

Checking Reasonbleness at the Ticket Counter: The Eighth Circuit's Flawed Approach to Seizures of Checked Baggage in *United States v. Va Lerie*

Jonathan Brett Strom

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Jonathan Brett Strom, *Checking Reasonbleness at the Ticket Counter: The Eighth Circuit's Flawed Approach to Seizures of Checked Baggage in United States v. Va Lerie*, 92 Cornell L. Rev. 157 (2006)

Available at: <http://scholarship.law.cornell.edu/clr/vol92/iss1/4>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTE

CHECKING REASONABLENESS AT THE TICKET COUNTER: THE EIGHTH CIRCUIT'S FLAWED APPROACH TO SEIZURES OF CHECKED BAGGAGE IN *UNITED STATES V. VA LERIE*

Jonathan Brett Strom†

INTRODUCTION	157
I. CHECKED BAGGAGE SEIZURES: LIMITED SUPREME COURT JURISPRUDENCE FOR A CRUCIAL CONSTITUTIONAL RIGHT ..	161
II. CASE DISCUSSION: <i>UNITED STATES V. VA LERIE</i>	165
III. ANALYSIS	174
A. Improper Description of the Possessory Interest Involved	174
1. <i>Jacobsen: A Clear Seizure</i>	176
2. <i>Narrowing the Possessory Interest Involved</i>	176
3. <i>Unworkable Standard</i>	178
B. Defining the Possessory Interest Involved: A Realistic View of Custody	180
1. <i>Dominion and Control</i>	180
2. <i>Purpose</i>	182
C. Proper Seizure Definition	183
D. Real World Application: TSA and Reasonableness ..	185
CONCLUSION	187

INTRODUCTION

The terrorist attacks of September 11, 2001, heightened the focus on protecting the United States from acts of terrorism.¹ Despite this heightened focus, the nation remains a vulnerable target for those

† A.B., Princeton University, 2001; candidate for J.D., Cornell Law School, 2007. Thanks to Professors Steven Clymer and Trevor Morrison for their very helpful comments and suggestions. Thanks to Jonathan C. Rothberg, Alison S. Fraser, Laura C. Klimpel, and Ulysses S. Smith for their terrific editing skills and thoughtful comments. Thanks also to In Ku Lee for helping me pursue this topic. I would also like to thank my friends who have made my experience at Cornell Law School so much fun. Most of all, I would like to thank my family for their constant love and support.

¹ See NAT'L COM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 361 (2004) [hereinafter 9/11 COMMISSION REPORT] ("Countering terrorism has become, beyond any doubt, the top national security priority for the United States.").

who wish to do it harm.² One of the more attractive targets—due in no small part to the difficulty of fully protecting it—is the nation’s transportation system.³ The nation’s large investment in securing its transportation infrastructure highlights the system’s great importance as well as its continuing vulnerability.⁴ Though the terrorist attacks of September 11, 2001, showed how the commercial transportation system may be used as the target of or the weapon for a direct attack,⁵ it may also be used as a conduit for weapons parts or dangerous chemicals intended to be used against civilians in a future attack.⁶ Moreo-

² See *id.* at 383–85, 390–92 (“[A]lthough Americans may be safer, they are not safe.”); Transportation Security R&D, GAO 04-890, TSA and DHS Are Researching and Developing Technologies, but Need to Improve R&D Management 7 (Sept. 2004), available at <http://www.gao.gov/new.items/d04890.pdf> (“The size of the [U.S.] transportation system, which moves millions of passengers and tons of freight every day, makes it both an attractive target for terrorists and difficult to secure.”); Stephen E. Flynn, *The Neglected Home Front*, FOREIGN AFFAIRS, September/October 2004, available at <http://www.foreignaffairs.org/20040901faessay83504/stephen-e-flynn/the-neglected-home-front.html> (“The transportation, energy, information, financial, chemical, food, and logistical networks that underpin U.S. economic power and the American way of life offer the United States’ enemies a rich menu of irresistible targets. And most of these remain virtually unprotected.”).

³ See, e.g., *Public Transportation Security: Hearing Before the Subcomm. on Highways, Transit & Pipelines of the H. Comm. on Transportation and Infrastructure*, 108th Cong. 2 (2004), available at <http://www.house.gov/transportation/highway/06-22-04/108-75.pdf> (noting the unique vulnerability of public transportation systems). Though aviation transportation is a terrorist target for different reasons than surface transportation and presents unique security concerns, both types of transportation within the United States are vulnerable. Compare Press Release, H. Comm. on Transp. & Infrastructure, Bill Requiring Missile Defense Protections for Airbus A380 Aircraft Introduced in Congress (June 15, 2005), available at <http://www.house.gov/transportation/press/press2005/release76.html> (“[W]e know that terrorists continue to consider commercial aviation an attractive target because of the public spectacle such attacks generate and because the world economy is increasingly dependent upon aviation.”), with Beth Dickey, *Safe Passage*, GOV’T EXECUTIVE, March 15, 2005, available at <http://www.govexec.com/features/0305-15/0305-15s3.htm> (“Compared with aviation, surface transportation offers easier access to more users, making it both an attractive target and difficult to protect.”). The attacks of September 11, 2001, and the continued threats to aviation security may have led to more government involvement in securing the airways, but the constitutional rights of American citizens are not contingent on the mode of transportation they choose. However, both the unique risks posed by aviation security and the fact that the U.S. aviation system has already been targeted inform the approach a court might take in seeking to balance security with individual rights. See *infra* Part III.D.

⁴ See Press Release, Dep’t of Homeland Sec., DHS Receives \$2.4 Billion Increase for 2006 Appropriations (Oct. 18, 2005), available at <http://www.dhs.gov/dhspublic/display?content=4894> (“The Appropriations Act provides a total of \$5.9 billion for the Transportation Security Administration, including \$443 million for explosive detection technology.”).

⁵ See 9/11 COMMISSION REPORT, *supra* note 1, at 31 (observing that the terrorist attacks of September 11, 2001, involved the “transformation of commercial aircraft into weapons of mass destruction”).

⁶ See *id.* at 177 (noting that a would-be terrorist successfully transported “precursor chemicals for explosives disguised in toiletry bottles” onboard a plane). The failed August 2006 terrorist plot to use liquid explosives to blow up U.S.-bound passenger jets went a step further, with terrorists seeking to mix seemingly innocuous precursor chemicals and components to create deadly explosives while the planes were in the air. See John Ward Ander-

ver, while concerns over possible terrorist attacks now predominate,⁷ drug dealers continue to rely on the commercial transportation system to move their product throughout the country.⁸

Recognizing the heightened threat of terrorism and the persistence of drug trafficking, government and private actors in the transportation industry have continued to alter the way they operate, especially concerning security protocols.⁹ Despite more aggressive law enforcement tactics,¹⁰ Americans still largely retain their civil liberties in the face of such threats.¹¹ Of course, the difficult question is where to strike the balance between protecting citizens and protecting their civil liberties.¹² Though citizens want to allow law enforcement to effectively prevent illegal activity—especially dangerous terrorist activ-

son & Karen DeYoung, *Plot to Bomb U.S.-Bound Jet Is Foiled*, WASH. POST, Aug. 11, 2006, at A01 (describing the plot in detail).

⁷ See, e.g., 9/11 COMMISSION REPORT, *supra* note 1.

⁸ Much of the drug trafficking takes place on the nation's highways, waterways, and border crossings, but the commercial transportation system is still widely used by drug traffickers. See U.S. Drug Enforcement Admin., *DEA Briefs & Background: Drug Trafficking in the United States*, http://www.usdoj.gov/dea/concern/drug_trafficking.html (last visited Sept. 6, 2006). While the threat of illegal drug trafficking may not arouse the fears of the American people as much as potential terrorist attacks, the drug trade continues to endanger American communities. See OFFICE OF NAT'L DRUG CONTROL POLICY, *DRUG-RELATED CRIME* (2000), <http://www.whitehousedrugpolicy.gov/publications/pdf/ncj181056.pdf> (describing the strong relationship between the use and sale of illegal drugs and other crimes).

⁹ See Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of the U.S.C.A.); 49 U.S.C. § 44901 (2000); *Transit and Over-the-Road Bus Security: Hearing Before the Subcomm. on Highways, Transit and Pipelines of the H. Comm. on Transportation and Infrastructure*, 109th Cong. (2006) (statement of Peter J. Pantuso, President and Chief Executive Officer, American Bus Association) (discussing the American Bus Association's efforts over the last five years to improve security and highlighting the continued need to fund future security initiatives); *Local Law Enforcement Agencies Ramp Up Security* (CNN television broadcast May 20, 2003), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0305/20/bn.07.html> (describing how upon an increase in the terrorist alert level, the Bush Administration asked state and local officials to be more vigilant in defending against terrorist threats); see also Jeremy R. Jehangiri, Student Article, *United States v. Drayton: Attention Passengers, All Carry-On Baggage and Constitutional Protections Are Checked in the Terminal*, 48 S.D. L. REV. 104, 129 (noting that Greyhound responded to the terrorist attacks of September 11, 2001, by instituting security measures such as increased screening, and by seeking additional federal assistance).

¹⁰ See, e.g., Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, N.Y. TIMES, July 22, 2005, at A1 (describing a new police policy to randomly check commuters' bags on the New York City subway system).

¹¹ See, e.g., James X. Dempsey, *Civil Liberties in a Time of Crisis*, HUMAN RIGHTS, Winter 2002, at 8.

¹² See, e.g., Angie Cannon, *Taking Liberties*, U.S. NEWS & WORLD REP., May 12, 2003, at 44, 45 ("Every week seems to bring fresh examples of the shifting balance between fighting terrorism and upholding personal freedoms."); Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46 (arguing that the rights conferred by the Bill of Rights are "alterable in response to changing threats to national security").

ity¹³—this nation was founded upon the principle that constitutional rights should not be violated or abused in that pursuit.¹⁴ The tension between these principles is particularly apparent in the tenuous relationship between law enforcement's goal of protecting citizens and the Fourth Amendment right against unreasonable searches and seizures.¹⁵

While it is impossible to eliminate this natural tension, clear rules and definitions relating to searches and seizures better protect constitutional rights and ensure judicial oversight to prevent overreaching by law enforcement.¹⁶ Standards employed by courts should be flexible enough to accommodate the different situations that may arise. However, to reduce the opportunity for abuse, such standards should be clear enough for principled and consistent application.¹⁷

In the seizure context, which is the focus of this Note, clear standards are crucial for protecting civil liberties because absent a court's determination that a government agent has, in fact, seized property, Fourth Amendment protections are not triggered and any reasonableness analysis is moot.¹⁸ Yet courts have still not developed a clear standard for determining when a temporary relinquishing of personal property to a common carrier while traveling through the United

¹³ See, e.g., Chan & Fahim, *supra* note 10 (noting the connection between visible anti-terrorism measures and the general public's confidence in their safety).

¹⁴ Benjamin Franklin expressed the importance of this debate when he uttered the following famous words: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." Pennsylvania Assembly: Reply to the Governor (November 11, 1755), in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963).

¹⁵ U.S. CONST. amend. IV; see Daniel W. Sutherland, *Homeland Security and Civil Liberties: Protecting America's Way of Life*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 289, 302 (2005) (acknowledging that "[i]t is natural for some to think that . . . the threats are so substantial that America needs to set aside or compromise certain principles," but concluding that "we must go back to our roots and redouble our commitment to the Constitution, to the Bill of Rights, and to our freedoms"). The author recognizes that "one of the greatest challenges brought on by the war on terror is to ensure that, while we increasingly secure our nation from terrorist attack, we also preserve America's way of life." *Id.*

¹⁶ See *United States v. Va Lerie*, 385 F.3d 1141, 1155 (8th Cir. 2004) (Riley, J., dissenting) ("It is absolutely critical that citizens and law enforcement understand what the Fourth Amendment protects."), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006). The denial of a writ of certiorari in this case, and indeed any case, does not give any indication as to how the Supreme Court views the lower court's decision. See *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))).

¹⁷ See *Va Lerie*, 424 F.3d at 701 ("[W]e recognize a principled interpretation, and consistent application, of the Seizure Clause of the Fourth Amendment . . . is vital to the protection of civil liberties and also to law enforcement's ability to conduct itself in a constitutional manner . . .").

¹⁸ See *Maryland v. Macon*, 472 U.S. 463, 468–69 (1985) ("Absent some action taken by government agents that can properly be classified as a 'search' or a 'seizure,' the Fourth Amendment rules . . . do not apply."); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

States constitutes a seizure.¹⁹ Recently, the Eighth Circuit sought to lay out a clear and consistent definition of seizure in the travel context.²⁰ However, the majority's decision only further confused the question of when the detainment of checked baggage is a Fourth Amendment seizure and, therefore, when reasonableness analysis applies.

Part I of this Note discusses the historical and judicial importance of the Seizure Clause of the Fourth Amendment as well as the limited Supreme Court jurisprudence concerning personal property checked with a common carrier. Part II discusses the background of *United States v. Va Lerie*²¹ as well as the legal reasoning behind the majority and dissenting opinions in that case. Part III evaluates the majority's opinion in *Va Lerie* and concludes that it contravenes Supreme Court precedent. Part III further argues that the *Va Lerie* majority failed to achieve its stated goal of bringing clarity to the definition of seizure as it relates to travelers' checked baggage. Instead, it established a test that is not only inconsistent with the Supreme Court's approach, but also impossible to apply in a rational and predictable manner. Finally, Part III offers a more workable approach that both comports with Supreme Court precedent and draws the clearer line that is necessary to protect citizens' civil liberties.

I

CHECKED BAGGAGE SEIZURES: LIMITED SUPREME COURT JURISPRUDENCE FOR A CRUCIAL CONSTITUTIONAL RIGHT

The Founding Fathers viewed the Bill of Rights, including the Fourth Amendment,²² as a critical tool in protecting citizens from an overzealous government.²³ In accordance with this view, the Supreme Court has in the past affirmed the variety of fundamental interests

¹⁹ See *Va Lerie*, 424 F.3d at 700 ("It can be argued our court has not spoken with a consistent voice when considering what constitutes a seizure in cases involving law enforcement's interference with luggage . . .").

²⁰ See *supra* note 17.

²¹ See 424 F.3d at 696–700.

²² U.S. CONST. amend. IV.

²³ See, e.g., Statement of Alexander Hamilton from Debate at the New York Ratifying Convention (June 25, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 303 (Jonathan Elliot ed., 2d ed. 1836) ("Good constitutions are formed upon a comparison of the liberty of the individual with the strength of government . . ."); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 297–300 (Charles F. Hobson & Robert A. Rutland et al. eds., 1977) ("Wherever the real power in a Government lies, there is the danger of oppression.").

implicated by unreasonable searches and seizures.²⁴ Yet, in response to terrorist threats, there is a tendency to narrow the protections afforded by constitutional rights.²⁵ Now, because of law enforcement's broadened responsibilities in combating terrorist threats²⁶ and government agents' more aggressive identification of baggage as suspicious,²⁷ the issue of protection from unreasonable seizures frequently arises when travelers' personal property is detained as they navigate the U.S. transportation system.²⁸

Observing the greater threat to national security and the vulnerability of the transportation system to a terrorist attack after September 11, 2001,²⁹ the federal government increased transportation security and passed legislation to federalize airline security.³⁰ Throughout the U.S. transportation system, not just on airplanes,³¹ government agents detain carry-on baggage, checked baggage, and mailed packages that the agents deem suspicious, and subject them to inspection.³² Because Fourth Amendment protections apply only when a "seizure" has occurred,³³ defining the term too narrowly would allow law enforcement to unreasonably detain checked baggage in violation of civil liberties, as Fourth Amendment reasonableness analysis would not even

²⁴ See *Segura v. United States*, 468 U.S. 796, 806 (1984) (noting that seizures impact possessory interests and searches impact privacy interests); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 643 (1994) (commenting on *Katz v. United States*, 389 U.S. 347 (1967)).

²⁵ See Posner, *supra* note 12. See generally Sutherland, *supra* note 15.

²⁶ See Press Release, U.S. Customs and Border Protection, U.S. Customs Service Inspectors Make Large Cocaine, Marijuana Seizures Over Holiday Weekend (Jan. 21, 2003), available at http://www.customs.gov/xp/cgov/newsroom/press_releases/archives/cbp_press_releases/012003/01212003.xml ("The sharp increase in drug seizures is directly related to the recent anti-terrorism training our officers have undergone.")

²⁷ See, e.g., Dep't of Homeland Sec., Travel & Transportation: Protecting Travelers and Commerce, http://www.dhs.gov/dhspublic/theme_home3.jsp (last visited Sept. 6, 2006) (discussing the consolidation of several federal agencies into the Department of Homeland Security to increase safety at entry and travel points in the United States); Transp. Sec. Agency, Security & Law Enforcement: Canine & Explosives Program, <http://www.tsa.gov/public/display?theme=32> (last visited Sept. 6, 2006) ("[The program] exists to deter and detect the introduction of explosive devices into the transportation system.")

²⁸ See *United States v. Va Lerie*, 424 F.3d 694, 703 (8th Cir. 2005) ("Seizure issues involving checked luggage are hardly new for circuit courts."), *cert. denied*, 126 S.Ct. 2966 (2006).

²⁹ See 9/11 COMMISSION REPORT, *supra* note 1; Posner, *supra* note 12, at 46 ("[I]t appears . . . that the events of September 11 have revealed the United States to be in much greater jeopardy from international terrorism than had previously been believed . . .").

³⁰ See Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of the U.S.C.A.).

³¹ See, e.g., Jehangiri, *supra* note 9 and accompanying text.

³² Some of the inspections occur after a government agent has received the owner's consent. See 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, 200-14 (2001) (discussing the "poofing" or "prepping" of a passenger's luggage).

³³ See *Maryland v. Macon*, 472 U.S. 463, 468-69 (1985).

be implicated.³⁴ Despite its importance, the Supreme Court has only rarely addressed the issue of what constitutes a seizure of individuals' personal property in the travel context.³⁵

In *United States v. Jacobsen*, the Supreme Court first addressed the definition of a seizure of property in the commercial transportation context when it looked at the detainment of a package mailed through a private freight carrier.³⁶ The Court found that a seizure had occurred when government agents, whom Federal Express employees had summoned to the Federal Express office to inspect a package containing a suspicious white powder, participated in a further detainment of the package for their own investigative purposes.³⁷ In an opinion that Justice John Paul Stevens authored, the Court made a general statement that a seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property."³⁸ In concluding that a seizure had occurred, the Court stated that "the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a 'seizure.'"³⁹ While the Court stated that property is seized when there is a "meaningful interference" with an individual's possessory interest in it,⁴⁰ the Court went on to ask only whether the government agents had exerted "dominion and control" over the defendant's property to determine if they had seized it,⁴¹ thus indicating that proof of dominion and control over property may establish meaningful interference with a possessory interest in it.⁴² The Court also

³⁴ See *United States v. Jacobsen*, 466 U.S. 109, 136–37 (1984) (Brennan, J., dissenting) ("[A]n investigative technique that falls within neither category need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use."); Rudstein, *supra* note 32.

³⁵ See *Jacobsen*, 466 U.S. at 113 n.5 ("[T]he concept of a 'seizure' of property is not much discussed in our cases.").

³⁶ See *id.* at 111.

³⁷ See *id.* at 111, 119.

³⁸ *Id.* at 113. The Court noted that this definition tracked its definition for seizures of persons, see *id.* at 114 n.5, but seemed to do so to explain the origin of the definition rather than to indicate that the possessory interest involved in seizures of property should relate to an individual's freedom of movement. See *id.* at 113 & n.5 ("While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement.").

³⁹ *Id.* at 120 n.18 (emphasis added); see *United States v. Karo*, 468 U.S. 705, 730 (1984) (stating that asserting dominion and control over property occurs when one has the power to use such property for one's own purposes); see also *Walter v. United States*, 447 U.S. 649 (1980) (ruling that even when federal agents only inspected packages after they were opened by a private third party, a seizure had taken place).

⁴⁰ *Jacobsen*, 466 U.S. at 113.

⁴¹ *Id.* at 120–21.

⁴² See *id.* at 120 n.18.

focused on who had custody of the package and the purpose of the seizure,⁴³ rather than any expectation of timely delivery.⁴⁴

Following *Jacobsen*, the Court refined its approach to the seizure of property by distinguishing between interests in personal belongings held in one's possession and in those checked with a common carrier.⁴⁵ In *United States v. Place*,⁴⁶ the Court found that the temporary investigative detention of a traveler's luggage that was in his "immediate possession" constituted a seizure.⁴⁷ However, the Court also stated that such a seizure "intrudes on both the suspect's *possessory interest in his luggage* as well as his liberty interest in proceeding with his itinerary."⁴⁸ This language, in conjunction with *Jacobsen's* holding that dominion and control create a meaningful interference with an individual's possessory interest, implies that travelers have possessory interests in their personal belongings, whether they have them on their persons, check them with third-party carriers, or mail them.⁴⁹

Additionally, while travelers' expectations about how carriers handle their belongings differ from their privacy concerns in the search context,⁵⁰ such expectations do interact with dominion and control to inform the seizure analysis.⁵¹

Viewing the constitutional interest in property seized during transportation that the Court addressed in both *Jacobsen* and *Place*, a consistent approach to the definition of a seizure of personal belongings in the travel context emerges. This clear approach should lead to uniform application in the lower courts. However, a recent Eighth Circuit case that directly addressed this issue not only settled on a standard that lacks clarity, but also applied that standard in a way that contradicts Supreme Court jurisprudence on the matter.⁵²

⁴³ See *id.* at 119.

⁴⁴ See *id.* at 120–21 & n.18.

⁴⁵ See *United States v. Place*, 462 U.S. 696 (1983) (affirming the Second Circuit's ruling that detaining the bags of a traveler that were in his possession violated the Fourth Amendment).

⁴⁶ *Id.*

⁴⁷ See *id.* at 708.

⁴⁸ *Id.* (emphasis added).

⁴⁹ See *Soldal v. Cook County*, 506 U.S. 56, 62 (1992) (stating that the Court's cases "unmistakably hold that the [Fourth] Amendment protects property as well as privacy"); *Jacobsen*, 466 U.S. at 113 (discussing the possessory interest in property).

⁵⁰ Cf. *Bond v. United States*, 529 U.S. 334 (2000) (finding an officer's physical manipulation of a bus passenger's bag stored in an overhead compartment constituted a search because it exceeded the passenger's expectations as to how his belongings would be handled). The *Bond* Court determined that the passenger's expectation was that the bus company or a fellow passenger might handle his luggage, but not in an exploratory manner. See *id.*

⁵¹ See *infra* Part III.B.1.

⁵² See *United States v. Va Lerie*, 424 F.3d 694, 701 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

II

CASE DISCUSSION: *UNITED STATES V. VA LERIE*

On December 23, 2002, Keith Va Lerie paid cash for a one-way Greyhound bus ticket and boarded in Los Angeles en route to Washington, D.C.⁵³ Va Lerie had checked a garment bag, which was placed in a luggage compartment underneath the bus.⁵⁴ At a refueling stop in Omaha, Nebraska, the bus passengers disembarked before the bus proceeded to the refueling area pursuant to Greyhound safety policy.⁵⁵ While the bus was in the refueling area, Investigator Alan Eberle of the Nebraska State Patrol (NSP), who performed regular duties for the NSP and watched for people transporting illegal items to the East Coast, looked into the lower compartment and noticed Va Lerie's "newer" garment bag,⁵⁶ which had a luggage ticket on it but no handwritten nametag.⁵⁷ After further investigation revealed that Va Lerie had paid cash for his one-way ticket,⁵⁸ Eberle "had the bag removed from the bus and brought into the rear baggage terminal by NSP investigators."⁵⁹ Eberle then paged Va Lerie and brought him into the office, where the officers obtained Va Lerie's consent to search the bag.⁶⁰ In the subsequent search, the officers found five sealed bags containing cocaine.⁶¹

For the purposes of this Note, the important question is whether a seizure of Va Lerie's bag had occurred when law enforcement removed the bag from the bus and brought it inside the baggage terminal. After his arrest and indictment, Va Lerie filed a motion to suppress the cocaine as evidence obtained from an unreasonable seizure,⁶² but the magistrate judge, while conceding that a seizure had

⁵³ See *United States v. Va Lerie*, No. 8:03-CR-23, 2003 WL 21953948, at *1 (D. Neb.), *rev'd*, No. 8:03-CR-23, 2003 WL 21956437 (D. Neb. Aug. 14, 2003), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

⁵⁴ See *Va Lerie*, 424 F.3d at 696.

⁵⁵ See *Va Lerie*, 2003 WL 21953948, at *1 (stating that Greyhound's policy for having passengers deboard the bus before fueling resulted from a desire to avoid "an excess of people in the refueling area").

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ After becoming suspicious of the garment bag, Eberle ran a computer check of the bag's luggage ticket and found that the bag's owner, using the name "Valerie Keith," had paid \$164 in cash for a one-way ticket. See *United States v. Va Lerie*, 385 F.3d 1141, 1143-44 (8th Cir. 2004), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

⁵⁹ *Va Lerie*, 2003 WL 21956437, at *1.

⁶⁰ *Va Lerie*, 385 F.3d at 1144. The defendant argued that he did not validly consent to the search of his bag. *Va Lerie*, 2003 WL 21956437, at *1.

⁶¹ *Va Lerie*, 385 F.3d at 1144.

⁶² *Va Lerie*, 2003 WL 21953948, at *1.

occurred,⁶³ recommended rejecting the motion⁶⁴ because the seizure had not been unreasonable.⁶⁵ Va Lerie was then indicted in the United States District Court for the District of Nebraska⁶⁶ for possession with intent to distribute five hundred grams or more of a mixture containing cocaine.⁶⁷ The district court heard the evidence upon the parties' objections and granted the defendant's motion to suppress,⁶⁸ holding that the NSP had seized the garment bag without reasonable suspicion.⁶⁹ The court invoked the language of *Jacobsen*, noting that when the officers removed the bag from the bus and brought it to a room inside the station, the officers had "substantially interfered with the defendant's possessory interest in the bag."⁷⁰

On appeal, the case moved to a three-member panel of the Eighth Circuit, which reconsidered the issue of whether a seizure had occurred within the meaning of the Fourth Amendment.⁷¹ Before the panel, the government argued that although the NSP removed Va Lerie's bag from the Greyhound bus, Greyhound continued to retain

⁶³ *Id.* at *2 ("Va Lerie seeks to suppress evidence taken during the seizure and search of the garment bag . . ."). In fact, the magistrate judge did not even suggest that there was a question as to whether a seizure occurred. *See id.* at *1.

⁶⁴ *Id.* at *6.

⁶⁵ *Id.* at *3 ("The removal of the bag to the rear baggage area of the terminal was not unreasonable."). If the seizure of the bag were deemed unreasonable, the evidence would have been suppressed. *See Segura v. United States*, 468 U.S. 796, 804 (1984) ("Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion.").

⁶⁶ *Va Lerie*, 2003 WL 21956437. Judge Bataillon noted the magistrate judge's "detailed and accurate" statements regarding the events. *See id.* at *1.

⁶⁷ *United States v. Va Lerie*, 424 F.3d 694, 697 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006). Va Lerie was charged with a drug possession violation. *See* 21 U.S.C. §§ 849(a)(1), (b)(1) (2000).

⁶⁸ *Va Lerie*, 2003 WL 21956437, at *9.

⁶⁹ *Id.* at *2 ("Based on the facts before me, I can only conclude . . . that a seizure occurred when the officers removed the defendant's garment bag from the bus and took it inside the terminal."). Once a detention is deemed a seizure, it must be reasonable, meaning it was justified by probable cause or, in some cases, reasonable suspicion. *See United States v. Place*, 462 U.S. 696, 701 (1983) (discussing the different procedures and standards for reasonable and unreasonable detentions); *see also Terry v. Ohio*, 392 U.S. 1, 20–23 (1968) (stating that warrantless seizure of luggage or packages requires "specific and articulable facts, which . . . reasonably warrant that intrusion"). For the purposes of this Note, it is only necessary to understand that without initially finding a seizure, the reasonableness analysis is not implicated.

⁷⁰ *Va Lerie*, 2003 WL 21956437, at *4; *see United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.").

⁷¹ *United States v. Va Lerie*, 385 F.3d 1141, 1145 (8th Cir. 2004), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006). The court also reviewed for clear error the factual findings relating to the defendant's consent to search. *See id.* at 1145–46.

custody of it.⁷² However, the divided panel⁷³ found that while bus passengers might expect carriers to handle their bags to some extent en route to their destinations,⁷⁴ Eberle had seized Va Lerie's bag when he "had the bag removed from the bus" and taken inside to be searched.⁷⁵ Invoking the language of *Jacobsen*, the court noted that a seizure occurs when officials exert "dominion and control" over an item⁷⁶ beyond a "superficial inspection."⁷⁷ The court also declared that a detention "for the *purpose* of seeking consent to search" is a detainment to pursue investigative measures, which goes beyond the reasonable expectations of someone with a possessory interest in that item.⁷⁸

In a noteworthy concurring opinion, Judge Michael J. Melloy claimed that while the court had correctly analyzed the case under its own "precedent dealing with the definition of a seizure,"⁷⁹ such precedent "is of questionable validity."⁸⁰ Judge Melloy urged the court to "re-visit the issue"⁸¹ and further emphasized the time element of a seizure,⁸² arguing that the court must consider the "temporal element of the inspection" more than it had in the past.⁸³

⁷² *Id.* at 1146 (stating that Eberle testified to the effect that when a bag was removed in this way "the bag nevertheless remained in Greyhound's custody and the officers were merely taking care of it").

⁷³ *Id.* at 1141 (2-1 decision).

⁷⁴ *Id.* at 1148.

⁷⁵ *Id.* On appeal, the government did not argue that a justified seizure had occurred, but instead challenged the district court's holding that a seizure had occurred at all. *See id.* at 1150 (Melloy, J., concurring) ("The government made the tactical decision to challenge the district court decision solely on the grounds that the district court was wrong in its ruling that a seizure occurred."). Without having to review the determination that the seizure was unreasonable, the court's finding of a Fourth Amendment seizure instantly resolved the case against the government. *See id.* However, if the court had not found a seizure, the unreasonableness of the detainment would have been irrelevant. *See supra* note 18.

⁷⁶ *Id.* at 1147 (quoting *United States v. Gomez*, 312 F.3d 920, 924 n.2 (8th Cir. 2002)).

⁷⁷ *Id.*; *see also Gomez*, 312 F.3d at 924 n.2 (stating that a seizure occurs when officers have "exerted dominion and control" over a package by deciding to "go beyond superficial inspection of the exterior of the package[]" and detain it for further inquiry into characteristics that are not observable just by holding it) (citing *United States v. Jacobsen*, 466 U.S. 109, 120 n.18 (1984)).

⁷⁸ *Va Lerie*, 385 F.3d at 1147 (emphasis added) (stating that a bus passenger with luggage in a common compartment does not "reasonably expect" that his luggage will be physically removed without his knowledge and detained for a consent to search).

⁷⁹ *Id.* at 1150 (Melloy, J., concurring).

⁸⁰ *Id.* Judge Melloy argued that in past decisions the court had placed "undue emphasis" on whether there was more than a "superficial review" of the package or whether it was moved to a different room, thus implying the risk of a similarly incorrect analysis in *Va Lerie*. *See id.*

⁸¹ *Id.* at 1151.

⁸² *Id.*

⁸³ *Id.* at 1150 (stating that "[p]roper analysis requires consideration of the temporal element of the inspection" and that "a *brief* detention of a piece of luggage that does not result in the delay of either the passenger, or ultimate delivery of the luggage, is not a

Interestingly, Judge William Jay Riley dissented⁸⁴ but essentially made the same argument as Judge Melloy,⁸⁵ urging the court to reconsider its approach to what constitutes a seizure “in the context of a temporary removal and inspection of packages and luggage that have been sent or checked with common carriers.”⁸⁶ Like Judge Melloy, Judge Riley noted the Eighth Circuit’s muddled precedent on this issue.⁸⁷ However, Judge Riley would not have found a seizure in Va Lerie’s case, concluding that the Fourth Amendment “does not frown” on such handling by officers because, as a traveler, Va Lerie would have reasonably expected it, and because the handling did not delay Va Lerie or interfere with the timely delivery of his baggage.⁸⁸ Moreover, Judge Riley would have found that there was no seizure because the NSP officers removed the checked bag at Greyhound’s request, handled it in a manner consistent with Va Lerie’s expectations, and never took custody of it.⁸⁹

Heeding the suggestions of Judges Melloy and Riley, the Eighth Circuit vacated the panel’s decision, granted a rehearing en banc to reconsider the seizure definition, and ultimately reversed the district court’s finding that a seizure had occurred.⁹⁰ Now writing for the majority, Judge Riley, while acknowledging that the court may not have in the past “spoken with a consistent voice” regarding its seizure definition,⁹¹ emphasized the importance of “principled interpretation[] and consistent application[] of the Seizure Clause.”⁹²

The majority then sought to apply the Supreme Court’s definition of seizure in *Jacobsen* “with an eye toward . . . applications provided by [other circuits],” particularly the Fifth, Seventh, and Ninth Circuits.⁹³ The majority noted that in *United States v. Lovell*,⁹⁴ the Fifth

seizure” (emphasis added)). *But cf.* *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) (stating that the definition of a seizure of property follows from the definition of a seizure of the person, which is “meaningful interference, *however brief*, with an individual’s freedom of movement” (emphasis added)).

⁸⁴ *Va Lerie*, 385 F.3d at 1151 (Riley, J., dissenting).

⁸⁵ *See id.* at 1151 (arguing that there is no seizure “if the removal of the luggage does not delay the passenger’s travel, affect the timely delivery of the checked luggage, or interfere with the carrier’s normal processing of the checked luggage”).

⁸⁶ *Id.* (quoting *id.* at 1151 (Melloy, J., concurring)).

⁸⁷ *See id.* at 1155 (Riley, J., dissenting) (“If anything is clear, it is that our seizure cases involving checked luggage and mailed packages are not.”). Judge Riley also noted that the Eighth Circuit’s “decisions in the Fourth Amendment seizure area do not clearly enunciate and faithfully apply a consistent standard.” *Id.*

⁸⁸ *See id.* at 1156.

⁸⁹ *See id.* at 1156–57.

⁹⁰ *See United States v. Va Lerie*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

⁹¹ *Id.* at 700.

⁹² *Id.* at 700–02.

⁹³ *Id.* at 706.

⁹⁴ 849 F.2d 910 (5th Cir. 1988).

Circuit focused on the defendant airline passenger's freedom of movement and his expectation of timely delivery of his checked luggage in determining whether a seizure had occurred.⁹⁵ The Fifth Circuit reasoned that with regard to the handling of his luggage, the passenger expected the airline to "transport the bags to [his] destination for him to reclaim when he arrived."⁹⁶ It concluded that a "momentary delay" in removing the bags from the conveyor belt did not constitute a meaningful interference with possessory interests,⁹⁷ because if drugs had not been found, the passenger's travel would not "have been interfered with or his [reasonable] expectations with respect to his luggage frustrated."⁹⁸

The *Va Lerie* majority also considered *United States v. Ward*,⁹⁹ a Seventh Circuit case that involved a defendant who had checked his baggage with Greyhound but did not get on the bus.¹⁰⁰ In *Ward*, law enforcement agents removed the defendant's checked baggage from the bus's lower compartment at a meal stop.¹⁰¹ Here, although the defendant did not accompany his bag on the trip, the Seventh Circuit addressed the possessory interest the defendant had in his checked baggage by noting that he had "no cognizable interest in repossessing his bag until his bus arrived" at its destination.¹⁰² The Seventh Circuit in *Ward* also stated that the defendant had no reasonable expectation that Greyhound employees performing their duties and other passengers would not handle or remove his bag throughout the trip.¹⁰³ Because the detainment in *Ward* did not interrupt the bag's transport or interfere with the defendant's "contractually-based expectation" that

⁹⁵ See *Va Lerie*, 424 F.3d at 703. In *Lovell*, border patrol agents removed a passenger's checked baggage from the conveyor belt and smelled marijuana when they compressed the sides several times, resulting in a police dog indicating the presence of the drug. 849 F.2d at 911. The Fifth Circuit also distinguished the case from *Place*, noting that the passenger in *Lovell* had surrendered his bags to a third-party common carrier. *Id.* at 916; see *United States v. Place*, 462 U.S. 696, 705 (1983) (noting that different interests are involved when bags in a traveler's immediate possession are detained than when those surrendered to a third party are detained).

⁹⁶ *Lovell*, 849 F.2d at 916.

⁹⁷ See *id.*

⁹⁸ *Id.* While agents clearly interfered with the defendant's travel after they discovered drugs, the seizure analysis applies only to the events before the dog sniff alerted agents to the presence of illicit drugs in defendant's bag, which provided the requisite probable cause. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (noting that every arrest and seizure is unreasonable unless supported by probable cause).

⁹⁹ See *Va Lerie*, 424 F.3d at 705.

¹⁰⁰ *United States v. Ward*, 144 F.3d 1024 (7th Cir. 1988).

¹⁰¹ See *id.* at 1027-28. The defendant paid for his ticket in Los Angeles, checked his luggage, and then flew to Indianapolis and waited for the bus's arrival so that he could retrieve his luggage, which contained a kilogram of cocaine and a semiautomatic handgun, a common practice for drug couriers. See *id.* at 1027-28, 1034 (stating that it was a typical practice of drug couriers to send unaccompanied bags by bus).

¹⁰² *Id.* at 1031.

¹⁰³ See *id.* at 1032-33.

he would regain possession of the bag at its destination, the Seventh Circuit held that the detention did not constitute a seizure.¹⁰⁴

The *Va Lerie* majority also noted the Ninth Circuit's adoption of the Fifth Circuit's approach in *United States v. Brown*.¹⁰⁵ In *Brown*,¹⁰⁶ law enforcement agents detained an airline passenger's checked luggage in the cargo hold area of an airport terminal.¹⁰⁷ The Ninth Circuit in *Brown* used similar language to that of the Fifth Circuit and observed that the length of the delay was important in determining whether a seizure had occurred, explaining that the "brief detention" of the defendant's bags "in no way interfered with his travel or frustrated his expectations with respect to his luggage."¹⁰⁸

The *Va Lerie* majority also discussed *United States v. Johnson*,¹⁰⁹ another Ninth Circuit case in which an airline planned to transport an airline passenger's checked luggage on a flight leaving two hours later than the passenger's flight because of his late arrival at the terminal.¹¹⁰ Although Drug Enforcement Administration (DEA) agents went onto the tarmac and took the luggage back to a DEA office to subject it to a dog sniff,¹¹¹ which indicated the presence of drugs,¹¹² the Ninth Circuit observed that because airline representatives had acquiesced, the "airline maintained custody of the luggage at all times."¹¹³ Instead of focusing on the duration of the detainment,¹¹⁴ the Ninth Circuit looked at the passenger's possessory interest, concluding that his "only interest was that the airline, as his bailee, would place his luggage on the next plane."¹¹⁵ Because the airline had not relinquished custody of the luggage, and because the airline would have still transported the luggage on the next plane if not for the discovery of the drugs,¹¹⁶ the Ninth Circuit ruled that there was no

¹⁰⁴ *Id.* at 1033. The Seventh Circuit in *Ward* also noted that in *United States v. LaFrance*, the First Circuit stated that a detention of a Federal Express package does not interfere with the sender's possessory interest until the contractual deadline for delivery has passed. *See id.* at 1029; *United States v. LaFrance*, 879 F.2d 1, 7 (1st Cir. 1989) ("[T]he only possessory interest at stake . . . was the contract-based expectancy that the package would be delivered to the designated address by morning's end.")

¹⁰⁵ *See United States v. Va Lerie*, 424 F.3d 694, 704 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

¹⁰⁶ 884 F.2d 1309 (9th Cir. 1989).

¹⁰⁷ *See id.* at 1310-11.

¹⁰⁸ *Id.* at 1311.

¹⁰⁹ *See Va Lerie*, 424 F.3d at 704-05.

¹¹⁰ *United States v. Johnson*, 990 F.2d 1129, 1130 (9th Cir. 1993).

¹¹¹ *Id.* at 1130.

¹¹² *Id.*

¹¹³ *Id.* at 1130-31.

¹¹⁴ *Cf. United States v. Brown*, 884 F.2d 1309, 1311 (9th Cir. 1989) (noting "brief detention" of the luggage); *United States v. Lovell*, 849 F.2d 910, 916 (5th Cir. 1988) (noting "momentary delay" due to removal).

¹¹⁵ *Johnson*, 990 F.2d at 1132.

¹¹⁶ *See id.* at 1132-33.

interference with the passenger's possessory interest and therefore no seizure had occurred.¹¹⁷

After reviewing other circuit cases and considering the Supreme Court's approach, the *Va Lerie* majority focused on the following three factors: interference with a traveler's freedom of movement,¹¹⁸ timely delivery of the baggage or package,¹¹⁹ and deprivation of custody.¹²⁰ The majority then applied these three factors to the facts of the case. First, the majority focused on the duration of the detainment and concluded that the "brief and temporary" bag removal neither delayed *Va Lerie*'s travel nor significantly affected his freedom of movement.¹²¹ The majority also found that the removal did not affect the timely delivery of the bag,¹²² as it would have continued to travel with the bus if not for the NSP officers' discovery of cocaine.¹²³

Addressing the final factor, deprivation of custody, the majority stated that *Va Lerie*'s possessory interest in his bag included an expectation that Greyhound or others at Greyhound's behest might remove the bag from the bus.¹²⁴ The majority also reasoned that since Greyhound's policy dictated removal of the bag,¹²⁵ the NSP's participation in the removal "never deprived Greyhound of its custody of *Va Lerie*'s checked luggage."¹²⁶ Finding that there was neither delay in *Va Lerie*'s travel¹²⁷ nor any significant interference with his freedom of

¹¹⁷ See *id.* at 1132 ("Because nothing that the officers did interfered with the [passenger]'s possessory interests in his luggage prior to the dog sniffing, there was no seizure of the luggage.").

¹¹⁸ See *United States v. Va Lerie*, 424 F.3d 694, 707 (8th Cir. 2005) ("First, did law enforcement's detention of the checked luggage delay a passenger's travel or significantly impact the passenger's freedom of movement?"), *cert. denied*, 126 S.Ct. 2966 (2006).

¹¹⁹ See *id.* ("Second, did law enforcement's detention of the checked luggage delay its timely delivery?").

¹²⁰ See *id.* at 706–07 ("Third, did law enforcement's detention of the checked luggage deprive the carrier of its custody of the checked luggage?"). The majority also noted that if any of these three factors is satisfied, then a Fourth Amendment seizure has occurred. See *id.* at 707. Additionally, the majority stated that to "test the breadth of the carrier's custodial rights" a court should look to "the passenger's reasonable expectations for how the passenger's luggage might be handled when in the carrier's custody." See *id.* at 707 n.7.

¹²¹ See *id.* at 708.

¹²² See *id.*

¹²³ See *id.* ("No evidence suggests the luggage would not have been placed back on the bus for transport to its destination . . .").

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ *Id.* Though the majority found that the NSP never established custody, it did recognize the *Jacobsen* approach. See *id.* at 708, 709 n.9 ("Had the NSP exerted dominion and control over *Va Lerie*'s luggage such that it deprived Greyhound of its custody of the luggage, then a seizure would have occurred. This is what happened in *Jacobsen*."). The majority found no distinction between the NSP removing the luggage to present it to *Va Lerie* inside the terminal and the NSP asking *Va Lerie* to come to the bus to consent to a search. See *id.* at 708.

¹²⁷ See *id.* at 708.

movement,¹²⁸ that the timely delivery of the baggage had not been affected,¹²⁹ and that Greyhound maintained custody of the bag even when the NSP officers removed it from the bus,¹³⁰ the majority concluded that no seizure had occurred.¹³¹ After having established that there was, in fact, no seizure, the majority held that Va Lerie had voluntarily consented to the search of his bag,¹³² and, as such, reversed the lower court's decision and allowed the admission of the cocaine into evidence.¹³³

This decision was, however, sharply criticized by Judge Steven M. Colloton and four other dissenting Eighth Circuit judges.¹³⁴ The dissent argued that the majority's decision conflicted with *Jacobsen*, the lone Supreme Court case directly on point.¹³⁵ It contended that *Jacobsen* should be the court's "guiding light,"¹³⁶ and that it dictated finding a seizure in *Va Lerie*.¹³⁷ The dissent based its conclusion on the view that there was "no viable distinction" between *Va Lerie* and *Jacobsen*,¹³⁸ since in both cases, a defendant passenger checked a personal article with a third-party common carrier, and government authorities subsequently exerted dominion and control over that personal article for their own purposes.¹³⁹ The dissent also pointed out that under the majority's three-factor test,¹⁴⁰ the government agents' detainment of the package in *Jacobsen* would not be considered a seizure.¹⁴¹ First, the dissent argued that because the Jacobsens had *shipped* the personal article, rather than *checking* it with a common carrier, there could have been no delay in their travel.¹⁴² Second, it noted that any delay in the delivery of the package was unlikely.¹⁴³ Finally, the dissent argued that if the NSP officers' "physical possession and control of Va Lerie's

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.* at 703, 708. Unsurprisingly, the majority opinion, written by Judge Riley, used the same language from his dissent in the panel decision. See *United States v. Va Lerie*, 385 F.3d 1141, 1151 (8th Cir. 2004) (Riley, J., dissenting), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

¹³² See *Va Lerie*, 424 F.3d at 709–10.

¹³³ See *id.* at 710–11.

¹³⁴ See *id.* at 711 (Colloton, J., dissenting).

¹³⁵ See *id.* at 711–12.

¹³⁶ *Id.* at 715.

¹³⁷ See *id.* at 711 ("The critical question before us . . . is whether the luggage was 'seized,' and *Jacobsen* dictates that the answer is yes.").

¹³⁸ *Id.* at 712.

¹³⁹ See *id.* at 712 (stating that the NSP investigators exerted dominion and control over the bag "for the purpose of furthering their law enforcement investigation of potential drug trafficking").

¹⁴⁰ See *id.* at 706–07 (majority opinion).

¹⁴¹ See *id.* at 713 (Colloton, J., dissenting) ("Under the test applied by the court today, the initial seizure in *Jacobsen* would not be a seizure.").

¹⁴² See *id.*

¹⁴³ See *id.*

luggage” failed to deprive Greyhound of its custody of the bag, then such a conclusion was inconsistent with *Jacobsen* wherein the Supreme Court found that the DEA had deprived Federal Express of its custody of the Jacobsens’ package.¹⁴⁴

The dissent also addressed the custody issue, concluding that if the NSP officers did not exceed Va Lerie’s reasonable expectations as to the manner in which his luggage might have been handled, then the DEA agents did not exceed the Jacobsens’ reasonable expectations when they “merely replicated what Federal Express itself already had done.”¹⁴⁵ The dissent concluded that both the DEA in *Jacobsen* and the NSP officers in *Va Lerie* exceeded reasonable expectations and “took ‘custody’ of the package and luggage, respectively, when they took physical possession and control of the containers for the purpose of investigating their contents.”¹⁴⁶

The dissent also criticized the majority’s failure to follow the court’s own precedent on this issue.¹⁴⁷ It pointed to *United States v. Morones*,¹⁴⁸ *United States v. Walker*,¹⁴⁹ and *United States v. Demoss*,¹⁵⁰ three recent cases in which the Eighth Circuit held that removing packages from conveyor belts for canine sniffs constituted seizures even though the brief detentions would not have delayed delivery.¹⁵¹ The dissent also pointed out that from the *Jacobsen* Court’s analogy of the field test to a dog sniff for drugs,¹⁵² one could infer that the Court viewed both as meaningful interferences with possessory interests.¹⁵³ The dissent concluded by pointing out that in *Jacobsen*, the Supreme Court “did not regard the initial seizure . . . as a close question,”¹⁵⁴ holding that the DEA’s actions “‘clearly constituted a seizure.’”¹⁵⁵ Following that logic, the dissent stated that “[a]bsent a revision of doctrine by the Supreme Court, the NSP investigators effected a ‘seizure’ of Va Lerie’s bag.”¹⁵⁶

With those final words echoing against the backdrop of one major Supreme Court case and a muddled Eighth Circuit interpretation,

¹⁴⁴ *Id.* at 713, 714 n.12.

¹⁴⁵ *Id.* at 713–14.

¹⁴⁶ *Id.* at 714 n.12. The dissent noted that the legal definition of custody would also lead to the same conclusion. *See id.* (quoting the definition of “custody” in BLACK’S LAW DICTIONARY 390 (7th ed. 1999) as “the care and control of a thing . . . for inspection, preservation, or security”).

¹⁴⁷ *See id.* at 714.

¹⁴⁸ 355 F.3d 1108 (8th Cir. 2004).

¹⁴⁹ 324 F.3d 1032 (8th Cir. 2003).

¹⁵⁰ 279 F.3d 632 (8th Cir. 2002).

¹⁵¹ *See Va Lerie*, 424 F.3d at 714 (Colloton, J., dissenting).

¹⁵² *See* 466 U.S. 109, 123 (1984).

¹⁵³ *See id.* at 123–24; *Va Lerie*, 424 F.3d at 714 (Colloton, J., dissenting).

¹⁵⁴ *Va Lerie*, 424 F.3d at 715 (Colloton, J., dissenting).

¹⁵⁵ *Id.* (quoting *Jacobsen*, 466 U.S. at 120 n.18).

¹⁵⁶ *Id.*

Part III seeks to clarify the definition of a seizure of personal property that is checked with a third party so that it both comports with Supreme Court jurisprudence and can be applied in a principled and consistent manner.

III ANALYSIS

The *Va Lerie* majority's misinterpretation of *Jacobsen* and creation of a rule that conflicts with Supreme Court jurisprudence¹⁵⁷ both highlight the need for a clearer seizure definition to properly protect citizens' constitutional rights. *Va Lerie* failed to apply *Jacobsen* faithfully because the majority formulated a test focusing mostly on temporal issues of detainment, while discounting the possessory interest individuals retain in their checked personal baggage, and approached the custody issue in a manner that stretches credulity and is unworkable.

A. Improper Description of the Possessory Interest Involved

Contrary to *Jacobsen*,¹⁵⁸ the *Va Lerie* majority discounted the possessory interest implicated by the detainment of checked baggage by viewing the interest as contractual,¹⁵⁹ thus leading it to unduly focus on the duration of the detainment, and thereby raise the bar for meaningful interference. In its opinion, the majority viewed the possessory interest in checked luggage as merely that of a bailor in his relationship with a bailee, with the interest of the bailor being only an expectation to regain possession in a timely manner.¹⁶⁰ The second part of the *Va Lerie* test reflects the majority's belief that the possessory interest involved is minimal in that it simply asks if the detention of the checked baggage delayed its timely delivery.¹⁶¹ The majority also implied that passengers have a greatly diminished possessory interest in their baggage when the baggage is not within their immediate pos-

¹⁵⁷ See *supra* Part II.

¹⁵⁸ See *infra* Part III.A.1.

¹⁵⁹ See *Va Lerie*, 424 F.3d at 705 (approving the Ninth Circuit's rationale in *Brown* that "[the passenger]'s only interest was that the airline, as his bailee, would place his luggage on the next plane" (quoting *United States v. Brown*, 884 F.2d 1309, 1132 (9th Cir. 1989)); *id.* at 706 (noting that the Seventh Circuit in *Ward* would not find a seizure unless an officer "'interfer[ed] with [the defendant]'s contractually-based expectation that he would regain possession of the bag at a particular time'" (quoting *United States v. Ward*, 144 F.3d 1024, 1033 (7th Cir. 1998)); *id.* at 703 (discussing how the Fifth Circuit in *Lovell* viewed the defendant's interest as his "'expectation that the carrier would transport the bags to [defendant]'s destination for him to reclaim when he arrived'" (quoting *United States v. Lovell*, 849 F.2d 910, 916 (5th Cir. 1988))).

¹⁶⁰ See *supra* note 159.

¹⁶¹ See *Va Lerie*, 424 F.3d at 706 ("At minimum, the passenger's possessory interests in his checked luggage entail the right (or at least the expectation) to . . . reclaim immediate possession of the checked luggage at the passenger's or the luggage's destination.").

session,¹⁶² noting the distinction in *Place* between baggage that passengers carry themselves and baggage they check with a common carrier.¹⁶³ The majority's choice of attaching "minimum" significance to passengers' possessory interests in their checked baggage is seemingly arbitrary and fails to consider the significant interests that passengers might retain in their personal belongings.¹⁶⁴

The majority incorrectly used the *Place* distinction to lessen the possessory interest attached to checked baggage. A better interpretation is that the distinction only *adds* additional liberty interests to baggage in a passenger's immediate possession.¹⁶⁵ While it is true that *Place* stands for the proposition that seizing a passenger's baggage from his immediate possession implicates personal liberty interests,¹⁶⁶ which are absent in checked baggage cases, this analysis is unnecessarily superficial.¹⁶⁷ Parsing the Court's language in *Place*, there is ample room to infer a relatively high baseline possessory interest associated with a traveler's personal belongings, whether they remain in his immediate possession or not.¹⁶⁸

A fair reading of *Place* renders this distinction as one that adds a liberty interest to the case of belongings in a passenger's immediate possession, but does not diminish the possessory interest a passenger has in personal baggage, even if checked, at all times throughout his journey. Therefore, the *Place* distinction as viewed by the majority in *Va Lerie* not only leads to an unwarranted discounting of the possessory interest involved, it also fails to reflect the views of the Supreme Court.

¹⁶² See *id.* ("To be certain, a passenger gives up his immediate possessory interest when he checks his luggage with the commercial carrier as bailee."); *id.* at 706 n.6 (noting how the Fifth and Seventh Circuits recognized the "critical difference" identified in *Place* between removing luggage from a passenger's immediate possession and removing luggage checked with a common carrier").

¹⁶³ See *supra* note 162.

¹⁶⁴ *Va Lerie*, 424 F.3d at 706–07. The majority does not explain why it attributes only minimal rights to a passenger's possessory interest in his checked luggage.

¹⁶⁵ See *United States v. Place*, 462 U.S. 696, 708 (1983) ("Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on *both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary.*" (emphasis added)). The natural implication of this language is that for cases in which the detention does not involve luggage in a traveler's immediate possession, that is, checked luggage, police conduct may still intrude on such traveler's possessory interest.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* This view in *Place* comports with the *Jacobsen* Court's description of the roots of its property seizure jurisprudence. See *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) (stating that a seizure of property occurs when there is meaningful interference with possessory interests).

¹⁶⁸ See *supra* note 165.

1. *Jacobsen: A Clear Seizure*

The *Va Lerie* majority ignored the significance of the Supreme Court's finding in *Jacobsen* that a seizure had occurred when federal agents detained a Federal Express package. In *Jacobsen*, the Court found that because there was a "meaningful interference with a possessory interest,"¹⁶⁹ a seizure had occurred when government agents detained a Federal Express package while en route to its destination.¹⁷⁰ If a possessory interest was meaningfully interfered with when the package, unaccompanied by its owner, was detained without endangering timely delivery,¹⁷¹ then such possessory interest is at least as great as a contractual expectation to reclaim possession of an item at the end of its journey.¹⁷² Further, if the Federal Express package case was a clear one,¹⁷³ the case is at least as clear when a passenger is actually accompanying his personal belongings, even though they may not be in the passenger's direct possession.¹⁷⁴

2. *Narrowing the Possessory Interest Involved*

The *Va Lerie* majority's assertion that a traveler's possessory interest is greatly diminished when he checks his baggage, such that his only expectation is to pick it up at the baggage terminal upon arrival, misconstrues travelers' expectations as to how their personal belongings will be handled. The majority takes the basic fact that others must handle checked baggage in order for it to arrive at its destination as implying that the possessory interest that attaches to such baggage is the bare minimum expectation to reclaim possession.¹⁷⁵ However, some modes of transportation, such as the bus, allow passengers to access their checked bags if necessary throughout the trip, indicating that there is more of a possessory interest than the majority acknowledges.¹⁷⁶ Furthermore, when evaluating the possessory interest involved, one should consider the basic property principle that one's ownership entails the right to exclude others.¹⁷⁷ However, the majority goes too far by treating a traveler's checking of his baggage as

¹⁶⁹ *Jacobsen*, 466 U.S. at 113.

¹⁷⁰ *See id.* at 120.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.* at 122 n.18.

¹⁷⁴ *See id.*

¹⁷⁵ *See United States v. Va Lerie*, 424 F.3d 694, 706 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

¹⁷⁶ While airline travel clearly does not allow for such access, others do, and the test in *Va Lerie* would apply to detainments of checked baggage regardless of the mode of transportation.

¹⁷⁷ *See BLACK'S LAW DICTIONARY* 1201 (8th ed. 2004) (defining possession as "the right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object").

consent not only to necessary handling but also to possibly unreasonable detainments by law enforcement.¹⁷⁸

This inappropriate narrowing of the interest involved is even clearer when comparing the facts in *Va Lerie* and *Jacobsen*. The *Va Lerie* majority found no seizure even though *Va Lerie* was on the same bus as his bag, could access it at stops, and expected to reclaim possession.¹⁷⁹ The Supreme Court, on the other hand, found meaningful interference with a possessory interest in *Jacobsen*,¹⁸⁰ where the owners did not accompany the package, and so could not access it, and did not expect to regain possession of it.¹⁸¹ Put differently, the *Va Lerie* majority would find *Jacobsen* to be an even weaker case for seizure, despite the fact that the Supreme Court did not view the question as close.¹⁸²

Additionally, the *Va Lerie* majority's approach goes against common sense and experience, as travelers would generally prefer to hold onto their personal items throughout their journeys.¹⁸³ Although the extra time involved with checking and retrieving baggage in addition to the chance that it may not reach the traveler's destination might partially explain the majority's conclusion of a lesser possessory interest in checked baggage, those factors also indicate travelers' general desire to avoid relinquishing custody of their personal belongings.¹⁸⁴ It is reasonable to infer that many travelers would prefer not to check their personal belongings, but rather are forced to do so by practical concerns.¹⁸⁵

¹⁷⁸ See *Va Lerie*, 424 F.3d at 707.

¹⁷⁹ See *id.* at 708–09.

¹⁸⁰ See 466 U.S. 109, 120 (1984).

¹⁸¹ See *id.* at 111–13.

¹⁸² See *supra* Part III.A.1.

¹⁸³ But see Chuck McCutcheon, *Air Passengers Devise Means to Minimize Luggage Hassles*, NEWHOUSE NEWS SERVICE (2003), <http://www.newhousenews.com/archive/mccutcheon071003.html> (observing that while there has been a trend among airline passengers to check less luggage, many people now prefer to check luggage due to onerous carry-on luggage security procedures).

¹⁸⁴ One can point to the common complaint that checking luggage with an airline can be a risky endeavor. See AIR TRAVEL CONSUMER REPORT, AVIATION CONSUMER PROTECTION DIVISION, DOT 25 (2005), <http://airconsumer.ost.dot.gov/reports/2005/November/0511atcr.pdf>; DOT Aviation Consumer Protection Division, *Tips on Avoiding Baggage Problems*, <http://airconsumer.ost.dot.gov/publications/bagtips.htm> (noting that although “relatively few bags are damaged or lost,” travelers should avoid putting valuables, critical items and irreplaceable items in checked luggage).

¹⁸⁵ It is logical to infer that most people would rather retain custody of all their belongings, or at least keep them in the immediate vicinity, but are unable to do so due to obvious space restraints. See, e.g., Travel Information Baggage Information, http://www.greyhound.com/travel_information/baggage.shtml (last visited Sept. 7, 2006) (discussing the restrictions on carry-on and checked luggage); American Airlines, Carry-on Allowance, <http://www.aa.com/content/travelInformation/baggage/carryOnAllowance.jhtml> (last visited Sept. 7, 2006) (discussing limitations on what passengers can bring on planes).

Thus, based on common sense as well as the Supreme Court's holdings in both *Place* and *Jacobsen*, it is clear that travelers do, in fact, retain a possessory interest in their personal belongings checked with common carriers beyond mere repossession at their destinations.¹⁸⁶ Moreover, the alternative—that the possessory interest that exists in these situations is merely contractual—is completely unworkable.

3. *Unworkable Standard*

The view that the possessory interest in checked baggage is merely contractual, entailing only an expectation of timely repossession from a third party, allows the interest to be dismissed too easily. By diminishing the possessory interest involved, the contractual view allows government agents or common carriers to engage in undesirable conduct.

In practice, applying the narrow possessory interest recognized by the *Va Lerie* majority would lead to strange results. For instance, it seems inconceivable that when a traveler checks his bags with a third-party carrier, his only possessory interest in his bags is that when he arrives at his destination, the bags are there. If an employee of the common carrier rummaged through the traveler's bags out of sheer curiosity or used the traveler's personal belongings as his own, one would be hard pressed to say that such action did not violate the traveler's possessory interest, even though such activity may not affect the timely delivery of the bags.¹⁸⁷ Nevertheless, because the test articulated by the *Va Lerie* majority describes the possessory interest so narrowly, such undesirable treatment would not interfere with the traveler's possessory interest as long as his bags arrived at their destination on time.¹⁸⁸

Describing a traveler's possessory interest as simply a contractual interest in having his baggage arrive on time also allows courts to engage in inappropriate hypothetical calculations that make it easier for them to disregard the possessory interest.¹⁸⁹ Whenever a bag is detained, the *Va Lerie* majority would first ask whether the bag would still

¹⁸⁶ See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Place*, 462 U.S. 696, 705 (1983) ("The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent.").

¹⁸⁷ Because law enforcement would not be involved, this would not implicate the Fourth Amendment, see U.S. CONST. amend. IV, but the important point is that individuals retain more than a mere contractual interest in their personal belongings checked with a common carrier.

¹⁸⁸ See *United States v. Va Lerie*, 424 F.3d 694, 706–07 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006). Conversely, if a common carrier were late in its delivery, even with a reasonable justification, this would automatically frustrate a traveler's expectation of timely delivery and implicate his sole possessory interest as defined by the *Va Lerie* majority.

¹⁸⁹ To find that timely delivery would not have been frustrated, a court might, for example, look at the probability that a connecting flight would have taken off late, or

have arrived on time assuming no intervening events, such as a positive dog sniff, that justified further detainment.¹⁹⁰ This analysis falls short because it is far too easy to argue that Herculean efforts, however unrealistic, could have been employed to ensure that the bag would have reached its destination on time. For example, even though the Seventh Circuit in *Ward* found a seizure when the traveler's bag was removed from the bus and held for canine inspection when the bus was scheduled for imminent departure,¹⁹¹ the Seventh Circuit indicated that alternative and speedier methods of transporting the detained baggage to its destination on time could appropriately be considered in the reasonableness analysis.¹⁹²

In *Ward*, the Seventh Circuit essentially eviscerated the already limited contractual possessory interest, thus demonstrating the consequences of defining the interest so narrowly in the first place.¹⁹³ The Seventh Circuit first reluctantly found that a potential delay constituted a seizure,¹⁹⁴ but then went on to rule that the seizure was a reasonable violation of the traveler's possessory interest.¹⁹⁵ The Seventh Circuit claimed that in the context of a two-day trip by bus,¹⁹⁶ a "relatively slow means of transport,"¹⁹⁷ a delay of three hours and fifteen minutes was reasonable.¹⁹⁸ The ease with which a court may dismiss a passenger's "only interest"¹⁹⁹ is alarming and shows how simple it is to maneuver around such a narrowly defined interest.²⁰⁰ Furthermore, when a law enforcement agent effects a seizure by detaining checked baggage in a manner that threatens timely delivery, but subsequently discovers nothing during the search, there is no incentive to deliver the baggage in a timely manner since suppression of evidence is irrelevant as there is no crime alleged. However, even if the agent does find enough evidence to detain or arrest the owner of the baggage, then courts, as previously discussed, can still dismiss the timely delivery is-

might even assume that a helicopter would have been available to avoid traffic and reconnect a detained bag with its original carrier, even though such a scenario is highly unlikely.

¹⁹⁰ See *Va Lerie*, 424 F.3d at 706–07.

¹⁹¹ See *United States v. Ward*, 144 F.3d 1024, 1033 (7th Cir. 1998).

¹⁹² See *id.* at 1034 n.5 (considering methods for getting the bag to Indianapolis on time despite the bus leaving without it).

¹⁹³ See *id.* at 1034–35 (limiting the scope of the passenger's interest by focusing on the length of the delay, not the nature of the intrusion); see also *Va Lerie*, 424 F.3d at 705 (discussing *Ward*).

¹⁹⁴ See *Ward*, 144 F.3d at 1034–35.

¹⁹⁵ See *id.* at 1035.

¹⁹⁶ See *id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ *United States v. Johnson*, 990 F.2d 1129, 1132 (9th Cir. 1993).

²⁰⁰ See *United States v. Va Lerie*, 424 F.3d 694, 704 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006). This kind of maneuvering directly contravenes the goal of reaching a seizure jurisprudence that is principled and consistent in its application.

sue through unlikely hypothetical calculations. As a result, the limited possessory interest based on a contractual view greatly reduces incentives for law enforcement to both minimize inappropriate detentions as well as to ensure timely delivery of checked baggage.

B. Defining the Possessory Interest Involved: A Realistic View of Custody

A reading of *Jacobsen* indicates that the exact nature of the possessory interest retained in checked baggage is unclear. However, one can infer from *Jacobsen* that the interest is the expectation that the common carrier will treat personal belongings in a manner consistent with the traveler's expectations.²⁰¹ This means that any handling must be consistent with the purpose for which the common carrier has been employed. Following this logic, the *Jacobsen* Court found that Federal Express infringed upon the Jacobsens' possessory interest when it failed to maintain custody and allowed the DEA agents to use the package for their own purposes.²⁰² The Jacobsens used Federal Express's services to move their package from its starting point to its destination, and giving up custody to the DEA conflicted with this purpose.²⁰³ When viewed in this way, the flaw in the *Va Lerie* majority's seizure analysis becomes clear—its test relating to custody is unrealistic.²⁰⁴

1. *Dominion and Control*

Rather than follow the *Jacobsen* Court's approach to custody, which realistically looks at dominion and control, the majority in *Va Lerie* defined custody in a manner that courts cannot consistently apply.²⁰⁵ In *Jacobsen*, the Supreme Court viewed custody as a question of dominion and control, finding that the DEA exerted dominion and control when agents took possession of the Jacobsens' package.²⁰⁶ Previous Eighth Circuit cases took a similar view, focusing on whether law enforcement had exerted dominion and control over packages in determining whether seizures had occurred.²⁰⁷ The *Va Lerie* dissent

²⁰¹ See 466 U.S. 109, 120 n.18 (1984).

²⁰² See *id.* at 120 n.18.

²⁰³ See *id.* The *Jacobsen* Court noted that the DEA meaningfully interfered with the Jacobsens' possessory interest, not only because the DEA agents took custody of the package, but also because they took custody for "their own purposes." *Id.* at 121 n.18.

²⁰⁴ See 424 F.3d at 706–07.

²⁰⁵ See *id.* at 703, 708 (laying out the standard); see also *id.* at 713 n.12, 713–14 (Colton, J., dissenting) (discussing the incongruence between the majority's holding and the *Jacobsen* decision).

²⁰⁶ See 466 U.S. at 120 n.18.

²⁰⁷ See *United States v. Morones*, 355 F.3d 1108 (8th Cir. 2004) (finding a seizure when an officer removed a Federal Express package from the "mail stream"); *United States v. Walker*, 324 F.3d 1032 (8th Cir. 2003) (noting that bringing a package into another room

similarly described custody as taking “possession and control”²⁰⁸ and viewed law enforcement’s actions in both *Jacobsen* and *Va Lerie* as taking possession and control for their own investigative purposes.²⁰⁹ Under either the “dominion and control” or “possession and control” standard, it is difficult to differentiate the actions of the DEA agents in *Jacobsen* from the NSP officers’ actions in *Va Lerie*.²¹⁰ In *Va Lerie*, the NSP officers themselves removed the bag from the luggage compartment and brought it inside, which by any fair analysis constitutes dominion and control.²¹¹ However, the majority pointed to the policy of removing bags to obtain owner consent to search, a policy that was adopted by the NSP at Greyhound’s prompting, as evidence that the NSP officers removed the bag *at the request* of Greyhound, and argued that therefore Greyhound retained custody of the bag.²¹²

Characterizing the bag’s removal as something done only at the request of Greyhound is disingenuous because such a characterization ignores the fact that the NSP’s desire to detain the bag was what drove Greyhound’s response in the first place. Greyhound did not initiate the request that the bag be removed, but only reacted to the NSP’s request to detain it.²¹³ Furthermore, the NSP officers removed the bag without help from Greyhound employees,²¹⁴ driven by a desire to detain and eventually search the bag.²¹⁵ Under a *Jacobsen*-like analysis, it is clear that the NSP exerted dominion and control over the bag in *Va Lerie*. However, the majority in *Va Lerie*, rather than follow its own

is sufficient to effect a seizure); *United States v. Gomez*, 312 F.3d 920 (8th Cir. 2002) (finding a seizure when an officer removed a package from the conveyor belt for inspection and opted not to return it to the conveyor belt). *But see* *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992) (finding that when an officer removed a passenger’s bag from the overhead compartment for the purpose of a dog sniff, no seizure had occurred because travel would not have been interrupted had the dog sniff not indicated contraband).

²⁰⁸ 424 F.3d at 712 (Colloton, J., dissenting).

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.* at 709 n.9 (majority opinion). The dissent took issue with the majority’s reliance on Investigator Eberle’s contention that Greyhound maintained custody of the bag. *See id.* at 713 n.12 (Colloton, J., dissenting) (“The subjective belief or assertion of an NSP investigator that *Va Lerie*’s bag ‘was not in our custody,’ certainly is not dispositive.” (citation omitted)); *see also* *United States v. Va Lerie*, 385 F.3d 1141, 1146 (8th Cir. 2004) (noting Investigator Eberle’s contention that Greyhound retained custody of the bag), *rev’d en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

²¹³ From the majority’s own description of the facts, it is clear that the NSP investigators removed the bag for their own purposes. *See Va Lerie*, 424 F.3d at 696–97.

²¹⁴ *See id.* It is questionable whether involving a Greyhound representative would make any difference in the analysis.

²¹⁵ *See id.* While it is unclear whether doing so would have threatened a delay, the NSP investigators could have waited until the bus moved out of the refueling area or reboarding began to locate *Va Lerie* and then attempt to receive consent to remove the bag.

precedent as well as Supreme Court jurisprudence, took a wholly different approach to the custody issue.²¹⁶

2. Purpose

The majority in *Va Lerie* followed the approach in *Ward*, under which custody is viewed as a question of “the passenger’s reasonable expectations for how the passenger’s luggage might be handled.”²¹⁷ Under this approach, any action that a passenger would reasonably expect the common carrier to take, including requesting action from others, is acceptable.²¹⁸ Therefore, if a passenger could reasonably expect that Greyhound employees might remove baggage from the bus from time to time, at refueling stops for example, or that other passengers might move bags around, then law enforcement is permitted to do the same.²¹⁹ However, this approach is misleading because it only examines how common carriers or other passengers may handle baggage without addressing the *purpose* of such handling.

²¹⁶ See *id.* at 707 n.7.

²¹⁷ *Id.* The majority did not explain why it avoided the Supreme Court approach. While courts often consider expectations in the context of searches to determine if a search violated an expectation of privacy, these expectations may also overlap into the reasonable expectation analysis of the custody question. See *Bond v. United States*, 529 U.S. 334 (2000) (discussing the interaction between an expectation of privacy and Fourth Amendment rights); Rudstein, *supra* note 32 (addressing “poofing” or “prepping” in relation to expectations of privacy).

²¹⁸ See *Va Lerie*, 424 F.3d at 707 n.7; *United States v. Ward*, 144 F.3d 1024, 1032 (7th Cir. 1998). If one does not view the NSP as removing the luggage at Greyhound’s request, then it is easy to conclude that *Va Lerie* had no reasonable expectation that people other than Greyhound employees or passengers would be removing luggage from the lower compartment.

²¹⁹ See *Va Lerie*, 424 F.3d at 706–07 (noting that passengers should expect a fair amount of handling, otherwise their checked luggage could not reach their destinations); *Ward*, 144 F.3d at 1032 (stating that there was “no reasonable expectation . . . that the bag would not be touched, handled, or even removed from the bus”); *United States v. Bronstein*, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring) (stating that it is common knowledge that checked luggage will be handled by many people who “may feel it, weigh it . . . and shake it”); see also *United States v. McDonald*, 100 F.3d 1320, 1326 (7th Cir. 1996) (“[T]he feeling and pressing of McDonald’s bags that the police officers undertook in the present case was nothing more than McDonald might expect from others, bus employees as well as passengers on the bus, moving luggage to adjust, remove, or make room for their baggage.”); *State v. Lancelotti*, 595 N.W.2d 558, 563 (Neb. Ct. App. 1999) (noting that the law enforcement officer’s touching of the bag “went beyond the type of touch that a person could reasonably expect from another passenger”); John Flinn, *Confessions of a Once-Only Carry-On Guy*, S.F. EXAMINER, Sept. 6, 1998, at T2 (discussing the trials and tribulations of stuffing carry-on luggage into an overhead compartment, including having an airline employee do much of the work and rearranging the bags of others).

C. Proper Seizure Definition

While “[m]ere handling” does not necessarily implicate Fourth Amendment seizure concerns,²²⁰ *Jacobsen* clearly stands for the proposition that such handling for law enforcement’s own purposes constitutes a seizure.²²¹ Therefore, when analyzing the custody issue, the purpose for which the law enforcement agents take custody is essential in determining if there is meaningful interference with a possessory interest. Passengers checking their baggage do not expect the common carrier to move or sort the bags for just any purpose, but instead expect the carrier’s employees to move or sort them *only as a necessary* incident to getting the bags where they need to go.²²²

The idea that passengers expect the common carrier to handle their baggage only in furtherance of getting the baggage to its destination is essential in understanding the relationship between the possessory interest and government detainment. After properly focusing on the role that purpose plays in the seizure inquiry, it becomes clear that if the handling occurs for an unexpected purpose, the custodial chain is broken.²²³ As a result, the *Va Lerie* majority’s analysis of reasonable expectations impermissibly broadened the purpose question that was essential to the holding in *Jacobsen*. If law enforcement agents handle checked baggage, thereby exerting dominion and control, and do so for their own purposes, then there is a meaningful interference with the traveler’s possessory interest according to *Jacobsen*. By allowing a reasonable expectation analysis to affect what the Supreme Court treated in a more straightforward manner,²²⁴ the *Va Lerie* majority’s approach to the definition of a seizure is likely to lead to results that diverge from what *Jacobsen* dictates. As such, given that the *Va Lerie* majority’s seizure definition contradicts the only clear Supreme Court precedent in this area,²²⁵ such definition does not allow for principled

²²⁰ *United States v. Terriques*, 319 F.3d 1051, 1055 (8th Cir. 2003); *see United States v. Karo*, 468 U.S. 705 (1984) (stating that mere technical trespass is insufficient to constitute a seizure).

²²¹ *See United States v. Jacobsen*, 466 U.S. 109, 120 n.18 (1984).

²²² *Cf. Va Lerie*, 424 F.3d at 706 (noting that passengers should expect a fair amount of handling, otherwise their checked luggage could not reach their destinations).

²²³ *See United States v. Morones*, 355 F.3d 1108, 1111 (8th Cir. 2004) (noting that as soon as the package was removed by law enforcement officers, a seizure had occurred, without focusing on the fact that Federal Express employees could have removed the package themselves); *United States v. Walker*, 324 F.3d 1032, 1036 (8th Cir. 2003) (stating that a postal inspector’s detention of the package is not part of the typical path of a package).

²²⁴ The *Jacobsen* Court did not struggle in concluding that the DEA agents took custody of the bag. *See* 466 U.S. at 120 n.18.

²²⁵ *See id.* at 109. The fact that *Jacobsen* would have come out differently if the Court had applied the *Va Lerie* majority’s test indicates that the cases are in conflict; it is evident that any differentiation is at best semantic or disingenuous. *See Va Lerie*, 424 F.3d at 712 (Colloton, J., dissenting).

and consistent application and a clearer definition therefore is required.

The correct test for defining a seizure would adhere closely to the principles the Supreme Court set forth in *Jacobsen* and focus on whether law enforcement agents exerted dominion and control over the baggage for their own purposes.²²⁶ Additionally, by looking at the purpose for which custody changed hands, the test would not only incorporate the Court's clear language and intent,²²⁷ but also realistically examine how and to what end the passenger reasonably expected that other individuals would handle his personal belongings.²²⁸

Under *Jacobsen*, removing the bag and placing it inside the terminal would have constituted a seizure and *Va Lerie* would have come out differently.²²⁹ *Va Lerie* reasonably expected that Greyhound employees would maintain possession and control over the bag and handle it in a manner consistent with the purpose for which *Va Lerie* employed Greyhound: to transport the bag, on the same bus as *Va Lerie*, to his destination. When the NSP officers removed *Va Lerie's* bag in an attempt to obtain consent to search it, they exerted dominion and control over it for their own purposes and effected a seizure under the Fourth Amendment.²³⁰

Closely following the Supreme Court's reasoning in *Jacobsen* allows for a consistent approach to seizures in the travel context without compromising Americans' safety. Essentially, following *Jacobsen* pushes detentions that might constitute seizures toward a reasonableness analysis, allowing courts to ensure that law enforcement is not overreaching.²³¹ It is through this reasonableness analysis that courts can properly weigh the interests of law enforcement and the safety of other travelers against the right to be free from illegal government intrusions. Indeed, this standard resulted in an acceptable result in *Jacobsen*, as the Court found the seizure to be reasonable in light of the overall circumstances surrounding it.²³²

²²⁶ See *Jacobsen*, 466 U.S. at 120 n.18.

²²⁷ See *id.*

²²⁸ See *supra* Part III.B.

²²⁹ See *Va Lerie*, 424 F.3d at 712 (Colloton, J., dissenting).

²³⁰ See *Jacobsen*, 466 U.S. at 120 n.18. Consequently, the Eighth Circuit should have affirmed the district court ruling and suppressed the evidence.

²³¹ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (emphasizing the importance of Fourth Amendment analysis even when "full-blown" detentions or "technical" arrests have not occurred).

²³² See *Jacobsen*, 466 U.S. at 120-21 ("While the agents' assertion of dominion and control over the package and its contents did constitute a 'seizure,' that seizure was not unreasonable."). In analyzing the field test, the Court also noted the "suspicious nature" of the package and that the "law enforcement interests justifying the procedure were substantial." *Id.* at 125.

D. Real World Application: TSA and Reasonableness

The application of a clearer standard that looks at dominion and control in light of purpose and traveler expectations transfers readily into the real world. After the terrorist attacks of September 11, 2001, the federal government took control of aviation security, with Transportation Security Administration (TSA) workers now screening all checked baggage.²³³ While the various modes of transportation have their own unique threats and security mechanisms to guard against them, the Fourth Amendment does not cease to operate in the aviation context merely because of a perceived greater threat, even though such perception does inform the seizure analysis. Unlike bus or rail travelers who simply transfer custody to a common carrier, airline passengers are well aware that airline employees provide customer service, but TSA employees do the actual handling of their bags. In fact, airline passengers have grown accustomed in many situations to checking their bags with the airline, only to then move the bags themselves to the screening area and a TSA employee. Just as a bus passenger expects a bus employee or fellow passenger to handle his checked baggage in a reasonable manner and for reasonably expected purposes, so does an airline passenger expect TSA employees to handle his baggage for limited purposes. Given TSA's visible presence and its responsibility for aviation security, airline passengers now entertain reasonable expectations that TSA employees will screen their baggage.²³⁴

However, detainment of such checked baggage is different than a superficial investigation of it in that a detainment halts the baggage's natural path. As a result, TSA's own purposes for screening baggage overtake those of the traveler who submitted to screening only as an incident to getting his baggage on the plane. Once TSA's own purposes govern the handling of the baggage, TSA exerts dominion and control over the baggage and effects a seizure. If TSA agents may detain checked baggage for any reason or for no reason at all, the Fourth Amendment truly would cease to operate in the aviation context. However, this conclusion does not deem all TSA detentions unconstitutional, but merely requires that they have some reasonable

²³³ See Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of the U.S.C.A.); 49 U.S.C. § 44901 (2000); TSA: What We Do, Baggage Screening, http://www.tsa.gov/what_we_do/screening/schecked_baggage.shtml (last visited Sept. 14, 2006) (“[W]e have fielded sophisticated technology solutions to screen all [passengers’] luggage . . .”).

²³⁴ See *United States v. Va Lerie*, No. 8:03-CR-23, 2003 WL 21956437, at *3 n.1 (D. Neb. Aug. 14, 2003) (noting that “air travelers can no longer have a subjective expectation of privacy in luggage or personal property” while “train or bus travelers can at least argue that they have a subjective expectation of privacy”), *rev'd en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

basis.²³⁵ Otherwise, TSA would act without any check at all. Still, it would be difficult to show that a TSA seizure was unreasonable in light of the thorough screening process, the unique vulnerabilities of air travel as compared to other forms of travel, and the fact that terrorists have already successfully targeted the U.S. aviation system. The TSA detention situation serves as a good example of how a clearer seizure standard provides a better framework for protecting civil liberties without sacrificing security.

Toward a similar end, the Supreme Court has made it clear that in exigent circumstances, the Fourth Amendment can bend to allow law enforcement to intervene.²³⁶ When a court finds a seizure, it may be constitutional if at a minimum, the government authorities conducting the seizure had a reasonable and articulable suspicion of illicit activity at the time.²³⁷ Thus, while seizures are generally unreasonable unless supported by probable cause,²³⁸ the real question in evaluating the constitutionality of a seizure is its reasonableness under the circumstances, taking into account all of the competing interests involved.²³⁹ The Supreme Court has recognized that some limited intrusions through seizures of persons or property are “justified by such substantial law enforcement interests that they may be made on less than probable cause.”²⁴⁰ The Court’s view here

²³⁵ See *Jacobsen*, 466 U.S. at 136–37 (Brennan, J., dissenting) (discussing the requirement that a search or seizure have a reasonable basis, and cautioning against the use of narrow definitions for searches and seizures).

²³⁶ See, e.g., *Payton v. New York*, 445 U.S. 573, 587–88 (1980) (noting the importance of exigent circumstances in determining whether full Fourth Amendment protections apply); *Arkansas v. Sanders*, 442 U.S. 753, 763 n.11 (1979) (stating, in a case involving a warrantless search for weapons, that there “may be cases in which the special exigencies of the situation” would alter the Fourth Amendment reasonableness analysis).

²³⁷ See *Michigan v. Summers*, 452 U.S. 692, 699 (1981) (“[S]ome seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity.”); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”); *Investigation and Police Practices*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 5, 19 (2004).

²³⁸ See *Summers*, 452 U.S. at 700 (“[E]very seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause.”); *Henry v. United States*, 361 U.S. 98, 100 (1959) (“The requirement of probable cause has roots that are deep in our history.”).

²³⁹ See *Terry*, 392 U.S. at 19 (“[T]he central inquiry under the Fourth Amendment . . . [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”).

²⁴⁰ *Summers*, 452 U.S. at 699. In *United States v. Place*, the Supreme Court noted: We must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual’s Fourth Amendment

is quite pragmatic, recognizing that in some cases “substantial” or “special” law enforcement interests require a slight loosening in the probable cause requirement to better serve the public interest.²⁴¹ Therefore, it is a fair inference that substantial law enforcement interests are more likely to justify and to deem reasonable a seizure of personal property, especially when such a seizure does not affect a person’s liberty interests.

Even though the result would be the same whether a court decided that *no seizure* occurred or that a *reasonable seizure* occurred, the appropriate way to balance the competing interests is to ensure that questionable detentions are subject to a reasonableness analysis. Therefore, the type of seizure analysis used is critically important in situations in which an unreasonable detention clearly occurred because a court could incorrectly determine that, in fact, no seizure took place depending on which framework it applied, and, as such, could permit otherwise unconstitutional conduct.²⁴² By ensuring that all such seizures of personal property are subject to reasonableness scrutiny, courts will be better able to consider the various circumstances of law enforcement agents’ actions and reach a more appropriate balance between the interests of law enforcement in an increasingly dangerous environment and the principles of liberty protected by the Fourth Amendment.

CONCLUSION

The Fourth Amendment’s prohibition of unreasonable seizures protects American society’s fundamental interest in ensuring that citizens will be free from governmental intrusions and abuses of power. Though the Supreme Court has rarely addressed the issue of what constitutes a seizure as it relates to personal belongings checked with common carriers, it spoke clearly when the issue was before it.²⁴³ Consequently, Supreme Court jurisprudence is clear that when law enforcement agents exert dominion and control over a traveler’s checked baggage for their own purposes, a seizure has occurred, and such seizure must not be unreasonable.²⁴⁴

interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

462 U.S. 696, 703 (1983); see *Terry*, 392 U.S. at 20–21; *Investigation and Police Practices*, *supra* note 237.

²⁴¹ *Summers*, 452 U.S. at 699–700.

²⁴² This is the danger presented by the facts in *Va Lerie*. See 385 F.3d 1141, 1150 (8th Cir. 2004) (Melloy, J., concurring) (“[T]he government expressly conceded that there was no reasonable suspicion to remove Mr. Va Lerie’s luggage.”), *rev’d en banc*, 424 F.3d 694 (8th Cir. 2005), *cert. denied*, 126 S.Ct. 2966 (2006).

²⁴³ See *United States v. Jacobsen*, 466 U.S. 109, 120 n.18.

²⁴⁴ See *id.*

In *Va Lerie*, the Eighth Circuit redefined custody in a manner that is unworkable and conflicts with the Supreme Court's approach.²⁴⁵ The *Va Lerie* definition diminishes travelers' interests in their personal belongings merely because they have checked them with a common carrier.²⁴⁶ Because it looks at possessory interests and custody in a manner that lacks a clear and logical framework, the *Va Lerie* majority's seizure definition is likely to result in inconsistent application and decisions that conflict with the Supreme Court's approach. Law enforcement actions that "clearly constitute[]" a seizure under Supreme Court precedent²⁴⁷ are nevertheless open to the wide discretion of judges,²⁴⁸ giving them more flexibility to avoid the reasonableness analysis, a valuable safeguard of constitutional rights.²⁴⁹

The U.S. transportation system is vast, unwieldy, and extremely difficult to protect adequately, which is cause for concern in light of the threat of terrorist attacks. While the tendency to narrow the seizure definition in the current environment is somewhat understandable, it is undesirable when bedrock constitutional rights are at stake, and especially when doing so contravenes clear Supreme Court precedent. By calling a seizure a seizure, courts will protect citizens against impermissible government intrusions while still allowing law enforcement to ensure transportation security. An unworkable and unprincipled approach to seizures impermissibly allows the bypassing of the constitutional safety net that a reasonableness inquiry affords, and as both the majority and dissent agree in *Va Lerie*, such an unpredictable approach is unacceptable in a democratic society.

²⁴⁵ See *supra* Part III.A.1.

²⁴⁶ See *supra* Part III.A.2.

²⁴⁷ *Jacobsen*, 466 U.S. at 120 n.18.

²⁴⁸ See *supra* Part III.A.3.

²⁴⁹ Ironically, the *Va Lerie* majority showed the importance of this type of analysis in weighing the interests involved by engaging in a sort of reasonableness analysis of travelers' expectations when it concluded that no seizure had occurred. See 424 F.3d 694, 708 (8th Cir. 2005) (establishing factors for courts to consider when confronted with seizure cases that examine travelers' reasonable expectations), *cert. denied*, 126 S.Ct. 2966 (2006). However, the majority bypassed the more comprehensive reasonableness analysis that would otherwise apply if it had held that a seizure had, in fact, occurred.