apartment and its contents by the securing of the apartment was "virtually nonexistent" because petitioners Segura and Colon were under arrest and in police custody during the entire time that government agents secured their apartment.442

Justice Stevens argued in dissent in *Segura* that "it is uncontested that the warrantless entry of petitioners' apartment was unconstitutional" because there were no exigent circumstances,443 and "that the subsequent 18-20 hour occupation of the apartment was independently unconstitutional for two separate reasons."444 His first reason for the latter argument was that the occupation of the petitioners' apartment was an unreasonable "search" in violation of the fourth amendment.445 His second reason was that the agents' occupation of the petitioners' apartment was an unreasonable "seizure" in violation of the

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440. Id. at 812 (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.).

441. Id. at 812 (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.). Chief Justice Burger stated that the agents "simply awaited issuance of the warrant." Id.

442. Id. at 813. Prior to this statement, he quoted the Court's observation in United States v. Place, 462 U.S. 696, 705 (1983), that "[t]he intrusion on possessory interests occasioned by a seizure . . . can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner." Segura v. United States, 468 U.S. at 813 (Part IV of the opinion of the Court by Burger, C.J., joined only by O'Connor, J.). Chief Justice Burger distinguished the *Place* Court's holding that a 90-minute detention of a traveler's luggage was unreasonable on the grounds that that detention was based only on suspicion, not probable cause; he noted that it was not suggested in *Place* that the detention of the luggage for three days after probable cause was acquired provided an independent basis for suppression of the evidence eventually discovered in the luggage. Id. at 813 n.8.


444. Id.

445. Id. He argued that this was the case because the agents' prolonged occupation of the petitioners' apartment "inevitably involved scrutiny of a variety of personal effects throughout the apartment," id. at 821, thus unreasonably infringing the petitioners' privacy interests. Id. at 821-22. He argued that Chief Justice Burger had ignored "this point, assuming that there is no constitutional distinction between surveillance of the home from the outside and physical occupation from the inside," and that his assumption was "untenable." Id. at 822.
fourth amendment.\textsuperscript{446} Justice Stevens asserted that even if there had been exigent circumstances that justified the entry and securing of the premises pending a warrant (which circumstances no one argued existed), “the duration of the seizure would nevertheless have been unreasonable.”\textsuperscript{447}

After asserting that warrantless police conduct that is justified by exigent circumstances must be “‘strictly circumscribed by the exigencies which justify its initiation,’ ”\textsuperscript{448} Justice Stevens argued that the cases cited by Chief Justice Burger in support of the Court’s securing-of-the-premises holding were inapplicable.\textsuperscript{449} Justice Stevens argued further that the eighteen to twenty hour occupation was an unreasonable seizure because “the agents unreasonably delayed in seeking judicial authorization for their seizure of petitioners’ apartment.”\textsuperscript{450}

Justice Stevens then criticized the three reasons given by Chief Justice Burger in support of his conclusion that the eighteen to twenty hour occupation of the petitioners’ apartment was not unreasonable, arguing that none of these reasons had “any merit.”\textsuperscript{451} Justice Stevens first criticized Chief Justice Burger’s reliance upon the officers’ processing of the persons they had arrested prior to seeking a warrant to justify the delay,\textsuperscript{452} on the grounds that there was no evidence of difficulties in processing the arrests.\textsuperscript{453} Justice Stevens next explained that the occupation of the petitioners’ apartment was a “seizure” of the contents of the apartment because it subjected the petitioners’ possessory interests with respect to their apartment to meaningful governmental interference.\textsuperscript{454}

\begin{footnotesize}
\footnote{446. Id. at 822. He argued that the occupation of the petitioners’ apartment was a “‘seizure’ of the contents of the apartment because it subjected the petitioners’ possessory interests with respect to their apartment to meaningful governmental interference. Id. at 822-23.}
\footnote{447. Id. at 823.}
\footnote{448. Id. (quoting Terry v. Ohio, 392 U.S. 1, 25-26 (1968)).}
\footnote{449. Id. at 823. In particular, Justice Stevens criticized Chief Justice Burger’s analysis, id. at 813 n.8, of United States v. Place, 462 U.S. 696 (1983), on the grounds that the Court in Place had no occasion to reach the issue of the legality of the 3-day detention of Place’s luggage. Segura v. United States, 468 U.S. at 823 n.14.}
\footnote{450. Segura v. United States, 468 U.S. at 824 (Stevens, J., dissenting). He asserted that there was no contention that the 18-20 hour detention “was even remotely necessary to procure a warrant.” Id. at 823-24. Justice Stevens also argued that the unreasonableness of the 18-20 occupation of the petitioners’ apartment was “graphically” illustrated by contrasting this period of occupation to the 90-minute detention of luggage which was held to be unreasonable in United States v. Place, 462 U.S. 696 (1983); he did not, as did Chief Justice Burger, Segura v. United States, 468 U.S. at 813 n.8 (Part IV of the opinion of the Court by Burger, C.J., which was joined only by O’Connor, J.), distinguish Place on the grounds that the detention in Place was based upon reasonable suspicion, not probable cause, as in Segura. Justice Stevens also distinguished Place from Segura on the grounds that the seizure of luggage in Place was lawful in its inception whereas the seizure of the petitioners’ apartment in Segura was unreasonable “from the moment it began,” because neither a search of a home nor the seizure of its contents may be conducted without a warrant and in the absence of exigent circumstances. Id. at 824 (Stevens, J., dissenting).

\footnote{452. Id. at 812 (Part IV of the opinion of the Court by Burger, C.J., joined only by O’Connor, J.).}
\footnote{453. Id. at 825 (Stevens J., dissenting). He also added, after asserting that “the arrest of the occupants [of the apartment] itself was unconstitutional,” that “it is truly ironic” that Chief Justice Burger “uses one wrong to justify another.” Id. He then stated: “Of greater significance, the District Court expressly found that the length of the delay was unreasonable and that the Government had made no attempt to justify it; that finding was upheld by the Court of Appeals, and in this Court the Government expressly concedes that the delay was unreasonable.” Id. (footnote omitted).}
\end{footnotesize}
criticized Chief Justice Burger's reliance upon the lack of bad faith by the agents who sought the warrant for the petitioners' apartment, on the grounds that the Supreme Court "has repeatedly held that a police officer's good or bad faith in undertaking a search or seizure is irrelevant to its constitutional reasonableness." Finally, Justice Stevens disagreed with the conclusion that the securing of the petitioners' apartment did not significantly interfere with the petitioners' possessory interests in their apartment because they were in custody. Justice Stevens argued that the petitioners retained a protected possessory interest in their home and effects that could be infringed without a warrant even though they were in custody.

454. Id. at 798 (opinion of the Court); Id. at 812 (Part IV of the opinion of the Court by Burger, C.J., which was joined only by O'Connor, J.); see supra text accompanying notes 406-08.

455. Id. at 826 (Stevens, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968); Beck v. Ohio, 379 U.S. 89, 97 (1964); Henry v. United States, 361 U.S. 98, 102 (1959); and United States v. Leon, 468 U.S. 897, 915 n.13 (1984)). Justice Stevens noted that the officers' lack of bad faith was raised despite the fact that there was "no finding as to whether the agents acted in good or bad faith" and that "the reason is that the litigants have never raised the issue." Id. at 825.

Beck v. Ohio, Henry v. United States, and United States v. Leon, three of the cases cited by Justice Stevens in support of his proposition that an officer's good or bad faith is irrelevant in determining fourth amendment reasonableness, only stated that a police officer's subjective good faith alone is not sufficient to establish probable cause. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); United States v. Leon, 468 U.S. 897 (1984). Terry v. Ohio, the other case cited by Justice Stevens in support of this proposition, only indicates that subjective good faith of an officer is not the test for determining whether an officer has the reasonable suspicion that is a prerequisite for making an investigative stop. None of these cited cases hold that a police officer's good or bad faith is irrelevant to determining the reasonableness of a seizure. The Court's decision in Maryland v. Macon, 472 U.S. 463, 470-71 (1985), decided subsequent to Segura, held that the determination of whether a fourth amendment violation has occurred does not turn on the officer's actual state of mind at the time the challenged action took place. Id. Therefore, under Macon, an officer's subjective good or bad faith is irrelevant to the determination of whether a seizure is unreasonable under the fourth amendment. The Supreme Court has not explicitly addressed the issue of whether a court, in determining the reasonableness under the fourth amendment of a search or seizure, should consider whether the officers whose conduct is being challenged acted in objective good faith. See supra text accompanying note 408. The court, however, states in dictum that "almost without exception in evaluating alleged violations of the fourth amendment, the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." Scott v. United States, 436 U.S. at 137.


457. Id. at 826 (Stevens, J., dissenting). In support of this argument, Justice Stevens cited Mincey v. Arizona, 437 U.S. 385 (1978), and Chimel v. California, 395 U.S. 752 (1969). The Mincey and Chimel decisions, however, only addressed the issue of whether warrantless entries and inspections of the contents of a person's residence were unreasonable searches in violation of the fourth amendment; neither Mincey nor Chimel addressed the issue of whether such conduct by police constitutes an unreasonable seizure in violation of the fourth amendment. See Mincey v. Arizona, 437 U.S. 385 (1978) (holding that warrantless four-day search of defendant's apartment, after arrest following a shooting in the apartment, could not be justified under so-called "murder-scene exception"; that fact of a homicide did not give rise to exigent circumstances so
Justice Stevens argued that a person in custody still "'owns his house and his right to exclude others—including federal narcotics agents—remains inviolate.'"\(^{458}\) He also noted that the Court's securing-of-premises holding allowed the authorities to benefit from their unlawful warrantless arrest of petitioner Colon, because "'[i]f the agents had decided to obey the Constitution and not arrest Colon, then she would not have 'relinquished control' over the property and presumably it would have been unreasonable for the agents to have remained on the premises under the Chief Justice's analysis. However, because the agents conducted an unlawful arrest in addition to their previous unlawful entry, an otherwise unreasonable occupation becomes 'reasonable.'"\(^{459}\)

In addition to being vague as to its application because of uncertainty with respect to the meaning of its "'good faith'" element and with respect to the permissible period of time that premises may be secured without a warrant,\(^{460}\) Segura's securing-of-premises holding is an unreasonable interpretation of the fourth amendment. The holding is unsound because it authorizes a warrantless securing of premises although the entry of the premises is assumed to be an unreasonable search in violation of the fourth amendment. The holding is also unsound because exigent circumstances (probable cause or reasonable suspicion to believe that evidence otherwise will be removed or destroyed) are not a prerequisite to securing of premises and because police do not need to justify (in terms of preventing removal or destruction of evidence or threats to the safety of police officers) why the premises are secured from within rather than from without. State appellate courts should interpret their state constitutions and state common law in a manner that rejects Segura's securing-of-the-premises holding.\(^{461}\)

**IX. CONCLUSION**

The Supreme Court has interpreted the fourth amendment's prohibition of unreasonable searches as protecting legitimate expectations of privacy, but has interpreted the fourth amendment's prohibition of unreasonable seizures as protecting only a narrow range of property and possessory interests. Although

\(^{458}\) Segura v. United States, 468 U.S. at 826 (Stevens, J., dissenting).

\(^{459}\) Id. at 826-27.

\(^{460}\) See supra text accompanying notes 406-08.

the Supreme Court's definition of a fourth amendment seizure of property may protect persons in constructive possession of property as well as persons in actual possession of property, the definition of a fourth amendment "seizure" of property should be expanded to protect individuals' non-possessory interests in real and personal property.

The Supreme Court has held that a "seizure" of real or personal property without a search warrant or without probable cause, or without either, is not unreasonable and in violation of the fourth amendment either when exigent circumstances are present or when governmental interests in conducting such a seizure outweigh the intrusion of individual rights. However, recent Supreme Court decisions authorizing warrantless seizures of property, or seizures of property on less than probable cause, often fail to define precisely when law enforcement officers are authorized to conduct such seizures. These decisions also fail to identify and fully analyze all policy considerations that are relevant to the determination of whether particular seizures of real or personal property by law enforcement officers should be permitted without a search warrant or without probable cause. The Supreme Court should attempt to avoid such shortcomings in future decisions addressing the issues of whether seizures of property should be permitted without a search warrant or without probable cause.