3. Let’s return to *Terry* and its impact on Fourth Amendment law. Professor Amar has argued that “in place of the misguided notions that every search or seizure always requires a warrant, and always requires probable cause,” *Terry* properly insisted “that the Fourth Amendment means what it says and says what it means; All searches and seizures must be reasonable.” Akhil Reed Amar, *Terry* and Fourth Amendment First Principles, 72 St. John’s L. Rev. 1097, 1098 (1997). He goes on to contend that *Terry* accurately identified some of the basic components of Fourth Amendment reasonableness:

Reasonable intrusions must be *proportionate* to legitimate governmental purposes—more intrusive government action requires more justification. Reasonableness must focus not only on privacy and secrecy but also on bodily integrity and personal dignity: Cops act unreasonably not just when they paw through my pockets without good reason, but also when they beat me up for fun or toy with me for sport. Reasonableness also implicates race—a complete Fourth Amendment analysis must be sensitive to the possibility of racial oppression and harassment.

Id. No doubt Amar correctly identifies aspects of what a reasonableness approach to Fourth Amendment interpretation should encompass. But what about the merits of adopting such an approach in the first place? *Terry* significantly changed existing law by employing a balancing test to hold that the police could subject individual criminal suspects to a Fourth Amendment intrusion without probable cause. Others have suggested that the case thus “unwittingly cracked the door for a decline in the role of traditional probable cause,” thus jeopardizing “the foundation of Fourth Amendment safeguards.” See Scott E. Sundby, An Ode to Probable Cause, 72 St. John’s L. Rev. 1133, 1134 (1997). Under what circumstances should a particular police practice qualify for assessment under *Terry’s* balancing test?

4. The Court made clear that some types of police intrusion would not qualify for such consideration in Dunaway v. New York, 442 U.S. 200 (1979). In that case the defendant, a murder suspect, was taken into custody without probable cause, and “although he was not told he was under arrest, he would have been physically restrained if he had attempted to leave.” He was questioned while in custody and made incriminating statements that were used against him at his murder trial. The Court, in an opinion by Justice Brennan, ruled that the statements were the fruits of an illegal seizure:

Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that “seizures” such as that in this case may be justified by mere “reasonable suspicion.” *Terry* and its progeny clearly do not support such a result. The narrow intrusions involved in those cases were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the “long-prevailing standards” of probable cause only because these intrusions fell far short of the kind of intrusion associated with an arrest. . . .
Reasonableness

... The detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry, and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

Id. at 211-212.

5. Dunaway refused to extend Terry's balancing test to cover all seizures falling short of a technical arrest. It's important to note, however, that by the time Dunaway was decided, the Terry "progeny" to which it referred had already considerably expanded Terry's scope along the lines suggested in Justice Harlan's concurrence. Thus, although the Terry Court carefully refrained from lending a constitutional imprimatur to the investigative "stop" (meaning the temporary detention of an individual for investigative purposes), later decisions clearly upheld such detentions so long as police had some articulate basis for suspecting criminal activity.

These later cases also made clear that the suspected criminal activity legitimating an investigative stop need not involve a potential armed robbery, as in Terry. Indeed, by the 1990s, the more routine fact pattern to be found in "Terry stop" cases before the Court involved the detention of people passing through airports and suspected of being drug couriers. The Court addressed one such airport confrontation in Florida v. Royer, 460 U.S. 491 (1983):

On January 3, 1978, Royer was observed at Miami International Airport by two plainclothes detectives of the Dade County, Florida, Public Safety Department assigned to the county's Organized Crime Bureau, Narcotics Investigation Section. Detectives Johnson and Magdalena believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile." Royer, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination, "LaGuardia." As Royer made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a "moment" to speak with them; Royer said "Yes."

Upon request, but without oral consent, Royer produced for the detectives his airline ticket and his driver's license. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license carried respondent's correct name, "Royer." When the detectives asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact narcotics investigators and that they had reason to suspect him of transporting narcotics.