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The Fourth Amendment and the Control of Police Discretion

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THE FOURTH AMENDMENT AND THE CONTROL OF POLICE DISCRETION

by William J. Mertens*

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I. INTRODUCTION

A. "Interest balancing" v. "discretion control"

The fourth amendment protects the security of people's "persons, houses, papers, and effects" in two distinct (if overlapping) ways. First, it requires a sufficiently weighty public interest before the government's agents are allowed to search or seize. Thus, for example, probable cause is required for arrest. Whatever uncertainty there may be in the phrase "probable cause"¹ (and, for that matter, however indefinite the idea of "arrest" may have become),² in this context, at least, the probable cause standard requires the demonstration of objective facts that point with some probability to the guilt for some particular offense of the person arrested. As the Supreme Court stated in its 1949 decision, *Brinegar v. United States*,³ "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the arrestee]."⁴ The governmental interest ultimately served by arrest is of course the enforcement of the

1. The most immediate source of uncertainty is the Supreme Court's decision in *Illinois v. Gates*, 103 S. Ct. 2317 (1983), where, reversing a determination of the Illinois Supreme Court that an affidavit in support of a search warrant application was insufficient, the Court said that probable cause should be assessed under a "totality of the circumstances approach," *id.* at 2328; that it "is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules," *id.*; that it means "circumstances which warrant suspicion," *id.* at 2330, (quoting *Locke v. United States*, 7 Cranch 339, 348 (1813)); and that, with respect to searches, it requires only that there be a "a fair probability that contraband or evidence of a crime will be found." 103 S. Ct. at 2332.

Under the test suggested by these formulations — by which "[a]lmost everything [is] relevant, but almost nothing [is] decisive" — there is indeed cause to worry that this "new" probable cause will work about as well as the "old" voluntary confession standard, which with all its "fluidity" and "flexibility" accommodated law enforcement interests to a much greater extent than it accommodated what the *Gates* majority called 'private interests.' " Kamisar, *Gates*, "Probable Cause," "Good Faith," and *Beyond*, 69 IOWA L. REV. 551, 570-71 (1984) (footnote omitted).

2. See *infra* notes 243-70 and accompanying text.

3. 338 U.S. 160 (1949).

4. *Id.* at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

criminal laws. The arrest brings the suspected wrong-doer to book, and it may also permit discovery of additional incriminating evidence. Yet the probable cause standard insists upon a sufficient likelihood that this interest will in fact be served before an arrest may be made. It assesses the relative worth of the opposing interests — the public interest in law enforcement and the individual's right to be left alone — and identifies when the one must give way to the other. It tolerates some but not too much risk of the arrest of the innocent. This is the interest-balancing role of the fourth amendment. Second, the fourth amendment also performs a discretion control function. Even when the governmental interest at stake might otherwise justify a search or seizure, that search or seizure may be illegal if allowing it would confer too broad a discretionary authority on the police. There is, it is thought, a separate evil in leaving the police too much discretion to decide on their own where to search and whom and what to seize, under their own perhaps unknowable standards or under no standards at all. The *Brinegar* opinion adverted to this idea when it mentioned that permitting arrests on less than probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice."⁵ Anthony Amsterdam seems to have been referring to these two functions of the fourth amendment when he asked whether a fourth amendment that limits the opportunity for "indiscriminate searches" should not also be concerned "with discriminatory ones."⁶

B. *Delaware v. Prouse*

Among recent Supreme Court decisions on the fourth amendment, the 1979 case of *Delaware v. Prouse*,⁷ probably best illustrates the distinction between interest balancing and discretion control. At issue was the constitutionality of driving license and car registration "spot-checks" — i.e., the police practice, previously approved in several jurisdictions⁸ and disapproved in several others,⁹ of stopping a car on the open road for a check of the car's and the driver's papers, in the absence of any reasons to believe or even suspect that the occupants of the particular car were violating the law. In support of spotchecks, the state argued that the public interest in "ensuring the safety of its roadways" outweighed the opposing interest of travelers on the road

5. 338 U.S. at 176.

6. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974); see also *id.* at 411-12 & nn.513-20.

7. 440 U.S. 648 (1979).

8. *Id.* at 651 n.3 (approval in three states, the District of Columbia, and two federal circuits).

9. *Id.* at 651 n.2 (disapproval in three states and three federal circuits including that of the District of Columbia).

in avoiding the intrusion and momentary loss of liberty involved in police spotchecks.¹⁰ Prouse argued that the balance in fact swung the other way, but he also went further and asserted that spotchecks should not be allowed because the practice left to the unfettered discretion of the police the decision of whom to stop and whom to allow to proceed unmolested.¹¹

Eight members of the Supreme Court, joining in an opinion by Justice White, agreed with both of Prouse's arguments, but the Court's reasoning was decidedly more convincing on the second point than on the first. On both points the Court compared the on-the-road standardless stop for a spotcheck with a roadblock stop at which all oncoming traffic is detained for brief license and registration checks.¹² The roadblock, the Court said, could well be justifiable. First, the public interest in detecting unlicensed drivers and unregistered vehicles (an interest that the Court found was only minimally furthered by either roadblock stops or spotchecks)¹³ might then outweigh the individual interest, because roadblock stops, in the majority's view, were less intrusive.¹⁴ Spot-

10. *Id.* at 655, 658. The state's efforts to persuade the Court that serious interests were actually furthered by the authority of its officers to stop cars at will, rather than by some more measured power, was not much assisted by the casualness with which the New Castle County police evidently exercised this authority, as revealed in the testimony of Officer Anthony Joseph Avena, who stopped Prouse's car:

- Q. Going back to this stop that you made, what, again, was the purpose of it?
- A. Basically, I told Officer Humphrey I checked for license and registration, I had no other traffic violations or criminal activity.
- Q. Do you do this often during your duties as a patrol officer?
- A. I have done it before. I wouldn't say often, but I have done it before.
- Q. Do you do this in a random manner?
- A. Basically, yes.
- Q. Was it in a random manner you stopped the Defendant on that particular day?
- A. I saw the car in the area and wasn't answering any complaints, so I decided to pull them off.
- Q. You saw the car and had time to make a license check?
- A. That is right.
- Q. Do you make license checks when you have an opportunity, when you are not responding to other criminal complaints and other vehicles?
- A. I have done it several times. I don't make it a habit.

Record, joint app. at 9.

11. Brief for Respondent, *passim*, Delaware v. Prouse, 440 U.S. 648 (1979). Prouse's brief relies heavily on social science research that, the brief argues, demonstrates the proclivity of the police to discriminate in the exercise of broad discretionary grants of power to stop vehicles.

12. 440 U.S. at 655-57; *see also id.* at 663 & n.26 (suggesting that "[q]uestioning of all oncoming traffic at roadblock-type stop" or conducting "roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention" may be permissible).

13. *Id.* at 659 (noting that "[t]he foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations.").

14. *Id.* at 657.

checks, said the Court, "entail law-enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority."¹⁵ They "interfere with freedom of movement, are inconvenient, and consume time."¹⁶ They also "may cause substantial anxiety."¹⁷ Such stops thus differed from those at "roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community."¹⁸ Quoting from *United States v. Brignoni-Ponce*,¹⁹ the Court explained, "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority and he is much less likely to be frightened or annoyed by the intrusion."²⁰ On this analysis, roadblock stops, though no more productive per stop than spotchecks, were tolerable because they intruded less on the interests of the motorists. This line of thinking pro-

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. 422 U.S. 873 (1975).

20. *Delaware v. Prouse*, 440 U.S. at 657 (quoting *United States v. Brignoni-Ponce*, 422 U.S. at 894-85).

Prouse was decided upon principles developed in a series of cases involving the powers of U.S. Border Patrol agents to stop and search cars away from the international border to enforce the immigration law. See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *Brignoni-Ponce*; *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Border Patrol was entitled to stop all traffic at permanent, fixed checkpoints (*Martinez-Fuerte*) and had authority to stop cars on the open road for brief inquiry upon reasonable and articulable suspicion that they were carrying illegal aliens (*Brignoni-Ponce*), but was forbidden to conduct random, discretionary stops on the open road (*Brignoni-Ponce*), and full searches of the vehicles either on the open road (*Almeida-Sanchez*) or at permanent checkpoints (*Ortiz*) in the absence of probable cause. The Court looked to the principle of discretion control to determine when vehicles may be stopped. See *Brignoni-Ponce*, 422 U.S. at 882-83:

In context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers

[A] requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference

In *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983), however, the Court was divided on whether this principle rendered unconstitutional a federal statute that allowed customs officers "at any time" and for any reason at all to stop and board vessels in the United States, when the statute was applied to a vessel that was "located in waters providing ready access to the open sea." *Id.* at 2575. The Court upheld such standardless boardings because of especially weighty governmental interests, the impracticability of alternative measures, and the particular statute's "impressive historical pedigree." *Id.* at 2582. Justices Brennan and Marshall dissented, finding the majority wrong on all three reasons for distinguishing *Prouse* and *Brignoni-Ponce*. *Id.* at 2585-91 (Brennan, J., dissenting). Neither group, however, questioned the continuing vitality of the discretion control principle.

voked Justice Rehnquist's sarcastic rejoinder that the Court, in finding that "motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse," had "elevat[e]d] the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence."²¹

But the Court had another string to its bow. Spotchecks were unconstitutional for an additional reason that did not depend on their being somehow more intrusive than roadblock stops: they are more subject to discriminatory abuse.²² The crucial difference was that the police cannot discriminate at a roadblock where every car was stopped, whereas in conducting spotchecks the police can act on whim or caprice or from some hidden discriminatory purpose in singling out those cars to pull to the side.

The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure — limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable — at the unbridled discretion of law-enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches" . . . This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.²³

21. 440 U.S. at 664 (Rehnquist, J., dissenting).

22. *Id.* at 661.

23. *Id.* (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967)). Justice Rehnquist's response to this point should be noted; it perhaps reflects a radical rejection of the legitimacy of judicial review of general police practices under standards that ask whether the practices are susceptible to discriminatory abuse. For Justice Rehnquist, the question in *Prouse* was not whether standardless spotchecks, as a practice, confer too broad a discretion on the police. It was instead whether *in this case* there had been evidence that the discretion was *in fact* abused. 440 U.S. at 667 (Rehnquist, J., dissenting). In support of this framing of the issue, Justice Rehnquist noted that an individual officer's action is deemed that of the state, citing *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880), and that a presumption of validity attaches to state acts, citing *McDonald v. Board of Election*, 394 U.S. 802 (1969). But this is sheer logic chopping. *Ex parte Virginia* held simply that a state officer's act is that of the state *for purposes of bringing it within the jurisdiction of the fourteenth amendment*, and the *McDonald* presumption of validity applied to acts of the *state legislature*, see 394 U.S. at 809, not individual state officers.

The dispute between Justice Rehnquist and the rest of the Court in *Prouse* reflects disagreement not so much over a factual question (indeed, the majority nowhere suggests that it thought

Thus the Court was apparently willing to tolerate that cumulatively greater invasion of privacy and liberty interests that roadblocks, where all oncoming traffic must stop, would entail in order to limit "at least to some extent" the otherwise unbridled discretion of the police. To the majority, the need to rein in police discretion was evidently sufficient not only to curtail a practice that the police deemed useful to their efforts to enforce the law but also to require a *greater* sacrifice of motorists' freedom. The concurrence by Justice Blackmun, joined by Justice Powell (both of whom also joined Justice White's majority opinion), further sharpened the distinction between the fourth amendment's two roles. Justices Blackmun and Powell wrote to make clear their view that the Court's decision did not forbid some systematic, non-discretionary stops away from roadblocks, such as a procedure to stop "every 10th car to pass a given point . . ." ²⁴ Whatever may be said for the majority's view that roadblock stops are less intrusive than open road stops — on the ground that when everybody is being stopped, all will feel less threatened or humiliated — this rationale plainly does not apply to the systematic stop that Justices Powell and Blackmun would allow. For them, at least, the only reason to declare spotchecks unconstitutional was to limit otherwise unregulated police discretion. Thus, in *Prouse*, the Supreme Court looked to the discretion control function of the fourth amendment to invalidate a police practice that may well have survived a test that only balanced the asserted state interest in enforcing licensing and registration laws against

Officer Avena had acted for some improper purpose) as over the question of when a case involving conduct in one particular instance provides the occasion for deciding the validity of the general power under which the conduct occurred. The majority likely reasoned that the asserted authority under which Avena stopped Prouse's car was highly susceptible to abuse of discretion; that it would also be extremely difficult to prove such discretionary abuse in any particular case where it had occurred; and that, consequently, Avena's stop of Prouse would be treated *as though it was an abuse of discretion* (even if, as a purely factual matter, it is unlikely that it was) because to do otherwise would allow such abuse forever to evade judicial review. Justice Rehnquist would insist on proof of actual abuse, evidently even if many instances of abuse would thereby pass undetected. (Proof of discriminatory abuse of discretion is surely complicated by the Court's recent reluctance to hear evidence of an officer's motives, if the officer's conduct is "objectively" reasonable. See *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2577 n.3 (1983); *Scott v. United States*, 436 U.S. 128, 135-39 (1978) (per Rehnquist, J.); see also Burkoff, *The Pretext Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984).) The majority's position is consistent with what Amsterdam has called the "regulatory" philosophy of the fourth amendment; Justice Rehnquist's seems more at home in the competing, "atomistic" philosophy. See Amsterdam, *supra* note 6, at 367-72.

24. 440 U.S. at 663-64 (Blackmun, J., concurring). Although it is plain that discretion control, as a *desideratum* in the law of search and seizure, is a separate matter from simple privacy protection — discriminatory and indiscriminate searches are both bad but for somewhat separate reasons — the Court in *Prouse* placed them together, to be balanced against the competing state interest. In *Prouse* that state interest was outweighed; in another case, the balance could swing the other way, as it did in *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983), discussed *supra* note 20.

the sort of intrusion that Prouse himself had experienced. Further, lower court decisions concerning police roadblocks, whether for registration and license checks or for checks for drunk drivers, have largely turned on the issue of discretion. Roadblocks conducted to eliminate or substantially confine the officers' discretion in stopping vehicles have been approved.²⁵ Roadblocks that have permitted the unfettered exercise of police discretion have not.²⁶ Yet the intrusiveness of approved and disapproved stops to the individual driver could be substantially the same.²⁷

II. DISCRETION CONTROL IN THE FOURTH AMENDMENT'S BACKGROUND

The need to control official discretion in conducting searches and seizures is no new discovery. When in 1765 Lord Mansfield declared that general warrants, issued in blank by a secretary of state for the arrest by the secretary's messengers of whomsoever they wished on suspicion of seditious libel, were unknown to the common law,²⁸ he pointed to the discretion that the general warrant conferred on the messenger. "It is not fit," he said, "that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officers."²⁹ In 1761, on this side of the Atlantic, when James Otis argued

25. *United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981); *State v. Deskins*, 673 P.2d 114 (Kan. 1983); *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980).

26. *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992 (Ariz. 1983); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *Koonce v. State*, 651 S.W.2d 46 (Tex. Crim. App. 1983).

27. *Compare* *State v. Deskins*, 673 P.2d 1175, 1185 (Kan. 1983) (approving roadblock: "[t]he officers in the field had no discretion to pick and choose who would or would not be stopped") with *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992, 996 (Ariz. 1983) (disapproving roadblocks: "[t]he roadblocks were set up at the discretion of a local highway patrolman and were operated without specific directions or guidelines").

28. *Leach v. Money*, 19 How. St. Tr. 1001, 1027 (1765).

29. *Id.* Lord Mansfield's statement was not uttered *ex cathedra*. He spoke before the case was reargued. Upon reargument, it appeared that the messengers had exceeded even the authority of the warrant that the secretary had issued, and the case was resolved on this basis. *Id.* at 1028. The case reporter's commentator thus noted that "this Case went off, without any official decision on any of the chief points which were raised in it," yet that "enough was said by the Court . . . to evince, that all the four judges thought general warrants to seize the person universally illegal, except where the granting of them was specially authorized by act of parliament . . ." *Id.*

The case of *Leach v. Money*, like the perhaps more famous *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), was one of a number of cases, growing out of the British government's efforts to enforce seditious libel laws, that attacked the validity of general warrants to arrest or to search and seize and that greatly influenced the American revolutionaries. See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION* 42-49 (1937); see also *Amsterdam*, *supra* note 6, at 362 & n.168, 396 & nn.442-43 and sources cited therein.

against the reissuance of writs of assistance in Massachusetts, he appealed to notions of “discretion control” as well as to the idea of “interest balancing.” As John Adams later recounted the argument, Otis said:

[T]he writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer

In the first place the writ is universal, being directed “to all and singular justices, sheriffs, constables and all other officers and subjects, &c” If this commission is legal, a tyrant may, in a legal manner also, imprison or murder any one within the realm.

In the next place, it is perpetual; there’s no return, a man is accountable to no person for his doings, every man may reign secure in his petty tyranny

In the third place, a person with this writ, in the day time may enter all houses, shops, &c. at will, and command all to assist. Fourth, by this not only deputies &c. but even their menial servants are allowed to lord it over us — What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of God’s creation.³⁰

Otis indeed cited an example of the vindictive exercise of the discretion conferred under the writ. One Ware, an officer who held such a writ, was brought before a magistrate “to answer for a breach of the Sabbath day acts, or that of profane swearing.” After proceedings on this offense were concluded, Ware employed the writ to retaliate against the magistrate as well as the constable who had brought him to court by searching the house of each “from the garret to the cellar.”³¹

Other revolutionary-era statements of grievances against the British government made similar complaints and decried the uncontrolled delegation of discretion to men who, in the revolutionaries’ views, were unfit to exercise it. The 1772 document, “The Rights of the Colonists and a List of Infringements and Violations of Rights,” drafted by Samuel Adams, complained of the search and seizure powers of revenue officers who had been appointed by the British rather than the provincial government. These officers could appoint their own deputies, who in turn were

entrusted with power more absolute and arbitrary than ought to be lodged in the hands of any man or body of men what-

30. I B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 190 (1971).

31. *Id.* at 190-91. See also Amsterdam, *supra* note 6, at 366 & n.195.

soever; for . . . [they are given] full power and authority from time to time, at their and any of their wills and pleasures, as well By Night as by day to enter and go on board any Ship, Boat, or other Vessel, riding lying or being within, or coming into any Port, Harbour, Creek or Haven, within the limits of their commission; and also in the day time to go into any house, shop, cellar, or any other place where any goods ware or merchandizes lie concealed, or are suspected to lie concealed, whereof the customs & other duties, have not been, or shall not be duly paid and truly satisfied, answered or paid unto the Collectors, Deputy Collectors, Ministers, Servants, and other Officers respectively, or otherwise agreed for; and the said house, shop, warehouse, cellar, and other place to search and survey, and all and every the boxes, trunks, chests and packs then and there found to break open. Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes, chests & trunks broke open ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants³²

The basic sentiments expressed here survived the revolution, and animated concerns that the new central government might revive the sorts of oppressions that the colonists had experienced under British rule. Elbridge Gerry, who opposed adoption of the new federal Constitution because of the absence of a bill of rights, voiced especial alarm at the lack of express limitations on the national government's power to send out agents to search and seize. He feared that ratification would mean again "subject[ing] ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure."³³ Expressing similar fears, the Maryland ratification convention demanded a prohibition against general warrants, which it condemned as "the great engine by which power may destroy those individuals who resist usurpation"³⁴ Behind the inflamed rhetoric there is visible the idea that a discretionary power to search and seize at will can be turned against one's political opponents.

32. 1 B. SCHWARTZ, *supra* note 30, at 205-06. Compare the "absolute and arbitrary" power "to enter and go on board any Ship, Boat, or their Vessel" that is decried here with the authority that the Supreme Court approved in *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983), allowing federal agents to stop and board vessels at will.

33. E. GERRY, *OBSERVATIONS ON THE NEW CONSTITUTION AND THE FEDERAL AND STATE CONSTITUTIONS* (1788), reproduced in 1 B. SCHWARTZ, *supra* note 30, at 488-89.

34. 2 B. SCHWARTZ, *supra* note 30, at 734.

III. CONTEMPORARY TREATMENT OF POLICE DISCRETION

In more recent times, the desirability of regulating the exercise of police discretion has been recognized, but aspects of police work other than searching and seizing have received the greatest attention. Professor Kenneth Culp Davis's book, *Police Discretion*,³⁵ is probably the fullest and most systematic treatment of the general issue. His ideas and proposals are incisive. Yet his interest is almost exclusively in the issue of police officers' exercise of the power to arrest, and then when probable cause to arrest, or even the suspect's guilt, is absolutely clear.³⁶ Professor Davis's concern — surely an important one — is with police action insofar as it marks the initiation of criminal prosecution, rather than with search and seizure power in its own right.³⁷ Likewise, in *Arrest: The Decision to Take a Suspect into Custody*,³⁸ Professor LaFave

35. K. DAVIS, *POLICE DISCRETION* (1975).

36. Davis describes his work as "a study of police discretion in selective enforcement. The purpose is to try to find or invent better ways to control police discretion in determining whether and when to enforce particular law." *Id.* at iii.

37. Some law the Chicago police always or almost always enforce, some law they never or almost never enforce, and some law they enforce if, as, and when they choose. They select not only the law they enforce but also the persons and the occasions. Their discretion to enforce or not to enforce is enormous and is seldom limited or guided by rules or instructions. The focus of this essay is discretionary selective enforcement.

Id. at 164. In passing, Davis approves Judge Carl McGowan's proposal to replace the fourth amendment exclusionary rule with a judicially mandated requirement that the police formulate and enforce their own rules on search and seizure, subject to judicial review, *id.* at 125-27, but the focus of the book is elsewhere.

Judge McGowan's proposal is nonetheless an intriguing one. It is difficult not to wonder whether the police, if they approached the task earnestly, might not be more demanding on themselves than outsiders — more skeptical of claims of necessity and less tolerant of excuses for failing to meet established standards. Some research indicates that internal police review of misconduct allegations tends to be more exacting than review by an outside, civilian board, at least when the internal review is reinforced by external pressures. Geller, *Police Misconduct: Scope of the Problems and Remedies*, 23 AM. B. FOUND. RESEARCH REP. 1, 4 (1983). In *United States v. Place*, 103 S. Ct. 2637 (1983) the Court declined to set any fixed limit on the duration of a detention made with less than probable cause, for a stop on authority of *Terry v. Ohio*, 392 U.S. 1 (1968). The *Place* Court, although holding that a 90 minute detention was excessive, declined to adopt any fixed standard and said:

We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.

103 S. Ct. at 2646 n.10. In contrast, the Metropolitan Police of the District of Columbia were not so timid. Adopting a regulation for *Terry* stops, they evidently perceived limited need for police flexibility, an array of graduated responses, or assessment of each situation and its own unique facts. Instead, they set a flat 10-minute limit. 1 CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL 11.40 (1982) (citing Metropolitan Police of the District of Columbia, MPD Order Ser. 304, No. 10, "Police-Citizen Contacts, Stops, Frisks, Motor Vehicle Spot Checks" (July 1, 1973)).

Yet the police rule making need not supplant the exclusionary rule. On the contrary, the exclusionary rule may be necessary to support police rules. See Amsterdam, *supra* note 6, at 429.

38. W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965).

devoted a chapter to the topic "Police Discretion."³⁹ Considerable discussion of the issue appears elsewhere,⁴⁰ but concern focuses largely on the separate (though obviously important) questions posed "by the common police decision not to arrest in some situations where criminal conduct has occurred" and hence to allow some law breakers to avoid prosecution.⁴¹ In contrast to these works, which largely treated the problem of police discretion outside the context of the fourth amendment, Professor Amsterdam's coruscating 1974 article⁴² addressed the question of how the fourth amendment might better serve the goal of regulating police discretion in search and seizure. He examined in some depth one particular solution: how the fourth amendment might be used to impose a rulemaking requirement on the police.⁴³ Such a requirement, he argues, would rope into fourth amendment control some seemingly low-level police intrusions and other intrusions otherwise likely to be held not to be searches or seizures at all;⁴⁴ and it would structure such discretionary decisions as whether to arrest or release on citation persons stopped for minor traffic offenses.⁴⁵

Since Professor Amsterdam wrote, the Supreme Court has on occasion taken specific notice of the discretion control problem and has imposed in some cases an internal regulation requirement, at least of sorts. In addition to *Prouse* and the border patrol cases on which *Prouse* relied,⁴⁶ the inventory search cases — *South Dakota v. Opperman*⁴⁷

39. *Id.* at 63-82.

40. Chapter 8, for example, concerns "Control of Police Discretion," *id.* at 153-67, and the issue of police discretion permeates the book.

41. *Id.* at 64. The definition of arrest that Professor LaFave employed distinguished it from a stop-and-frisk, on the one hand, and from "those situations in which a suspect is taken into custody for purposes of prosecution," on the other. *Id.* at 3. He classified as an "arrest" a forcible taking of a suspected criminal to the stationhouse "for some purpose," *id.* at 4, and examined in detail such police practices as the arrest of drunks to confine them until they sober up, *id.* at 440-49, and the arrest of prostitutes to clear them from the streets, subject them to medical examination, and generally deter their activities, even when prosecution did not ensue. *Id.* at 450-64. Professor LaFave considers police discretion as an aspect of the more general issue of selective enforcement of the criminal laws. *See, e.g., id.* at 492-95.

42. Amsterdam, *supra* note 6.

43. *Id.* at 415-28.

44. *Id.* at 405-09.

45. *Id.* at 415-16.

46. *See supra* note 20 and accompanying text.

47. 428 U.S. 364 (1976). In *Opperman*, the Court upheld the right of the police, in the performance of their "community caretaking functions," to conduct warrantless, non-probable cause "inventory searches" of properly impounded cars. But the Court emphasized the police department's routine practice of conducting, and standard procedures for such searches. *Id.* at 372-76. Justice Powell stressed the control over police discretion: "The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized." *Id.* at 383 (Powell, J. concurring).

Thus it has been urged that "[i]nventories should not be upheld under *Opperman* unless the government shows that there exists an established reasonable procedure for safeguarding im-

and *Illinois v. Lafayette*⁴⁸ — and administering search cases, most importantly, *Marshall v. Barlow's Inc.*,⁴⁹ should be mentioned. Yet in the decade since the article's publication, the Court has not adopted his idea of a catholic internal regulation requirement, embracing the whole of search and seizure. Nor has it even accepted his more modest application of the idea, of bringing under the control of police-made rules some police intrusions that would otherwise escape regulation entirely. The Court's embrace of a rule requirement has been more restrained, and it has served a largely different purpose. At least if the administrative search cases are placed to one side, the Court has employed a version of a rule promulgation requirement not to extend the reach of the fourth amendment, as Professor Amsterdam wished, but instead to increase the power of the police. Rule promulgation has not been required, as he envisioned, to allow the courts to treat as searches and seizures some varieties of police conduct that the courts might be reluctant to recognize as searches or seizures if the result were full-force fourth amendment restrictions — forbidding the conduct absent probable cause and a warrant. Instead, the rule making requirement has been imposed to permit the police to engage in acts that are inarguably searches or seizures — the searching of shoulder bags, the stopping of cars — without first satisfying ordinary standards of justification. The requirement of rules, at least in the form of “standard procedures” for inventory searches, or “neutral plans” for roadblock stops, has substituted for the reasonable suspicion or probable cause (and maybe a warrant) otherwise necessary.

Whatever disappointment one might feel at the direction the law has thus taken (or, for that matter, whatever elation), the continuing importance of discretion control should not be lost. Even if the idea of discretion control has not led to a general rule-promulgation requirement that the police must follow, and is unlikely to do so soon, this idea remains important as the courts proceed in the conventional manner of case adjudication to develop fourth amendment law, themselves declaring the standards for the police to observe. For these judicially declared standards do perform a discretion control function. They may do it well or poorly, and it is useful to ask how well, or how poorly, these standards do serve to cabin and to guide police discretion in searching and seizing.

pounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure.” 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 7.4, at 577 (1978) [hereinafter cited as W. LAFAVE, SEARCH AND SEIZURE].

48. 103 S. Ct. 2605 (1983). In *Lafayette*, the Court extended *Opperman* to allow a stationhouse “inventory search” of an arrestee’s “purse-type shoulder bag,” but again limited the power to searches performed “in accordance with established inventory procedures.” *Id.* at 2611.

49. 436 U.S. 307 (1978). The Court in *Barlow's* required federal Occupational Safety and Health Administration agents to adopt and follow “a general administrative plan . . . derived from neutral sources,” and obtain a warrant certifying compliance with such a plan, before

IV. THE REASONS TO REGULATE POLICE DISCRETION

But why is the idea of discretion control worthy of independent examination? Why should the fourth amendment be read so as to control “the discretion of the official in the field,” “at least to some extent”? The principal answer is that an overly broad, unstructured and unchecked discretionary power to search and seize can and too often will be used to discriminate against people in ways that offend important values, some of them constitutionally based, of our society. Such a power thus allows “unreasonable” searches and seizures in violation of the fourth amendment (even when it does not violate the more specific requirements mentioned in the amendment’s language) — with the word “unreasonable” thus deriving its meaning at least in part from rights and values that are found outside the fourth amendment itself. For example, a police officer’s decision to stop a particular car for a license and registration “spotcheck” because the officer disapproves of the political message of a sticker on the car’s bumper surely offends the value that we attach to freedom of expression. So a general power of the police to stop whomever they please should be found presumptively “unreasonable” under the fourth amendment, particularly in light of the frequent impossibility of proving such discrimination on any particular occasion. Likewise, overly broad discretion may be exercised to penalize members of certain racial or ethnic groups, in violation of public policy if not also the equal protection clause of the fourth amendment.⁵⁰ Such broad discretionary power could also

forcibly entering employers’ work areas to conduct inspections. *See also* *Donovan v. Dewey*, 452 U.S. 594 (1981) (allowing warrantless Mine Safety and Health Act inspections; detailed act and regulations do not “leave the frequency and purpose of inspections to the unchecked discretion of government officers”); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1979) (disapproving warrantless Internal Revenue Service entry into corporate offices and seizure of property there to levy for tax deficiency; a “critical concern” was the “discretion of the seizing officer”).

50. Dean Ely, noting the fourth amendment’s two roles — in requiring “at least moderately convincing justification” for official intrusions and limiting “official discretion” — observed that, in conducting searches and seizures, “law enforcement officials will necessarily have a good deal of low visibility discretion.” J. ELY, *DEMOCRACY AND DISTRUST* 96-97 (1980). In seeking to control this discretion, he argues, “the Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment.” *Id.* at 97. Compare Dean James Vorenberg’s assessment of the existing judicial checks against abuse of a prosecutor’s discretion, in Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981):

Unless based on a constitutionally impermissible criteria such as race, sex, or exercise of first amendment rights, the exercise of prosecutorial discretion has routinely been upheld by the courts

Although some cases do enunciate a general doctrine prohibiting retaliatory prosecution based on personal animus or impermissible motives, . . . [this doctrine] appears to be applied only where prosecutors have retaliated against specially protected actions by defendants, such as the exercise of first amendment rights or the right to appeal a conviction.

Id. at 1540-41 (notes omitted). Vorenberg notes that “the problems involved in proving that

penalize the visible expressions of cultural diversity —as anyone who read about Edward Lawson's case in the Supreme Court last year and observed Mr. Lawson's appearance on television could surely appreciate.⁵¹ James Otis's account of Ware's vindictive use of the writ of assistance can be understood in this light: The unbridled discretion that the writ conferred not only resulted in objectively unjustified rummaging of two peoples' houses but also threatened the ability of the provincial courts and their agents to enforce the laws that Ware evidently had violated.

A somewhat more difficult argument against overly broad discretion to conduct searches and seizures is that it threatens to undermine limitations to be found elsewhere in the fourth amendment. One objection voiced to spotchecks was that they could be used as pretexts to stop cars when the police wanted to investigate offenses unrelated to the possession of driving licenses and car registrations, but lacked the justification — "articulable suspicion" of "criminal activity afoot" — that was otherwise required.⁵² Indeed, pre-*Prouse* decisions that approved spotchecks uniformly declared the courts' readiness to condemn this form of abuse of the spotcheck power, if it could be proved that it had actually occurred in a particular case.⁵³

a prosecutor has an impermissible motive or personal animus are enormous," *id.* at 1542, and such problems would no doubt be greater still with respect to the police, whose decisions are even less visible than those of prosecutors. Existing fourth amendment doctrine, which permits some facial challenges to the broad discretionary authority that the police sometimes claim, at least potentially allows for more effective regulation. Vorenberg recommends changes to increase prosecutors' accountability. *Id.* at 1562-72.

51. See *Kolender v. Lawson*, 103 S. Ct. 1855 (1983). The majority of the Court, entertaining a facial challenge to a California loitering statute, found it sufficiently vague to violate due process. The Court, however, used an exceedingly narrow basis to reach this decision; the statute was defective, even as construed by the state courts, in failing to specify the kind of "credible and reliable" identification that it required persons lawfully stopped to display, on pain of arrest and prosecution. The statute's vice was that it thus vested "virtually complete discretion in the hands of the police," *id.* at 1859, and thereby threatened first amendment values as well as "the constitutional right of freedom of movement." *Id.*

The parallel to fourth amendment-based arguments against overbroad police discretion is evident. Justice Brennan, though joining the majority opinion, would have held that the statute violated the fourth amendment; by compelling persons stopped by the police to respond, it conferred broader authority on the police than was permitted under *Terry v. Ohio*, 392 U.S. 1 (1968), in the absence of probable cause to arrest. 103 S.Ct. at 1861-65 (Brennan, J., concurring).

52. See *United States v. Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977) (footnote omitted):

Stops are not random simply because they are left to the officer's discretion. In that formulation there lurks the possibility that assertedly "random" stops will be used to harass where reasonable grounds for suspicion do not exist. The courts have had experience with stops represented as a "random traffic stop" but found to be a pretext for investigation of other matters.

Indeed, the fact that the spotcheck program scrutinized in *Montgomery* was evidently conducted to gather information about "suspicious" persons as to whom the police lacked "articulable suspicions" was central to the court's decision finding the program unconstitutional. See *id.* at 885-87.

53. *E.g.*, *Palmore v. United States*, 290 A.2d 573, 582 (D.C.), *aff'd on jurisdictional grounds only*, 411 U.S. 389 (1972) (citation omitted): "We hasten to add that the courts, including ours,

Lastly, overly broad discretion imperils a proper relationship between the police and the citizenry. If police discretion is too broad, and the opportunity for police intrusion into people's lives is too great, both the people and the police may become corrupted. In our society, people should not learn to fear that displeasing the police may mean a stop and search or other harassing conduct, and the police should not be permitted to become bullies who, in Otis's words, "are allowed to lord it over us" through underregulated power to search and seize.⁵⁴

For all of this, it must also be recognized that police discretion is, within limits, not only unavoidable but also desirable. As Davis and others have pointed out,⁵⁵ life would be intolerable if the police arrested every time they observed the law being violated, no matter how technical the violation and how trivial the offense. So, too, if the police detained every person when they had cause, if housing inspectors entered dwellings whenever it might be justified, or if every car was stopped when the police had sufficient reason to suspect a traffic violation, our society would be very different. Moreover, it would break our already strained public treasury to pay for the army of occupation that would be necessary for the task. Davis argues, therefore, that the inevitability of police discretion must be acknowledged, but that its exercise must be regulated. The area where discretion is allowed must be confined; discretionary decision-making, even by police on the beat, must be structured; and, finally, those decisions must be checked, i.e., subject to after-the-fact review by higher ups.⁵⁶ Davis proposes increased use of the administrative rule-making process to serve these purposes.⁵⁷ The courts, by the process of fourth amendment adjudication through

have warned law enforcement officers, specifically and emphatically, that a so-called 'spot check' is not to be 'used as a substitute for a search for evidence of some crime unrelated to possession of a driver's permit.' " This passage may be ambiguous. Use of the word "search" instead of "stop" may be advertent. Rather than set a limitation on the *initiation* of the encounter based on the police purpose, the court may have intended to limit the subsequent *scope* of the intrusion.

In *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983), the Court tersely rejected an argument that the power of customs officers to make standardless boardings of vessels had been abused because they were in reality following up on a tip that the boat was carrying marijuana into the United States. The Court said, "[a]cceptance of respondent's argument would lead to the incongruous result criticized by Judge Campbell in *United States v. Arra*, 630 F.2d 836, 846 (1st Cir. 1980): We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." 103 S. Ct. at 2577 n.3.

54. See Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966). Reich recounted his own and others' experiences of being stopped by police, under some evidently standardless powers, and noted the tendency of police in such encounters to treat others with condescension or worse. "There is something deeply offensive in familiarity which is deliberately used by a person in authority for the purpose of causing humiliation." *Id.* at 1164.

55. See K. DAVIS, *POLICE DISCRETION* 64-66, 166 (1975); H. GOLDSTEIN, *POLICING A FREE SOCIETY* 9, 39 (1977); W. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 71-72 (1965); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 106 (1967) [hereinafter cited as *THE CHALLENGE OF CRIME IN A FREE SOCIETY*].

56. K. DAVIS, *supra* note 55 at 145-49 (1975).

57. See generally *id.* at 98-120.

enforcement of the exclusionary rule, can perform a similar (and complementary) function. Indeed, more consistent attention to the need to regulate discretion can result in better performance than has occurred in the past.

V. POLICE DISCRETION IN POLICE PATROL PRACTICES

A. *Pre-Terry v. Ohio Supreme Court Law*

Discretion control issues loom especially large in the mundane search and seizure practices of police patrol officers. This is in part because very little of this conduct is likely to be accomplished pursuant to a warrant; the decision to search and seize (or the decision not to) is probably made on the spur of the moment, in response to a quickly evolving situation on the street.⁵⁸ And an individual officer — at the bottom of the police hierarchy — is likely to have to make the decision by him or herself.⁵⁹ Further, as a result of the Supreme Court's 1968 decision in *Terry v. Ohio*,⁶⁰ and its companion cases,⁶¹ the initial decision at least may well be free even of that degree of discretion control that the probable cause standard can enforce; for, at least at the outset, the police-citizen encounter, if it is a search or seizure at all, is likely to be controlled only under the lower standards that *Terry* and its progeny have set.

The Supreme Court's 1961 decision, *Mapp v. Ohio*,⁶² which held that the courts of the states must apply the federal rule of exclusion for evidence obtained by illegal search or seizure, seems in retrospect to

58. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968). "[W]e deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat"

59. As Chief Justice Warren Burger observed:

[T]he scope of discretion [ordinarily] enlarges as we look upward in the hierarchy of government. In other words, the higher the rank, the greater is the discretion. But this is not true in police work. The policeman on the beat, or in the patrol car, makes more decisions and exercises broader discretion affecting the daily lives of people, every day and to a greater extent, in many respects, than a judge will ordinarily exercise in a week.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, COMPILATION WITH INDEX 8 (1974). See also M. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 6 (1981):

To say that the police, through their discretionary choice, determine the meaning of law and order, is largely to say that patrolmen determine the meaning of law and order If and when the police deny legal protection to individuals, abridge due process, or employ distinctions of race and class, it is patrolmen who do so.

60. 392 U.S. 1 (1968).

61. *Sibron v. New York*, 392 U.S. 40 (1968). The *Sibron* opinion also disposed of a third case then before the Court, *Peters v. New York*.

62. 367 U.S. 643 (1961).

have made inevitable the Court's confrontation of problems it had long managed to skirt: the constitutional limits of the powers of police officers patrolling their beats to conduct searches and seizures short of those involved in a full-blown arrest. An occasional pre-*Mapp* case rose to the Supreme Court through the federal courts where police patrol practices were in issue.⁶³ But the Court managed to dispose of these cases through application of the law of arrest.⁶⁴ If the Court found that a seizure had occurred, it was labeled an arrest. Then the legality of this "arrest" was assessed against traditional standards, which usually meant simply asking whether there was or was not probable cause.⁶⁵ Other common patrol practices, especially those that have been labeled "field interrogation" or "stop-and-frisk," escaped the Court's attention altogether. These practices, which might commonly yield a weapon or a small quantity of illegal drugs, apparently led to few federal prosecutions. But they no doubt provided much business for the criminal courts of the states, especially in the nation's cities. And the practices raised important issues concerning the scope and the regulation of patrol officer discretion in conducting search and seizure.

63. *United States v. Di Re*, 332 U.S. 581 (1948), might, for example, be characterized as such a decision. A federal investigator, working in tandem with a Buffalo, New York police detective, arrested Di Re and a companion in a car, upon a tip involving a counterfeit gasoline ration scheme. *Id.* at 583.

64. *See, e.g., id.* at 587-95 (finding that Di Re had been arrested illegally, in the absence of probable cause).

65. Two years before *Mapp*, however, when the Court decided *Henry v. United States*, 361 U.S. 98 (1959), it had an opportunity to consider other modes of analysis for on-the-street encounters. FBI agents, investigating the theft of an interstate whiskey shipment, became suspicious of Henry and waved his car to a stop. *Id.* at 99. Relying on *the government's concession* "that the arrest took place when the federal agents stopped the car," *id.* at 103, the Court found the FBI actions illegal, since, at that moment, they lacked probable cause. *Id.* at 103-04. Justice Clark, dissenting, concluded that the mere stop of the car was not an arrest and that, moreover, it was justified by the "suspicious activities of the petitioner during the somewhat prolonged surveillance by the agents" *Id.* at 106 (Clark, J., dissenting).

Later the same term, in *Rios v. United States*, 364 U.S. 253 (1960), the Court again confronted a set of facts that suggested the desirability of distinguishing a "mere" stop from a "full-blown" arrest. *Rios* was a federal prosecution, but it arose from the actions of Los Angeles city police who (under controverted circumstances) recovered a package of narcotics from Rios. *Id.* at 255-57. But for the Court's decision the same day, in *Elkins v. United States*, 364 U.S. 206 (1960), that evidence that *state* police obtained illegally is inadmissible in federal prosecutions — the repeal of the so-called "silver platter" doctrine — the conduct of the Los Angeles police would have been immaterial. Since it was now relevant, the Court remanded the case for resolution of the unclear factual question of when the arrest of Rios actually occurred. *See* 364 U.S. at 261-62. The Court dropped a tantalizing hint that the officers might have been justified in approaching Rios as he sat in a taxicab in order to detain him momentarily "for the purpose of routine interrogation," though they then lacked probable cause. *Id.* at 262.

One point should give pause to those who now urge some weakening of the exclusionary rule: police conduct such as this received little Supreme Court scrutiny until an expanded exclusionary rule required adjudication of cases where the conduct was called into question. A contraction of the rule will likewise mean a contraction of judicial review of police search and seizure practices. *See generally* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 449-57 (1981).

B. *Antecedents to the modern "stop-and-frisk"*

Despite the Supreme Court's inattention to the issue, it was an old idea that a patrol officer might forcibly stop a "suspicious" person, and perhaps also conduct a limited search, even when grounds for arrest were plainly absent. This notion likely goes back to the practices of the "night watchman" in colonial times,⁶⁶ and it is at least as old as the development of urban police forces in this nation in the nineteenth century. A Philadelphia patrolman's manual from 1913, for example, imposed this duty on the officers:

They should particularly scrutinize persons encountered who are carrying goods under suspicious circumstances. Should circumstances demand, such persons must be compelled to show the contents of their bundles, or baggage, care being taken always to let them do the opening and carrying⁶⁷

And this asserted authority was sharply distinguished from the power to arrest, which was discussed elsewhere in the manual.⁶⁸

C. *Modern police theory, the "field interrogation" and the "aggressive preventive patrol"*

1. *In police theory*—Dusted off and refurbished, this old practice — the stop and investigation of "suspicious persons" for whom there were insufficient grounds to arrest — played a central role in the theories of reformers whose ideas came to dominate American policing by the late 1950s and early 1960s. Preeminent in this group was O. W. Wilson. Wilson gained prominence as chief of the previously scandal-ridden police department in Wichita, Kansas between 1928 and 1939. His commitment to enforcement of vice laws provoked opposition that eventually forced him to resign, but his success in purging the department of its corruption, and his innovative ideas, particularly in the use of motorized patrols, earned him a national reputation. Wilson went on to become first a professor of police administration at the University of California at Berkeley, and then dean of its School of Criminology, which he had built. In 1960, when the city of Chicago sought someone

66. See, e.g., THE COLONIAL LAWS OF MASSACHUSETTS 1660 — 1672, at 198-99 (1889) (1658 statute authorizing watchman to stop and detain strangers found abroad at night). For an analysis of how early English common law authorities treated this issue, see Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 393, 408-11 (1963).

67. CITY OF PHILADELPHIA, BUREAU OF POLICE, PATROLMAN'S MANUAL 9 (1913) reprinted in METROPOLITAN POLICE MANUALS: 1871, 1913 (R. Wade ed. 1974).

68. *Id.* at 38-54.

to reform its own troubled department, Wilson was selected as superintendent.⁶⁹ Wilson challenged the ideas that had been advocated a generation earlier, principally by Arthur Woods and August Vollmer, that crime prevention strategies should seek the eradication of underlying social causes of crime. Wilson agreed that crime prevention should be the primary goal of the police, but he and others, notably Chief of Police William H. Parker of Los Angeles, questioned the ability of the police to provide more than a "bandaid" treatment.⁷⁰ The elimination of poverty and social alienation, however lofty an aspiration, was likely beyond society's reach and certainly beyond that of the police, at least in the short run. So, Wilson argued, the police should seek to prevent crime, through the means that they were best equipped to provide, by the direct discouragement of would-be criminals. Crime should be controlled, said Wilson, through a combination of such police efforts with efforts by potential victims to safeguard themselves. As he wrote in his influential work, *Police Administration*:⁷¹

The core of the police purpose is to prevent unlawful acts. Crime and misconduct of any type under police control result from the co-existence of the desire to commit the misdeed and the belief that the opportunity to do so exists. When either factor is absent, criminal acts will not be committed. The presence of one factor alone, regardless of how strong it may be, will not result in crime. The elimination or reduction of these two factors, therefore, is a basic police duty. One task is to prevent or eradicate criminality in the individual; the other embraces all security measures designed to hamper or prevent criminal operations.

. . . . The desire to misbehave may, to some extent, be prevented by the removal or suppression of unwholesome influences, but the police may not hope to eliminate it entirely. Likewise, they cannot develop sufficient strength or efficiency to eliminate all opportunity for misconduct. Its actual physical removal, however, is not always necessary; it is sufficient to eliminate the potential offender's belief that the opportunity for successful misconduct exists.⁷²

This line of thought led Wilson to conclude that patrol officers, in addition to responding to specific complaints and seeking apprehen-

69. S. WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 209-11 (1980) [hereinafter cited as S. WALKER, *POPULAR JUSTICE*].

70. R. FOGELSON, *BIG-CITY POLICE* 187 (1977).

71. O. WILSON, *POLICE ADMINISTRATION* (2d ed. 1963). Walker calls this book a "'bible' of modern police management." S. WALKER, *POPULAR JUSTICE*, *supra* note 69, at 211 (1980).

72. O. WILSON, *supra* note 71, at 227-28.

sion of persons responsible for known offenses, should try to identify and correct potential hazards and should conduct "routine preventive patrol" so as to discourage persons who might be bent on crime.⁷³ And, under Wilson's theory, a principal tool of this discouragement was the regular practice of "field interrogations":

The officer lessens opportunity for misconduct by the observation and supervision of persons and things during his routine movement from one point to another on his beat, especially when he gives particular attention to areas in which incidents calling for police service most frequently occur. Street interrogations of persons whose appearance and actions arouse the suspicion of alert patrolmen are important tasks in preventive patrol.⁷⁴

But the logic of Wilson's argument suggests a broader function for "street interrogations" as part of "preventive patrol" than just questioning of those who, in the eyes of the "alert patrolman," have shown visible signs of "suspiciousness." If only those who have manifested their dangerousness by "suspicious" conduct are at risk of a stop, will not many other would-be criminals be immune? What about those who, by luck or by design, fail to do anything in particular to single themselves out as worthy of the patrol officer's attention? Won't the preventive patrol be less likely to deter them from carrying out their plans? But what if anyone on the street (except perhaps those whose appearance marks them, in the officer's judgment, as obviously *not* criminals) could at any moment be stopped and questioned by the patrolling officer? Won't the chance of such a stop be more likely to inhibit even the careful malefactor?

2. *In practice*— Such reasoning evidently persuaded some police departments as a matter of policy, and many more individual officers as a matter of practice, that the conduct of stops should not be hindered by an overly strict standard of "suspiciousness." Instead, they conducted essentially indiscriminate stopping, at least ostensibly for the purpose of more efficaciously discouraging the commission of crime. Thus the chief of the San Francisco police department, Thomas J. Cahill, in the late 1950's inaugurated Operation S — "S" for "saturation" — which was intended to send overwhelming numbers of officers onto the street in high crime areas in order to give pause to anyone planning mischief or worse, for anyone could, without warning, find himself the object of an officer's street interrogation. In practice, if

73. *Id.* at 238.

74. *Id.*

not by design, Operation S evidently led to widespread, indiscriminate stopping and searching.⁷⁵

Professor Lawrence P. Tiffany, in an American Bar Foundation study of police practices,⁷⁶ confirmed that police were in fact conducting stops in the absence of probable cause to arrest under two quite distinct kinds of circumstances: when they wished to investigate particular persons whose appearance or conduct aroused the officers' suspicion of wrong-doing; and, without such particularized suspicion, for general preventive purposes, when the police wanted to make their presence felt by the community at large, or by groups within that community that, in the view of the police, included potential trouble makers.⁷⁷ Only the former practice, which is aimed at eventual prosecution of detected wrong-doers, is, according to Professor Tiffany, a true "field interrogation"; the latter falls under another rubric, such as "field contacts," "street stops," or, in O. W. Wilson's terminology "aggressive preventive patrol."⁷⁸ As an example of this second kind of practice, Professor Tiffany cited certain weapons confiscation programs:

In some sections of large cities there is a high incidence of serious, assaultive behavior involving the use of guns, knives, or other dangerous weapons. One police response to this problem is a continuing effort to remove dangerous weapons from persons in those areas. Special squads of police allocate a substantial part of their time to stopping and searching males found on the street. . . . In most instances, the officers have no grounds for suspicion other than the facts that it is night, that the 'suspect' is male, and that he is in an area with a high crime rate. Such areas are predominately inhabited by minority racial groups. During one typical evening, two officers engaged in twenty such stops, during which they searched thirty-seven persons and eleven cars.⁷⁹

Practices like these, and indeed the true "field interrogation" itself, led predictably enough to complaints of harassment, to charges that the police were not only indiscriminate in choosing whom to stop and possibly search but were also discriminatory. According to one assess-

75. R. FOGELSON, *supra* note 70 at 187-88. "During its first year of operation the S squad stopped 20,000 people, filed 11,000 reports, and arrested 1,000 persons, most of whom were blacks and youths." *Id.* (footnote omitted).

76. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (1967) [hereinafter cited as *DETECTION OF CRIME*].

77. *Id.* at 6-17.

78. *Id.* at 10-11.

79. *Id.* at 13.

ment, Chief Parker's officers in Los Angeles "developed a shorthand for 'suspicious' persons which inevitably emphasized young blacks as potential criminals"; and minority groups there viewed "aggressive preventive patrol" activities "as systematic harassment."⁸⁰

Studies prepared for the President's Commission on Law Enforcement and Administration of Justice provided additional accounts of prevalent police practices and recorded similar complaints. Researchers from the School of Criminology at Berkeley concluded from their study of police operations in San Diego that "[t]he field interrogation . . . probably contributes negatively to police-public relationships more than any other single policing technique."⁸¹ Members of minority groups in the city — blacks and Mexican-Americans — believed that they were singled out for stops (and that, when stopped, they were often treated offensively).⁸²

3. *The Crime Commission's recommendations*— Taking note of both the asserted need of the police to stop and question suspicious persons (and, during at least some of these stops, to conduct self-protective weapons searches), and the citizen complaints that the practice often provoked, the crime commission's Task Force on the Police recommended that this police power be recognized as legitimate but that it be limited and regulated.⁸³ The Task Force recommended that state legislatures and police departments themselves impose controls on field interrogation practices:⁸⁴ (1) limiting them to circumstances "when an officer has reason to believe that a person is about to commit or has committed a crime" or has knowledge of one; (2) prohibiting such stops for vagrancy and similar offenses; (3) insisting on an objective basis for the stop, "and not on race, poverty, or youth"; (4) imposing temporal limits, allowing only the time necessary to accomplish the limited legitimate purposes of the stops;⁸⁵ (5) requiring the police to

80. S. WALKER, *POPULAR JUSTICE*, *supra* note 69, at 212.

81. I. J. LOHMAN & G. MISNER, *FIELD SURVEYS IV: THE POLICE AND THE COMMUNITY: THE DYNAMICS OF THEIR RELATIONSHIP IN A CHANGING SOCIETY* 142 (1966) [hereinafter cited as *FIELD SURVEYS IV*].

82. *Id.* at 54-55, 66-67, 82-89, 98-107.

83. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE ON THE POLICE, TASK FORCE REPORT: THE POLICE 183-86* (1967) [hereinafter cited as *TASK FORCE REPORT: THE POLICE*].

The report singled out for criticism the practice of low-threshold stops, i.e., those not limited by a requirement of sufficiently particularized suspicion.

Misuse of field interrogations . . . is causing serious friction with minority groups in many localities.

This is becoming particularly true as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.

Id. at 184.

84. *Id.* at 185.

85. The Task Force noted with apparent approval the American Law Institute's proposal to limit such stops to 20 minutes. *Id.* at 185 n.375.

treat stopped persons civilly;⁸⁶ (6) permitting a search in the course of a field interrogation "only if [the officer] has reason to believe that his safety or the safety of others so requires"; and (7) instituting record keeping procedures.⁸⁷ Thus the Task Force evidently sought to permit field interrogations but to domesticate the practice and to ban altogether those more intrusive (and potentially more offensive) operations that might come under a rubric like "aggressive preventive patrol." The Commission's report made a similar distinction between "stop[ping] persons at the scene of a crime, or in situations that strongly suggest criminality," which the Commission approved, and "indiscriminate detention and street searches of persons and vehicles," which it deplored.⁸⁸ It recommended a legislative solution, but was less specific than the Task Force had been. Statutes should be enacted, it said, that set "[s]pecific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk," and such laws should be supplemented by "specific guidelines" that police administrators themselves develop. But the Commission left the specific content of such laws and regulations to be worked out later.⁸⁹

D. Terry and Sibron

1. *Background*— These developments provided the backdrop, then, for the Supreme Court's 1968 "stop and frisk" decisions: *Terry v. Ohio*,⁹⁰ *Sibron v. New York*,⁹¹ and *Peters v. New York*.⁹² The issues were joined about as one might have expected. It was argued on the one hand that police power should be circumscribed by the traditional law of arrest. Allowing seizures and searches, however they might be labeled, on less than probable cause would mean an intolerable dilution of basic civil liberties.⁹³ For the other side, it was argued that

86. The Task Force received recurrent complaints about officers' unnecessarily offensive manner of conducting stops, in particular, racially or ethnically derogatory language. See, 1 FIELD SURVEYS IV *supra* note 81, at 55, 86-87. The President's Commission on Civil Disorders later reported similar evidence. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 302-05 (N.Y. Times ed. 1968).

Given the Supreme Court's willingness to consider the *subjective* aspects of police practices, in, for example, *Delaware v. Prouse*, 440 U.S. 648 (1979), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), unnecessary offensiveness in the conduct of an otherwise proper stop could well be found to turn a particular stop into a fourth amendment violation.

87. TASK FORCE REPORT: THE POLICE, *supra* note 83, at 185.

88. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 55, at 94-95.

89. *Id.* at 95.

90. 392 U.S. 1 (1968).

91. 392 U.S. 40 (1968).

92. *Sibron* and *Peters* were decided together in a single opinion, but *Peters* was resolved on the ground that the officer in that case had made a proper arrest on probable cause. *Id.* at 66-67.

93. Brief for Petitioner, *passim*, *Terry v. Ohio*, 392 U.S. 1 (1968). This position had been forcefully argued in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 402 (1960).

the "stop and frisk" power had proved to be a useful technique for the prevention and investigation of crime.⁹⁴ To ban this more flexible procedure and to measure all police-citizen contacts against the all-or-nothing standard of the law of arrest would strike a serious, and undeserved, blow to effective law enforcement. Two of the briefs that were filed with the Supreme Court in these cases were especially interesting in the divergent use they made of the Crime Commission's reports. An *amicus curiae* brief filed in *Terry* on behalf of the National District Attorneys Association⁹⁵ cited the Crime Commission's studies and admitted the potential for abuse of the power to conduct "field interrogations" in the absence of probable cause,⁹⁶ but asked the Court to adopt, under the fourth amendment, the distinction that the Crime Commission had urged on the legislatures: to allow the brief detention of identifiably suspicious persons (and also to allow weapons searches when there were grounds for the officer to fear for his safety), but to prohibit even brief seizures in the absence of objective reasons to suspect the particular person who is stopped.⁹⁷ The brief filed for *Sibron* also cited the Crime Commission studies but drew a different lesson from them.⁹⁸ It highlighted the evidence of wide-spread complaints of discriminatory exercise of the "stop and frisk" power and argued that this abuse could be curbed only by total prohibition of the "stop and frisk" in absence of grounds for arrest. Only the standard of traditional probable cause, *Sibron's* counsel argued, could guard sufficiently against abuse of discretion of this kind.⁹⁹

The issues before the Court in *Terry*, *Sibron*, and *Peters* were thus of different sorts. In one sense, the cases involved the legitimacy and proper bounds of a particular police practice, commonly called "field interrogation" (or, more narrowly, the propriety of the police conduct that might be so labeled on the three particular occasions that gave rise to each of the cases that eventually reached the Supreme Court). And it seems clear that for many observers (as well as amici) the propriety of "field interrogation" was indeed the central if not the only question. In a more general sense, however, the trio of cases also

94. Brief for Respondent, *passim*, *Terry v. Ohio*, 392 U.S. 1 (1968). Support for this point of view could be found, for example, in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942), which argued for the validity, on both historical and practical grounds, of provisions in the Uniform Arrest Act that conferred powers on police similar to the powers at issue in *Terry*.

95. Brief of National District Attorneys Association, *Amicus Curiae*, in Support of Respondent, *Terry v. Ohio*, 392 U.S. 1 (1968).

96. *Id.* at 16-19.

97. *Id.* at 23-25. Similarly, in the Brief of Americans for Effective Law Enforcement, *Amicus Curiae*, in Support of Respondent, *Terry v. Ohio*, 392 U.S. 1 (1968), the distinction that Tiffany had observed between the "field interrogation" and other, more indiscriminate practices, was noted; only the former was approved. *Id.* at 7-8.

98. Brief for Appellant, *Sibron v. New York*, 392 U.S. 40 (1968).

99. *Id.* at 31, 49-51.

presented the problem of striking a proper balance between individuals' interests in personal liberty and privacy and the public interest in prevention and discovery of crime. Should this issue be regarded as settled by the law of arrest and the standard of probable cause? If the answer is "no," *when* should the courts undertake the fashioning of new and lesser standards through some process of weighing the competing interests? And how should this new interest balancing be conducted? The cases raised, in addition, thorny problems of controlling police discretion. For recognizing the legitimacy of "field interrogation" and allowing the police to conduct limited seizures of people on the streets and searches of their persons in the absence of probable cause to arrest, would substantially widen the area encompassed by the discretionary decision to seize and search. By lowering the quantum of evidence that an officer needed before the fourth amendment allowed him to act, the Court would, of course, be increasing by some substantial but unknown factor the number of opportunities for an officer to act. Unless there was a proportionate increase in the number of police on the street — an unlikely development and one of questionable desirability — there would be that many more occasions for the police to respond selectively. Since selectivity generally implies discretion, there would be more opportunities for abuse. And the Crime Commission studies had surely revealed a prevalent belief that the police were in fact sometimes using the discretion that the "field interrogation" technique conferred on them as a license to discriminate.¹⁰⁰

So one important way of assessing the Supreme Court's work in *Terry* and its companion cases is to ask how well the Court handled the new problems of control of police discretion that "field interrogation" practices raised. Professor Davis's analysis of the elements of a system of discretion regulation suggests the questions that such an assessment might address.¹⁰¹ Although there are surely differences between the administrative promulgation and enforcement of internally developed rules, which Davis has espoused, and the regulation of police discretion through the judicial process, there are obvious similarities as well. In either situation, the regulation effort can be judged by how well it *confines* police discretion, i.e., sets boundaries within which discretion may be exercised; how well it *structures* the exercise of discretion within these boundaries, i.e., articulates the goals, policies, and principles that are to guide the discretionary exercise of power; and, finally, how well the exercise of discretion is *checked*, i.e., reviewed by someone else.¹⁰²

All three of these elements can be identified in Chief Justice War-

100. See *supra* text accompanying notes 83-89.

101. See K. DAVIS, *supra* note 55 at 145-46.

102. *Id.*

ren's opinion for the Court in *Terry*; yet the treatment is not entirely successful. At crucial points, the opinion is obscure or self-contradictory, and it is vague or overly general where more specific guidance could usefully have been given to the lower courts and the police. A detailed examination of what the Court said in this most important case is in order.

2. *Terry v. Ohio*— The opinion commences with a statement that the case before the Court “presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.”¹⁰³ It proceeds to recite the facts of the case and its procedural history.¹⁰⁴ There follow five numbered sections of varying lengths. Section I, which was evidently intended to serve as backdrop for what would follow, contains perhaps the most puzzling material in the opinion. It opens with a ringing affirmation of the fourth amendment's protections of personal liberty and privacy even of persons on the street,¹⁰⁵ but on its heels comes a reminder that this guarantee protects only against unreasonable searches and seizures, not reasonable ones.¹⁰⁶ Then the opinion frames the issue presented for decision, and does so in terms that could give pause to one who has read only this far and had entertained the hope that the Court would provide realistic but meaningful standards for field interrogations: “The question is whether in all the circumstances of this on-the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure.”¹⁰⁷ Was the Court on the verge of announcing a new “totality of the circumstances” test? And so soon after it had given up on a similar test as unworkable for assessing the admissibility of confessions?¹⁰⁸ There is no immediate answer, for the opinion at this point proceeds to sketch out the legal debate over the propriety of “field interrogation” practices, employing the “on the one hand” “yet on the other hand” mode. The dispute, the Court informs us, is between those on the one hand who advocate arming the police with “an escalating set of flexible responses, graduated in relation to the amount of information they possess,”¹⁰⁹ and those on the other who argue instead “that the authority of the police must be strictly cir-

103. 392 U.S. at 4.

104. *Id.* at 4-8.

105. *Id.* at 8-9.

106. *Id.* at 9.

107. *Id.*

108. *Miranda v. Arizona*, 384 U.S. 436 (1966). On the unworkability of the “totality of the circumstances” voluntariness test for confession, see, e.g., Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 69-76 (1980).

109. 392 U.S. at 10.

cumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment."¹¹⁰

This discussion might lead one to expect that the Court would now announce that it had decided to reject both of these "extreme" positions in favor of some middle ground. Rather than enter the debate at this point, however, the Court now injects yet another consideration. The question to be decided, it reminds us, "is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure."¹¹¹ Thus begins what was in 1968, and remains 16 years later, the most mysterious passage in the *Terry* opinion, a desultory discussion of the policies, purposes, and likely limitations of the exclusionary rule.

One such limitation, the opinion says, is that "[i]t cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections."¹¹² What the Court meant by this is still not entirely clear. In a limited sense, the Court seems to be saying that it would not seek to forbid field interrogation altogether merely because some similar practices — those loosely termed "aggressive preventive patrol"¹¹³ — were constitutionally unreasonable. But the passage suggests a broader meaning as well, whether or not it was intended. If police conduct and the exercise of police discretion are to be regulated at all, then that conduct must be categorized. The stuff of rulemaking in this area, whether the process is administrative or judicial, is the development of categories to which particular incidents of police conduct must be assigned. Fixed legal consequences will then follow, depending on the category — a certain quantum of justification will be required, and certain limitations on the degree of police intrusiveness will be enforced. But categorization requires, of course, the drawing of lines, and the location of any line will be somewhat arbitrary.¹¹⁴ The process cannot take

110. *Id.* at 11 (footnote omitted).

111. *Id.* at 12.

112. *Id.* at 13.

113. See *supra* notes 76-80 and accompanying text. This is the meaning Professor LaFare assigned to the passage — that it was put in the opinion in service of some narrow points about the reach of the exclusionary rule. LaFare, "*Street Encounters*" and *the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 61 (1968).

114. The problem is perhaps analogous to the conflict that the Court has perceived when, in examining statutory classification schemes challenged on equal protection or due process grounds, it has noted that the process of categorization sometimes leads to seemingly arbitrary results; yet the alternative, to insist on a "perfect fit" in every case, would be unmanageable. In *Califano v. Boles*, 443 U.S. 282 (1979), a case involving classifications set up for the provision of social security benefits, Justice Rehnquist wrote for the Court:

[I]t is necessary to define categories of beneficiaries. The process of categorization presents the difficulties inherent in any line-drawing exercise where the draftsman confronts a universe of potential beneficiaries with different histories and distinct needs.

account of every nuance, of every subtle distinction between similar incidents, unless the number of categories is allowed to proliferate unmanageably.¹¹⁵ Did the Court mean to disapprove this categorization process? In order to avoid the possibility that slightly different situations would be treated as though they were the same, did the Court mean to forbid all categorization? Did it mean to require the consideration of each case entirely on its own facts? Elsewhere in its opinion, the Court suggested that this is precisely what it did mean.¹¹⁶

Yet there is another possibility. The Court may not have intended to forbid all line drawing and all categorization. It may have intended only to mandate the drawing of lines in a certain way. The Court may have wanted to assure that when the line was laid down to separate police conduct that would be tolerated from that which was forbidden, it would extend far enough to include within the approved territory all that conduct that would be allowed under a "totality of the circumstances" standard that permitted consideration of every facet of every case in all its uniqueness. Only in this way can a categorization approach accommodate the demand that no evidentiary "products of legitimate police investigative techniques" be suppressed "on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." But the consequence of thus extending the line outward is that police conduct that, standing only on its own bottom, would be declared illegal will undeservedly receive "the constitutional imprimatur." The product of many illegitimate police techniques will be *received* solely on the ground that some conduct which is closely similar involves *permissible* intrusions upon constitutional protections. In later cases, this is precisely what has happened. Most notably, in *New York v. Belton*,¹¹⁷ the Court employed a

He strives for a level of generality that is administratively practicable, with full appreciation that the included class has members whose "needs" upon a statutorily defined occurrence may not be as marked as those of isolated individuals outside the classification.

Id. at 284. See also *Jimenez v. Weinberger*, 417 U.S. 628, 639 (1974) (Rehnquist, J., dissenting) ("The very process of making legislative decisions to govern society as a whole means that some individuals will be treated less favorably than other individuals who fall within a different legislative classification."); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 660 (1974) (Rehnquist, J., dissenting) ("All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification.").

115. See Amsterdam, *supra* note 6, at 116; LaFare, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142.

116. See 392 U.S. at 17 (noting that the issue is "the reasonableness in all the circumstances of the particular governmental invasion"); *id.* at 21-22 (defining standard as whether "facts available to officer" warrant reasonable belief "that the action taken was appropriate"). Here the Court has couched the standard in terms that seem to require striving for the elusive "perfect fit" in each individual case, as judged on its own no doubt unique facts.

117. 453 U.S. 454 (1981).

categorical approach to hold that, contemporaneously incident to the arrest of the occupants of a car, the police may search the car's entire passenger compartment and all containers found there. This broad area will *always* be open to search, the Court said, because experience teaches that it is *often* in fact within reach of the arrestees¹¹⁸ and hence subject to search incident to arrest doctrine of *Chimel v. California*.¹¹⁹

The Court in *Terry* went on to declare, in language that elicited immediate criticism,¹²⁰ that the exclusionary rule is in any event "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal,"¹²¹ and that, therefore, "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."¹²² Did the Court mean to say that the fruits of illegal searches and seizures ought to be admitted despite the illegality when the police have sufficiently strong reasons of their own, such as a desire to harass or a perceived need to protect themselves, to continue the practice? In fact, the Ohio Court of Appeals had said just this in support of its decision affirming the admission of *Terry*'s pistol as evidence against him at his trial (although the court also upheld the legality of the frisk that yielded the weapon).¹²³ But Professor LaFave was probably correct when, writing shortly after the *Terry* decision, he disputed such an interpretation of the Supreme Court's words.¹²⁴ In all likelihood, the Court intended principally to reinforce the point it had just made, that it would not ban proper "field interrogations" simply because other police conduct — those practices that had

118. *Id.* at 460-61. When *Belton* was decided, it was suggested that the case might represent merely an effort, albeit a clumsy one, to get at a different problem from the search incident to arrest issue, namely the problem of when the police may search a car, and containers found in it, for evidence of a crime, when they have probable cause to believe such evidence will be found but lack a warrant (as they did on the facts of *Belton*). Professor LaFave expressed the hope that once the Court resolved this other issue, it might retreat from its broad *Belton* rule. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 332-33 (1982). Although the evidentiary container search issue has been more or less resolved, in *United States v. Ross*, 456 U.S. 798 (1982), the Court has not retreated from but has expanded *Belton*. The Court in *Michigan v. Long*, 103 S. Ct. 3469 (1983), relied on *Belton* to hold that the police may search the entire passenger compartment of a car "limited to those areas in which a weapon may be placed or hidden" when they have a reasonable and articulable basis to believe "that the suspect is dangerous and . . . may gain immediate control of weapons" — even in the absence of probable cause either to arrest or to search.

119. 395 U.S. 752 (1969).

120. See LaFave, *supra* note 113, at 60-61 (noting but disagreeing with the criticism).

121. 392 U.S. at 14.

122. *Id.* at 15.

123. *State v. Terry*, 5 Ohio App. 2d 122, 131-32, 214 N.E.2d 114, 121 (1966).

124. LaFave, *supra* note 113, at 61.

sometimes been labeled “aggressive preventive patrol” — was abusive.¹²⁵ Such a total ban would fail to accomplish its purpose, since the disapproved practices were not even aimed at the acquisition of evidence and so would continue in any event. Yet, the Court chose unfortunately broad language to make these rather limited points. By denying the efficacy of suppressing evidence when the police have other purposes than successful prosecution in mind when obtaining that evidence, then pressing this point as a reason to withhold the exclusionary sanction, the Court at least weakened its own argument in support of the rule. Although the Court hastened to say that when the police exceed their legal bounds, even for their own immediate purposes, this action “must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials,”¹²⁶ some might remain unconvinced.¹²⁷

Section I of the opinion, at any rate, ends with some conventional protestations that the Court can only adjudicate the case before it, on its own particular facts, but in words that might have further disheartened those who had hoped that the Court would attempt to establish guidelines for the regulation of “field interrogation”:

No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. . . .

125. *Id.* The *Terry* opinion articulated a rationale for suppressing illegally obtained evidence *even if* to do so would not discourage one iota of future police misconduct. First “[t]he rule also serves another vital function — ‘the imperative of judicial integrity.’ ” 392 U.S. at 12 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)). “Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.” *Id.* at 13. Second, the Court evidently valued the norm-articulation function that exclusionary rule litigation serves, when it noted that “in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents.” *Id.* Without this process, of course, we would not know what the non-self-defining terms of the fourth amendment mean, what conduct the amendment allows, and what it forbids. Lastly, the Court recognized that allowing evidence in “legitimiz[es] the conduct which produced the evidence,” whereas suppressing the evidence “withholds the constitutional imprimatur,” *id.*, a rationale possibly somewhat independent of the “deterrence,” the “judicial integrity,” and the “norm-articulation” rationales.

Thus, the Court provided ample reason to exclude illegally obtained evidence *even if* no deterrence followed. When the Court said it would withhold application of the exclusionary rule because the deterrence function was unlikely to be served, it was, as LaFave concluded, deciding not to suppress evidence that was itself *legally* obtained merely out of the hope that similar *illegal* conduct would thereby be discouraged. If in fact this deterrence does not occur, there is no remaining reason to apply the exclusionary rule.

Yet this was an exceedingly round-about way of making a rather narrow point, and with the Court now speaking of the deterrence rationale as the only reason for the exclusionary rule’s continued existence, *e.g.*, *United States v. Janis*, 428 U.S. 433, 446-47 (1976), it provides some authority — however unintended — for the rule’s curtailment, even as to evidence that was itself illegally obtained.

126. 392 U.S. at 15.

127. *See* note 124.

. . . [W]e turn our attention [now] to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.¹²⁸

Section II of the opinion is at least ostensibly aimed at refuting a position that the Court — perhaps unfairly¹²⁹ — attributes to the Ohio and the New York Courts of Appeals, namely that on-the-street encounters that do not amount to full-blown arrests and searches incident to arrest are altogether beyond the fourth amendment's reach.¹³⁰ But the Court's strategy in pursuing this aim is curious, and, yet again, the Court raises serious doubts whether its approach is capable of achieving meaningful regulation of police conduct. The Court focuses on the distinctions that, it says, the state courts drew in the course of removing stops and frisks from the scope of the fourth amendment's regulation. Thus, the Supreme Court says, it perceives a "danger in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search.'" ¹³¹ Surely the Court is correct, if the purpose of the categorization process described here is to place conduct in one set of categories — the "stop" and the "frisk" — altogether beyond the fourth amendment's control (which is indeed the result suggested by the particular labels that the court here identifies). But this is not to say that this kind of categorization is also useless for another purpose — namely, to sort out different kinds of police practices, all of them subject to fourth amendment regulation, but each requiring a different but relatively fixed degree of justification.

On the contrary, categorization for this purpose is essential if workable regulation is to be achieved. Yet, in rejecting a particular process of categorization, which employs one set of labels that altogether excludes certain intrusive police conduct from the fourth amendment's requirements, the Court appears to reject the very idea of categorization. "The distinctions of classical 'stop-and-frisk' theory," the Court says, "serve to divert attention from the central inquiry under the Fourth Amendment — the reasonableness in all the circumstances of the par-

128. 392 U.S. at 15-16.

129. See LaFave, *supra* note 113, at 51-52 & n.62.

130. 392 U.S. at 16-18.

131. *Id.* at 17.

ticular governmental invasion of a citizen's personal security."¹³² So, in place of a categorization scheme that might serve to domesticate on-the-street police practices that had previously escaped fourth amendment control, the Court appears to endorse a "reasonableness under the totality of the circumstances" test that merely promises a level of judicial control that the test is unlikely ever to attain.

The principal theoretical justification for the Court's decision is set forth in section III. Here the Court confronts the most formidable doctrinal obstacle standing in the way of a decision to uphold but regulate the practice of field interrogations: the probable cause requirement of the fourth amendment's warrant clause. How could the Court approve any searches or seizures on less than traditional probable cause when the text of the amendment itself imposed a requirement of probable cause on the government, at least when the search or seizure was conducted pursuant to a warrant?¹³³ A year earlier, in *Camara v. Municipal Court*,¹³⁴ the Court had encountered a similar problem. The issue in that case was the propriety of administrative housing inspections, which, it was asserted, should be forbidden in the absence of a warrant issued on traditional probable cause to believe that housing code violations would be discovered.¹³⁵ Fearing that such a stringent requirement would thwart the legitimate and benign purposes of routine municipal housing inspections, the Court balked at imposing it.¹³⁶ Yet, principally as a check against abuse of discretion, the Court also required a warrant before inspectors forcibly entered any homes.¹³⁷ How could it accomplish these two purposes — forbidding warrantless entries but allowing the issuance of warrants despite the absence of reason to believe that code violations lay hidden behind any particular door — in light of the fourth amendment's interdiction against the issuance of warrants without probable cause? In *Camara*, the Court reconciled the seemingly irreconcilable by a simple trick: it redefined probable cause. At least in this context, the Court said, probable cause is a standard without any fixed content. It means that which is required as a justification for the particular kind of search or seizure.¹³⁸ And the

132. *Id.* at 19.

133. The first clause of the amendment prohibits "unreasonable searches and seizures," and the second demands certain safeguards of warrants, including the requirement that they not be issued except "upon probable cause."

134. 387 U.S. 523 (1967) (involving a residential inspection). A companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), involved similar inspections of commercial structures.

135. 387 U.S. at 534.

136. *Id.* at 535-37.

137. *Id.* at 532-34.

138. After finding that area-wide housing inspections were reasonable, if conducted pursuant to sufficiently regularized procedures, *id.* at 534-38, the Court concluded that *therefore* such searches were being conducted on the relevant form of probable cause. *Id.* at 538-39. This reasoning reverses the usual form. For a felony arrest in a public place, for example, the Court would

level of justification in a given case is to be found, then, not in the text of the amendment but rather through a process of interest balancing.¹³⁹

The *Camara* solution had a salutary advantage. It drastically limited the kinds of cases where this new (and diluted) form of probable cause would control, since history and a large body of precedent required traditional probable cause — as defined, for example, in *Brinegar*¹⁴⁰ — for most governmental searches and seizures,¹⁴¹ and the circumstances in *Camara* itself were exceptional: minimally intrusive administrative searches were conducted pursuant to a neutral plan, and for the mutual advantage of all of those whose homes were inspected. Under the *Camara* approach, only those searches or seizures that were substantially less intrusive than searches or seizures associated with ordinary law enforcement efforts would be judged under the new balancing test rather than traditional probable cause. In creating an *exception* to the ordinary probable cause requirement, it emphasized that it would be applied only in exceptional cases.

But in *Terry*, the Court took a different tack. It observed that when Officer McFadden accosted Terry and searched the surface of his clothing, he neither had a warrant nor, in light of the exigencies of the moment, could realistically have been required to obtain one.¹⁴² Thus, the probable cause standard, which the fourth amendment makes a prerequisite to the issuance of a warrant, does not control.¹⁴³ The officer's conduct was to be judged only under the less rigorous standards of the reasonableness clause of the amendment, whose language permits far wider room for judicial interpretation. Probable cause, however defined, need not be shown; it is enough if the search or seizure can be found to be reasonable.¹⁴⁴ So the Court drove a wedge between

ask if there was probable cause. If so, *then* the arrest could be held reasonable. Cf. *United States v. Watson*, 423 U.S. 411 (1976). In *Camara*, however, the Court said:

Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

387 U.S. at 538-39.

139. 387 U.S. at 536-37.

140. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

141. The *Camara* Court could say correctly that its "approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area." 387 U.S. at 539. Its strategem allowed it to treat this new kind of probable cause as an exception — and a quite limited one — to the usual requirement of *Brinegar*-style probable cause.

142. 392 U.S. at 20.

143. *Id.*

144. *Id.*

the amendment's two clauses. In so doing it potentially increased the applicability of a balancing test far beyond the area envisioned in *Camara*. Since the large majority of police searches and seizures are, as a factual matter, likely to be conducted without a warrant and to involve, like *Terry* itself, "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat,"¹⁴⁵ the theoretical importance of the probable cause test was radically diluted. The approach is thus doubly objectionable. First, as Justice Douglas pointed out in dissent, it meant that an officer could accomplish on his own that which the magistrate would be forbidden to allow him to do pursuant to a warrant.¹⁴⁶ Second, and perhaps more importantly, it threatened to weaken judicial control over an unknowably broad area of police conduct that had previously been subject to the restraint of traditional probable cause.

Having severed the fourth amendment's two clauses, the *Terry* opinion then attempts to stitch them back together again, at least loosely, when it asserts that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context."¹⁴⁷ But just how loose the new connection is soon becomes apparent. When explaining why probable cause to arrest imposes an inappropriately strict standard for judging Officer McFadden's actions, the Court stresses the role of an arrest as a step in the commencement of the criminal process, rather than the reality of an arrest as an intrusion on the person of the arrestee. "An arrest," says the Court, "is a wholly different *kind* of intrusion . . . [It] is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed,"¹⁴⁸ in addition to being a substantial deprivation of liberty and invasion of privacy. So, the Court seems to say, an equally intrusive police procedure, not leading to prosecution, may well be assessed against a less demanding standard.¹⁴⁹

145. *Id.*

146. *Id.* at 36. "I would award this round to Justice Douglas . . ." LaFave, *supra* note 113, at 54.

147. 392 U.S. at 20.

148. *Id.* at 26 (emphasis added).

149. To be sure, the prosecution-initiation function was not the only basis on which the Court distinguished an arrest from a *Terry* frisk. It did, for example, point out that an arrest "is inevitably accompanied by future interference with the individual's freedom of movement." *Id.* But to argue that an arrest was different "in kind" from lesser intrusions, the Court kept returning to the point that an arrest is the first step leading to trial and perhaps conviction. For example, "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." *Id.* at 26-27 (emphasis added). The Court's fixation on this idea is readily understandable (even if, with the advantage of hindsight, one might wish it had adopted a different strategy that would have made it harder to argue that other sorts of police intrusions, themselves different in kind from arrests, might also be justified on less than probable cause). On the one hand, the Court had to find a basis for saying that some investigative intrusions

Loosed from the stringency of ordinary probable cause, the Court states the standard to apply in this new but unclearly broad area:

[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. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search “warrant a man of reasonable caution in the belief” that the action taken was appropriate?¹⁵⁰

This passage merits comment. First, the Court is plainly concerned to hold the police officer to an “objective” standard of sorts, and an important facet of this objectivity is the insistence upon specificity (at least as to the facts upon which the officer acts). This insistence on specificity — along with the correlative distaste for “inarticulate hunches” — is, the Court informs us in a footnote, “the central teaching of this Court’s Fourth Amendment jurisprudence.”¹⁵¹ Second, the importance that the Court attaches to after-the-fact judicial review here appears to transcend the consideration that is commonly (if misleadingly) referred to as the deterrent impact of the exclusionary rule.¹⁵² Apart from the ultimate result at a hearing on a defendant’s subsequent motion to suppress, the Court seemingly finds value in the very process of scrutinizing the officer’s conduct and assessing his or her justification. This idea bears close resemblance to an idea from administrative law, that subjecting agency action to judicial review is important for its

were so short of an arrest that probable cause should not be required. On the other hand, the Court also had to say that these “lesser” intrusions were substantial enough to count as searches and seizures subject to fourth amendment controls. The Court may have seized on the prosecution-initiation function for the arrest as a way out of this dilemma, for it permitted the Court to stress the intrusiveness of field interrogation conduct, while at the same time sharply distinguishing it from arrests.

150. *Id.* at 21-22 (citations and note omitted).

151. *Id.* at 21 n.18.

152. For example, Professor Kamisar has argued that it would be more accurate to say that receiving the fruits of police illegalities encourages their misconduct, and that the exclusionary rule merely removes this incentive. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 597 n.204 (1983).

own sake because it forces the agency to articulate a justification for what it has done. The process of articulation, it has been argued, establishes patterns of thought that encourage more rational and coherent agency action.¹⁵³ Perhaps it is the same with the police. Third, the utility of these first two considerations as regulating devices may well be undermined by the generality of the standard against which the police conduct is to be measured.

Apart from the requirement of "specificity" and insistence on "articulable facts," there is very little to it. No particular quantum of evidence is mentioned or clearly implied. It is like a recipe for cake batter that calls for grade "A" medium eggs but neglects to say whether one, two, or a dozen of them should be put in. Worse, the standard itself encompasses the ultimate policy judgment of the justifiability of the given conduct, given the facts that were available to the officer at the time. The officer is evidently to decide for him or herself, at least in the first instance, whether those available facts "reasonably warrant [the] intrusion." Similarly, the judge at the suppression hearing is to decide whether the available facts "warrant a man of reasonable caution in the belief," not that a particular situation exists (as it is with traditional probable cause), but rather "that the action taken was appropriate." So the question of what response the law should allow to a certain kind of situation is delegated to the police officer, subject, to be sure, to later judicial review, but that review will doubtless include a healthy dose of deference to the officer's on-the-spot judgment.

Applying these standards to Officer McFadden's conduct caused little evident difficulty. The government's "general interest" in "effective crime prevention and detection"¹⁵⁴ was implicated here, the Court concludes, because of the officer's detailed observations of Terry's and Chilton's many trips — the Court counted about 24 past the same store window — and their numerous conferences with each other and the third man, Katz.¹⁵⁵ Moreover, McFadden developed a "more immediate interest"¹⁵⁶ in protecting himself from attack while investigating the trio of men whom he suspected of planning a robbery, and, in such a situation, the Court recognized "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the officer,

153. As the Supreme Court said about the requirement that the Secretary of Labor state reasons when declining to bring a civil action in response to a complaint of irregularities in a union election, in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), "a 'reasons' requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies, and . . . the need to assure careful administrative consideration 'would be relevant even if the Secretary's decision were unreviewable.'" *Id.* at 572 (citing lower court opinion).

154. 392 U.S. at 22.

155. *Id.* at 23.

156. *Id.*

where he has reason to believe that he is dealing with an armed and dangerous individual”¹⁵⁷

So, in part IV of the opinion, the Court upholds the officer’s conduct and affirms the court of appeals’ decision. The Court deemed it reasonable to think that the three men were preparing to commit a daylight robbery¹⁵⁸ and thus it was reasonable to believe, or at least reasonable to fear (the Court used both terms), that the men were armed.¹⁵⁹ Finally, the Court adjudged McFadden’s search of Terry to be reasonably limited in scope, commensurate with the limited legitimate purpose that the Court recognized, to discover weapons that might threaten the policeman’s safety. For the officer merely “patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons.”¹⁶⁰

The fifth and final section of the opinion contains a single long paragraph. It includes a conventional (and unconvincing) assurance of the narrowness of the decision. “We merely hold today,” the opinion avers,

that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that

157. *Id.* at 27.

158. *Id.* at 28. In fact, Terry and Chilton had evidently broken off their reconnaissance when Detective McFadden intervened. The policeman first saw the two men at the corner of Huron Road and Euclid Avenue in downtown Cleveland. *Id.* at 5. The store whose window they took turns examining was on Huron Road, southwest of the intersection. *Id.* at 6. McFadden approached them only after they had abandoned their post at the intersection and had begun to walk west on Euclid — away from the store they were supposedly casing. *Id.* Thus it seems unlikely that McFadden jumped in to prevent an imminent hold up. It seems more likely that he acted to prevent them from getting away, after they had given up on (or at least postponed) their plan. The Court’s opinion indicates awareness of this point (although it is studiously downplayed), saying though the suspects “had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery *at some point.*” *Id.* at 28 (emphasis added).

159. *Id.* at 29. The opinion suggests various (and perhaps conflicting) formulations of the degree of fear that justified the frisk. See *id.* at 24 (“justified in believing that the individual . . . is armed and presently dangerous”); *id.* at 26 (“reasonable apprehension of danger”); *id.* at 27 (“reason to believe that he is dealing with an armed and dangerous individual”); *id.* (“whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger”); *id.* at 28 (“a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat”); *id.* (“quite reasonable to fear that they were armed”); *id.* at 30 (“reasonable grounds to believe that petitioner was armed and dangerous”); *id.* (“[reasonable conclusion] that the persons with whom he is dealing may be armed and presently dangerous”); *id.* (“reasonable fear for his own or others’ safety”).

So what is required? A “reasonable belief”? Or a “reasonable fear,” suggesting a lower standard? And are the “armed” and the “dangerousness” requirements independent of each other — must both be shown? Or is “danger” presumed when only the “armed” requirement is made out (by whatever standard the Court meant to set)? Or vice versa? The answers were unclear, and they remain so today.

160. *Id.* at 29-30.

criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or other's safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.¹⁶¹

But, the Court also emphasized, "[e]ach case of this sort will, of course, have to be decided on its own facts."¹⁶²

Seen as an effort to regulate the exercise of police discretion, the *Terry* opinion deserves at best mixed marks. It is weakest in its confining of that discretion, for in the course of bringing field interrogation practices within fourth amendment control it opened wide the door to an unpredictably diverse array of police practices that might now be permitted in the absence of traditional probable cause. The doctrinal reason for this potential breadth is the opinion's divorce of the probable cause requirement in the warrant clause from the fourth amendment's reasonableness clause.¹⁶³ In addition, the Court passed up two opportunities that the case presented for imposing some limits on police discretion. First, the Court declined to suggest meaningful standards for determining when traditional probable cause is or is not required, standards that would look to the intrusiveness of a particular practice in comparison to the intrusiveness of an arrest. The Court instead emphasized the function of an arrest as the commencement of criminal prosecution, a feature that distinguishes it from virtually every other police search or seizure of the person.¹⁶⁴ So, at least

161. *Id.* at 30.

162. *Id.* The most startling feature of the *Terry* opinion is thus evident: the extreme narrowness of its purported holding, which contrasts with the extreme breadth of the new fourth amendment theory that the Court espoused in support of it. The language of the holding claims only to resolve the question of the propriety of a pat-down, not a detention, and it assertedly allows the pat-down only after an officer has unsuccessfully tried less intrusive means to dispel his fear. Justice Harlan, out of concern to provide somewhat fuller "guidelines for law enforcement authorities and courts," felt "constrained to fill in a few gaps" in the opinion. *Id.* at 31 (Harlan, J., concurring). First, because the state of Ohio was making no claim that its officers had any general power to frisk and disarm dangerous persons, he saw Detective McFadden's right to conduct a pat-down as necessarily dependent upon an antecedent right "to make a forcible stop" on articulable suspicion. *Id.* at 32. Second, despite the limiting language in the majority's statement of its holding, he thought that an officer conducting a stop could frisk immediately, rather than first conduct some preliminary inquiry, when, as in *Terry*, the stop was conducted on "articulable suspicion of a crime of violence." *Id.* at 33.

163. See *supra* notes 142-46 and accompanying text.

164. See *supra* notes 147-49 and accompanying text.

arguably, any of these other searches or seizures should be assessed on a balancing text; traditional probable cause should be reserved for the traditional arrest, leading to prosecution. Second, the Court also rejected, on grounds of unworkability, a distinction that it attributed to the New York Court of Appeals. This suggested limitation would allow the police to act without probable cause when investigating violent crimes or those that threaten extreme loss or destruction of property but would require the police to stay their hand when the suspected crime was a mere minor theft or sumptuary offense.¹⁶⁵ So, although *Terry* itself concerned an officer's well-founded fear that an armed robbery of a downtown store was in the works, the Court's opinion apparently sanctioned police intrusions without probable cause on the far more numerous occasions when they suspect some less serious wrongdoing, such as a drug offense.

The Court did somewhat better in structuring police discretion, although even here its performance was uneven. The Court was virtually silent concerning the quantity of information that an officer must possess before acting, but it did insist upon specificity and condemned conduct based on mere hunch.¹⁶⁶ While attaching some significance to an officer's experience,¹⁶⁷ it also said that the officer's judgments

165. See 392 U.S. at 17 n.15.

166. See *supra* notes 150-53 and accompanying text.

167. The Court appeared ambivalent on the subject of Detective McFadden's experience. In its statement of the facts, the Court stressed his 39 years on the force, his 35 years' tenure as a detective, and his 30 years of experience in the same area of downtown Cleveland, 392 U.S. at 5, and quoted his assessment of Terry and Chilton when he first observed them: "Now, in this case when I looked over they didn't look right to me at the time." *Id.* Further, it referred to this experience later. *Id.* at 27 ("due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"); *id.* at 30 (officer may act upon reasonable conclusions reached "in light of his experience"). Yet, more often, the Court couched its standards in terms of a "reasonable man" test that, on its face, showed no special deference to police expertise. *E.g.*, *id.* at 27 ("reasonably prudent man"). Too much deference to police expertise would, of course, lessen the need for "specificity" in observed facts, and a total surrender would allow the police to act upon mere inchoate hunch. The Court might also have been reluctant to accord too much weight to McFadden's expertise in spotting incipient stick-ups. His work focused on shoplifting and pick-pocket offenses, *id.* at 5, and, as he admitted upon questioning by the judge at the suppression hearing, his directly relevant experience was surprisingly limited:

Q. In your thirty-nine years of experience as an officer . . . [h]ave you ever had any experience in observing the activities of individuals in casing a place?

A. To be truthful with you, no.

Q. You never observed anybody casing a place?

A. No.

* * *

Q. During your tenure as a police officer, . . . how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up?

A. To my recollection, I wouldn't know, I don't know if I had — I don't remember any.

must ultimately be tested by an objective, "reasonable man" standard.¹⁶⁸ Further, it emphasized that, when the reasonableness of an officer's conduct is assessed, the scope of the particular intrusion must be scrutinized, as well as its initiation.¹⁶⁹ Yet the Court made little effort to translate these very general considerations into specific standards that the officer in the field might apply. The Court itself applied these considerations to find Officer McFadden's actions reasonable. In doing so, the Court called especial attention to the specificity of the information McFadden had acquired before stepping in and to the restraint he exercised when he did act.¹⁷⁰ Yet, all the while, the Court insisted that each case must be decided upon its own facts.¹⁷¹ Further, it left the individual officer free to decide, at least in the first instance, whether under the totality of the circumstances the particular conduct would be justified.¹⁷² Thus the ultimate value judgment that would have to be made was entrusted to the police themselves.

The *Terry* opinion was probably strongest in its affirmation of the exclusionary rule as a check on police discretion, although the Court also weakened its case through some loose and unnecessary speculation concerning limitations of the rule as a specific deterrent of police misbehavior.¹⁷³

3. *Sibron v. New York*— These problems of appropriate control of police discretion have plagued the Court ever since *Terry*, and they continue to divide the Court today. Indeed, some of these difficulties surfaced in the companion case of *Sibron v. New York*,¹⁷⁴ decided the same day as *Terry*. The *Sibron* opinion, also written by the Chief Justice, found a constitutional violation and ordered suppressed the heroin that Brooklyn Patrolman Anthony Martin found in Sibron's pocket,¹⁷⁵ but the opinion is as significant for what it does not say as for what it does. First, the opinion nowhere directly questions the officer's right to stop Sibron, and indeed very little in the *Terry* opinion would have cast doubt on the temporary seizure of Sibron's person. As Justice

168. 392 U.S. at 21-22, 27-28.

169. *E.g.*, *id.* at 19-20.

170. *E.g.*, *id.* at 22-23, 29-30.

171. *Id.* at 30.

172. *Id.* at 21-22.

173. *See supra* notes 111-27 and accompanying text.

174. 392 U.S. 40 (1968).

175. Martin observed Sibron for an eight-hour period — between 4 p.m. and midnight — during which Sibron conversed with six or eight persons Martin knew to be narcotics addicts. *Id.* at 45.

Late at night, Sibron went into a restaurant, where he spoke with three more addicts and ordered pie and coffee. Before he could finish eating, however, Martin told him to come outside. Martin then said, " 'You know what I am after,' " and Sibron reached into his pocket in response. Martin then "thrust his hand into the same pocket." The plum that he came out with was several glassine envelopes of heroin. *Id.* At no time, however, had Martin heard Sibron's conversations with the addicts or seen anything transferred. *Id.*

Harlan's concurrence in *Terry* pointed out, the Court's opinion did not expressly establish the standard that must be met for such a detention,¹⁷⁶ and to the extent that *Terry* at least inferentially required specificity and more than a hunch for a stop, as well as for a frisk, that standard was surely met. It was satisfied by the patrolmen's observation of Sibron in the company of known narcotics users over an eight-hour period.¹⁷⁷ Since *Terry* said very little indeed about the quantum of evidence that police must have in hand, there is little in the opinion that would support a finding that information was too thin.

Second, the *Sibron* opinion does not say that Officer Martin *could not* have reasonably feared that Sibron was armed and dangerous during their encounter. It would have been difficult indeed for the Court to have said so, since the officer surely had a specific, articulable fact to point to: Sibron's reaching into his pocket.¹⁷⁸ Could not an officer reasonably have feared that the suspect was going for a weapon? The Court, significantly, stops short of challenging the reasonableness of such a fear. It relies instead on the finding that Officer Martin in fact *did not* fear for his own safety, since, when he testified, he never "urge[d] that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense."¹⁷⁹ The Court is at pains to demonstrate that when the officer put his hands into Sibron's pocket he was hoping to seize drugs, not to disarm a dangerous man, that "he sought narcotics" and "thought here were narcotics in Sibron's pocket."¹⁸⁰ Standing alone, this is obviously an insubstantial basis for finding Officer Martin's conduct improper, since it would permit precisely the same conduct in another case arising on the same facts if the officer *did* fear that the suspect was trying to grab a gun (or at least if the officer made such a claim that the lower courts accepted).

So, to bolster its conclusion that Officer Martin stepped beyond constitutional limits, the Court went on to find that the method this policeman employed, even if it was prompted by a justified fear, was too intrusive; for, unlike Officer McFadden in Cleveland, the officer from Brooklyn thrust his hand into the suspect's pocket before con-

176. *Terry v. Ohio*, 392 U.S. 1, 33-34 (1968) (Harlan, J., concurring).

177. *Sibron v. New York*, 392 U.S. 40, 45 (1968). The Court never decided whether Martin would have been justified in *stopping* Sibron. It said, first, that Martin's observation of Sibron's association with known addicts was insufficient to provide probable cause *to arrest*, *id.* at 62-63, and that it was unnecessary to decide "whether there was a 'seizure' of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search." *Id.* at 63. Rather, the Court decided the case upon the question of the propriety of a "self-protective search for weapons," once Sibron put his hand into his pocket outside the restaurant. *Id.*

178. *Id.* at 45.

179. *Id.* at 64.

180. *Id.*

ducting a pat-down of his outer clothing and feeling a weapon.¹⁸¹ Thus, said the Court, “[t]he search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man.”¹⁸² Yet this distinction is altogether specious as a basis for decision. *Terry* nowhere limited the police to one particular method. On the contrary, it repeatedly admonished that each case must be decided under the totality of its own circumstances.¹⁸³ And on the facts of *Sibron*, a pat-down, if it could have revealed a weapon at all (as Professor LaFave was quick to point out, the presence of Sibron’s own hand in the pocket may have made it impossible to feel a weapon even if one had been there¹⁸⁴), might have revealed it too late. Wasn’t Officer Martin entitled to grab the suspect’s hand, to prevent the weapon’s use against him? The *Sibron* opinion lacks answers to troubling questions of this sort.

Still, the Court’s reluctance to endorse Officer Martin’s actions is readily understandable. Sanctioning a forcible stop on these facts would place too indiscriminate a power in the hands of the police, and it would confer an authority that could readily be turned to discriminatory abuse. The problem that *Sibron* illustrates is the inadequacy of the standards set forth in *Terry* to prevent such abuses. In particular, *Terry* fails to articulate workable standards for the quantum of evidence an officer must have, and it fails to limit the new powers granted police to situations where violent offenses demand immediate response. The *Sibron* Court had to rely on distinctly unpersuasive arguments to find a constitutional violation, for those were the only arguments that *Terry* allowed.¹⁸⁵

181. *Id.* at 65.

182. *Id.*

183. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 30 (1968) (emphasis added): “The policeman [McFadden] carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. *Each case of this sort will, of course, have to be decided on its own facts.*” Indeed, the later case of *Adams v. Williams*, 407 U.S. 143 (1972), approved an officer’s decision to reach directly in to a suspect’s waistband, where the officer had been informed that the man was carrying a gun, without first conducting a pat-down.

184. LaFave, *supra* note 113, at 89.

185. Justice Harlan did take on the issue that was the real nub of *Sibron* — whether there were adequate grounds for a stop — and concluded that such grounds were absent. 392 U.S. at 72 (Harlan, J., concurring). But he had to depart from *Terry* itself to do so. First, he adopted a requirement from New York law that “the officer must ‘reasonably suspect’ that the person he stops ‘is committing, has committed or is about to commit a felony,’” which, Justice Harlan noted, “is, if anything, more stringent than the requirement stated by the Court in *Terry*” *Id.* On this standard, Justice Harlan concluded that Sibron’s observed association with known addicts, while “properly . . . a factor,” was not enough. *Id.* at 73. This conclusion is hard to justify under *Terry* alone, which requires *specificity* of information but says little directly about any required quantity. Second, Justice Harlan identified the “need for immediate action” as an important factor justifying a stop in *Terry* but found it absent in *Sibron*. *Id.* Again, however Justice Harlan had to move considerably beyond the *Terry* text.

VI. POST-*Terry* ELABORATIONA. *Structuring — or loosening — discretion: Brown and Cortez*

Later decisional law has continued to grapple with the same problems. Concern over the need to structure the officer's exercise of discretion is plainly visible in the Court's later efforts to give more content to the "specific and articulable facts" standard of *Terry*. This concern is clearest in the Court's development of a "particular individual" test as a measure of the quantum of evidence necessary to justify the initiation of a detention of an individual for a limited investigation of suspicious circumstances. This idea is expressed in, for example, *Brown v. Texas*,¹⁸⁶ where the Court found that the police lacked sufficient basis to conduct a *Terry* stop of a person whom they saw one afternoon in an alley in a high crime area of El Paso. Although the man — Brown — appeared to the officers to have been together with a second man, or about to meet him, when the officers appeared, and though Brown and the other man walked away from each other as the officers approached,¹⁸⁷ this conduct was held to be insufficient to single Brown out for special scrutiny. In the Court's view, "the appellant's activity was no different from the activity of the other pedestrians in that neighborhood."¹⁸⁸

The result in *Brown* was, it is submitted, eminently sensible and indeed necessary if the authority that *Terry* granted the police is not to become a basis for indiscriminate and potentially discriminatory stops. Yet it is difficult to extract the idea of "particularity" from *Terry* itself. In speaking of a need for "specific" facts, the *Terry* Court seemed to be referring to the need for identifiable and describable evidence.¹⁸⁹ The Court's purpose was to distinguish conduct based upon concrete evidence from that based upon naked hunch. The police in *Brown* did have such concrete evidence before they acted, namely Brown's and his companion's conduct, which they evidently described in as much detail as the situation permitted.¹⁹⁰ The problem was not with the specificity of their information but rather with its weight, and the particularity requirement sets a useful if fairly minimal sufficiency standard: the police must be able to justify singling out from the rest of humanity (or at least from the rest of the people in the general area)

186. 443 U.S. 47 (1979).

187. *Id.* at 48.

188. *Id.* at 52.

189. See *supra* notes 150-53 and accompanying text.

190. 443 U.S. at 48-49. Significantly, however, the officer was evidently unable to articulate what he suspected Brown for: he stopped Brown, he said, "because the situation 'looked suspicious and we had never seen that subject in that area before.'" *Id.* at 49.

the particular individual whom they have stopped as somehow meriting this special attention. Indeed, this particularity test could have provided a more satisfactory basis for the decision in *Sibron* than the Court was able to develop in that case.

In addition, as the *Brown* opinion makes clear, the requirement of particularity exists principally to inhibit "arbitrary invasions [of privacy] solely at the unfettered discretion of officer in the field."¹⁹¹ Thus the police may perhaps avoid the rigors (such as they are) of this test if they can demonstrate instead "that the seizure [was] carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."¹⁹² The "particularity" and "neutral plan" requirements are alternative tests that the police might attempt to meet to demonstrate that the power they have exercised was not overly subject to discretionary abuse.¹⁹³

191. *Id.* at 51.

192. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

193. The "particularity" idea seems to have informed the Court's decision in *Ybarra v. Illinois*, 444 U.S. 85 (1979), where it held that the police were not entitled to pat down the patrons at a tavern, where they were executing a search warrant for narcotics said to be on the premises and on the person of the bartender:

Upon seeing Ybarra, [the police] neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any patron in Illinois in early March.

Id. at 93. Despite a state statute that authorized the detention and search of all persons found on premises being searched under a warrant, *id.* at 87 & n.1, the Court did not, however, consider whether the "neutral plan" rationale justified the pat-down of Ybarra. There are, nonetheless, two immediately apparent objections to relying on a "neutral plan" justification here. First, a search of the person, as opposed to a brief detention, may be simply too intrusive for justification solely under a "neutral plan," in the absence of sufficient "particularization." *Cf.* *United States v. Ortiz*, 422 U.S. 892 (1975). Second, the authority purportedly conferred under the Illinois statute was permissive — it did not *require* an officer to conduct the searches that it allowed — and was drawn so broadly that an officer would have to apply it selectively. Thus, the statute was not a sufficient curb against discriminatory abuse.

In addition, in *Reid v. Georgia*, 448 U.S. 438 (1980), the Court found that two suspects' resemblance to some characteristics on a Drug Enforcement Administration "drug courier profile" was too slight to permit a forcible stop. Some of the circumstances — their arrival at the Atlanta airport from Fort Lauderdale on an early morning flight — failed the particularization test, since they also "describe a very large category of presumably innocent travellers" *Id.* at 441. Further, the Court deemed a DEA agent's conclusion, based on their conduct, that they were travelling together but attempting to hide the fact, "more an 'inchoate . . . hunch' . . . than a fair inference in light of his experience" *Id.*

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), however, the Court dispensed with the need for a particularized showing of dangerousness in holding that *whenever* the police stop a vehicle for a traffic violation they may order the driver out of the car. It justified this new grant of authority by pointing to *generalized* concerns about the officer's safety whenever approaching a stopped car. *Id.* at 110-11. The need for particularization was not, however, entirely ignored. The officer's observation of a particular traffic violation justified the initial stop, *id.* at 109 & n.4, and the Court deemed the further order to exit an already stopped car a mere "*de minimus* additional intrusion." *Id.* at 111.

In another important respect, however, the Court has gone beyond *Terry* in deferring to the officer's discretionary decisions in the field. The *Terry* opinion several times mentioned Officer McFadden's experience — his 39 years on the force, 35 years as a detective, and 30 years working the particular area of downtown Cleveland — yet the standards that the opinion set ultimately accorded that experience little weight.¹⁹⁴ In describing the use that could be made of the "specific and articulable facts" that an officer had acquired, *Terry* allowed consideration of the "rational inferences from those facts"¹⁹⁵ And elsewhere it worded the standard in terms of how "a reasonably prudent man in the circumstances" would view the situation.¹⁹⁶ Later decisions have gone considerably further in according weight to the inferences that the *particular police officer* (as opposed to the hypothetical reasonably prudent person) drew, and the Supreme Court has said that the courts owe deference not only to the judgments of the officer whose experience approaches that of Martin McFadden but to the "trained" officer as well.¹⁹⁷ Evidently, then, even the recent police academy graduate is entitled to his or her share of this deference. Thus in *United States v. Cortez*¹⁹⁸ — a virtual paean to police expertise — the Court repeatedly stressed what it described as "the imperative of recognizing that, when used by *trained* law enforcement officers, objective facts, meaningless to the *untrained*, can be combined with permissible deduction from such facts to form a legitimate basis for suspicion of a particular person"¹⁹⁹

194. See *supra* notes 167-68 and accompanying text.

195. 392 U.S. at 21.

196. *Id.* at 27.

197. For example, in *Brown v. Texas*, 443 U.S. 47 (1979), the Court called attention to "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Id.* at 52 n.2. The inability of the officer in *Brown* to draw on his training and experience to "articulate meaning" in what he had observed was evidently significant to the Court's conclusion that he had not observed enough before he stopped *Brown*. *Id.*

198. 449 U.S. 411 (1981). *Cortez* involved the elaborate efforts of Border Patrol agents to catch the people running an apparently illegal alien border crossing enterprise. In pain-staking detail, the Court's opinion relates the course of the investigation, the officers' deductions about the operation of the scheme, and how the deductions ultimately led the officers to apprehend *Cortez* and a companion. *Id.* at 413-17. It is difficult to read the account and not be persuaded of the reasonableness of the agents' ultimate decision to stop *Cortez's* van. Anyone with a taste for Sherlock Holmes stories will appreciate these agents' work. Yet the deference to police expertise that *Cortez* mandates is likely to be applied far more often in an altogether different kind of situation, not involving the exacting deductive process that occurred in this case. *Cortez* threatens to lead to increased deference to officers' on-the-spot interpretations of some highly ambiguous acts, such as the infamous "furtive gesture." Will *Cortez*, for example, encourage unthinking judicial deference to police assertions that the hand movement of a car's driver must mean that he is hiding contraband, or going for a gun? One may hope that judges will remain critical of such claims. Cf. 1 W. LAFAVE, SEARCH AND SEIZURE § 3.6(d) (1978). Yet *Cortez* hardly encourages judicial skepticism.

199. *Id.* at 419 (emphasis supplied). The shift from a focus on *experience* to deference for

*B. Confining — or expanding — discretion:
the balancing test v. probable cause*

The most interesting, and probably the most important, post-*Terry* developments have, however, taken place in another area. They have concerned the reach of *Terry*'s most general idea, that some categories of searches and seizures may be justified on less than ordinary probable cause. How numerous are those categories? How closely must they resemble the stop and frisk that *Terry* itself concerned? How much must they differ from an arrest? How much freedom should the lower courts have in recognizing such categories on their own? And will the police be allowed to experiment in order to discover which kinds of conduct the courts will accept on less than traditional justification and which they will not?

1. *Dunaway v. New York*— The Court considered some of these issues in its 1979 decision, *Dunaway v. New York*.²⁰⁰ The police in Rochester, New York suspected Dunaway in the murder of a pizza parlor proprietor but lacked probable cause to arrest him. Nonetheless, a detective on the case "ordered other detectives to 'pick [him] up' . . . and 'bring him in.'"²⁰¹ He was found at a neighbor's home, taken into custody, put into a police car for the drive to headquarters, and there placed in what the Court described as an "interrogation room"

training is worth notice. Observers of the police have stressed the importance of an officer's on-the-street experience in deciphering clues that he observes and have accorded little weight to the rookie's training. *E.g.*, J. RUBINSTEIN, CITY POLICE 232-33 (1973). Whether the Court's enthusiasm for deference to police expertise in identifying "suspicious" persons is justified is indeed questionable. Studies suggest that officers are likely to stop for field interrogations those who are black and young in higher proportion to that group's representation among the people who are actually arrested. Thus the factors of being young and black appear important to the police in making stops but are less important in deciding who is likely to have actually committed an offense. Bogomolny, *Street Patrol: The Decision to Stop a Citizen*, 12 CRIM. L. BULL. 544, 569-73 (1976).

Professor Sheri L. Johnson reviewed the relevant social science research and concluded, "[t]here is substantial evidence that many police officers believe minority race indicates a general propensity to commit crime. The evidence further suggests the police weigh that belief in their decisions to detain." Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 236 (1983) (note omitted). "One recent study," she continued, "found that blacks are disproportionately the victims of arrests not supported by probable cause. Whatever the general predictive power of race, this study suggests that, for various reasons, police overestimate it." *Id.* at 239 (note omitted). Further, the prejudice that such findings evidently reflect "may be hidden in the police officer's 'expertise'. . . . The court may completely accept the expertise, risking that the officer's prejudice about ghetto neighborhoods clouds his evaluation of the probability of crime contributed by the neighborhood." *Id.* at 255. So, Johnson concludes, "[c]ourts should be reluctant to place substantial weight on facts where expertise and prejudice often intersect." *Id.* Yet the Supreme Court has lately been mandating greater judicial deference to police "expertise," without any of the caveats Johnson suggests are necessary.

200. 442 U.S. 200 (1979).

201. *Id.* at 203.

for questioning.²⁰² In support of the admission against him at his murder trial of incriminating statements and sketches that this questioning yielded, the state of New York argued — and the New York courts found — that this detention was permissible even in the absence of probable cause to arrest. According to the Appellate Division of the New York Supreme Court, “law enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual’s Fifth and Sixth Amendment rights.”²⁰³ The U.S. Supreme Court disagreed. In an opinion by Justice Brennan, the Court held that the kind of detention to which Dunaway had been subjected must, whatever its label, be supported by traditional probable cause. Despite the breadth of the theory of non-probable cause seizures that had been developed in *Terry*, the *Dunaway* opinion rejected on principle the idea that a detention for the purpose of station-house interrogation could be judged upon a balancing test.²⁰⁴ This detention was too similar to an arrest to be tolerated on a lesser justification. But the opinion also had a more ambitious reason for rejecting the position of the New York courts. The Supreme Court strongly suggested that the “stop and frisk” was a virtually unique exception to the requirement of probable cause; this kind of intrusion was, the *Dunaway* Court said, “a sui generis ‘rubric of police conduct,’ ”²⁰⁵ and, it implied, anything more intrusive required probable cause.

The first element of Justice Brennan’s strategy to support these views was to stress the narrowness of the actual holding in *Terry*. That case, *Dunaway* observed, involved only “a limited, on-the-street frisk for weapons,”²⁰⁶ and had indeed “specifically declined to address ‘the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation.’ ”²⁰⁷ Further, Justice Brennan was able in 1979 to make an argument that the Court in 1968 had been unable to make: that the stop-and-frisk was substantially less intrusive than an ordinary arrest. When *Terry* was decided, the Court had been at pains to demonstrate that a stop-and-frisk, or field interrogation, was intrusive enough to come within the ambit of fourth amendment control (even if the level of control was diminished). Thus the Court had been constrained to point out that a frisk was far more than a “petty indignity,”²⁰⁸ that it was rather

202. *Id.*

203. *Id.* at 206 (quoting opinion following earlier remand from U.S. Supreme Court).

204. *Id.* at 215-16.

205. *Id.* at 209.

206. *Id.* at 210.

207. *Id.* at 210 n.12.

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

“a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be taken lightly.”²⁰⁹ By 1979 this point was settled, and it was taken for granted that the fourth amendment governed such on-the-street encounters. As a result, Justice Brennan was freer to make another point: that the stop-and-frisk was, nonetheless, substantially less intrusive than an arrest (a point that the *Terry* opinion had avoided making when it pointed to the arrest’s function in the initiation of prosecution to explain why arrests required a higher level of justification).²¹⁰ Consequently, in his opinion for the Court in *Dunaway*, Justice Brennan could write that the pat-down for weapons that *Terry* had authorized was “so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment ‘seizures’ reasonable could be replaced by a balancing test.”²¹¹ In the same vein, the *Dunaway* opinion stressed limitations on the duration and intrusiveness of the investigative stop about which the Court had spoken previously,²¹² and it attempted to assimilate to the specific, narrow *Terry* holding other, later cases that had permitted the police to conduct some limited intrusions on less than probable cause.²¹³ So, the *Dunaway* opinion implies, only a single category of police intrusions had been approved on less than probable cause, and those intrusions were far less severe than arrests.²¹⁴

The second element in Justice Brennan’s plan was to develop a rationale — which had been missing in *Terry* — for confining the balancing test to the stop-and-frisk. And here the *Dunaway* opinion talks the language of discretion control. The Court did not dispute that some additional kinds of searches or seizures could in the abstract be justified under a balancing test, at least if they were also “substantially less intrusive than arrests.” It feared rather that reliance on a balancing test would free the police from effective regulation, whether that test applied only to stationhouse interrogation or covered as well

209. *Id.*

210. See *supra* notes 148-49 and accompanying text.

211. 442 U.S. at 210.

212. To explain the limits of the detention that *Terry* allowed, Justice Brennan quoted a description of the investigative stop conducted by roving border patrols. “The investigative stops usually consumed less than a minute or two and involved ‘a brief question or two.’ ” *Id.* at 210-11 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

213. *Id.* at 210-11.

214. The effort to squeeze into a single, discrete category all of the *Terry* progeny that had appeared on the scene by 1979 was not entirely successful, but the *Dunaway* Court could note that the seizures allowed on less than probable cause had all fallen “far short of the kind of intrusion associated with an arrest,” *id.* at 212, and it quoted language from *Brignoni-Ponce* that, after “‘a brief question or two’ ” upon a forcible stop, “‘any further detention or search must be based on consent or probable cause.’ ” *Id.* at 212 (quoting *United States v. Brignoni-Ponce*, 422 U.S. at 881-82) (emphasis supplied by Court in *Dunaway*).

“all seizures that do not amount to technical arrests.”²¹⁵ The Court explained that “the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the ‘often competitive enterprise of ferreting out crime.’”²¹⁶ The Court also compared the unworkability of a balancing formulation with the certainty that, it said, probable cause provides. The police should refer to that “single, familiar standard,”²¹⁷ rather than conduct on-the-spot balancing of important “social and individual interests” against each other.²¹⁸

Only Justice White specifically took issue with any of these points. He joined the Court’s opinion but also wrote separately to express his disagreement with the idea, which in his view the majority opinion “might be read” to embrace, that *Terry* recognized “an almost unique exception to a hard-and-fast standard of probable cause.”²¹⁹ Rather, for Justice White, “the balancing of competing interests” was “the key principle of the Fourth Amendment.”²²⁰ Evidently in response to the majority’s concern that a balancing test could not adequately regulate police conduct, Justice White added: “if courts and law-enforcement officials are to have workable rules, this balancing must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers.”²²¹

2. *Michigan v. Summers*— Just two years later, in *Michigan v. Summers*,²²² the Court returned to the balancing test, and it inducted a new member to the class of searches and seizures permitted in the absence of probable cause, though *Dunaway* had appeared to close the membership roll. Summers was leaving just as Detroit police officers arrived to execute a warrant to search his home for drugs. The police detained him inside his house during the search, and, after they found narcotics in his basement, placed him under arrest. They then found additional drugs — 8.5 grams of heroin — in a search of his person incident to the arrest.²²³ Summers questioned the legality of the initial detention, which lasted for some unclear period of time, but perhaps hours, while the search occurred.²²⁴ The Court assumed for purposes

215. *Id.* at 213.

216. *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

217. *Id.*

218. *Id.* at 214.

219. *Id.* at 219 (White, J., concurring).

220. *Id.*

221. *Id.* at 219-20.

222. 452 U.S. 692 (1981).

223. *Id.* at 693.

224. The record in *Summers* evidently did not disclose the duration of the detention, but

of decision that the police lacked probable cause to arrest Summers at the time of the initial encounter (perhaps because the police may not have known until later that Summers was the owner as well as an occupant of the house).²²⁵ Could this detention be assessed under the balancing test?

A six-justice majority, in an opinion by Justice Stevens, concluded that it could. To justify the use of the balancing test rather than probable cause, the Court emphasized a narrower line of reasoning in *Dunaway*, which had noted that the detention in that case "was in important respects indistinguishable from a traditional arrest."²²⁶ In contrast the detention of Summers was "substantially less intrusive, than an arrest"²²⁷ and so could be judged under the fourth amendment's reasonableness clause rather than under the probable cause standard of the warrant clause. Further, *Summers* disputed the *Dunaway* Court's claim that those searches or seizures that the Court had previously approved under the balancing test could all be assimilated to a single category, essentially a stop-and-frisk.²²⁸ *Summers* instead identified four separate categories of previously approved non-probable cause intrusions: the *Terry* frisk for weapons, conducted on "an officer's reasonable belief that he was dealing with a possibly armed and dangerous suspect";²²⁹ the forcible stop of a suspect, said to have been approved in *Adams v. Williams*²³⁰ to allow the officer "to investigate an informant's tip that the suspect was armed and carrying narcotics";²³¹ U.S. Border Patrol stops of cars on the open road, conducted, as approved in *United States v. Brignoni-Ponce*,²³² "on the agents' awareness of specific articulable facts indicating that the vehicle contained illegal

the dissent noted other cases where the search of a house consumed up to five hours. *Id.* at 711 & n.3 (Stewart, J., dissenting).

225. *Id.* at 693-94 & n.1.

226. *Id.* at 696-97 (quoting *Dunaway v. New York*, 442 U.S. at 212).

227. *Id.* at 702 (quoting *Dunaway*). In making this assessment, the Court virtually ignored the duration of the detention, which the record did not reveal, *see supra* note 224, but looked instead to (a) the officers' possession of a search warrant, (b) the improbability of an officer exploiting this new authority, on grounds that the search that the magistrate had already authorized would likely satisfy the officer's investigative thirst, and (c) the location of the detention in the suspect's own home, which, the Court thought, should minimize the stigma involved. 452 U.S. at 701-02. With the exception of the last factor, however, these matters seem more relevant to the seizure's ultimate reasonableness than to its intrusiveness, insofar as "intrusion" connotes an abridgement of privacy interests. They are, however, relevant to the likelihood that this new authority will be subject to discriminatory abuse. In effect, the Court identified some reasons for thinking that this police power will not be susceptible to discriminatory exercise, and concluded that it could be assessed under a balancing test. *Id.*

228. 452 U.S. at 697-99.

229. *Id.* at 698.

230. 407 U.S. 143 (1972).

231. 452 U.S. at 698.

232. 422 U.S. 873 (1975).

aliens”;²³³ and, finally, the stops at permanent checkpoints that the Court had upheld in *United States v. Martinez-Fuerte*,²³⁴ also for the purpose of stemming the flow of illegal aliens.²³⁵ Such a diverse set, the *Summers* opinion implies, must all stand for some more general principle that is capable of extension to yet further situations.

These cases recognize that some 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 They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. But they demonstrate that the exception for limited intrusions that may be justified special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*.²³⁶

The Court went on to approve the detention of *Summers*, using a balancing test. It argued in particular that this new authority was not

233. 452 U.S. at 699.

234. 428 U.S. 543 (1976).

235. 452 U.S. at 699 n.10.

236. *Id.* at 699-700. Justice Stewart (dissenting with Justices Brennan and Marshall) managed to group *Terry* and all its progeny into two narrow categories: a “limited stop to question a person and to perform a pat-down for weapons when the police have reason to believe that he is armed and dangerous”; and “a brief stop of vehicles near our international borders to question occupants of the vehicles about their citizenship.” *Id.* at 706 (Stewart, J., dissenting).

Each of these “isolated exceptions” to the probable cause requirement was supported by “some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, an interest important enough to overcome the presumptive constitutional restraints on police conduct.” *Id.* at 707. Stewart found the more mundane interests involved in *Summers* insufficient to dispense with probable cause. *Id.* at 708-10

This argument makes clever use of Supreme Court precedent, but it is ultimately unpersuasive. Its exceedingly narrow reading of *Terry* itself — that a *detention* of a suspect will be allowed only when there is reason to believe he is *armed and dangerous* (and hence fair game also for a frisk) — is consistent with the actual narrow *Terry* holding, but against this interpretation stands the near-universal understanding that, at least by implication, *Terry* also settled the right of the police to conduct momentary on-the-street seizures of suspects, upon “articulable suspicion” that “criminal activity may be afoot” even in the absence of any fear of a weapon. Other strategies than the “special governmental interest” argument will have to be devised to limit further expansion of use of the balancing test for seizures of the person. As argued below, see *infra* notes 304-17 and accompanying text, it will be necessary to consider (a) the minimality of a given detention and (b) the susceptibility of a new police authority to discriminatory abuse. A variant of the “special governmental interest” argument may, however, yet prove useful to contain another newly recognized police power, that of non-probable cause seizures of personal property. See *infra* notes 274-81, 318, and accompanying text.

overly susceptible to discretionary abuse. The *Summers* majority, quoting Justice White's *Dunaway* concurrence with approval, insisted that it was proceeding categorically, as Justice White had urged, rather than on an *ad hoc*, case-by-case basis.²³⁷ Several features distinguish this new category: the possession of a search warrant for the house; contraband as the object of the search; and the detention only of an occupant of the premises, by which the Court evidently meant a resident.²³⁸ Permitting a detention under these limited circumstances, the Court said, would not involve the dangers that the court had perceived in *Dunaway*, since police officers acquired no balancing responsibilities.²³⁹ The right to detain the occupant would follow automatically from the issuance of a proper warrant by the magistrate, and the satisfaction of the other objective features that the Court noted.²⁴⁰ Such a detention could be justified by concerns of safety as well as two additional, narrow but significant state interests: the desirability of securing the occupant's assistance during the course of the search when, for example, it becomes necessary to open locked containers that might otherwise have to be broken and the convenience of not having to locate the occupant if the search yields sufficient information to justify his arrest.²⁴¹

237. *Id.* at 705 n.19.

238. *Id.* at 705.

239. *Id.* at 703 & n.18.

240. *Id.* at 705. A curious feature of *Summers*, in light of *Terry's* emphasis that an officer could not realistically be required to seek a warrant before conducting a stop-and-frisk, was the *Summers* Court's reliance on the fact that the police had obtained one. Whereas in *Terry* the impracticability of obtaining a warrant allowed the Court to look to the fourth amendment's reasonableness clause to fashion a new standard, in *Summers* the Court pointed to the presence of a warrant in support of the seizure's "general reasonableness." The crucial fact that allowed the *Terry* Court to dispense with the probable cause that the warrant clause requires — namely, the practical unavailability, under the circumstances, of a warrant — was simply absent in *Summers*. Not only was a warrant obtainable, but one had been obtained, to conduct the search. Yet no one on the Court evidently noticed this point.

Still, the *Summers* Court was surely correct in its assessment of the value of the warrant in this context. The same problem had arisen before in *Davis v. Mississippi*, 394 U.S. 721 (1969), where the Court, per Justice Brennan, suggested in dicta that magistrates could lawfully issue limited warrants on less than traditional probable cause, requiring suspects to appear at the stationhouse for fingerprinting. *Id.* at 727-28. See also *Wise v. Murphy*, 275 A.2d 205 (D.C. 1971) (authorizing judicial orders to stand in a line-up at police station, on less than probable cause to arrest).

The way out of this doctrinal mess, and the way to restore the connection between the probable cause requirement and the reasonableness clause, would be for the court to revert to *Camara v. Municipal Court*, 387 U.S. 523 (1967), and say that probable cause is required for all searches and seizures, but that for some few, narrow categories, such as *Terry* stops and frisks, a diminished form of probable cause, rather than probable cause as defined in *Brinegar*, is sufficient. This proposal is no panacea. The problem will still remain of defining when "diminished probable cause" rather than "*Brinegar* (or *Gates*?) probable cause" is required. But this approach will, first, focus attention on the fact that "diminished probable cause" is the exception; it ought to be reserved for exceptional circumstances. Second, it will place *Summers* and its requirement of a warrant on sounder doctrinal footing.

241. 452 U.S. at 702-03.

3. *Florida v. Royer*— Two recent cases have explored *Summers*' reach, and both have sharply divided the Court. *Florida v. Royer*,²⁴² like an increasing number of search and seizure cases reaching the Supreme Court lately,²⁴³ concerned the conduct of drug agents who accosted a suspected drug courier at an airport. Dade County detectives working at Miami International Airport became suspicious of Royer because of his resemblance to a "drug courier profile": he paid cash for a one-way ticket to New York, exhibiting a large number of bills; the two suitcases that he checked appeared heavy; he was young and casually dressed and appeared nervous; and he failed to fill out completely the baggage identification tags.²⁴⁴ When approached in the airport concourse, he complied with the agents' request to produce his airline ticket and driver's license. These documents only heightened the officers' suspicion. The ticket and luggage tags listed another name — Holt — and he could only partially explain the discrepancy by saying that a friend had made his airline reservation for him.²⁴⁵

The agents identified themselves and informed Royer, by now visibly nervous, of their suspicions. Retaining possession of his ticket and license, they requested that he accompany them. Without protest, Royer complied. They escorted him to a room about forty feet away, a "large storage closet"²⁴⁶ in the stewardesses' lounge, that contained two desks and a chair. The officers retrieved Royer's suitcases and asked for consent to search them. Without an oral response, Royer produced a key with which an officer opened one suitcase which contained a quantity of drugs. Royer then allowed the police to break open the second suitcase; additional drugs were discovered.²⁴⁷

Five members of the Court found Royer's consent invalid, not because it was involuntary under the totality of the circumstances formulation of *Schneckloth v. Bustamonte*,²⁴⁸ but because it occurred during a period of illegal detention. For Justice Brennan, one of the five justices voting to suppress the evidence, the case was easy. The police lacked probable cause, as the plurality concluded,²⁴⁹ and the closet detention could not be justified under any lesser standard. Comparing this intrusion with what, in his view, *Terry* allowed — only "the briefest of detentions or the most limited of searches" — he found that these Dade County detectives had "clearly exceeded the permissible bounds of a

242. 103 S. Ct. 1319 (1983).

243. *United States v. Place*, 103 S. Ct. 2637 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Mendenhall*, 446 U.S. 544 (1980).

244. 103 S. Ct. at 1321-27.

245. *Id.* at 1322.

246. As one of the detectives described it in his testimony. *Id.*

247. *Id.*

248. 412 U.S. 218 (1973).

249. 103 S. Ct. at 1329.

Terry 'investigative' stop."²⁵⁰ Justice Brennan, however, was alone among the Court's members in analyzing the problem in these terms, an analysis similar to his analysis for the Court in *Dunaway*.

Four other justices, joining Justice White's plurality opinion, posed and answered somewhat different questions in concluding that the detention in the closet was of a sort that required probable cause. For them, one critical question was not how far this detention differed from a classic *Terry* stop but rather how closely it resembled an arrest. Employing this standard, which also came from *Dunaway* but by way of *Summers*, the plurality found that by the time the police sought Royer's consent for a luggage search, "[a]s a practical matter, [he] was under arrest."²⁵¹ A certain resemblance between the facts of Royer and of both *Dunaway v. New York*²⁵² and *Brown v. Illinois*²⁵³ surely helped the Court reach this conclusion. In all three cases, suspects were taken from familiar and accessible surroundings to enclosed, isolated, and unfamiliar locations. Further, in the police-dominated atmosphere of these settings, all three suspects were induced to provide what the police wanted, Brown and Dunaway to incriminate themselves, and Royer to allow search of his marijuana-laden luggage.²⁵⁴ The *Royer* plurality played on this similarity when it repeatedly referred to the stewardesses' closet as a "police interrogation room."²⁵⁵

Still, on closer examination, the analogy is unpersuasive. When Brown and Dunaway were whisked away to the stationhouse their lives were disrupted to a degree that the detention of Royer in the airport closet did not approach. Brown and Dunaway had to abandon whatever they had been doing or planning before the police arrived. If they had not incriminated themselves and if the police had released them from custody, they would have had to spend time traveling some substantial distance home.²⁵⁶ The interference with their right to be left alone was

250. *Id.* at 1330 (Brennan, J., concurring).

251. *Id.* at 1327.

252. 442 U.S. 200 (1979).

253. 422 U.S. 590 (1975).

254. According to the Court in *Dunaway*, after a decision was made to "pick [him] up" and "bring him in," detectives found him "at a neighbor's house [He] was taken into custody He was driven to police headquarters in a police car and placed in an interrogation room, where he was questioned by officers" 442 U.S. at 203. Similarly, two Chicago police officers accosted Brown at gun-point as he was entering his apartment. 422 U.S. at 592. They informed him he was under arrest, *id.*, and drove him in handcuffs to a police station a 20 minute drive away. *Id.* at 593. There he "was placed in the second-floor central interrogation room," which "was bare, except for a table and four chairs," and was questioned. *Id.* at 594.

255. 103 S. Ct. at 1327-28 (including three references to "interrogation room"); *id.* at 1326-1328 (including four references to "police room"). As in *Brown*, the *Royer* plurality described the room's furnishings, "a desk and two chairs." *Id.* at 1327; *see also id.* at 1322 ("a small desk and two chairs").

256. The drive from Brown's home to the police station took 20 minutes. 422 U.S. at 593.

great, surely great enough to insist that the police not act without probable cause. Royer's situation was different. If, after he consented to a search of his baggage, the police had let him go and returned his ticket, he could presumably have caught his flight.²⁵⁷ In comparison with what Brown and Dunaway were forced to experience, Royer's disruption was relatively minor. More important, the disruption Royer suffered cannot clearly be blamed on the fact that he was detained in a closet, since the *Royer* plurality upheld the officers' right to detain him in the concourse, which was only 40 feet away,²⁵⁸ and the plurality may have assumed that Royer *went* voluntarily to the closet and that the more intrusive, non-consensual detention began only after he and the officers had arrived at the closet.²⁵⁹ Whatever disruption Royer experienced occurred because he was detained, not because he was detained in the closet rather than in the concourse.²⁶⁰ Further, while Brown and Dunaway likely suffered substantial stigma from the public knowledge that they had been "brought downtown" for questioning about murder charges, Royer's trip to the closet likely minimized the stigma for him. It allowed him to avoid additional public attention in the concourse while the police continued their investigation.

But the plurality had not yet expended all its ammunition. From

257. The plurality opinion does worry that the detention in the "closet" involved an unnecessary risk that Royer would miss his flight, 103 S. Ct. at 1328, but in comparison with a comparable detention and consensual luggage search in the concourse, this risk appears slight. The room was about 40 feet from where Royer was stopped. *Id.* at 1322. If he and the agents walked at three miles per hour, the trip would have taken about 9 seconds each way, or 18 seconds from concourse to closet and back. Assuming that it likewise took an additional 18 seconds to bring his luggage to the closet for a consensual search, then return it to the custody of the airline (and, for all the opinion tells us, the closet could have been *closer* to the luggage holding area, thus saving time), about 36 seconds would have been lost by bringing Royer to the "police interrogation room" if he had ultimately been sent on his way.

258. *See id.* at 1326.

259. This, at any rate, is how the principal dissent reads the plurality opinion. "The plurality does not seem to dispute that Royer consented to go to the room in the first instance." *Id.* at 1341-42 (Rehnquist, J., dissenting). The plurality is in fact unclear about when, in its view, the encounter turned into a detention. At one point, the plurality says that:

[W]hen the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.

Id. at 1326. Since all these events occurred in the concourse, the point is evidently that Royer was stopped there, which under the circumstances would seem to indicate that the trip to the room was likewise nonconsensual (though Justice Blackmun took the strange position that, although Royer was being coercively detained, insofar as he acceded to the officers' request to move the place of the detention from the concourse to the room, he voluntarily consented to the transfer, *id.* at 1334-35 (Blackmun, J., dissenting)). Moments later, however, the plurality notes that, in the closet, Royer found himself "alone with two police officers," who, "without his consent, had retrieved his checked luggage from the airlines." *Id.* at 1327. "At least as of that moment, any consensual aspects of the encounter had evaporated . . ."

260. *See* 103 S. Ct. at 1340 (Rehnquist, J., dissenting).

Terry's requirement that the scope of an intrusion be carefully limited by the purposes that justify it at the outset, Justice White extracted a further mandate that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officers' suspicion in a short period of time."²⁶¹ His opinion then found that the Dade County detectives' "conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases."²⁶² The plurality's explanation of this point is, however, puzzling. Noting that no one claimed that the officers had acted out of any concern for their or others' safety by moving the questioning away from the airport's public areas, the opinion focuses on what was surely the detectives' real interest, a desire to search Royer's suitcases. That interest, the plurality says, did not necessitate taking Royer to a private room. He could even have been released and then asked if he would consent to a luggage search, or the officers could have sought his consent while detaining him in the concourse.²⁶³ The plurality also suggests the possibility of more expeditious means, not relying on consent; the police could have, for example, "momentarily detained" the luggage in order to present it to a trained drug-sniffing dog.²⁶⁴

It is difficult to accept this argument at face value. If the plurality meant to say that the police did not increase their chances of obtaining Royer's legally voluntary consent by taking him to the "closet" before seeking it, then its opinion is speaking nonsense. If the police had told him that he was free to go but that, if he wished, he could nonetheless show them what was in his suitcases, would he have been as ready to open them? Isn't it clear that the police increased their chances of obtaining his cooperation by steering him toward the privacy of the room in the stewardesses' lounge rather than asking him, there in the concourse, to allow the search? Might he not well have refused, until they impressed him with their seriousness, and with the trouble he could be in by escorting him to the "police interrogation room"? Though nothing in the several opinions would support a finding of involuntariness — and no member of the Court argued that Royer's consent was involuntary under *Schneckloth v. Bustamonte*²⁶⁵ — it is plain that the trip to the "closet" increased the pressures on him to grant his consent. Without these pressures, the consent may have been withheld.²⁶⁶ Wasn't the intensification of the intrusion actually the "least

261. *Id.* at 1325.

262. *Id.* at 1328.

263. *Id.*

264. *Id.* at 1328-29.

265. 412 U.S. 218 (1973).

266. *But see Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam) (finding consent to search luggage conferred as suspects returning into airport terminal with DEA agent).

restrictive means" necessary to attain the goal of the police, namely a look inside Royer's baggage (at least if no dogs were immediately available to smell the suitcases for drugs)?²⁶⁷

This may indeed be the point. The plurality may have thought, not that the detention in the closet was excessive in relation to its purpose, but that it likely served its purpose, of persuading Royer to confer his consent, all too well. The plurality may have questioned the legitimacy, not the necessity of continuing the detention in the "interrogation room." The decision, then, may have reflected not so much an intention to place limits upon *Terry* for its own sake as disquiet with *Bustamonte*. The plurality may have thought that detaining Royer in the small room placed unfairly heavy pressure on him to allow the search and, although the pressure likely fell short of what was necessary under *Bustamonte* to show involuntariness,²⁶⁸ the Justices may have balked at allowing such pressure. Rather than find *Bustamonte* wrong or inapplicable in this context, however, the plurality chose a basis for decision in apparently closer harmony with settled doctrine, by saying that *Terry* does not permit an intensification of the intrusion when the intensification's most obvious purpose is the creation of pressure to achieve the police goal of consent to search. In effect, the plurality imposed a requirement of probable cause to arrest to compensate somewhat for the damage that *Bustamonte* had inflicted on the requirement of probable cause to search and on the necessity for a warrant.²⁶⁹

4. *United States v. Place*— The second airport case, *United States v. Place*,²⁷⁰ is more troublesome. In it the Court extended the *Terry* rationale to allow Drug Enforcement Administration (DEA) agents to seize an airline traveler's luggage on reasonable, articulable suspicion that the luggage contained narcotics, but in the absence of probable cause, "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel

267. There was evidently nothing in *Royer* to show whether a trained dog was immediately available at the Miami International Airport, 103 S. Ct. at 1328-29, although the Court noted that a prior case indicated that such a dog had been stationed at the Ft. Lauderdale airport. *Id.* at 1328 n.10.

268. *Bustamonte* requires assessment of the voluntariness of consent to search under a "totality of the circumstances" approach, under which ignorance of one's right to refuse consent, while relevant, is not dispositive. See 412 U.S. at 227. In *United States v. Watson*, 423 U.S. 411 (1976), the Court applied this standard to find voluntary the consent conferred by a suspect who was under arrest and had not been warned that he had a right to refuse but who was still on a public street and thus had not been brought to the stationhouse or any "interrogation room" elsewhere.

269. Cf. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57-58 (1974) (arguing that courts should be more exacting in assessing voluntariness of consent when police lack sufficient information to obtain a warrant).

270. 103 S. Ct. 2637 (1983).

the authorities' suspicion."²⁷¹ The Court then found, however, that the federal police exceeded the bounds of this authority by holding Place's bags for some ninety minutes before completing the "limited" phase of their investigation by submitting the luggage to a dog sniff.²⁷²

In the narrow context of *Place* itself — involving efforts to detect drug couriers coming through airports — this newly recognized authority does not seem much susceptible to abuse, and it may indeed permit more satisfactory resolution of the burgeoning number of airport luggage search cases. The Court's holding may well prompt narcotics police to station drug dogs in more of the airports that they patrol, since they lost this case evidently because they had to take Place's luggage from LaGuardia Airport, where they seized it, to Kennedy Airport, where they had their dog. It seems clearly preferable to regulate DEA encounters with airline travelers by insisting that *Terry* grounds be present and that appropriate limits on the scope of their intrusions be observed, than to rely so heavily on sometimes strained concepts of consent.

There is, moreover, language in the opinion which arguably restricts the right of the police to conduct seizures of personal property, in the absence of probable cause, to the specific type of law enforcement effort at issue in *Place* itself. Although the Court rejected the argument that non-probable cause detentions were permissible only in response to "some special law enforcement interest"²⁷³ above and beyond merely "investigating crimes effectively and apprehending suspects,"²⁷⁴ the Court did emphasize that the law enforcement interest must be "substantial."²⁷⁵ And DEA airport operations can be characterized as

271. *Id.* at 2642.

272. *Id.* at 2645-46. Place first attracted drug agents' attention as he waited in line one Friday to buy his ticket at Miami International Airport, but, because he was about to board his plane when agents there approached him they let him and his luggage go. *Id.* at 2639-40. Discrepancies in the addresses he had used, however, prompted them to discover that the addresses on his luggage tags did not even exist, so the Miami agents relayed this information to DEA agents at LaGuardia Airport in New York, Place's destination. *Id.* at 2640. Place's conduct upon his arrival further heightened the agents' suspicion, and, when they requested consent to search his luggage, he refused. But they seized his bags anyway, saying they were going to present them to a magistrate in order to obtain a search warrant. Place declined to accompany them on this errand and went on his way, receiving only one of the agents' phone numbers. *Id.*

Rather than present the luggage immediately to a magistrate, however, the agents took it to Kennedy Airport and, 90 minutes after the limited seizure, presented it to a drug detection dog. The canine sniffed cocaine. The following Monday morning, they obtained a warrant and executed it on the bag on which the dog had alerted. Inside was 1,125 grams of cocaine. *Id.*

273. *Id.* at 2642-43.

274. *Id.* Thus the Court rejected the limited reading of *Terry*, as allowing detention of suspects only upon reasonable suspicion (or belief?) that they are armed and dangerous, *id.*, a reading that was perhaps still tenable as late as 1979. See *Dunaway v. New York*, 442 U.S. 200, 210 & n.12 (1979).

275. 103 S. Ct. at 2643 (quoting *Michigan v. Summers*, 452 U.S. 692, 699 (1981)).

In light of the obvious importance of the issue, it is remarkable that the Supreme Court has

involving acutely substantial state interests. The first of these interests is the imperative of stemming the flow of illegal drugs. As Justice Powell wrote for himself, Justice Blackmun, and the Chief Justice, in *United States v. Mendenhall*,²⁷⁶ “[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances.”²⁷⁷ Additionally, the Court has perceived especial difficulties in combatting the problem of detecting drug couriers. As Justice O’Connor wrote for the Court in *Place*, “[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels.”²⁷⁸ Before approving a non-probable cause seizure of personal luggage, the Court also noted that investigative methods were available to the police “that would quickly confirm or dispel the authorities’ suspi-

never seriously considered the question of whether ordinary field interrogation practices sufficiently advance important law enforcement interests to justify their continuation, whether, that is, the interests these practices in fact serve are themselves “substantial.” The *Terry* Court evidently assumed they were, perhaps because it was impressed by Detective McFadden’s obvious success, or because it deferred on this general point to the judgment of police theoreticians like O.W. Wilson. Results of the most important effort to date to study the question should, however, give one pause. The Police Foundation in 1973 conducted a systematic experiment to test the impact of field interrogations in San Diego. The results, published in 1975, indicated that 98 percent of field interrogations that the police conducted did not lead to arrests. J. BOYDSTUN, SAN DIEGO FIELD INTERROGATION FINAL REPORT 45 (1975). Further, although officers reported that 17.1 percent of arrests that were made grew out of encounters that were initiated as field interrogations, *id.*, the researchers concluded that field interrogations did not significantly increase the arrest rate, since when field interrogations were suspended in the experiment, arrests based on other sorts of encounters seemed to pick up the slack. *Id.* at 42, 45. Nonetheless, the suspension and then resumption of field interrogations in an experimental area of the city did appear to affect the crime rate, although a statistically significant difference was noted only for the specific offenses of petty theft and malicious mischief or disturbing the peace. *Id.* at 28-29.

These results, when combined with arrest data, led the researchers to conclude that “whatever effects Field Interrogations have in suppressing crime stem mainly from the FI process itself.” *Id.* at 45.

If the decrease in minor offenses is achieved through an *in terrorem* effect, rather than through more efficient nabbing of the actual malefactors, one might worry that field interrogations — though in theory limited to stops on “reasonable suspicion,” *id.* at 3 — were in practice indiscriminate and perhaps also discriminatory. The study provides fuel for such fears. Those stopped were more likely to be young, male, and black or Mexican-American than persons actually arrested. Similarly, persons from outside the area were stopped at higher rates than their contribution to the arrest rates would seem to justify. *Id.* at 49-51.

276. 446 U.S. 544 (1980).

277. *Id.* at 561 (Powell, J., concurring); see also *Florida v. Royer*, 103 S. Ct. 1319, 1329 (1983) (Powell, J., concurring) (“[T]he public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit”); *id.* at 1332 (Blackmun, J., dissenting) (citing the passage quoted from *Mendenhall*).

278. 103 S. Ct. at 2643 (note omitted).

cion" that a particular suitcase contained drugs:²⁷⁹ they could place it under the nose of one of their trained dogs.²⁸⁰ Rarely, outside of airport drug courier investigations, will these factors coalesce as they did in *Place*: a state interest that, if not "special," was at least "compelling"; extreme practical obstacles to other modes of investigation; and the ready availability of otherwise proper police techniques that will quickly either establish probable cause or allow return of the property.

Yet *Place* is also disquieting. One may hope that the opinion's limitations will prove to be a sturdy barrier against further encroachments of "articulable suspicion," but there is cause to fear that they will not. *Place* did, after all, apply the *Terry* concept, which had previously been applied almost exclusively to seizures of the *person* and to limited self-protective searches, to a totally new field, seizures of personal *property*.²⁸¹ While this new police power, at present, occupies only a small corner of this broad field, the limitations in *Place*'s holding appear to reflect the results of the Court's balancing. The limitations do not appear to address the question of whether balancing, rather than traditional probable cause, is the proper standard. The *Place* opinion is in fact remarkably inattentive to the issue that so preoccupied the Court in *Dunaway*, *Summers*, and *Royer*, namely the threshold question whether a given kind of intrusion ought to be measured against traditional probable cause or instead judged by a balancing test. The Court says merely, "[w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause."²⁸² The case does not articulate the relevant principle for judging whether a given seizure satisfies this

279. *Id.* at 2642.

280. This point is emphasized by the Court's extensive discussion of the propriety of the dog-sniff technique. *Id.* at 2644-45. Indeed, it appeared to hold that such sniffing does "not constitute a 'search' within the meaning of the Fourth Amendment," *id.* at 2645 — over Justice Brennan's protest that the Court was reaching to resolve constitutional issues that were unnecessary to its decision. *Id.* at 2651 (Brennan, J., concurring). *Place* can be read to say that a seizure of personal property, on less than probable cause, violates the fourth amendment unless otherwise proper means are readily available that will "quickly confirm or dispel" the suspicion.

281. In *United States v. Van Leeuwen*, 397 U.S. 249 (1970), on which the Court in *Place* relied, the Court upheld the right of government agents to detain at a post office two packages that had been placed in the mail while the agents pursued an investigation that disclosed sufficient evidence to justify issuance of a search warrant for the contents of the packages — a number of illegally imported coins. Custody of the packages had already been entrusted to the postal service, and they were delayed in their transmission. On these facts, a unanimous Court concluded that there had simply been "no possible invasion of the right 'to be secure' in the 'persons, house, papers, and effects' protected by the Fourth Amendment," and that, if a cognizable intrusion at all, this delay was a lesser intrusion than in *Terry*, rather than a *Terry* extension. *Id.* at 252.

282. 103 U.S. at 2642.

“minimally intrusive” test. The Court’s debate about the analogous question of seizures of persons, in other cases, is only weakly informative in this new context. On *Place*’s facts, to be sure, there was a seeming connection between the seizure of personal property and a seizure of the person, since an airline traveler will naturally feel inhibited from going on his way so long as the police retain custody of his luggage. Consequently, the duration of this detention may be judged much the same way as the duration of a more direct seizure of the person. Indeed, when the Court in *Place* found that a luggage detention of ninety minutes had been excessive, it made this very comparison and noted that it had never approved a *Terry* detention of the person that lasted so long.²⁸³ Yet, in other cases, the seizure of a suspect’s possessions may not so readily be equated with a seizure of his person. If the police observe a person walking down the street with a radio, under circumstances that they deem suspicious, and determine to seize the radio to investigate whether it has been stolen, can this suspect, like the traveler who has been separated from his personal belongings in his luggage, be said himself to be “seized” himself, until the property is returned? Most likely not, at least not if the police inform him how to recover the item if further investigation dissipates their suspicion. What is the test to determine whether the radio seizure is “minimally intrusive”? *Place* provides little guidance. It is not even clear that the 90-minute seizure in *Place* failed the threshold “minimally intrusive” test. The seizure may have satisfied the “minimally intrusive” standard but flunked the balancing test.²⁸⁴ On this reading of the case,

283. 103 S. Ct. at 2645-46. Significantly, this rationale was actually rather weak on the facts of *Place* itself. *Place* had arrived at his ultimate destination; he had no continuing journey still before him for which he would need his baggage. *Id.* at 2640.

Further, *Place* himself did not feel restrained when the police decided to keep his suitcases. He declined their invitation to accompany the police while they presented the luggage to a magistrate (as they perhaps misleadingly told *Place* they were going to do) and simply went on his way. Thus it appears that the Court in *Place* was, in at least this limited way, proceeding categorically. Whenever DEA agents now seize a piece of luggage from an airline traveler whom they suspect of being a courier, they may not retain it for any longer time than would be proper for detention of a person. Professor LaFave has cited additional textual evidence from the *Place* opinion in support of a similar categorical reading of the holding. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.6(e), at 95-96 (Supp. 1984).

Yet the Court quickly threw away much of the advantage that this categorical approach could have provided when it refused even to say that 90 minutes — or any other certain amount of time — was a fixed outer limit on a non-probable cause detention. “Such a limit,” the Court weakly explained, “would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.” 103 S.Ct. at 2646 n.10.

284. The fact that the Court left open the possibility that, on other facts, a 90-minute detention might be proper on less than probable cause, *id.* at 2646 & n.10, supports this view, for the threshold, “minimally intrusive” test looks only to the intrusion. If the police conduct is too intrusive, it requires probable cause, no matter how compelling the competing governmental interest will be. The alleged need for the police “to graduate their responses,” on other facts, which the Court cited as justification for perhaps longer detentions, would become relevant only

an identical seizure could well be approved in the absence of probable cause if it could be justified by a special law enforcement need, not arising in *Place*, that required a lengthier period of detention.

There is, in addition, inherently greater uncertainty in judging the intrusiveness of a seizure of personal property than a seizure of a person. With few exceptions, the seizure of persons requires consideration of only one variable, the quality of the seizure. With personal property the quality of the property comes into play. A seizure that could be characterized as "minimal" with respect to one kind of property, for example, an inexpensive hand-carried radio, might appear more serious if the item is more expensive or if the suspect has some immediate need for the property, like the tools a mechanic is carrying on the way to work, or if, like luggage and some other containers, the property is a repository for personal effects. The variables are numerous, and, if the *Place* authority is allowed to expand, they could quickly lead to the need to solve the seizure question on an *ad hoc*, case-by-case basis. In stark contrast to the tight limitations on the exercise of police discretion that were imposed the last time that the Supreme Court recognized a major extension of *Terry*, in *Michigan v. Summers*,²⁸⁵ the decision in *Place* may well result in entrusting to the police "the consideration and balancing of the multifarious circumstances presented by different cases"²⁸⁶ in deciding both whether a given seizure is only "minimally intrusive," and, if it is, whether, on balance, it is justified by some legitimate law enforcement interest.

In *Place*, the Court may indeed have stepped into a trap that it had avoided shortly before. In the container search cases, the Court had refused to establish as a test for determining whether a warrant was required for an evidentiary search of a container, a standard based on the extent to which a particular container manifested a reasonable expectation of privacy.²⁸⁷ The Court correctly refrained from foisting

when the Court is already balancing one set of interests against another, i.e., only after it has decided not to require traditional probable cause.

285. 452 U.S. 692 (1981). See *supra* notes 237-39 and accompanying text.

286. *Dunaway v. New York*, 442 U.S. 200, 213 (1979).

287. In *United States v. Ross*, 456 U.S. 798 (1982), the Court recognized a broad right of the police to search containers found in a car, on probable cause to believe that evidence is in the car but without a warrant, though the same container could not be opened or its contents searched, without a proper warrant, if it had been found elsewhere. The Court, however, expressly rejected a test that would have turned on the quality of a particular container, as a likely repository, or not, of privacy expectations. See *id.* at 822-23. Judge Ginsburg's opinion for the U.S. Court of Appeals for the D.C. Circuit in *Ross* — whose decision the Supreme Court then reversed upon other grounds — cogently explained how a "worthy"/"unworthy" container doctrine would prove unworkable:

The fine distinctions into which the police and the courts would be drawn were we to adopt an "unworthy container" rule are apparent. Size could not be the dividing line, nor does the Government contend otherwise A priceless bequest, great grandmother's diary, for example, could be carried in a sack far smaller than one

such value-laden decisions on the police, decisions to be made on a case-by-case basis. Now *Place* may require the police to make just such judgments as part of an even more complicated multi-factor determination of the intrusiveness of particular seizures of particular objects.

The comparison with the container search cases leads to another point. Although the *Place* opinion several times notes that it is approving only non-probable cause *seizures* of personal property,²⁸⁸ is it not possible that its rationale will soon be extended to allow some evidentiary *searches* at least when those searches can also be characterized as "minimally intrusive"? It seems inevitable that, before long, the Court will be asked to approve, on articulable suspicion, the "cursory viewing" of the contents of some container like a hand-held paper bag, when the container is described as manifesting "minimal investment of privacy" (as distinguished presumably from the "rummaging" of a suitcase or other "repository of personal effects"). Further, because *Place* nowhere defends any hard-and-fast distinction between seizures of personal items and a search of their contents, despite its limiting language, the Court may be hard pressed to reject the request. To do so, the Court will need to articulate far more clearly than in *Place* why the *Terry* "general reasonableness" principle is inapplicable to certain *categories* of police conduct despite its utility elsewhere.

VII. CONCLUSIONS

A. *Terry's unsolved problems and the later case law*

Thus, new challenges lie ahead for control of police discretion in search and seizure, especially in that expanding area where the Supreme Court has been willing to tolerate official intrusions on less than traditional probable cause. The seeds of the problems are present in *Terry*

accommodating jogging suit and sneakers. And if quality of material is what counts, on what side of the line would one place the variety of parcels people carry? Are police to distinguish cotton purse from silk, felt, vinyl, canvas, tinfoil, cardboard, or paper containers from leather; sacks closed by folding a flap from those closed with zippers, drawstrings, buttons, snaps, velcro fastenings, or strips of adhesive tape? Would a Tiffany shopping bag rank with one from the local supermarket?

The point need not be labored further. Not only would an "unworthy container" rule fail to supply an "easily understood and administered" guide for the police, it would suffer from infirmities more critical than administrative infeasibility. It would snare those without the means or the sophistication to use worthy containers. And, most importantly, it would destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant. *United States v. Ross*, 655 F.2d 1159, 1170 (D.C. Cir. 1981) (*en banc*) (notes omitted).

288. *E.g.*, 103 S. Ct. at 2641-42 (emphasis added): "The Government asks us to recognize the reasonableness under the Fourth Amendment of warrantless seizures of personal luggage . . . short of opening the luggage . . ."

v. *Ohio*.²⁸⁹ One source of the difficulty was the style of the opinion. It combined the broadest, most general rationale that searches and seizures not directly controlled under the warrant clause are to be judged in terms of their general reasonableness, by application of a balancing test, with a razor-thin statement of its holding. The opinion says little on some intermediate level of generality that would provide specific guidance for resolution of future cases that appear to fit within *Terry*'s rationale yet fall beyond its holding. There are some principles on this intermediate level, most notably the opinion's insistence on articulable facts and on the control of the scope as well as the initiation of an intrusion. But the opinion seemed to discourage a process of adjudication by categorization, at least when this process might result in the disapproval of some police practices solely because of their close resemblance to other practices that ought to be condemned. To this extent, the *Terry* Court appeared to encourage an approach that proceeded one case at a time, judging each entirely on its own facts.

On the specific question of the legality of the "stop-and-frisk," the Court, though disapproving use of this terminology, upheld the right of the police to conduct a "pat-down" of a suspect's outer clothing when specific, articulable facts justified the suspicion that the suspect was poised to commit a serious offense, when such facts also justified the belief or at least the suspicion that the suspect was armed and dangerous, and when the officers' initial encounter with the suspect failed to dispel that suspicion. As Justice Harlan pointed out in his separate opinion,²⁹⁰ the Court's holding logically implied a power to detain such a person briefly, as well as frisk him, and that the officer need not risk a violent response to his initial questioning but may conduct the frisk as the first order of business in such a detention, provided that he is acting upon the requisite "specific and articulable" facts. The Court approved in principle the practice of "field interrogations" but threw some protective limitations around it. The Court also outlawed those more indiscriminate police practices — stops and limited searches conducted without particularized suspicion — that had elicited especially sharp criticism.

Yet the Court failed to provide the specificity that the Crime Commission's Task Force on the Police had called for, or even the specificity that the Commission itself had recommended (though both had advocated legislation or internal police regulation to achieve more specific control).²⁹¹ Additionally, while establishing the limits that it did, the Court in *Terry* adopted a rationale with the potential to confer on

289. 392 U.S. 1 (1968).

290. *Id.* at 32-33 (Harlan, J., concurring).

291. See *supra* note 85 and accompanying text.

the police greater powers, in other areas, than those powers withheld in the relatively narrow area of "stop-and-frisk."

In later cases the Court has again addressed some of these points, but it has not simply imposed limitations that it did not or could not apply in deciding *Terry* and its two companion cases. The Court has yet to establish limits to the stop-and-frisk power that depend on the nature of the offense that serves as the basis for the officer's suspicion. Plainly, the Court has not limited the right to stop, or frisk, to violent crimes like the robbery that was evidently afoot at the corner of Huron Road and Euclid Avenue on Halloween day in 1963. Indeed, the Court has considered the reach of *Terry* to two quite different kinds of offenses, posing no comparable immediate threat of violence: the illegal entry of aliens²⁹² and the transporting of illegal drugs for later distribution on the retail market,²⁹³ and has upheld the applicability of *Terry* to both.²⁹⁴ Nor has *Terry* been limited to situations where an immediate police response is necessary to prevent an impending crime. On the contrary, the Court has stated that stops on less than probable cause may be permissible for the prevention of crimes that are imminent, or for the apprehension of persons presently committing offenses or who are wanted for past criminal behavior.²⁹⁵ Likewise, another limitation suggested by the narrowness of *Terry*'s actual holding, that no stops be allowed in the absence of justifiable suspicion that the suspect is *armed and dangerous*, has been rejected.

Last year, the Court did address one of the Crime Commission's concerns, temporal limitations on the non-probable cause stop. When, however, the Court in *United States v. Place*²⁹⁶ held that a 90-minute detention of luggage (like that of the suspect himself) was unreasonable,

292. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

293. *E.g.*, *United States v. Place*, 103 S. Ct. 2637 (1983).

294. The Court has yet to hold that an offense such as possession of small quantities of drugs for personal use may, without more, serve as the predicate for a *Terry* stop. In *Adams v. Williams*, 407 U.S. 143 (1972), the Court upheld an officer's intrusion on suspicion (provided by a tip) that a man was carrying both narcotics and, at his waist, a gun. A similar case, but without the gun, has not reached the Court since *Sibron v. New York*, 392 U.S. 40 (1968), which was decided on other grounds.

295. So the Court said in considered dicta in *United States v. Cortez*, 449 U.S. 411, 417 n.2 (1981). In *Place*, moreover, the Court took at least a half-step further, and said that a stop may be justified upon "articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." 103 S. Ct. at 2642. The progression from "wanted for past criminal conduct" in *Cortez* to "has been . . . engaged in criminal activity" in *Place* marks a clear broadening of police power. *Cortez* would allow an officer to stop a person on articulable suspicion that he is the man (or she is the woman) whom the police want — evidently upon evidence beyond that immediately available to the stopping officer — for a particular past crime. The standard in *Place* would evidently allow a stop without any additional evidence either that a past crime was committed, or that some identified person committed it, other than what gives rise to the stopping officer's immediate suspicions.

296. 103 S. Ct. 2637 (1983).

it expressly declined to establish any per se rule, and evidently left open the possibility that a ninety-minute detention might be allowed on other facts, if justified by some more compelling law enforcement needs.²⁹⁷ The Court, in the last sixteen years, has said less than might have been predicted in 1968 about the quantity of evidence necessary to satisfy the *Terry* "specific and articulable facts" standard. The handful of cases that have turned on the issue do not permit the drawing of many generalizations likely to provide useful guidance to officers in the field. The Court has articulated two important new ideas concerning "articulable suspicion," one extending police discretion and the other reining it in: that especial deference is owed the inferences that a "trained" or "experienced" law enforcement officer draws and that the suspicion must nonetheless be "particularized" with respect to the individual suspect.

What is most remarkable about the current expansion of the *Terry* idea beyond the area of stop and frisk is not that it is taking place, but that so much time elapsed — thirteen years between *Terry* and *Summers* — before the Court recognized a major extension and that such caution is being exercised by the Court now that the expansion process has begun. The extension of *Terry* nonetheless threatens to hand the police new search and seizure powers with little protection against discretionary abuse. The root problem is the *Terry* Court's severance of the probable cause requirement from the fourth amendment's reasonableness clause, which would, if pushed to its logical limit, allow all searches and seizures not requiring a warrant to be judged under a balancing test rather than traditional probable cause.²⁹⁸ With respect to seizures of the person, the Court may be groping toward a standard that recognizes the arrest as the archtypical personal seizure. A given seizure

297. See *supra* notes 283-84 and accompanying text.

298. Thus *Terry's* rationale for dispensing with probable cause is too broad. It is also too narrow, for, assuming that it makes sense not to require ordinary probable cause for some low-level police intrusions, the availability or absence of a warrant should have nothing to do with the dismissal of the probable cause requirement. Such intrusions should be allowed, even if a warrant can be obtained, and indeed the obtaining of a warrant in such circumstances should be encouraged, if not required. *Cf. Davis v. Mississippi*, 394 U.S. 721 (1969), discussed *supra* note 240.

Place also illustrates this point. Recall that DEA agents in New York had been tipped off by their counterparts in Florida and so were expecting *Place*, with his luggage, upon his arrival. See 103 S. Ct. at 2639-40. It is not clear whether the New York agents received notice far enough in advance to have obtained a warrant for seizure of *Place's* luggage, but particularly in light of the availability of telephonic warrants, see Fed. R. Crim. P. 41(c)(2), circumstances can be imagined where a warrant could have been obtained. Should the agents be denied the right to conduct a brief seizure of the luggage on articulable suspicion simply because there was time to get a warrant? Plainly not, at least if one goes along with *Place*. On the contrary, the reasonable response would be to allow the seizure, but require advance judicial approval, since the magistrate's judgment as to whether articulable suspicion is present is obviously desirable.

From either of these perspectives, then, *Terry's* justification for not holding the police to ordinary probable cause is unsatisfactory.

is compared with this archetype and, if the differences are sufficient a balancing test is applied. If the similarities are too great, the seizure will be held unconstitutional in the absence of traditional probable cause.²⁹⁹

This process is not entirely satisfactory, as *Royer* well illustrates, for it focuses attention on features of the seizure that may not be crucial to its intrusiveness but that merely suggest some superficial resemblance to an arrest. What made *Royer*'s seizure the functional equivalent of an arrest, in the plurality's view, was the similarity of the room adjacent to the stewardesses' lounge to an "interrogation room" at police headquarters. If, as has been suggested, the plurality's tacit concern was to forbid, absent probable cause to arrest, certain kinds of pressures on a suspect whose consent to search the police were bent on securing, it would have been better to say so (and a rule that frankly prohibited such pressures, at least absent probable cause to arrest, would be attractive).³⁰⁰ At any rate, the plurality's preoccupation might in another case divert attention from features of a detention that make it intrusive indeed, but not in the same way as an arrest. What if *Royer* had been held for an hour — but kept the whole time in the airport concourse? The specific features that led the plurality to require probable cause would have been missing, but the encounter could well have been a greater intrusion. Most obviously, *Royer* would likely have missed his flight, which he evidently still had time to catch at the point in the investigation that, according to the plurality, marked the commencement of the arrest, and public interrogation may have been a greater embarrassment. The inquiry that the plurality undertook could still result in this detention being declared an arrest, solely because of its duration (although the Court's refusal in *Place* to declare any fixed, outer limits would make this less likely), or the detention could fail the "least intrusive alternative" test.³⁰¹ Justice Brennan's approach, which asks

299. See *supra* notes 242-69 and accompanying text (discussing *Florida v. Royer*, 103 S. Ct. 1319 (1983)).

300. See *supra* notes 261-69 and accompanying text. Significantly, in a factual situation like *Royer* itself, probable cause to arrest would go hand-in-hand with probable cause to search. If the police had had reasonable grounds to believe that *Royer*'s luggage contained drugs, they also would have had reasonable grounds to believe he was violating the law, and vice versa. Consequently, requiring the police to obtain probable cause to arrest before employing "police interrogation room" pressures to seek his consent to search would protect the privacy of the luggage. Even if the consent was not truly voluntary (though passing the minimal voluntariness standard of *Bustamonte*), at least the police would have had probable cause to search (although they still would have lacked a warrant). In other imaginable contexts, however, this rationale makes less sense. If the arrest concerns a matter wholly unrelated to drug trafficking, e.g., a failure to appear in court a week earlier on a traffic offense, then probable cause to arrest might not even partially legitimate an investigative search of the suitcase.

301. Whether this brainchild of Justice White's survived even the term of the Court that witnessed its birth may be questioned. In *Illinois v. LaFayette*, 103 S. Ct. 2605 (1983), the Court approved the practice of routine "inventory" searches of an arrestee's effects at the stationhouse, as applied to a shoulder bag. The Court pontifically dismissed the argument that the police could

how much the given detention *differs* from a brief, classic *Terry* stop, seems more to the point,³⁰² but universal application of such a test now seems foreclosed by *Michigan v. Summers*.³⁰³

With respect to seizures (and perhaps also searches) of items of personal property — the field that *Place* has now threatened to open up to the balancing test — there is not yet even an archetype. *Place* itself establishes no model to serve the role that arrest plays in the *Royer* plurality's test. Given the greater variety in searches and seizures of property than in arrests, it seems unlikely that any one archetype will ever be identified. If *Place* is not limited to airport drug courier investigations, an inquiry more like that which Justice Brennan espouses with respect to seizure of persons may eventually evolve (though Brennan would categorically require probable cause for investigatory seizures of property). A simple seizure of property that is sufficiently brief, shorter than ninety minutes by whatever margin the seizure in *Place* exceeded permissible bounds, may be balanced. Anything more requires probable cause. Yet, as has been suggested, any test in this area, because of the multitude of factors involved, may prove susceptible to uncontrolled expansion and to discretionary abuse.³⁰⁴

There is also a danger that extends beyond the problems associated with any new categories of intrusions that might be allowed with less

just as well have sealed the bag in plastic and thus achieved their purposes " 'in a less intrusive manner,' " by saying that "it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. Our role is to assure against violations of the constitution." *Id.* at 2610. And in *Michigan v. Long*, 103 S.Ct. 3469 (1983), the Court held that the fourth amendment allowed the police to conduct a protective search of the passenger compartment of a suspect's car upon "a reasonable belief" "that the suspect is dangerous and . . . may gain immediate control of weapons." *Id.* at 3480. "In such circumstances, we have not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter." *Id.* at 3482 (footnote omitted).

Do these pronouncements mark the demise, so soon, of the "least intrusive alternative" standard? Perhaps, but not inevitably. *LaFayette* and *Long* both arose in contexts different from *Royer* and involve different interests. The Court may have felt bound to adopt a hands-off attitude toward routine, administrative searches, so long as standards of neutrality and regularity are observed. Likewise, the Court has traditionally been reluctant to second-guess police decisions involving their own safety. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106 (1977). But Justice O'Connor, who wrote *Long*, also wrote *Place*, where she showed greater willingness to scrutinize police investigative conduct, than she displayed as to police self-protective conduct in *Long*. In *Place*, indeed, she ultimately found a fourth amendment violation on grounds that sound very much like a violation of a "least intrusive alternative test." The police should have had a dog at LaGuardia airport, the opinion implies, because then their investigation would have intruded less on the suspect's interests.

Perhaps, then, the "least intrusive alternative" standard still lives, as a limit on police *investigative* practices.

302. Justice Brennan's most expansive treatment of this problem in the 1982-83 term appears in his separate opinion in *Kolender v. Lawson*, 103 S. Ct. 1855 (1983), where he argued that the fourth amendment did not permit a state to expand an officer's powers during a *Terry* stop by compelling, on pain of arrest and trial, answers to the officer's interrogatories. *Id.* at 1861-65 (Brennan, J., concurring).

303. 452 U.S. 692 (1981).

304. *See supra* notes 284-88 and accompanying text.

than traditional probable cause. The very process of increasing these categories may encourage police experimentation and create new opportunities for abuse of police discretion. With a majority of the Supreme Court now evidently ready to entertain arguments that additional kinds of police intrusions ought to be permitted on less than ordinary probable cause, might not the police decide to try some out to see what happens? Predictions about whether the Court will disapprove a particular practice, if it does not seem too "unreasonable," could well appear uncertain. So, the police may ask themselves, why not try?

B. *A suggested approach*

1. *A new doctrinal basis for Terry and restoring Brinegar probable cause*— A better resolution of these issues is, however, attainable. The first, necessary step is the abandonment of *Terry's* idea that when police conduct is beyond the control of the warrant clause, it is also beyond the control of the probable cause requirement stated in that clause. This rationale was unsound in 1968, and its defects have become more apparent in the intervening years. A far superior strategy would begin with the renewed recognition that the "probable cause" in the warrant requirement is an essential attribute of the "reasonable searches and seizures" permitted in the unreasonableness clause. The *Terry* Court's position to the contrary led, as Justice Douglas pointed out, to the anomaly that an officer had broader powers to act on his own, without a warrant, than he had when acting under the magistrate's command.³⁰⁵ Further, in *Terry* the Court created an incentive for the police to dispense with a warrant, while the fourth amendment should be read to encourage the police to seek advance judicial approval of searches and seizures.³⁰⁶ The *Terry* Court's position also undercut the importance of traditional probable cause, despite its central place in fourth amendment jurisprudence. "The requirement of probable cause has roots that are deep in our history."³⁰⁷ "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.'"³⁰⁸ So, likewise, such lower standards should not be held to justify police searches or seizures, merely because the officer *lacks* a warrant. Doctrinal coherence

305. *Terry v. Ohio*, 392 U.S. 1, 36 (1968) (Douglas, J., dissenting).

306. *See, e.g., Illinois v. Gates*, 103 S. Ct. 2317, 2331 (1983).

307. *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (quoting *Henry v. United States* 361 U.S. 98, 100 (1959)).

308. *Id.* (quoting *Henry v. United States*, 361 U.S. 98, 101 (1959)).

and practical workability both argue in favor of jettisoning the *Terry* stragem. It would be far better if the "articulable suspicion" that permits a *Terry* stop were redefined as a lower quantity of probable cause — as an exception to the requirement of "*Brinegar* probable cause" that ordinarily sets the standard for warrantless police-citizen encounters, but as a sub-species of probable cause nonetheless. If the Court, even now, applied the analysis that it applied, in 1967, to housing inspections,³⁰⁹ (as Professor LaFave argued that the Court should have done in 1968, when *Terry* itself was decided³¹⁰), the law would be placed on sounder footing. This doctrinal shift would emphasize the fact that *Brinegar* probable cause states the general test for the propriety of police searches and seizures, and that any lesser form of probable cause will be allowed only under exceptional circumstances, and then only when justified by some particularly pressing need.

2. *Confining the balancing test*— Second, better standards need to be developed for identifying those intrusions that might be justified by a diminished form of probable cause. With respect to seizures of the person, existing case law would recognize two quite distinct classes of intrusions as candidates for the select group of intrusions allowable on less than *Brinegar* probable cause. One such category — surely the smaller both numerically and its importance to police practice — is represented by *Michigan v. Summers*.³¹¹ There, a perhaps lengthy detention was allowed despite the absence of probable cause to arrest, but under circumstances that made this kind of intrusion uniquely immune to discriminatory abuse.³¹² Perhaps other situations will arise where relatively intrusive practices may be permitted without significant expansion of police discretion. They are likely to be very few. The second category contains those intrusions that can be assimilated to *Terry* itself: police investigative practices, conducted on less than probable cause to arrest, based on justifications that necessarily involve considerable amounts of officer judgment and that therefore present the risk of discretionary abuse. The "interrogation room" (or "stewardesses' closet") detention in *Florida v. Royer*³¹³ is a prime example of a police practice that should be judged under standards applicable to this category of intrusion. The *Royer* plurality correctly perceived that *Terry* should not be expanded to allow this form of detention, but the reasons the Court articulated should not provide,

309. See *Camara v. Municipal Court*, 387 U.S. 523 (1967), discussed *supra* notes 134-41 and accompanying text. In fact, the dicta in *Davis v. Mississippi*, 394 U.S. 721 (1969), suggesting approval of a magistrate's order that a suspect appear at the stationhouse for fingerprinting on less than traditional probable cause, cite to *Camara* and not *Terry*.

310. See LaFave *supra* note 114, at 53-56.

311. 452 U.S. 692 (1981).

312. See *supra* notes 222-41 and accompanying text.

313. 103 S. Ct. 1319 (1983).

in future cases, the only limits on *Terry*'s expansion. Asking whether "[a]s a practical matter, [a suspect] was under arrest," as the plurality did in *Royer*,³¹⁴ may divert the inquiry into aspects of a detention separate from the larger point of the detention's intrusiveness. Another standard, the "least intrusive alternative" test articulated in *Royer*,³¹⁵ might well play a useful, supplementary role, but it is an insufficient limit even when coupled with the "as a practical matter under arrest" test. These two tests, together, would still allow some highly intrusive police practices, if the practices are not intrusive in ways sufficiently similar to an arrest, and if no less intrusive means enabled the police to vindicate whatever interests they were pursuing. It seems inevitable, also, that the "least intrusive means" test will be applied with a large dollop of deference to police judgments about the practicability of alternative investigative techniques. Justice Brennan's approach may well be the only workable one for this category of detentions: *Terry* should be read to allow only "the briefest of detentions or the most limited of searches"³¹⁶ and any detention more intrusive than a tightly limited *Terry* stop should be held to require ordinary probable cause.³¹⁷

For investigations focusing on personal property, the Court would do well to limit *Place* to virtually its own facts, the momentary seizure, at an airport, of a suspected courier's luggage to subject it to a dog sniff that will immediately confirm or dissipate the suspicion. The *Place* opinion itself provides a basis for such a limit (even if the limitation

314. *Id.* at 1327 (plurality opinion). When it observed that *Terry* did not allow the police to "seek to verify their suspicion by means that approach the conditions of arrest," *id.* at 1325, Justice White's opinion cited *Dunaway v. New York*, 442 U.S. 200 (1979). *Dunaway* indeed made this point, but it nowhere suggested that intrusions that did *not* "approach the conditions of arrest" might for that reason be weighed upon the scales of a balancing test. On the contrary, the central point of the *Dunaway* opinion was a demonstration that a *Terry* intrusion was indeed minimal and that the Court had required traditional probable cause for anything more. See 447 U.S. at 208-11. As a matter of abstract logic, the *Dunaway* opinion might have stopped there, since the detention of *Dunaway* went far beyond what *Terry* itself had allowed, but to buttress further the conclusion that probable cause was necessary, the Court went on to show that *Dunaway*'s detention "was in important respects indistinguishable from a traditional arrest." *Id.* at 212. Nothing in *Dunaway* suggests, however, that *unless* an intrusion is "indistinguishable from a traditional arrest," traditional probable cause is unnecessary. On *Dunaway*'s facts, to have allowed the detention despite the absence of probable cause would indeed have allowed an exception to the probable cause standard "to swallow the general rule." *Id.* at 213. But that is not to say that any exception to the rule, except that which swallows it all up, should be allowed. Instead, any exception that takes more than a very small nibble should be rejected. Indeed, things might now be much better if, after *Terry* had taken its bite, all further lurching had been banned.

315. 103 S. Ct. at 1325.

316. *Id.* at 1331 (Brennan, J., concurring).

317. Although *Place* and *Summers* now appear to preclude adoption of Justice Brennan's view as the sole standard of what intrusions may be allowed on less than traditional probable cause, this view may yet prevail as the standard for assessing the permissible intrusiveness of non-probable cause investigative detentions of the person. His opinions indicate that such stops may "consume[] less than a minute and involve[] 'a brief question or two.'" *Dunaway v. New*

does not yet appear inevitable),³¹⁸ and the extreme difficulty of insulating any expanded form of this power from discriminatory abuse is ample reason to find any such expansions unreasonable.³¹⁹ Like the standardless license and registration checks that the Court disapproved in *Delaware v. Prouse*,³²⁰ a general authority to conduct *any* "minimally intrusive" seizures (or searches) of personal property subject to judgment only by a balancing test would leave things far too much to the good or bad judgment of the individual police officer, since comprehensive, workable rules might never be formulated.

3. *Judge Oakes's proposal*— The police may take advantage of the Court's apparent willingness to approve new categories of intrusions on less than probable cause, by experimenting with people's fourth amendment rights. One proposal which would limit possible experimentation merits consideration as an adjunct to the limitations already suggested. Dissenting from a 1979 decision, *United States v. Vasquez*,³²¹ Judge Oakes of the Second Circuit argued that before the courts recognize a new exception to the traditional probable cause requirement, at least when it concerns "a *course of organized police conduct*,"³²² the police should be required to identify a pre-existing rule, regulation, or legislative enactment authorizing the practice and adequately guarding against abuse of discretion.³²³ In particular, Judge Oakes would require rules that "were framed and enforced so as not to discriminate against any particular group on account of race, ethnic background, or the like."³²⁴ In addition to discouraging ad hoc experimentation, the proposal would provide some assurance that the particular practice in fact served a weighty law enforcement need, sufficient to justify this formal recognition. A majority of the Second Circuit declined to find such a requirement on the facts of the case before it, which involved DEA activities in an airport that the majority approved on ordinary *Terry* grounds.³²⁵ Arguably, however, such pre-existing authorization is an element of the reasonableness standard that

York, 442 U.S. 200, 210-11 (1979) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). "Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him." *Kolander v. Lawson*, 103 S. Ct. 1855, 1862 (1983) (Brennan, J., concurring).

318. See *supra* notes 273-80 and accompanying text.

319. See *supra* notes 282-88 and accompanying text.

320. 440 U.S. 648 (1979).

321. 612 F.2d 1338 (2d Cir. 1979), *cert. denied*, 447 U.S. 907 (1980).

322. *Id.* at 1349 (Oakes, J., dissenting) (emphasis in original).

323. *Id.* at 1352 (Oakes J., dissenting).

324. *Id.*

325. *Id.* at 1344-46.

The majority said, "We cannot agree with the characterization of this case and its predecessors as 'expansion' of *Terry v. Ohio*, [392 U.S. 1 (1968)]." 612 F.2d at 1344.

new categories of intrusions must satisfy in the absence of *Brinegar* probable cause.³²⁶

C. *The exclusionary rule and line drawing*

It seems fit to conclude with two points about the exclusionary rule and the proposals, before the Court as this is written, to modify the exclusionary rule, such as by permitting introduction of evidence obtained through fourth amendment violations that were committed in "good faith" or as the result of "reasonable mistake."³²⁷ First, it is clear that the Court that decided *Terry v. Ohio*³²⁸ considered the continuing operation of the exclusionary rule essential to the regulation of the discretion it was entrusting to the police.³²⁹ It likely anticipated that later case decisions would, over time, elucidate the opinion's overarching generalities and provide the specific guidance to the police that the 1968 decisions, involving just three cases, could not produce. There is perhaps reason to be disappointed that, sixteen years later, specific guidance remains limited, especially on the question of how much evidence is required for the police to conduct a stop or a pat-down. But changes in the exclusionary rule that make it more difficult for the appellate courts to produce clear-cut opinions, saying that on *these* facts the police had enough evidence, but on *these*, they did not, will retard if not reverse the process.³³⁰ Further, the *Terry* Court evidently valued the process of police officers articulating their justifications for searching or seizing, because of the impact of this process on future police conduct, even when the particular evidence is held properly seized.³³¹ Greater tolerance of legal errors by the police may translate into a less demanding requirement that the police articulate their reasons for acting. To the extent that tolerance has this effect, the value of the articulation process will be lost.

Second, it is a particularly impropitious moment to amend the exclusionary rule if, as some have feared, a consequence of the amendment will be a weakening of the ability of the courts to continue to

326. Judge Oakes had earlier spoken of this rulemaking requirement, which he borrowed from Amsterdam, *see* Amsterdam, *supra* note 6, in his opinion for the Court in *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975). *See also* *United States v. Place*, 660 F.2d 44, 53-54 (2d Cir. 1981) (Oakes, J., concurring), *aff'd*, 103 S. Ct. 2637 (1983); *United States v. Streifel*, 665 F.2d 414, 425-27 (2d Cir. 1981) (Oakes, J., dissenting).

327. Such proposals are pending consideration in *United States v. Leon*, *cert. granted* 103 S. Ct. 3535 (1983) and *Massachusetts v. Sheppard*, *cert. granted* 103 S. Ct. 3534 (1983).

328. 392 U.S. 1 (1968).

329. *See supra* note 126.

330. For an expression of the view that exclusionary rule modifications are likely to have such an impact, *see* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 449-53 (1981).

331. *See supra* note 153 and accompanying text.

articulate standards and to draw lines between what the fourth amendment allows and what it forbids. Such weakening will complicate the task of regulating police discretion within the already recognized exceptions to the ordinary probable cause requirement. Courts face enough difficulty establishing standards for the police to follow in deciding, for example, whether a given seizure of personal property is "minimally intrusive." The task may become impossible when the question on which the outcome hinges becomes instead whether it was *reasonable to think* that a given seizure was "minimally intrusive." The courts may find themselves determining, in such cases, whether a reasonable police officer could believe that the given intrusion did not require traditional probable cause (regardless of whether a court would later agree, applying the complicated and uncertain tests that the Supreme Court has so far supplied). If discretion in these broad areas is to be controlled, lines should be drawn wherever it is feasible to do so, yet the exclusionary rule amendments now under consideration will complicate line drawing efforts, if not thwart them altogether.

