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Seizures Without Searches: Defining Property Seizures and Developing a Property Seizure Model

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I. INTRODUCTION

The body of law surrounding search and arrest is well developed. However, because a seizure is usually the natural by-product of a search, or is otherwise justified under the plain view doctrine, "pure" property seizure law is not well developed. Consequently, "pure" property seizures have not received much attention, and the term "seizure" has not been clearly defined. Most law school graduates can recite the definition of "search"; how many can recite the definition of "seizure"?

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As Professor Wayne LaFave notes, "The word 'seizure' in the Fourth Amendment has, in the main, not been a source of difficulty."[1] But consider the following hypothetical: imagine federal agents think that an American of Saudi Arabian descent has ties to a terrorist organization. The man takes a package to a shipping store, with an outbound address to Yemen. He leaves the store, and a federal agent, with the consent of the shipping store, takes the package to her office to investigate the shipping address, all without having a reasonable suspicion that the man was engaged in any criminal activity. The agent then returns the package before the truck that would have shipped the package departs. Did the officer's actions amount to a "seizure" within the meaning of the Fourth Amendment?[2] If the officer had eventually found some evidence in this package, would that evidence be admissible in court?

Under the definition of a property seizure found in *United States v. Jacobsen*,[3] and under the model for analyzing property seizures that has been developed by some lower federal courts using this approach,[4] the agent did not seize the package, and the evidence comes in. The *Jacobsen* model addresses two questions: 1) has there been a seizure?; and 2) if there has been a seizure, was the seizure reasonable in inception and scope?[5] The *Jacobsen* Court defined a property seizure to be the government's meaningful interference with a person's possessory interest in an item.[6] This definition for "seizure" is a term of art—it includes a threshold requirement for government activity before a person's possessory interest in an item becomes protected by the Fourth Amendment. Thus, what might appear to a layperson to be a "seizure," like the agent taking someone's package, is not a "seizure" within the meaning of the Fourth Amendment.

Under this definition, a broad range of government conduct is *beyond* judicial scrutiny. Generally, the government has not meaningfully interfered with a person's possessory interest unless a government agent takes the item directly from the person or somehow interferes with the person's liberty interests (say, by causing the item to not be there when the person goes to pick it up, thereby disrupting the person's travel).[7] If the government has not meaningfully interfered with this possessory

1. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a) (4th ed. 2004).

2. *See* U.S. CONST. amend. IV.

3. 466 U.S. 109 (1984).

4. *See, e.g.*, United States v. Ward, 144 F.3d 1024, 1032 (7th Cir. 1998); United States v. England, 971 F.2d 419, 420 (9th Cir. 1992); United States v. Lovell, 849 F.2d 910, 915 (5th Cir. 1988); United States v. Quiroz, 57 F. Supp. 2d 805, 813 (D. Minn. 1999); United States v. Wood, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998); United States v. Visser, 40 M.J. 86, 90 (C.M.A. 1994).

5. *See* discussion *infra* Part IV.B.

6. *See* discussion *infra* Part IV.B.

7. *See* discussion *infra* Part IV.C.

interest, then the Fourth Amendment provides no protection. Consequently, the government's actions may not receive judicial review.

In the hypothetical, the agent did not take the package directly from the citizen. Further, because the agent did not otherwise meaningfully interfere with the citizen's liberty interest in the package by, say, delaying the citizen's receipt of the package on the other end, the agent did not "seize" the package. Therefore, without even having reasonable suspicion, under the *Jacobsen* model, the agent could have taken the package from the store, and her actions would not have received judicial review.[8]

Another model for seizures exists and competes with the *Jacobsen* model in the lower federal courts. This model derives from *Terry v. Ohio*[9] and *United States v. Place*.[10] The *Terry* and *Place* Courts addressed three basic questions: 1) is there a constitutionally protected interest?; 2) did the government interfere with that interest?; and 3) was that interference reasonable at inception and in scope?[11] The first two questions amount to Fourth Amendment triggers and, when joined, serve as the definition of seizure: a seizure occurs when the government interferes with a liberty or property interest.[12]

The *Terry* and *Place* Courts confirmed that the Constitution protects *all* liberty and property interests,[13] and both the *Terry* and *Place* Courts found that *any* government interference with those constitutionally protected rights triggers Fourth Amendment analysis.[14] A combination of these two Fourth Amendment triggers—a constitutionally protected interest and government interference with that interest—is how the *Terry* Court defined a liberty seizure: when a police officer, through means of physical force or show of authority, has in some way restrained the person's liberty.[15] Likewise, the *Place* Court defined a property seizure to be: when the government, for its own purposes, exercises dominion and control over property in which the person has a possessory interest.[16] Under these definitions, a broad range of government conduct falls *within* judicial review.

The *Terry* and *Place* approach to defining seizures is the common-sense approach. Either a person has a protected interest or the person does not; and either

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8. Under the *Jacobsen* model, if the government has "seized" the item, the courts then conduct a reasonableness inquiry. The seizure must be reasonable at inception (supported by at least a reasonable suspicion) and reasonable in scope (if supported by reasonable suspicion, limited to those courses of action that will quickly confirm or dispel the government's suspicion). *See* discussion *infra* Part IV.B.

9. 392 U.S. 1 (1968).

10. 462 U.S. 696 (1983).

11. *See* discussion *infra* Part III.A.

12. *See* discussion *infra* Part III.A

13. *See* discussion *infra* Part V.B.

14. *See* discussion *infra* Parts II-III.

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part III.

the government has interfered with that interest or the government has not. Lay people can understand that when they are no longer free to leave, the government has interfered with their liberty interests and has "seized" them. In addition, lay people can understand that when the government has taken control of their property to conduct a criminal investigation, the government has infringed on their possessory interests and has "seized" their property.

Returning to the hypothetical, but this time using the *Terry* and *Place* approach, a different outcome is achieved. First, the citizen had a possessory interest in his package. The agent interfered with that interest when she exercised dominion and control over the package (she took it to her office) for her own purposes (to conduct a limited criminal investigation). Her interference with his protected interest amounts to a "seizure," the Fourth Amendment applies, and her actions *will* receive judicial scrutiny.

After deciding that a seizure occurred, both the *Terry* and *Place* Courts examined the reasonableness of the seizure.[17] The reasonableness inquiry examined both the reasonableness of the seizure at its inception and the reasonableness of its scope. Inception deals with what the government must *know* before seizing an item, and scope deals with what the government can *do* after seizing an item. Under both *Terry* and *Place*, at inception, the government could justify brief seizures with reasonable suspicion, but needed to justify intrusive seizures with probable cause. Both Courts placed scope limitations on reasonable suspicion seizures. Under *Terry*, the scope is narrow, and where liberty interests are directly impacted, the government must move quickly to confirm or dispel its suspicions.[18] Under *Place*, the allowable scope can vary relative to how burdensome the seizure is on the person's possessory interests.[19] If the burden is slight, the government will have more latitude on the length of delay. If the burden is more substantial (for example, a corresponding limit on the person's freedom of movement), then the government must limit its actions to those necessary to quickly confirm or dispel its suspicions.

Under *Place*, a seizure occurs when there is *any* government interference of a possessory interest in property.[20] The degree of intrusiveness is a factor when determining the allowable *scope* of that seizure and not in determining whether a seizure occurred in the first place. However, under the *Jacobsen* model, a seizure occurs only when there is a *meaningful* government interference with a possessory interest in property.[21] Significantly, the *Jacobsen* model moves the "degree of interference" factor from the scope inquiry into the definition of seizure itself. Thus, back to the hypothetical, under *Place*, the agent had seized the citizen's package and so had to have a reasonable suspicion to do so; but under *Jacobsen*, she did not

17. *See* discussion *infra* Parts II-III.
18. *Terry*, 392 U.S. at 21-22.
19. *Place*, 462 U.S. at 709.
20. *Id.* at 708.
21. United States v. Jacobsen, 466 U.S. 109, 113 (1984).

meaningfully interfere with the citizen's possessory interest, did not "seize" the package, and so could take it even without having a reasonable suspicion to do so.[22]

Despite the strengths of the *Place* model and the flaws in the *Jacobsen* model, commentators,[23] horn book authors,[24] and even the Supreme Court (in cases not requiring actual application of the definition)[25] agree with the *Jacobsen* definition of seizure. Lower federal courts are split between the models, with some applying the *Place* model[26] and some applying the *Jacobsen* model.[27] Of more concern, some appellate courts have reached different results on similar fact patterns.[28] This split among the lower federal courts creates the opportunity for the Supreme Court to resolve the confusion by deciding that the *Place* model is the correct approach for property seizure analysis.

Section II reviews *Terry* and examines the framework it established for seizures of people. Section III turns to *Place* (and *United States v. Van Leeuwen*,[29] a prelude to *Place*) and finds that the *Place* framework derives from and parallels the framework created under *Terry* for the seizure of persons.[30] Section IV examines *Jacobsen* and discovers that, although it announced a definition for seizures, it applied the *Place* framework when deciding the case. The focus is then placed on a

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22. *Id.* at 121.

23. *See* Mary Kim, *Investigation and Police Practices: Overview of the Fourth Amendment*, 90 GEO. L.J. 1099, 1105-06 (2002) (citing the *Jacobsen* language as the definition of seizure); David S. Rudstein, *"Touchy" "Feely"—Is There a Constitutional Difference? The Constitutionality of "Prepping" a Passenger's Luggage for a Human or Canine Sniff after* Bond v. United States, 70 U. CIN. L. REV. 191, 201 (2001) (citing the *Jacobsen* language as the definition of seizure); Antonio Yanez, Jr., Ayeni v. Mottola *and the Implications of Characterizing Videotaping as a Fourth Amendment Seizure*, 61 BROOK. L. REV. 507, 518 (1995) (using the *Jacobsen* model to analyze the issue of commercial cameramen accompanying police officers into suspects' homes).

24. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 8.02(A) (3d ed. 2002); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(a) (4th ed. 2004).

25. *See* Soldal v. Cook County, 506 U.S. 56, 61 (1992); Arizona v. Hicks, 480 U.S. 321, 324 (1987); Maryland v. Macon, 472 U.S. 463, 469 (1985).

26. *See, e.g.*, United States v. Johnson, 171 F.3d 601, 603 (8th Cir. 1999); United States v. Glover, 104 F.3d 1570, 1576-77 (10th Cir. 1997); United States v. Allen, 990 F.2d 667, 671 (1st Cir. 1993); United States v. Banks, 3 F.3d 399, 401 (11th Cir. 1993); United States v. Aldaz, 921 F. 2d 227, 229 (9th Cir. 1990); United States v. Lux, 905 F.2d 1379, 1382 (10th Cir. 1990); United States v. LaFrance, 879 F.2d 1, 4 (1st Cir. 1989); United States v. Martinez, 869 F. Supp. 202, 205 (S.D.N.Y. 1994).

27. United States v. Conley, 856 F. Supp. 1010, 1018 (W.D. Pa. 1994); State v. Weekley, 27 P. 3d 325, 328 (Ariz. App. 2001).

28. *Compare Johnson*, 171 F.3d at 605-06 (reversing a conviction after finding that the initial seizure—setting aside mail for a drug sniff—was not supported by reasonable suspicion) *with* United States v. Lovell, 849 F.2d 910, 912 (5th Cir. 1988) (upholding a conviction after finding that the initial detention—setting aside luggage for a drug sniff—did not trigger constitutional scrutiny).

29. 397 U.S. 249, 252-53 (1970).

30. *Place*, 462 U.S. at 708.

lower federal court's application of the *Jacobsen* definition to fully develop the *Jacobsen* model.

Section V explores the problems with the *Jacobsen* model: its definition for "seizure" does not find support in *Terry* or *Place*—the cases that authorized reasonable suspicion seizures of persons and property in the first place; the *Jacobsen* model places too much police conduct beyond constitutional scrutiny, a result that neither the *Terry* nor *Place* Courts would have accepted; and when put to the test, the *Jacobsen* framework has limited usefulness. It is then noted that the *Place* model is consistent with *Terry* and with traditional search analysis, and that the *Place* model ensures that the initial stages of contact between citizen and government agent remain under judicial scrutiny, thereby protecting citizens from potential abuses. Further, if courts are concerned that the *Place* model will exclude too much relevant evidence, these courts can alleviate their concerns by liberally construing what constitutes reasonable suspicion.

II. A REVIEW OF *TERRY V. OHIO*

Before turning to the Court's analysis in *Place*, a review of the case that serves as its foundation, *Terry v. Ohio*,[31] is proper. In *Terry*, an experienced policeman observed three men (one of whom was Terry) who appeared to be casing a store.[32] The officer approached the men and asked for their names; when they mumbled some responses, the officer spun Terry around and then patted down Terry's clothing, discovering a gun.[33] Terry was convicted of carrying a concealed weapon.[34]

The Court dealt with two issues: the initial stop and the subsequent frisk.[35] The government argued that the officer's initial actions (when he grabbed Terry, spun him around, and patted him down) did not amount to a "seizure" or "search" that would trigger the Fourth Amendment.[36] The government argued that a stop and frisk only amounted to a "minor inconvenience and petty indignity."[37] Essentially, the government asked the Court to treat "seizure" and "search" as terms of art.[38] By this reasoning, any government interference with a protected interest that amounted to no more than a minor inconvenience and petty indignity would fall outside of the constitutional definition of seizure and search.[39] The appellant asked the Court to

31. 392 U.S. 1 (1968).
32. *Id.* at 5-6.
33. *Id.* at 6-7.
34. *Id.* at 8.
35. *Id.* at 15.
36. *Id.* at 10.
37. *Id.* at 10 (quoting People v. Rivera, 14 N.Y. 2d 441, 447 (1964)).
38. *Id.* at 10.
39. *Id.* at 10-11.

apply the common-sense definitions of the terms,[40] under which the police conduct would constitute a seizure and search. If the Court accepted the appellant's argument, traditional Fourth Amendment analysis would require the government to support the officer's actions with full-blown probable cause, which under these facts, the officer did not have.[41]

The Court collectively described the parties' approach to the problem as "all-or-nothing."[42] Either the police conduct did not amount to a search and seizure, and the Fourth Amendment did not apply; or the police conduct did amount to a search and seizure, and the government must provide probable cause.[43] Recognizing the value of this police conduct, the Court was unwilling to require that police have probable cause before conducting a stop and frisk.[44] However, the Court rejected the temptation to turn the definitions of "seizure" and "search" into terms of art, stating "There was some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. *We emphatically reject [that] notion.*"[45] Instead, the Court took the middle ground, declaring that the police conduct *was* a seizure and search, but was of the sort that did not require probable cause.

Next, the Court pointed out that a constitutionally protected interest was involved, as "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person . . . ."[46] Having identified the protected interest, the Court turned to whether the government had interfered with that interest.[47] The Court had little difficulty deciding that the officer's conduct interfered with Terry's liberty interest and, therefore, constituted a seizure: "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house . . . [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[48]

The Court used a common-sense definition of seizure, finding that a seizure of a person occurs when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[49] Further, the Court described *any* government restraint or interference with a person's liberty, however slight, as constituting a seizure: "[T]he Fourth Amendment governs *all* intrusions by agents of

40. *Id.* at 11-12.
41. *Id.* at 7-8.
42. *Id.* at 17.
43. State v. Terry, 214 N.E.2d 114, 120, 5 Ohio App. 2d 122, 130 (1966).
44. *Terry*, 392 U.S. at 22-23, 26-27.
45. *Id.* at 16 (emphasis added) (internal footnotes omitted).
46. *Id.* at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
47. *Id.* at 9.
48. *Id.* at 16.
49. *Id.* at 19 n.16.

the public upon personal security."[50] This is an absolute right to be "free from *all* restraint and interference of others, unless by clear and unquestionable authority of law,"[51] even if this conduct only amounts to a "minor inconvenience and petty indignity."[52] Thus, the Court emphatically rejected the idea that, for there to be a seizure, the government must meaningfully interfere with a person's liberty interest.[53]

Having decided that this police conduct was a seizure within the meaning of the Fourth Amendment, the Court turned to the reasonableness of the seizure, both at its inception and in its scope.[54] The Court weighed the government interests against the intrusion on individual rights and decided these types of seizures are reasonable at inception if the agent can articulate a reasonable suspicion of criminal activity.[55] Applying this test, the Court found the officer had a reasonable suspicion that the men were casing a store.[56]

The Court then focused on the scope of these reasonable suspicion seizures[57] and decided that the government should limit its actions to those "reasonably related in scope to the circumstances which justified the interference in the first place."[58] Here, the justifying circumstances (the suspect's suspicious behavior) would allow for the officer to take those steps which were "minimally necessary" to dispel those suspicions.[59] On the facts before it, the Court found the officer's actions were necessary to quickly confirm or dispel those suspicions, and so affirmed the conviction.[60]

Looking back at the *Terry* opinion, it is clear that the Court used the following analytical framework. First, the Court found that there was a protected interest, liberty.[61] Second, the Court found that the government interfered with that interest.[62] With those two triggers satisfied, the Fourth Amendment applied and the government had seized the person.[63] Finally, the Court required that the seizure be reasonable,

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50. *Terry*, 392 U.S. at 18 n.15 (emphasis added).

51. *Id.* at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 257 (1891)) (emphasis added).

52. *Id.* at 10.

53. Likewise, the Court rejected the idea that a frisk was not a search: "And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'" *Id.* at 16.

54. *Id.* at 19-20.

55. *Id.* at 22-25, 27.

56. *Id.* at 27-28.

57. *Id.* at 19.

58. *Id.* at 20.

59. *Id.* at 30.

60. *Id.* at 26-27, 29-31.

61. *Id.* at 9.

62. *Id.* at 9-10.

63. *Id.* at 16.

both at inception (a reasonable, articulable suspicion for temporary seizures or probable cause for arrest-type seizures) and in scope (the government must limit its actions to those necessary to quickly confirm or dispel those suspicions).[64]

In its analysis, the Court spotted a serious danger embedded within the term of art approach to defining seizure. The court explained, "[This approach] seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."[65] Had the Court decided that these government actions did not constitute a "seizure," a whole class of police behavior would be placed beyond constitutional scrutiny.[66] Police could use a show of force to stop any citizen at any time for any reason, without even having a reasonable suspicion that the citizen was engaged in criminal activity.[67] By rejecting the term of art approach, the Court refused to give the police such broad authority to interfere with the liberty of citizens.[68]

Additionally, the Court recognized another peril in adopting a term of art approach in that it could not place any scope limitations on reasonable suspicion seizures.[69] A term of art approach, which resulted in an "all-or-nothing model," did not allow for middle ground—it choked off the potential for reasonable suspicion seizures. The Court explained that the all-or-nothing model "*obscures the utility of limitations upon the scope*, as well as the initiation, of police actions as a means of constitutional regulation."[70] The Court was willing to allow the government to perform these seizures, but with scope restrictions.[71]

It will be shown that the *Place* model remains consistent with the *Terry* model. In contrast, the *Jacobsen* model turns the definition of property seizure into a term of art, thereby accepting the two perils that the *Terry* Court identified.

III. The *Place* Model

Because of the relatively narrow set of circumstances in which a pure property seizure may be controversial, the Supreme Court did not directly tackle pure property seizures until 1983, when it decided *United States v. Place*.[72] *Place* involved a canine

64. *Id.* at 15-16. For a graphical representation of this model, *see infra* App. A.

65. *Terry*, 392 U.S. at 17.

66. *Id.* at 17.

67. *Id.* at 19.

68. *Id.* at 16-17.

69. *Id.* at 17-18.

70. *Id.* at 17 (emphasis added) (footnotes omitted).

71. *Id.* at 19.

72. 462 U.S. 696, 700-01 (1983) (recognizing that it faced a new issue, the Court stated, "Although in the context of personal property, and particularly containers, the Fourth Amendment challenge is typically to the subsequent search of the container than to its initial seizure by the authorities, our cases reveal some general principles regarding seizures"). Granted, in 1970, just two years after *Terry*, the Court touched on pure property seizures in United States v. Van Leeuwen, 397

sniff of a person's luggage.[73] Place aroused the suspicion of law enforcement agents while he was waiting in line at the Miami airport to board a flight to New York City.[74] The agents approached Place and noticed that the address tags on his luggage were different from each other.[75] After further investigation, they discovered that neither address existed.[76] The agents contacted federal agents in New York and relayed their suspicions about Place.[77]

Two federal agents observed Place as he got off the plane in New York and approached him after he claimed his bags.[78] The agents told Place that they suspected that his bag contained narcotics and requested to search his bags.[79] When Place refused, the agents explained that they were going to take his luggage to a judge so that they could get a search warrant.[80] The agents took the luggage to Kennedy Airport, and ninety minutes after the initial seizure, a trained narcotics detection dog sniffed the bags and alerted on one of them.[81] Because it was late on a Friday afternoon, the agents waited until the next Monday to seek a warrant from a magistrate.[82] After receiving the warrant, the agents opened the bag and found 1125 grams of cocaine.[83] Place later pleaded guilty of possession of cocaine with intent to distribute.[84]

A. Place *Analysis*

In *Place*, the Court formally extended *Terry* reasoning from people to objects.[85] The Court found that a possessory interest in property is an interest protected by the Fourth Amendment and also found that the government had interfered with that interest by exercising dominion and control over the luggage for the government's own purposes.[86] Together, these two constitutional triggers provide the definition of a

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U.S. 249 (1970), but did not offer much analysis, and generally limited its holding to its facts.

73. *Place*, 462 U.S. at 699.

74. *Id.* at 698.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 699.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 700.

85. "[W]e are asked to apply the principles of *Terry v. Ohio* . . . to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime. In our view, such application is appropriate." *Id.* at 702.

86. *Id.* at 710.

property seizure.[87] A seizure occurs when the government exercises dominion and control, for its own purposes, over property in which another has a possessory interest.[88] The Court then examined the reasonableness of the seizure, both at inception and in scope.

First, in finding that the Fourth Amendment covers property interests, the Court explained "[t]he Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, *and effects*, against unreasonable searches and seizures.'"[89] The Court also noted that within its jurisprudence the detention of personal property had always triggered Fourth Amendment analysis.[90] Additionally, the Court stated that the Fourth Amendment even protects the property interest "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."[91]

Turning to the next trigger, the Court analyzed whether the government had interfered with that possessory interest in property.[92] The Court found that the government did seize the luggage, stating, "There is no doubt that the agents made a "seizure" of Place's luggage for purposes of the Fourth Amendment when . . . the agent told Place that he was going to take the luggage to a federal judge to secure issuance of a warrant."[93] Reduced to simple terms, the Court found that the agents exercised dominion (a show of force) in order to control Place's luggage for their own purposes (to conduct a limited criminal investigation).[94]

In this definition of "seizure," the Court echoed the *Terry* Court's emphatic rejection of the term of art approach.[95] In fact, it did not even entertain the idea that

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87. United States v. Karo, 468 U.S. 705, 730 n.3 (1984).

88. *Id.* at 730.

89. *Place*, 462 U.S. at 700 (emphasis in original).

90. *Id.* at 701.

91. *Id.* at 705.

92. *Id.*

93. *Id.* at 707.

94. Although the *Jacobsen* Court later announced a contrasting definition of seizure, it also provided language that nicely captures the principle behind the *Place* definition, stating that "[t]he decision by governmental authorities to exert dominion and control over [an object] for their own purposes clearly constitute[s] a seizure. . . ." United States v. Jacobsen, 466 U.S. 109, 120 n.18 (1984). Note how this parallels the definition of seizure of persons announced in *Terry*. Under *Terry*, a seizure of the person occurs when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Using the terms "dominion and control," the *Terry* definition can be restated as: a seizure occurs when a police officer dominates a person (through a show or use of force), so as to control that person (preventing that person from walking away) for the officer's own purposes (to conduct a limited criminal investigation).

95. In its analysis of whether the dog sniff amounted to a "search," the *Place* Court used a term of art approach, adopting the definition established in *Katz v. United States*—a search occurs when the government interferes with a reasonable expectation of privacy—when deciding that the sniff did not amount to a Fourth Amendment search. *Place*, 462 U.S. at 706-07; Katz v. United

the interference with Place's possessory interest amounted to something less than a seizure.[96] Further, the Court did not look to the seizure's level of intrusiveness when defining "seizure." The Court stated, "When 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."[97] Seizures that are more than minimally intrusive on the individual's Fourth Amendment interests must be supported by probable cause, and seizures that are minimally intrusive or less can be supported by a reasonable suspicion.[98] Thus, *any* government interference with a protected interest, even if only minimally intrusive, is still a seizure: *minimally intrusive* seizures are just a subset of seizures that qualify for reasonable suspicion analysis.[99]

Having decided that the government seized the luggage, the Court next addressed the constitutional reasonableness of the seizure at inception and in scope. The Court rejected the "all-or-nothing" approach, which would require the seizure to be supported by probable cause.[100] The Court sought the middle ground, deciding that the government's actions amounted to a seizure but could still be reasonable if based on reasonable suspicion.[101] While the Court never directly ruled on this point in *Place*, the Court implied that the agents, with the facts known to them, could have reasonably suspected that Place was distributing drugs.

Moving from the inception analysis, the Court placed scope limitations on reasonable suspicion seizures. It limited reasonable suspicion seizures to investigations "that [will] quickly confirm or dispel the authorities' suspicion."[102] The Court noted two factors to consider: 1) the length of the seizure, and 2) the government's diligence in pursuing the investigation.[103] The Court noted that the officers took the luggage from Place's direct possession, and that by taking his

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States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For a discussion of this apparent inconsistency, *see* discussion *infra* Part IV.E.

96. *Place*, 462 U.S. at 703 ("We examine *first* the government interest offered as a justification for a brief *seizure* of luggage . . . .") (emphasis added).

97. *Id.* (emphasis added). The Court makes this clear on two other occasions: "Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so *minimally intrusive* of Fourth Amendment interests that strong countervailing government interests will justify a *seizure* based only on *specific articulable facts* [of criminal activity]." *Id.* at 705-06 (emphasis added). "[T]he 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*." *Id.* at 709 (emphasis added).

98. *Id.* at 706.

99. *Id.* at 705-06.

100. Like *Terry*, *Place* argued the "all-or-nothing" approach, arguing that once the property is seized, the government must justify the seizure with probable cause. *Id.* at 705.

101. *Id.* at 703.

102. *Id.* at 702.

103. *Id.* at 709.

luggage, the officers may have interfered with his personal itinerary.[104] Because this reasonable suspicion seizure was fairly intrusive—nearly equivalent to a *Terry* stop—and because the agents had plenty of time to arrange for a dog to be at the New York airport by the time Place arrived, the Court considered the officers' ninety minute seizure to be too long.[105] Thus, once the agents exceeded the reasonable suspicion seizure's scope, they had to justify it with probable cause, which could not be done under the facts.[106] While it is unclear at what precise moment the seizure transitioned from a reasonable suspicion seizure to a probable cause seizure, it is clear that within ninety minutes, it had. Importantly, the Court considered the invasiveness of that seizure on the person's property interest within its reasonableness inquiry, and not when deciding whether a seizure had occurred in the first place.[107]

B. Van Leeuwen *Revisited*

Although the Court decided *United States v. Van Leeuwen*[108] thirteen years before *Place*, *Van Leeuwen* fits into the *Place* framework and serves as a useful factual contrast to *Place*. At 1:30 in the afternoon, Van Leeuwen mailed two packages from within Washington State, one bound for Southern California and the other for Tennessee.[109] He declared that the packages contained coins and chose a method of mailing that would not qualify the packages for discretionary inspection by the post office.[110] A suspicious clerk notified a policeman, who then noticed that the return addresses on the packages were bogus and that Van Leeuwen had Canadian license plates.[111] At 3:00 that afternoon, the policeman learned that the addressee in California was under investigation for trafficking in illegal coins.[112] Due to the time difference, the investigators could not reach authorities in Tennessee until the next morning.[113] After learning that the Tennessee addressee was also under investigation for trafficking in illegal coins, investigators in Washington filed for a search warrant.[114] It was received at 4:00 p.m. and executed at 6:30 p.m.[115]

Van Leeuwen argued that the government illegally seized his mail, particularly for the ninety minutes that the policeman held the mail while investigating his

104. *Id.* at 708-09.
105. *Id.* at 709-10.
106. *Id.*
107. *Id.*
108. 397 U.S. 249 (1970).
109. *Id.* at 249.
110. *Id.* at 249-50.
111. *Id.* at 250.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

suspicions.[116] The Court looked to *Terry* for guidance[117] and applied a now familiar model. First, the Court decided that Van Leeuwen had a protected interest to be free from unreasonable searches and seizures of his papers, "thus closed against inspection, wherever they may be."[118] Next, the Court found that the government had detained the mail. This detention triggered the application of the Fourth Amendment because "[i]t has long been held that first-class mail . . . is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment."[119]

Last, the Court turned to the reasonableness of the seizure, as "even first-class mail is not beyond the reach of all inspection; and the sole question here is whether the conditions for its detention and inspection had been satisfied."[120] Looking at the seizure's inception, the Court found that the officer could have reasonably suspected that the packages contained illegal coins.[121] The Court then looked to the scope of the seizure and declared that, "Detention for 1 1/2 hours—from 1:30 p.m. to 3 p.m.—for an investigation certainly was not excessive; and at the end of that time probable cause existed for believing that the California package was part of an illicit project."[122] Detention of the Tennessee package, for which probable cause did not exist until the following morning (a total of about seventeen hours) was also reasonable because the agents had acted diligently, and the delay was the result of working across different time zones.[123]

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116. *Id.* at 252.

117. *Id.*

118. *Id.* at 251 (quoting Ex parte Jackson, 96 U.S. 727, 733 (1878)).

119. *Id.* While the Court in *Van Leeuwen* uses the term "detention" throughout its opinion, that use is consistent with this article's model for the definition of seizure. A seizure occurs when the government interferes with a protected property or liberty interest. Detention (government interference) plus a protected interest (possessory interest in mail) equals a seizure.

120. *Id.* at 252.

121. *Id.*

122. *Id.*

123. *Id.* at 253. The Court used some imprecise language when discussing the overnight delay, stating, "No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited." *Id.* Elsewhere in the opinion, the Court states, "There was at that point no possible invasion of [a Fourth Amendment right]. Theoretically . . . detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment." *Id.* at 252. Some courts have cited this language as support of the *Jacobsen* model, where the government interference with a possessory interest must be meaningful for the Fourth Amendment to apply. *See, e.g.*, United States v. Ward, 144 F.3d 1024, 1031 (7th Cir. 1998). However, the *Van Leeuwen* Court did not fully develop or analyze seizure principles—the *Place* court did, thirteen years later—and the analysis in *Van Leeuwen* is sparse. The Court did not use either of those statements in its analysis, and the statements actually run counter to the analysis the Court did apply. For example, if those statements were true and no Fourth Amendment interest was implicated, what was the Court doing applying Fourth Amendment analysis to the facts before it? If the detention did not implicate the Fourth

The Court did not offer much more analysis beyond this. Broad pronouncements on pure seizure law would come thirteen years later in *Place*. Still, the *Van Leeuwen* analysis fits into the *Place* model. In both cases, the agents seized the property and the Fourth Amendment applied. In both cases, the degree of intrusion on the person's property interest only affected the scope of that seizure, not the decision that the government activity triggered Fourth Amendment protection. Certainly, *Van Leeuwen* reflects *Place* in that whenever a police officer exerts dominion and control over an object in which another has a possessory interest for their own purposes, the police officer has seized that object. Thus, *Van Leeuwen* shows that in the definition of seizure, there is no room for varying degree. Degree is important only in the seizure's reasonableness.

Additionally, *Van Leeuwen* presents a nice factual counterbalance to *Place*. Because the seizure in *Place* was relatively intrusive, the Court said that the seizure must have a narrow scope. Contrast this with the results in *Van Leeuwen*, where the intrusion on the person's property interest was not so great and the Court allowed a much broader scope for reasonableness: ninety minutes for one piece of mail and seventeen hours for the other.[124]

C. *Summary of the* Place *Model*

The *Place* model closely mirrors the *Terry* model upon which it is based. This model has been followed by several lower federal courts.[125] Stated again, the model asks three fundamental questions: 1) is there a protected interest (a possessory interest in property is protected), 2) has the government interfered with that interest (by exercising dominion and control over the property for its own purposes), and 3) was that interference reasonable at inception (at a minimum, a reasonable, articulable suspicion for temporary seizures) and in scope (the government must limit its investigation to those actions necessary to quickly confirm or dispel those suspicions, considering the impact of the seizure on the property interest, the length of delay, and government diligence).[126] Again, the first two questions are constitutional triggers

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Amendment, then the Court should not have conducted any analysis of the initial detention at all, other than to say that a seizure did not occur. Instead, the Court conducted Fourth Amendment analysis of the reasonableness of the seizure. In the hindsight that *Place* makes possible, it is clear that the Court actually applied *Terry* and *Place* principles.

124. *Van Leeuwen*, 397 U.S. at 252-53.

125. *See supra* note 26.

126. *See* United States v. Aldaz, 921 F. 2d 227, 231 (9th Cir. 1990) (finding a three day delay in delivery of mail was reasonable because the government was acting diligently, most of the delay was due to unrelated mechanical problems with airplanes, and much of the delay was the result of the great distances and limited resources inherent to Alaska); United States v. Allen, 990 F.2d 667, 671-72 (1st Cir. 1993) (finding that a nine-hour delay that prevented the suspect from picking up the package was reasonable because the government developed probable cause two hours before the time that the carrier had guaranteed delivery); United States v. Martinez, 869 F. Supp. 202, 207-08

and serve to define a seizure as when the government exercises dominion and control, for its own purposes, over property in which another has a possessory interest.[127]

IV. THE *JACOBSEN* MODEL

The major difference between the *Place* and *Jacobsen* models is that under the *Jacobsen* model, a seizure occurs only when there is a *meaningful* government interference with a possessory interest in property.[128] The *Jacobsen* model thereby moves the "degree of interference" factor from the reasonableness inquiry into the definition of seizure itself.[129]

In *United States v. Jacobsen*, Federal Express employees accidentally punched a hole in a box that they were shipping.[130] After opening the box to document the damage in anticipation of an insurance claim, they noticed white powder in cellophane bags stuffed inside of a tube.[131] The FedEx employees then put the box back the way they found it and called federal drug enforcement agents.[132] The arriving agent assumed control of the box and saw the damage.[133] He then reached into the box, removed the tube and cellophane bags with the white powder, and conducted a field test on the powder.[134] The test indicated that the powder was cocaine.[135] Up to the point where the agent developed probable cause that the package contained cocaine, no facts indicate that the agent's actions caused any delays in delivering the package.[136] After the field test, agents applied for, received, and executed a warrant.[137]

While these facts suggest several Fourth Amendment implications, the focus here will be on the initial seizure. The Court began its opinion by defining a seizure of property as "some meaningful interference with an individual's possessory

(S.D.N.Y. 1994) (finding that an overnight delay was reasonable while the government diligently investigated the facts, and developed probable cause before the packages would have been delivered).

127. For a graphical representation of this model, *see infra* App. A.

128. United States v. Jacobsen, 466 U.S. 109, 109 (1984).

129. The *Jacobsen* model follows the same analysis as *Place* and *Terry* when analyzing the reasonableness of any government actions, though it is evaluated at a different point in the process. *See infra* Part IV.C.

130. *Id.* at 111.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 111-12, 118.

135. *Id.* at 112.

136. *Id.*

137. *Id.*

interests in that property."[138] Eventually, this language spins off a different framework for approaching pure property seizure issues.

A. *The Actual* Jacobsen *Analysis*

Once into its analysis, the Court abandoned the definition that it announced and instead followed the *Place* model. First, the Court concluded that Jacobsen had a protected property interest in the package.[139] The Court then turned to whether the government had interfered with that protected interest.[140]

Like the Court in *Place*, the *Jacobsen* Court did not take issue with whether the initial government action was enough to trigger Fourth Amendment scrutiny, reasoning that "[a]lthough respondents had entrusted possession of the items to Federal Express, *the decision by the governmental authorities to exercise dominion and control over the package for their own purposes clearly constituted a 'seizure,'* though not necessarily an unreasonable one."[141] The Court thus applied a plain meaning to the term seizure, deciding that when the government exercises dominion and control over an object for its own purposes, the government has seized that item. Interestingly, the agent's initial actions did not appear to meaningfully interfere with Jacobsen's possessory interests in the box—the agent only had the box a few moments before conducting the field test, and nothing indicates that the agent caused the package to miss a delivery deadline.

The Court then examined the seizure's reasonableness. The Court decided that the seizure was reasonable because the government agent had probable cause, based on what the Federal Express employees told him, to believe that the box contained contraband.[142] Because the agents so clearly had probable cause, the Court did not even have to address those portions of the *Place* model that deal with supporting a seizure based on reasonable suspicion.[143] Therefore, with respect to the implication of the Fourth Amendment of concern here—the initial seizure—the Court's analysis was complete. As it turned out, the Court applied the *Place* model and never once returned to the definition of seizure that it announced at the start of its opinion.[144]

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138. *Id.* at 113.

139. *Id.* at 114.

140. *Id.* at 115.

141. *Id.* at 120-21 n.18 (emphasis added).

142. *Id.* at 121-22, & n.20.

143. *Id.* at 122 n.20.

144. Note that if the Court had applied its announced definition, it would have decided that these actions did not amount to a seizure.

B. *The* Jacobsen *Model, As It Has Developed*

Prior to the *Jacobsen* decision, the model for seizure was fairly clear. *Terry*, *Place*, and *Van Leeuwen* provided a simple framework for analyzing pure property seizures. Moreover, had lawyers taken a look at the actual *Jacobsen* reasoning, they would have discovered that *Jacobsen* was actually decided using the *Place* framework. However, commentators,[145] horn book authors,[146] some lower federal courts,[147] and the Supreme Court[148] have taken the *Jacobsen* Court's initial definition as the dogmatic definition of seizure without looking to the actual *Jacobsen* analysis. As some lower federal courts have applied this definition, they have created a framework that differs significantly from the *Place* model, thereby creating competing models in the lower federal courts.

United States v. Ward,[149] a Seventh Circuit case, illustrates the *Jacobsen* model.[150] Ward purchased a Greyhound bus ticket from Los Angeles to Indianapolis, checked a bag that contained cocaine and a handgun on the bus, but did not board the bus.[151] Instead, he flew to Indianapolis the next day (the day the bus would arrive), where he intended to pick up the bag.[152] Unfortunately for Ward, law enforcement authorities knew that this bus line was frequented by drug couriers, and when the bus stopped in Saint Louis, federal and local authorities were conducting counter-drug operations.[153] Agents knew that a common drug-courier technique was for the courier to check a bag to a destination city, then fly to that city and wait for the bag.[154] If the courier believed that authorities were not suspicious of the bag, the courier would collect it.[155] If the courier believed that authorities were suspicious, the courier would simply walk away.[156]

As part of the counter-drug operations, agents boarded the bus and identified a different suspect (this suspect had no connection to Ward).[157] Agents discovered drugs in one of his bags, and as part of their investigation of this suspect, the agents

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145. *See supra* note 23.

146. *See supra* note 24.

147. *See supra* note 4.

148. *See supra* note 25.

149. 144 F.3d 1024 (7th Cir. 1998).

150. *See also* United States v. England, 971 F.2d at 420-21 (9th Cir. 1992) (explicitly distinguishing *Jacobsen* reasoning from *Place* and *Van Leeuwen* reasoning, and following *Jacobsen* reasoning).

151. *Ward*, 144 F.3d at 1027-28.

152. *Id.* at 1027.

153. *Id.*

154. *Id.* at 1028.

155. *Id.*

156. *Id.*

157. *Id.* at 1027.

then decided to match all of the bags on the bus to the bus passengers, reasoning that any leftover bags were probably bags that belonged to this suspect.[158] One unclaimed bag caught the agents' attention.[159] This bag's tag showed that it originated in South Central Los Angeles and had listed an area code but no local phone number.[160] The agents pulled the bag off the bus and questioned the initial suspect about it, but quickly ruled out this suspect as the owner of this bag.[161] Because the bag was checked to Indianapolis and none of the passengers was headed there, the agents continued their investigation and called in a drug-sniffing dog.[162]

During the period that the agents were waiting for the dog to arrive, the bus left.[163] The dog arrived between seventy-five and ninety minutes later and immediately became alerted to the bag, well before the bus would have arrived at its destination.[164] The agents sought and obtained a search warrant and discovered the bag's contents.[165] The agents then contacted agents in Indianapolis, who packed a dummy suitcase so that they could trap the person who claimed the bag.[166] Ward showed up after the bus arrived to claim the bag and was subsequently arrested.[167] Ward moved to suppress the cocaine and gun, which the district court denied, and then pleaded guilty to conspiracy to distribute cocaine while reserving his right to appeal the suppression of evidence issue.[168]

On appeal, the court applied *Jacobsen* reasoning, explicitly rejecting *Place* as the appropriate model to follow.[169] The court's first step was to apply the *Jacobsen*

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158. *Id.* at 1027-28.

159. *Id.*

160. *Id.* at 1028.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1029-30. The district court recognized that two models existed and separately applied both the *Place* and *Jacobsen* models, finding that under both, the seizure was reasonable.

169. *Id.* at 1032. Oddly, the court cited two *Place* model cases as applications of the *Jacobsen* model. The court cited the *Van Leeuwen* statement that "'no interest protected by the Fourth Amendment was invaded' by the overnight delay in forwarding packages that the defendant had sent through the mail." *Ward*, 144 F.3d at 1031 (citing United States v. Van Leeuwen, 397 U.S. 249, 253 (1970) (emphasis omitted)). For discussion of this reference to *Van Leeuwen*, *see supra* note 123.

The court also cited *United States v. LaFrance*, a case with similar facts, stating that that case stands for the following rules: "[T]he owner's possessory interest is defined by the common carrier's contractual obligations to deliver the bag at a specified time", *Ward*, 144 F.3d at 1031; and "[A] detention does not begin to interfere with the owner's possessory interest until it delays delivery of the package beyond the contractually agreed-upon hour." *Id.* However, the *LaFrance* court believed

definition of seizure, saying, "A 'seizure' of property connotes 'some meaningful interference with an individual's possessory interests in that property . . . .'"[170] The court then looked at the agents' initial action: taking the luggage from the common luggage area of the bus and setting it aside while questioning the initial suspect.[171] The court found that, at that point, the government did not meaningfully interfere with Ward's possessory interests in the luggage because Ward had given the luggage over to a common carrier, thereby relinquishing possessory interest in the bag.[172] Specifically, the court found that at the time Ward gave the bag to Greyhound "[h]e could reasonably have foreseen that the bag would be handled, moved around, and even taken off the bus, whether at intermediate stops when the driver might need to remove the bag to sort and/or gain access to other luggage, or . . . transfer[] [it] to another bus."[173] Thus, Ward had "no reasonable expectation . . . that the bag would not be touched, handled, or even removed from the bus prior to the bag's arrival in Indianapolis."[174]

The court also found that because Ward did not accompany his bag, the government did not meaningfully interfere with his possessory interest in the bag.[175] The court reasoned that the agent did not seize the bag "merely by touching and then removing it from the luggage compartment"[176] and concluded that this initial action by the government did not amount to a "seizure"[177] and so did not trigger Fourth Amendment scrutiny.[178]

The court then turned to the next point where a seizure might have occurred—when the agents decided to keep the bag for a dog sniff.[179] By calling for a dog sniff,

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that a seizure occurred on the facts before it, applied the *Place* definition of seizure and followed the *Place* framework. United States v. LaFrance, 879 F.2d 1, 4 (1989) ("In this case, the police seized [the] package. They did so on reasonable suspicion that it contained contraband . . . Once having seized the parcel, the officers exercised effective control over it for some five and one-quarter hours . . ."). Further, the *LaFrance* court clearly made the statements that the *Ward* court attributes to it in the context of the *reasonableness* of the seizure's scope: "Appellees do not contest the reasonableness of the initial seizure, nor could they successfully do so. We are therefore required to weigh the length of the detention and its impact upon defendants' [F]ourth [A]mendment interests against the importance of law enforcement concerns . . ." *Id.* at 6. The *Ward* court's representations of *LaFrance* as supportive of the *Jacobsen* model are simply wrong, and also illustrate how the *Jacobsen* model moves the "meaningful interference" factor from the reasonableness inquiry to the threshold inquiry.

170. *Ward*, 144 F.3d at 1033 (quoting United States v. Jacobsen, 466 U.S. 109, 133) (1984)).
171. *Id.* at 1033.
172. *Id.* at 1032-33.
173. *Id.* at 1032.
174. *Id.*
175. *Id.* at 1033.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

the agents ensured that the bag would not continue on with the bus.[180] The court decided that if the bus arrived at its destination without the bag, the government would have meaningfully interfered with Ward's contractually-based possessory interest in his bag, and so the government would need to have at least a reasonable suspicion at that point.[181] However, by that point, the government had developed probable cause to seize the bag: the dog sniff occurred before the bag would have arrived in Indianapolis, thereby giving the agents probable cause to seize the bag and keep it past the arrival time.[182] During the period that was supported by something less than probable cause, the government never meaningfully interfered with Ward's possessory interests in his bag, and so never seized the bag.[183]

The court then assumed for argument's sake that when the agents made the decision to subject the bag to a dog sniff, the agents seized the bag.[184] This dicta provides a useful example of how to apply the *Jacobsen* model had the court found a "meaningful interference."[185] The court analyzed whether this seizure would have been reasonable at its inception by looking to whether the agents had reasonable suspicion when they made this decision.[186] The court decided that the agents did have reasonable suspicion, based both on the facts before the agents and the agents' knowledge of common drug courier tactics.[187]

Satisfied that this hypothetical seizure would have been reasonable at inception, the court then analyzed whether it would have been reasonable in scope.[188] The court checked whether the agents acted diligently (the Court found that they did), and whether the length of the detention was acceptable.[189] The Court noted that while the length of detention here was around three hours, and that the *Place* Court had found that ninety minutes was too long, certain factors that were present in *Place* were missing in the fact pattern before it.[190] First, the bag was not seized from Ward's possession, and second, Ward had chosen a slow means of transportation. (A three hour delay was not unreasonable on a two day bus trip).[191] Based on these facts, the Court concluded that the scope was reasonable.[192]

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180. *Id.*
181. *Id.*
182. *Id.* at 1033-34.
183. *Id.* at 1034.
184. *Id.*
185. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984).
186. *Ward*, 144 U.S. at 1034.
187. *Id.*
188. *Id.* at 1035.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

C. *Summary of the* Jacobsen *Model*

Courts that follow *Jacobsen* use a framework that is different from the *Place* framework.[193] The *Jacobsen* model asks two questions. First, has there been a seizure (has the government meaningfully interfered with a person's possessory interest in an item)?[194] Generally, the government has not meaningfully interfered with a person's possessory interest unless the government has taken the item directly from the person or somehow also interfered with the person's liberty interests (say, by causing the item to miss the person's expected pick-up time).[195] This inquiry contains the critical difference between the two models—it imports the degree of interference factor from the *Place* model's reasonableness inquiry into its threshold definition for seizure.

Second, the *Jacobsen* model asks, if there has been a seizure, was the seizure reasonable in inception and scope.[196] If the government did seize the item, the seizure must still be reasonable—supported by at least a reasonable suspicion. Last, the seizure cannot exceed the scope allowed by reasonable suspicion seizures—those courses of action that will quickly confirm or dispel the government's suspicion.[197] This reasonableness analysis is the same as that found in the *Place* model.

V. CHOOSING *PLACE* OVER *JACOBSEN*

The significant difference between the two models is where you factor in the degree of intrusion on the person's property interest. Under *Place*, this occurs in the reasonableness inquiry.[198] Under *Jacobsen*, this inquiry is in the definition of seizure itself.[199] Several reasons favor choosing the *Place* model over the *Jacobsen* model. First, and most simply, *Place* is good law while the *Jacobsen* definition is only dicta. Furthermore, the *Place* model values property interests and reflects the degree to which the Fourth Amendment protects property, while the *Jacobsen* model undervalues property interests and does not correctly reflect the Fourth Amendment's protections. Next, the *Jacobsen* model is based on a term of art definition and thereby incorporates the dangers that *Terry* warned of, which severely limits its

193. *See generally id.*; Maryland v. Macon, 472 U.S. 463 (1985); Soldal v. Cook County, 506 U.S. 56 (1992).

194. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984).

195. *E.g.*, United States v. England, 971 F.2d 419, 420-21 (9th Cir. 1992) (finding that people who place items in the United States mail possess a lower level of interest in the items than if they were checked on a common carrier); United States v. Visser, 40 M.J. 86, 90 (C.M.A 1994) (finding that the government action did not cause some household goods to remain in storage or transit for any longer than the suspect expected them to be).

196. *Jacobsen*, 460 U.S. at 115.

197. For a graphical representation of this model, *see infra* App. A.

198. *See* United States v. Place, 462 U.S. 696, 709 (1983).

199. *See Jacobsen*, 466 U.S. at 113.

usefulness. Alternately, *Place* chooses a common sense approach that avoids these dangers, while still providing the government plenty of room to conduct investigations. Finally, the *Jacobsen* model does not even parallel the apparent source of its definition (search analysis), while the *Place* model does.

A. Place *Is Good Law: The* Jacobsen *Definition Is Dicta*

As shown earlier, the *Jacobsen* Court itself followed the *Place* definition and model in its reasoning.[200] The Court did not apply the very definition it announced in the case, thereby making it mere dicta. In fact, had the *Jacobsen* Court applied the model that has developed based on the definition that it announced, it would have come to a different conclusion in that case. In *Jacobsen*, the agent merely took the package from the Federal Express employees and conducted a field test on the powder that was found inside.[201] He did not cause the package to reach its destination any later, take the package directly from Jacobsen's presence, or otherwise "meaningfully interfere" with his possessory interest.[202] Based on the "meaningful interference" definition, the Court should have said that there was *no* seizure. But the Court found that there *was* a seizure, announcing the true definition of property seizure as, "the decision by the governmental authorities to exercise dominion and control over the package for their own purposes . . . ."[203]

While the Supreme Court has subsequently cited the dicta *Jacobsen* definition, it has never applied this definition in any meaningful way. Further, *Terry* and *Place* have not been overturned by the Supreme Court and their models are still binding. Therefore, the *Jacobsen* model, as developed by lower courts, does not follow the precedent set by *Terry* and *Place* and should not be followed.

B. *The Fourth Amendment Protects All Property Interests:* Place *Agrees*

The Court made clear in *Soldal v. Cook County*[204] that the Fourth Amendment guards property interests just as jealously as it guards privacy and liberty interests.[205]

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200. *See* discussion *supra* Part IV.B.

201. *Jacobsen*, 466 U.S. at 111-12.

202. *Id.* at 126.

203. *Id.* at 120-21 n.18.

204. 506 U.S. 56 (1992). For more discussion on *Soldal*, *see infra* Part VI.

205. *See* William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 654 (1994). Heffernan traces the development of Fourth Amendment search and seizure law from United States v. Olmstead, 277 U.S. 438 (1928), through Katz v. United States, 389 U.S. 347 (1967). Under *Olmstead*, the primary interests served by the Amendment were "to prohibit unreasonable trespasses on property" and "to protect people in their possession of material things." *Id.* at 639. *Katz* turned to a privacy-based analysis, and the question Heffernan examined was, "Did *Katz* turn *Olmstead* on its head? That is, where *Olmstead* had made it necessary to show infringement of a property interest to assert a [F]ourth [A]mendment claim, did *Katz* make it

It declared that "[w]hat matters is the intrusion on the people's security from governmental interference."[206] The people's security consists of liberty, privacy, *and* property interests, together or separately.[207] The free exercise of property rights, like the free exercise of liberty and the right to privacy, is a critical component of the people's security.[208]

The *Place* model conforms to this constitutional mandate. The *Place* Court made clear that whenever the government interferes with a person's property interest, the Fourth Amendment will govern the government's conduct.[209] When deciding whether the government has seized an item, there is no room for degree. But the *Jacobsen* model, by importing the degree of intrusion on property rights from the reasonableness inquiry into the definition of seizure inquiry, essentially states that there are some property interests that are not worthy of Fourth Amendment protections.[210]

The *Jacobsen* model asserts that once a person transfers an item to a bailee, that person no longer has a possessory interest in the property, or that any remaining interest is so slight that the Fourth Amendment should not protect it.[211] According to the *Jacobsen* model, the Fourth Amendment should only protect meaningful property interests.[212] However, people do retain a significant property interest in objects that they transfer to a bailee.[213] *Place* makes it clear that the Fourth Amendment guards property rights even "*after the owner has relinquished control of the property to a third party*."[214] Indeed, that is the exact fact pattern found in *Van Leeuwen*, where the

necessary to show infringement of a privacy interest to assert such a claim?" *Id.* at 645. Heffernan answers the question, "[N]o." *Id.* "*Katz* heralded not another single-variable approach to the Fourth Amendment, but instead a multi-variable approach in which privacy, property and liberty interests stand on their own . . . ." *Id.* Consequently, interference with possessory interests is sufficient to trigger the Fourth Amendment—an interference with privacy or liberty interest is not needed. *Soldal*, 506 U.S. at 63-64.

206. *Soldal*, 506 U.S. at 69.

207. *Id.* at 62.

208. *Id.*

209. United States v. Place, 462 U.S. 696, 700-01 (1983).

210. United States v. Jacobsen, 466 U.S. 109, 113 (1984).

211. *Id.* at 113, 117-18.

212. *See supra* note 4.

213. *See generally*, BARLOW BURKE & JOSEPH A. SNOE, PROPERTY: EXAMPLES & EXPLANATIONS 55-65 (2001). At some point, a person *can* transfer all possessory or other property interest in an object, such as when that person sells the object, gives it away, throws it away, or abandons it. When that happens, the Fourth Amendment will not be triggered by police activity because the person no longer has a protected property interest in that object. Maryland v. Macon, 472 U.S. 463, 469 (1985). In *Macon*, the Court found that the seller of an obscene magazine did not have a possessory interest in the magazines once he voluntarily sold the magazine to an undercover officer. *Id.* The suspect transferred all property interests in the magazines when he sold them, and therefore no longer had any protected property interest in them. *Id.*

214. *Place*, 462 U.S. at 705 (emphasis added).

Court found that the government's conduct was regulated by the Fourth Amendment.[215]

The *Jacobsen* model also asserts that the bailor, by transferring the property to a bailee, has essentially given consent for others (including government agents) to handle her property in any way.[216] Certainly, when a bailor transfers her property to a bailee, she implicitly authorizes other people to handle her property in certain ways—the handling that would come in the normal course of the contracted-for action.[217] However, the bailor's implied authorization for her property to be handled in certain limited ways by the bailee does not include the authorization for anyone else to do whatever that other person might want to do with the bailor's property.

Certainly, the bailor's implied consent for her property to be handled in certain limited ways does not include the implied consent for the *government* to assert a superior interest in her property so that the government can conduct a criminal investigation.[218] To interfere with the bailor's remaining property interest in the luggage, the government *must* have the clear authority of law—at least a reasonable suspicion that the property contains evidence of criminal activity.

The proper place to measure the degree of intrusion on a property interest is in the reasonableness inquiry. The degree of property interest that the government interferes with is an important factor in determining how much information the government must have *before* seizing the object, and in defining the permissible *scope* of that seizure, but not in deciding whether a seizure has occurred in the first place.

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215. United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970).

216. *Jacobsen*, 466 U.S. at 117.

217. BURKE & SNOE, *supra* note 213, at 55.

218. The *Ward* court made the flawed argument that Ward implicitly consented to the handling of his luggage by the government. United States v. Ward, 144 F.3d 1024, 1033 (7th Cir. 1998). *See* discussion *supra* Part. IV.B. However, the Supreme Court made clear in *Bond v. United States* that when a person gives luggage to a common carrier, that person does not somehow give the government implied consent to handle the luggage for the purpose of conducting a criminal investigation. Bond v. United States, 529 U.S. 334, 338-39 (2000). Using search analysis, the Court decided that when the government squeezed a piece of luggage that was in an overhead luggage rack, the government had frisked that bag. *Id.* at 337-38. The Court rejected the government's argument that a bailor should expect that his luggage will be handled in this way. *Id.* at 338-39. The Court stated:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.

Id.

C. *The* Jacobsen *Model Includes the Term of Art Dangers*

The *Jacobsen* definition is a term of art that creates a threshold requirement for government activity to qualify as a "seizure."[219] The *Terry* Court warned that using a term of art approach to seizures is dangerous in that "[i]t seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."[220] The *Jacobsen* model integrates that danger. Compared to the *Terry* and *Place* models, the *Jacobsen* Model places a broad range of government activity beyond constitutional scrutiny.[221]

Consider that in the introductory hypothetical, a police officer could take a citizen's package from a shipping center, to her office, and conduct a limited criminal investigation—without even having a reasonable suspicion of criminal activity. Subsequent discussion has shown other fact patterns that, if analyzed under the *Jacobsen* model, are beyond constitutional scrutiny: the police can remove your luggage from an airplane or bus, even to the point of the airplane or bus leaving without it, and can hold your mail for extended periods of time—all without any reason to suspect you of criminal activity. Essentially, under *Jacobsen*, if you give an item to a third person, then the police can do what they want with your property for no reason at all, provided you do not know what the police are doing. This potential for abuse should offend most people. As Justice Stewart cited in *Katz v. United States*: "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately or by stealth."[222]

This danger is not just theoretical. Because the *Jacobsen* model includes a high hurdle in its definition of seizure, most courts that use the *Jacobsen* model resolve cases on this prong, thereby deciding that the police conduct does not amount to a seizure and, consequently, never reviewing the reasonableness of the government's actions.[223]

This leads to the next danger that the *Terry* Court exposed, that "by suggesting a rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment, *it obscures the utility of limitations upon the scope, as well as the initiation*, of police actions as a means of constitutional regulation."[224] The *Jacobsen*

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219. *Jacobsen*, 466 U.S. at 113.

220. Terry v. Ohio, 392 U.S. 1, 17 (1968).

221. To see this represented graphically, *see infra* App. A.

222. Katz v. United States, 389 U.S. 347, 350 n.4 (1967) (quoting Griswold v. Connecticut, 381 U.S. 479 (1965)).

223. *E.g.*, *Ward*, 144 F.3d 1024, at 1032-33; United States v. England, 971 F.2d 419, 421 (9th Cir. 1992); United States v. Lovell, 849 F.2d 910, 916 (5th Cir. 1988); United States v. Quiroz, 57 F. Supp. 2d 805, 813 (D. Minn. 1999); United States v. Wood, 6 F. Supp. 2d 1213, 1224-25 (D. Kan. 1998); United States v. Visser, 40 M.J. 86, 90 (C.M.A. 1994).

224. *Terry*, 392 U.S. at 17 (emphasis added).

model comes as close to being an "all or nothing" model as it can, thereby choking off the range available for reasonable suspicion searches and obscuring the value of their scope limitations. To see how this has happened, consider that the facts in *Place* represent the upper threshold of what government agents can do at inception and still only minimally intrude on a person's property interests. The *Place* seizure was nearly equivalent to a *Terry* stop: by seizing the luggage, the agents essentially placed some conditions on Place's liberty.[225] The agents really could not have done much more without exceeding even the limits of a *Terry* stop.[226] With just slightly more intrusive facts, the government would have done more than minimally intrude on Place's rights (as in, the government would now have meaningfully interfered with Place's rights), and so would been required to show probable cause for the seizure.

But the *Jacobsen* model requires "meaningful interference" to implicate a person's liberty interest.[227] Reasonable suspicion seizures are therefore choked off. This distortion manifests itself as the narrow range of facts that, under the inception prong, can qualify for reasonable suspicion. Either the conduct would not be a seizure (no meaningful interference), or the conduct would be a seizure (meaningful interference, or more than minimally intrusive) and the government would be required to support it with probable cause.

The distortion also is apparent in the "scope" prong. Under *Place*, ninety minutes will almost always be too long to seize an item based on reasonable suspicion when the seizure is significantly intrusive on possessory interests.[228] Under the *Jacobsen* model, every detention that qualifies as a seizure will be at this high level of intrusion, because it had to be at that high level of intrusion just to qualify as a seizure.[229] So, *almost all* reasonable suspicion seizures under *Jacobsen* must be less than ninety minutes, and probably significantly less (in the range of what is appropriate for a *Terry* stop). The *Terry* Court warned that "a rigid all or nothing model of justification and regulation . . . obscures the utility of limitations upon the scope" of reasonable suspicion searches.[230] The Court was right.

Taken together, these two distortions severely limit the usefulness of the *Jacobsen* model. Almost all government activity is beyond constitutional scrutiny, and if the government's actions do amount to a "meaningful interference," these actions will almost always require probable cause. Reasonable suspicion seizures might as well not exist.

225. United States v. Place, 462 U.S. 696, 708-09 (1983).
226. *Terry*, 392 U.S. at 30-31.
227. United States v. Jacobsen, 466 U.S. 109, 113 (1984).
228. *Place*, 462 U.S. at 710.
229. *See Jacobsen*, 392 U.S. at 113.
230. *Terry*, 392 U.S. at 17.

D. *The* Place *Model Does Not Bind the Government's Hands*

Courts appear to use "meaningful interference" because they are afraid that, under the *Place* model, they may have to exclude compelling evidence of guilt.[231] However, the *Place* model allows plenty of room to admit evidence. While a wide range of government conduct will trigger the Fourth Amendment, the government only needs to justify its actions with a reasonable suspicion. Reasonable suspicion is a low hurdle and will often be easily met.[232] Generally, for reasonable suspicion, the

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231. One of the reasons that the *Ward* court may have distinguished its case from *Place* is that under the *Place* model, the court would have had to rule that the seizure violated the Fourth Amendment. The court found that under these facts the agents did not have reasonable suspicion to pull the bag from the luggage compartment: the bag originated from a high-crime area in the source city; there was an identification tag that had an area code but no phone number; the other suspect had joined the bus in the same source city; and the other suspect had just been found with cocaine. United States v. Ward, 144 F.3d 1024, 1032 (7th Cir. 1998). For some reason, when coming to that decision, the court did not explicitly consider the agents' knowledge of the drug trade. Finding that the agents did not have reasonable suspicion, had the court followed *Place*, the court would have had to rule that the seizure was unreasonable at inception, and therefore exclude compelling evidence of guilt. Based on these facts, however, the court could have easily found that the agents had a reasonable suspicion. *Id.* at 1034.

232. In addition to the facts found in *Place* and *Van Leeuwen*, for facts amounting to reasonable suspicion, *see Ward*, 144 F.3d at 1034 (finding reasonable suspicion when a bag was checked onto a bus without a passenger—a common practice of drug couriers); United States v. Glover, 104 F. 3d 1570, 1576 (10th Cir. 1997) (finding reasonable suspicion when a package smelled strongly of coffee; the suspect's daughter was suspected of drug trafficking; the return address on package was fictitious; and the cost of shipping the package was greater than the value of the coffee it could have contained); United States v. Allen, 990 F.2d 667, 671 (1st Cir. 1993) (finding reasonable suspicion when the suspect received three Express Mail packages in five months; the suspect had received mail from suspicious addresses in the past; the handwriting on the labels was the same but the return addresses were different; one of the senders was known to have previously sent psilocybin; and the sender's address was fictitious); United States v. Banks, 3 F.3d 399, 402 (11th Cir. 1993) (finding reasonable suspicion when a reliable confidential informant told police that the suspect often mailed drugs, then picked the package up at the receiving end); United States v. Aldaz, 921 F.2d 227, 228, 231 (9th Cir. 1990) (finding reasonable suspicion when police previously suspected that a suspect was dealing drugs through the mail; the suspect always had money but was unemployed; the suspect mailed packages with his girlfriend's return address while she waited in the car; and she mailed packages with his return address while he waited in the car); United States v. LaFrance, 879 F.2d 1, 2, 4 (1st Cir. 1989) (finding reasonable suspicion when there were anonymous tips about the suspects involvement in drug trade and that the suspect delivered drugs through express mail to a particular location; and confirmation that he did use express mail to send packages to that location); United States v. Martinez, 869 F. Supp. 202, 205 (S.D.N.Y. 1994) (finding reasonable suspicion when an informant stated that drugs were going to be shipped from Puerto Rico to New York via Express Mail; inspectors found two packages that were heavily wrapped, came from a known source state, had handwritten labels, the handwriting was the same but the return addresses were different, and were mailed from two different post offices); United States v. Visser, 40 M.J. 86, 87-88, 90 (C.M.A. 1994) (finding reasonable suspicion following a report that tires and other items were stolen from a government agency, and the stolen tires were visible on suspect's trailer).

government just needs to articulate the legitimate reasons that caused the government to choose that item over others.[233] There must be some facts that led the government to suspect criminal activity—the government did choose this bag or box or suitcase—the government just needs to say what those facts were.[234] If the government can provide a legitimate reason why those facts relate to that item (assuming that the government was not using race as the primary factor), the courts should find that the government had reasonable suspicion.[235]

Further, the *Place* model provides the government with plenty of time to develop probable cause after they have seized an item based on reasonable suspicion. Once the government has shown reasonable suspicion, courts can find that even long seizures are reasonable—upwards of many hours or even days.[236] Provided the agents are acting diligently, the agents can generally seize an item that a person gives to a bailee all the way up to the delivery time of that item, and even for some short period of time thereafter.[237]

E. Jacobsen *Does Not Parallel Search Analysis, While* Place *Does*

The *Jacobsen* model actually seems to be based more on traditional search doctrine than seizure doctrine.[238] Apparently, the *Jacobsen* Court molded its definition of seizure in an effort to match the "search" definition. When the Court stated its definition, the Court began with a reference to searches: "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed, [and a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property."[239] While this definitional revision makes for an eloquent statement, it is flawed. The two statements are not actually parallel.

To see this, take a step back from the definition of "search" and look at its parts. The search model looks like this: 1) was there a protected privacy interest?; 2) has the government interfered with that interest?; 3) was that interference reasonable?[240]

The first trigger is the focal point of Fourth Amendment jurisprudence. Deciding whether someone has an interest covered by the Fourth Amendment is not always self-evident. The Court defines "privacy" on a case-by-case basis, using a "reasonable expectation of privacy" test that requires one to look at the circumstances

233. *Terry*, 392 U.S. at 21.
234. *Id*
235. *Id.*
236. United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970).
237. *Id.*
238. United States v. Jacobsen, 466 U.S. 109, 119-22 (1984).
239. *Id.* at 113 (internal citations omitted).
240. *Id.*

in each case just to decide whether the person has a protected privacy interest.[241] In the "reasonable expectation of privacy test," there is no grey area: either you have a reasonable expectation of privacy that implicates the Fourth Amendment, or you do not. Note also that this analysis focuses on the person's reasonable expectations, not on the government's actions and intent. Thus, a person's expectation of privacy is not related to the government activity giving rise to the search.

Once this inquiry is satisfied, the court must decide whether the government's actions intruded on that right; generally, this is obvious from the facts. Like the first trigger, there no grey area: either the government interfered with that privacy interest, or the government did not.

So far, nothing in this analysis of the "search" definition looks like a term of art. "Search" becomes a "term of art" for another reason.[242] Generally, having found that the person did not have a reasonable expectation of privacy, so no protected privacy interest, the Court declares that the government's activity is not a "search"—even though the activity would look like a search to a layperson. Really, the Court is saying that the person does not have a privacy interest that is protected by the Fourth Amendment. Thus, the Fourth Amendment is not triggered. But by answering both the first trigger (is there a constitutionally protected interest) and the second trigger (has the government interfered with that interests) with one statement, the Court obfuscates the distinction between the two inquiries, and creates an apparent term of art.

At its base, seizure analysis does not involve a term of art, either. Comparing search analysis to the *Terry* and *Place* seizure analysis reveals that they are fundamentally the same. The search analysis asks: 1) is there a protected privacy interest? (a reasonable expectation of privacy); 2) has the government interfered with that interest?; 3) was that interference reasonable.[243] The seizure analysis asks: 1) is there a protected property interest?; 2) has the government interfered with that interest?; 3) was that interference reasonable?[244]

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241. Terry v. Ohio, 392 U.S. 1, 9 (1968).

242. *See* DRESSLER, *supra* note 24, at § 7.01. ("'Search' is a technical term of art in Fourth Amendment jurisprudence. The word is not employed by lawyers in its ordinary and popular sense.").

243. *Jacobson*, 466 U.S. at 113.

244. *Id.* It is now recognizable that the difference between the "search" model and the *Terry* and *Place* "seizure" model is really only a difference in semantics, not substance, with the search model providing one answer to the first two prongs, instead of being precise and providing two. When the *Terry* Court announced its decision, Justice Harlan's concurring opinion in *Katz*—the source of the "reasonable expectation of privacy" test—had not yet gained the persuasive hold over search doctrine that it now has gained. *Terry* was decided just months after *Katz*, and the *Terry* Court's emphatic rejection of turning the definition of "search" doctrine into a term of art has, in the end, lost out to the *Katz* approach—although the underlying analysis is essentially the same. Still, the *Terry* analysis won the semantics war in seizure law. *Place* solidified the fork in the road between seizure analysis and search analysis. The *Place* Court chose the *Terry* common-sense approach for

In both the search model and the seizure model, the first prong focuses on the person's constitutionally protected interest.[245] In the seizure model, this inquiry is fairly easy. The interests—liberty or property—are simple to define, generally self-evident, and do not receive much analysis.[246] Narrowing the discussion to property seizures, either a person has a possessory interest in the object, or she does not.[247] In the search model, though, this prong is a more difficult and lengthy inquiry. But once a protected interest is identified, both models agree that there is either a protected interest that triggers the Fourth Amendment, or there is not.[248]

In both models, the second prong focuses on the government's activity.[249] In search jurisprudence, deciding whether the government has interfered with a privacy interest is usually not even discussed because it is so obvious.[250] In seizure jurisprudence, deciding whether the government has interfered with that interest becomes a significant focus of the inquiry.[251] But as *Terry* and *Place* show, that inquiry is actually easy. Just as in the search model, where there is no such thing as a "meaningful interference with a reasonable expectation of privacy," under the *Terry* and *Place* model, there is no such thing as a "meaningful interference with a possessory interest."[252]

The *Jacobsen* model makes the mistake of unnecessarily looking to the search model's first trigger—the inquiry into whether the person even has a privacy interest—and importing like-sounding language into the second trigger of seizure analysis—whether the government has interfered with a protected interest.[253] In an attempt at creating an eloquent phrase that would parallel the oft-quoted language used in search analysis, the *Jacobsen* Court failed to notice that it was not quoting in a

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seizures, but the *Katz* term of art approach for searches. The *Place* Court had the opportunity to adopt a term of art approach towards seizures in its analysis—after all, it applied the *Katz* term of art definition of "search" when it decided that dog sniffs did not amount to Fourth Amendment searches—but it clearly rejected that approach in its seizure analysis. The Court's decision that dog sniffs that detect the scent of contraband items does not amount to a "search" (more precisely, that people do not have a protected privacy interest in the scent of contraband items) recently survived attack in Illinois v. Caballes, 543 U.S. 405, 416-17 (2005).

245. *Jacobsen*, 466 U.S. at 113.

246. *Id.*

247. *E.g.*, Maryland v. Macon, 472 U.S. 463, 469 (1985) (no possessory interest in magazines sold to an undercover agent).

248. *Jacobsen*, 466 U.S. at 113.

249. *Id.*

250. *See generally* Terry v. Ohio, 392 U.S. 1 (1968); United States v. Place, 462 U.S. 696 (1983).

251. *See generally Jacobsen*, 466 U.S. at 124-25.

252. *See generally id.* at 113.

253. *Id.*

parallel fashion at all—it was knocking down pylons as it cut across lanes of traffic. Because the Court ultimately used the *Place* analysis, this mistake went unnoticed.[254]

VI. COMPLETING THE *PLACE* MODEL ANALOGY TO SEIZURES OF PERSONS

Now that the *Place* model has been fully developed, a comparison with the *Terry* model can be established that will allow the placement of the few Supreme Court cases that do deal with pure property seizures (and which cite the *Jacobsen* definition for seizures) into categories against their *Terry* counterparts. Charted below, the seizure cases will be discussed in detail in this section.

Government Intrusion on Property Interests	Government Intrusion on Liberty Interests	Information Needed at Inception
None (no government dominion and control; merely handles or moves, not for a government purpose) *Hicks*[255]	None (questions on the street, person is free to leave) *Royer*[256]	None
Limited (government exercises dominion and control to conduct limited to criminal investigation; temporary; no intent yet to book into evidence) *Place*,[257] *Van Leeuwen*,[258] *Jacobsen*[259]	Limited (person is not free to leave, but not under arrest) *Terry*,[260] *Bostick*,[261] *Drayton*[262]	Reasonable Suspicion
Significant (permanent seizure; government intends to book into evidence; government exceeds scope of reasonable suspicion seizure) *Place*,[263] *Soldal*[264]	Significant (arrest)	Probable Cause

254. *Id.* at 124.
255. Arizona v. Hicks, 480 U.S. 321, 324 (1987).
256. Florida v. Royer, 460 U.S. 491, 497-98 (1983).
257. United States v. Place, 462 U.S. 696, 707 (1983).
258. United States v. Van Leeuwen, 397 U.S. 249, 253 (1970).
259. *Jacobsen*, 466 U.S. at 123-24.
260. Terry v. Ohio, 392 U.S. 1, 16, 30-31 (1968).
261. Florida v. Bostick, 501 U.S. 429, 435-37 (1991).
262. United States v. Drayton, 536 U.S. 194, 203-04 (2002).
263. United States v. Place, 462 U.S. 696, 706-09 (1983).
264. Soldal v. Cook County, 506 U.S. 56, 61-62 (1992).

First, *Arizona v. Hicks*,[265] is another case generally known as a "search" case for its pronouncements on the plain view doctrine. However, the case does briefly deal with seizure issues. In *Hicks*, a bullet was fired from Hicks' apartment, went through the floor to the apartment below, and struck a man.[266] Police entered Hick's apartment seeking the shooter and any other victims, and found several weapons and other evidence of criminal activity.[267] One officer also "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment."[268] Based on his experience, the officer suspected that this stereo equipment was stolen property.[269] To confirm his suspicions, he recorded the serial numbers of several of the components, but had to move a turntable so that he could see the serial number.[270] He radioed in the serial numbers and learned that many of the components, including the turntable, had been stolen in an armed robbery.[271]

The officers' entry of the apartment under exigent circumstances was not an issue,[272] so the Court next discussed whether the officer "seized" the turntable by shifting it so that he could read the serial numbers.[273] The Court spent a mere paragraph on this issue (the remainder of the opinion dealt with whether the officer's actions amounted to a search):

> As an initial matter, the State argues that [the officer's initial] actions constituted neither a "search" nor a "seizure" within the meaning of the Fourth Amendment. We agree that the mere recording of the serial numbers did not constitute a seizure. To be sure, that was the first step in a process by which [Hicks] was eventually deprived of the stereo equipment. In and of itself, however, it did not "meaningfully interfere" with [Hicks'] possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure.[274]

The Court applied, in a conclusory fashion, the *Jacobsen* definition and found that the government's initial actions of handling the turntable and recording the serial number did not amount to a seizure.[275] However, by applying the *Place* reasoning, it

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265. 480 U.S. 321 (1987).
266. *Id.* at 323.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 323-24.
272. *Id.* at 324.
273. *Id.*
274. *Id.* (citations omitted).
275. *Id.* The Court overturned Hicks' conviction, though, stating that the officer's actions amounted to a search that exceeded the scope of the exigent circumstances authorization that allowed the officers to be in the apartment in the first place. *Id.* at 325. Later in the opinion, the Court

is clear that *Hicks* properly fits into the *Place* model. Applying the *Place* model's definition of seizure, the officer's actions did not amount to a seizure. The officer did not intend to exercise dominion and control of this turntable. He did not pick it up and set it aside or take it to his patrol car, indicating that he was now in control of that object; the officer simply handled it for a moment.[276] In this sense, *Hicks* serves as an example of police conduct that involves the handling of property that does not amount to a seizure. This is the mere handling or touching of property, with no government intent to exercise dominion and control over it. To relate this to *Terry*, this action is equivalent to a police officer directing questions to a person on the street, when that person is still free to leave.

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acknowledged and approved of the *Place* "seizure" model, although it slightly modified it. *Id.* Because the Court cited both models in this opinion, this opinion does not advance the substantive discussion of the models, but does serve as a nice factual bracket for *Place* and example of government conduct that does not amount to a seizure, even under the *Place* model.

Interestingly, the government had argued that the officer had a reasonable suspicion that the turntable was stolen, and so could seize it under the *Place* model. *Id.* at 326. The Court made this argument a non-issue by deciding that no seizure took place, but addressed it while rebutting the dissent's arguments. However, if you assume for the sake of argument that the officer's initial actions amounted to a seizure (remember, the actions did not amount to a seizure because the officer did not intend to exercise dominion and control over the turntable), this argument should have worked. Assume that the officer seized the item by taking it down to his patrol car while he made the radio call. Turn next to the inception prong of the reasonableness analysis. The officer made this seizure based on the fact that the stereo equipment was out of place in a dingy apartment, an apartment that was obviously used for criminal activity. That amounts to reasonable suspicion, and the inception prong is satisfied. Finally, turn to the scope prong of the reasonableness analysis. The officer's actions were clearly within the scope of that seizure—he immediately made a phone call which confirmed that the stereo equipment was stolen, thereby giving him probable cause to permanently seize the equipment. Under *Place*, if there had been a seizure, the seizure would have survived scrutiny.

The Court rejected this argument, however, primarily because the police conduct occurred in a home and not in a public place. *Id.* at 326-28. Noting that a seizure can be justified on less than probable cause, the Court stated: "We have held that [a seizure] can [be supported by reasonable suspicion]—where, for example, the seizure is minimally intrusive and *operational necessities* render it the only practicable means of detecting certain types of crime." *Id.* at 327 (citing *Place* to support this proposition) (emphasis added). After adding the "operational necessities" requirement to the *Place* model's inception prong, the Court found that there were none on the facts before it. Important to note is that the Court's reasoning here is purely dicta. At this point in its reasoning, the Court had already decided that the officer's actions did not amount to a seizure, and included this commentary to rebut the dissent's counter-argument. *Id.* Even if this language is given the force of law, the most it would do is cause a modification of this article's *Place* model by excepting out, in the "reasonable at inception" prong, any seizures that occur in a home. Those seizures would always require probable cause unless the government could also articulate some additional operational necessity for the seizure.

276. *Id.* at 323.

Next, in *Soldal v. Cook County*,[277] a case arising outside of the criminal justice system, Soldal and his family were forcibly evicted from a trailer park when their landlord, accompanied by county sheriffs, disconnected the Soldal trailer home from its utility connections, disconnected the home's skirting, attached it to a tractor trailer, and drove it away.[278] The landlord did all of this without an eviction order (the trial to settle the rent dispute was coming up).[279] To make matters worse, the sheriffs knew that the landlord did not have an eviction order.[280] By the time the Soldals got their home back, it was badly damaged, and they brought suit under 42 U.S.C. § 1983, alleging a violation of their rights under the Fourth and Fourteenth Amendments.[281] The District Court found that there was no state action.[282] The Court of Appeals reversed on that issue, but somehow found that there was no seizure.[283]

The Supreme Court had little difficulty finding that the government had seized the trailer home.[284] The Court applied the *Jacobsen* "meaningful interference" definition[285] and found a pretty clear case of a meaningful interference: "As a result of the state action in this case, the Soldal's domicile was not only seized, it literally was carried away, giving new meaning to the term, 'mobile home.'"[286] The Court remanded and stated that the Soldals had made a complaint alleging a violation of their rights under the color of law.[287] Although not a criminal case, *Soldal* serves as an example of a seizure without a search that clearly would require probable cause at inception if done in a criminal context. To relate this to *Terry*, this action was the equivalent of an arrest.

As a final matter, *Place*, *Van Leeuwen*, and *Jacobsen* can quickly be fit into our matrix. Remember that in *Place*, the Court found that the agents had seized the items, that there was reasonable suspicion at inception, but that the agents exceeded the scope authorized under reasonable suspicion seizures.[288] As a result, *Place* serves

277. 506 U.S. 56 (1992).

278. *Id.* at 58-59.

279. *Id.* at 56.

280. *Id.*

281. *Id.* at 59.

282. *Id.*

283. *Id.* at 59-60.

284. *Id.* at 72.

285. While the Court cited to this definition, it also noted that the *Jacobsen* court actually applied *Place* reasoning in its decision: "[T]he Court in *Jacobsen* did not put an end to its inquiry . . . Instead, adhering to the teachings of *United States v. Place* . . . it went on to determine whether the invasion . . . was reasonable under the Fourth Amendment." *Soldal*, 506 U.S. at 63 (citations omitted). Like *Hicks*, this case does not do too much to substantively advance either model, but does provide a useful factual benchmark for the *Place* model.

286. *Id.* at 61.

287. *Id.* at 72.

288. United States v. Place, 462 U.S. 696, 707, 709-10 (1983).

as an example of facts that satisfy the definition of seizure, and facts that require reasonable suspicion at inception. In addition, *Place* shows that when the government exceeds the scope of a reasonable suspicion seizure, the government now needs probable cause. Next, in *Van Leeuwen*, the Court found that the government had seized the mail, that there was reasonable suspicion at inception, and that the government did not exceed the scope authorized by reasonable suspicion seizures.[289] Therefore, *Van Leeuwen* serves as an example of facts that satisfy the definition of seizure and facts that require reasonable suspicion at inception.[290] Finally, remember that in *Jacobsen*, the Court found the government's initial actions were a seizure, and the government actually had probable cause at inception (the Court did not need to reach scope limitation issues).[291] Probable cause is greater than reasonable suspicion, so the government also satisfied reasonable suspicion. Therefore, Jacobsen serves as an example of facts that satisfy the definition of seizure and facts that require at least a reasonable suspicion at inception.

VII. CONCLUSION

The Supreme Court should acknowledge the confusion among the lower federal courts on "pure" seizure doctrine and resolve this issue by deciding that the *Place* model is the correct approach for seizure analysis. The *Terry* Court decided that the Constitution allowed the government to seize persons with less than probable cause, but only in limited circumstances, and with judicial oversight. This article demonstrates that the *Place* model is derived from and consistent with *Terry*, the foundational case for reasonable suspicion seizures. The *Place* model is also consistent with the holdings of other existing Supreme Court jurisprudence on pure property seizures (to include the actual analysis within *Jacobsen*), and parallels traditional search analysis.

The *Jacobsen* model, however, is not consistent with *Terry* or traditional search analysis; in fact, the *Jacobsen* Court actually followed the *Place* model, making the *Jacobsen* definition and the model that results merely dicta. The *Jacobsen* model is essentially an "all or nothing" approach that converts the definition of "seizure" to a term of art and chokes off the useful range of reasonable suspicion seizures. Additionally, the *Jacobsen* model, both in theory and in practice, places a broad range of government investigative activity beyond judicial scrutiny.

In contrast, the *Place* model provides the government with the ability to investigate criminal activity while not placing a broad range of police misconduct beyond the scope of the Fourth Amendment. Furthermore, the *Place* model fully respects a person's right to exercise dominion and control over her property, free from claims of superior right by others, including the government. Under the *Place* model,

289. United States v. Van Leeuwen, 397 U.S. 249, 253 (1970).

290. *Id.* at 252.

291. United States v. Jacobsen, 466 U.S. 109, 110, 121-22 (1984).

if the police want to seize a package of mail without probable cause, the police can. All that is required is a reasonable suspicion of criminal activity before they do so.

APPENDIX A. GRAPHICAL COMPARISON OF THE MODELS