

4-1-1982

## The Erosion of Probable Cause

Frederick D. Unger

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>



Part of the [Fourth Amendment Commons](#)

---

### Recommended Citation

Unger, Frederick D. (1982) "The Erosion of Probable Cause," *North Carolina Central Law Review*: Vol. 13 : No. 2 , Article 5.  
Available at: <https://archives.law.nccu.edu/ncclr/vol13/iss2/5>

This Comment is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## COMMENT

### The Erosion of Probable Cause

#### I. INTRODUCTION

In 1968, the Supreme Court's holding in *Terry v. Ohio*<sup>1</sup> that less than probable cause is permissible to stop and frisk an individual created a marked exception to the absolute fourth amendment<sup>2</sup> requirement that probable cause<sup>3</sup> must accompany all searches and seizures. This new exception to the probable cause requirement generally has been called the "reasonable suspicion" standard.<sup>4</sup> Although the *Terry* Court intended its holding to be narrowly interpreted<sup>5</sup> and applied only in dangerous law enforcement situations,<sup>6</sup> it has been expanded to many areas where there is little, if any, danger to law enforcement officials. Indeed, the *Terry* standard has been invoked under circumstances involving aggressive law enforcement practices where there has been an absence of probable cause to justify search and seizure.<sup>7</sup> This erosion

---

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

2. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

3. For a discussion of probable cause, see notes 12-62, *infra* and accompanying text.

4. The term "reasonable suspicion" was never expressly stated by Chief Justice Warren in *Terry*. In a companion case to *Terry*, however, *Sibron v. New York*, 392 U.S. 40 (1968), reasonable suspicion was articulated in the concurring opinion of Justice Harlan. He stated: "Under . . . *Terry* a right to stop may indeed be premised on *reasonable suspicion* and does not require probable cause." *Id.* at 71. (Harlan, J., concurring) (emphasis added). Justice Douglas also used the phrase in his *Terry* dissent, where he stated: "The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'" 392 U.S. 1, 37 (Douglas, J., dissenting).

"Founded suspicion" has been used interchangeably with "reasonable suspicion" by some courts. See, e.g., *United States v. Nunez-Villalobos*, 500 F.2d 1023 (9th Cir. 1974); *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966). See Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Problem of Stop and Frisk*, 45 CONN. B.J. 146, 181 n.115 (1971); Morris, *Search and Seizure, Border Area Stops*, 4 AM. J. CRIM. L. 203, 212, n.41 (1975-1976).

5. The Court stated:

[T]here must be a *narrowly drawn authority* to permit a reasonable search *for weapons* for the *protection of the police officer*, where he had reason to believe that he is dealing with an *armed and dangerous individual*, regardless of whether he has probable cause . . .

392 U.S. at 27 (emphasis added).

6. *Id.*

7. See, e.g., *United States v. Mendenhall*, 446 U.S. 544 (1980) (stop and subsequent search of suspected drug courier based on a profile of drug couriers), discussed *infra* at notes 223-239 and accompanying text; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (investigatory stop of a

of probable cause has effectively diluted the traditional fourth amendment protections embodied in the probable cause standard<sup>8</sup> and threatens ultimately to eliminate the probable cause requirement, thereby "eviscerating [the] fourth amendment protections against unreasonable searches and seizures."<sup>9</sup>

In tracing the development of the *Terry* reasonable suspicion standard, this article will discuss the probable cause requirement prior to *Terry*, the *Terry v. Ohio* decision itself, and the extension of reasonable suspicion to select areas of the law.<sup>10</sup> The thesis of this article is that the probable cause standard has been greatly diluted by the Supreme Court and is being replaced slowly by the reasonable suspicion exception. The expansion of this new standard is consonant with the Burger Court's antipathy toward the exclusionary rule<sup>11</sup> and its attempts to circumvent the rule by lowering the overall standards for constitutional searches and seizures under the Fourth Amendment.

## II. THE TRADITIONAL REQUIREMENT OF PROBABLE CAUSE

The Fourth Amendment was designed to insure that individuals and their property will not be subjected to unreasonable searches and seizures.<sup>12</sup> The Amendment was a reaction to the oppressive writs of

---

vehicle without probable cause because occupants appeared to be of Mexican ancestry), discussed *infra* at notes 130-145 and accompanying text.

8. For a discussion of the historical roots of the probable cause standard, see *Henry v. United States*, 361 U.S. 98, 100-102 (1958), and notes 29-44 *infra* and accompanying text.

9. *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1975) (Brennan, J., dissenting).

10. Except for a brief discussion of administrative searches, this comment will not specifically address the dilution of probable cause in situations requiring a warrant for a reasonable search and seizure.

11. See *Stone v. Powell*, 428 U.S. 465 (1975). In *Stone*, Chief Justice Burger, concurring, noted: "[I]t seems clear to me that the exclusionary rule has been operative long enough to demonstrate its flaws. The time has come to modify its reach, even if it is retained for a small and limited category of cases." *Id.* at 496 (Burger, C.J., concurring).

The exclusionary rule enforces the fourth amendment protections against unreasonable searches and seizures. It was adopted in *Weeks v. United States*, 232 U.S. 383 (1914), where the Court held that any evidence seized in violation of the fourth amendment was inadmissible in federal court. The fourth amendment exclusionary rule was applied to states through the fourteenth amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). See *United States v. Janis*, 428 U.S. 433, 443-44 (1949); *Wolf v. Colorado*, 335 U.S. 25 (1959); *Elkins v. United States*, 364 U.S. 206 (1959); *Lustig v. United States*, 338 U.S. 74, 78-79 (1949). The judicial basis for the exclusionary rule is its successful tendency to deter police misconduct. See generally *United States v. Janis*, 428 U.S. 433 (1975); *United States v. Calandra*, 414 U.S. 338, 347 (1974); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part Two—Defining the Norms and Training the Police*, 30 MO. L. REV. 566 (1965); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C.S. 255 (1961).

12. See *supra* note 2 for the text of the fourth amendment. The prohibition against unreasonable searches and seizures is considered one of the most essential constitutional guarantees of liberty and personal security. Mr. Justice Bradley stated in *Boyd v. United States*, 116 U.S. 616, 630 (1885), that the Amendment shall

[a]pply to all invasions of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors . . . that constitutes . . . the offence; but it is the invasion . . . of his

assistance<sup>13</sup> the British used to indiscriminately search for colonist violations of British tax laws.<sup>14</sup> The writ, as well as the general arrest warrant, which left blank the name of the person to be arrested, both perpetuated the abusive police practice of arresting and searching any individual on a mere suspicion.<sup>15</sup> Consequently, in early searches and seizures, "police control took the place of judicial control since no showing of probable cause before a magistrate was required."<sup>16</sup> In order to avoid the oppressive search and seizure policies that existed prior to the American Revolution, the Framers of the Bill of Rights enacted

---

indefensible right of personal security, personal liberty and private property. . . , it is the invasion of [a] sacred right.

13. Writs of assistance were general search warrants, which were adopted under the 1662 Act of Charles II, 13 and 14 Char. II, ch. 11, sec. 5. The 1662 Act was an attempt to strictly enforce the British trade laws. It authorized the Court of Exchequer to issue a broad warrant for the search of any house, shop, warehouse, and, if necessary, break open doors, chests, and packages. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES* at 43-52 [hereinafter cited as LASSON]. See generally Gray, *Quincy's Reports of Massachusetts Bay, 1761-1772*, Appendix I, pp. 395-540.

14. *Stanford v. Texas*, 379 U.S. 476, 481 (1964); *Boyd v. United States*, 116 U.S. 616, 629 (1885). In America, writs of assistance generally were abused. Once issued, the writ was not returnable after execution and was good as a continuing license. Thus, the discretion delegated to the official was almost absolute and unlimited. The strongest resistance to the writs was in Massachusetts, where the Governor issued them excessively. They were used as general search warrants which enabled the police to search randomly for contraband. The writs were later one of the first areas of colonist opposition against England's whole policy in the American colonies and, therefore, were one of the leading causes of the American Revolution. LASSON, *supra* note 13, at 54-59. The writs were denounced by James Otis "as the worst instrument of arbitrary power . . . because they placed 'the liberty of every man in the hands of every petty officer!'" 379 U.S. at 481 (quoting *Tudor*, LIFE OF JAMES OTIS, 66 (1823)).

15. *Henry v. United States*, 361 U.S. 98, 100 (1959).

16. *Id.* Probable cause is a general prerequisite to the issuance of arrest and search warrants by a magistrate. The warrant requirement generally is considered the cornerstone of the Fourth Amendment. Indeed, one commentator reports that the Amendment was "a one-barreled affair, directed apparently only to the essentials of a valid warrant." LASSON, *supra* note 13, at 103.

The major purpose of the warrant requirement was articulated by the Court in *McDonald v. United States*, 335 U.S. 451 (1948).

The presence of a search warrant serves a high function. . . . [It] interpose[s] a magistrate between the citizen and the police . . . [The warrant requirement] was done so that an objective mind might weigh the need to invade . . . privacy in order to enforce the law.

*Id.* at 455-56.

Moreover, warrantless searches and seizures are "*per se* unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967); see *Chapman v. United States*, 365 U.S. 610 (1961); *Jones v. United States*, 362 U.S. 257 (1960).

The basic requirements of a valid warrant under the fourth amendment include:

- 1) A probable cause showing supported by oath or affirmation that the particular person or thing can be found in the place to be searched;
- 2) A specific place to be searched, particularly described;
- 3) The specific things to be seized or the person to be arrested;
- 4) All of the above must be reviewed by a magistrate who decides whether to issue the warrant.

See Note, *Recent Fourth Amendment Developments*, 29 OHIO STATE L.J. 217, 222 (1968). Other factors that a magistrate can consider are the nature and number of items to be seized, the time of the search, the place to be searched, and whether an arrest is a pretext for a search. *Id.* at 219, n.16.

the Fourth Amendment, which required a showing of probable cause before a search and seizure could take place.<sup>17</sup> Therefore, because the fourth amendment "has roots that are deep in our history,"<sup>18</sup> early American case law stressed the paramount importance of the probable-cause requirement.<sup>19</sup> In fact, in some situations a "strong suspicion to suspect" was even inadequate to support a warrant.<sup>20</sup>

The traditional approach to defining the probable cause requirement was expressed in probabilities.<sup>21</sup> The Supreme Court has defined probable cause as "reasonable grounds for belief of guilt [which is] . . . less than evidence which would justify condemnation or conviction."<sup>22</sup> It is a standard, however, that requires "more than bare suspicion."<sup>23</sup> This simplistic formula of early probable cause was predicated on the belief that law enforcement officials may not initiate a search unless they have a reasonable belief that contraband is present.<sup>24</sup> However, a "mere belief or suspicion is generally not enough to furnish probable cause unless the officer can point to specific facts or circumstances [observed by or] presented to him."<sup>25</sup> Furthermore, probable cause is an objective standard.<sup>26</sup> The reasonable man test cited most often by courts to determine probable cause was first articulated in *Carroll v. United States*<sup>27</sup> where the Court stated that probable cause exists when "the facts and circumstances within the . . . [officer's knowledge] are suffi-

17. The probable cause requirement is stated in note 2, *supra*.

18. *Henry v. United States*, 361 U.S. 98, 160 (1959). See generally Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. L.J. 137 (1970).

19. *Henry v. United States*, 361 U.S. at 101. Cf. *Boyd v. United States*, 116 U.S. 616 (1886) (warrantless seizure of private papers found outside of defendant's premises unconstitutional); *Stacey v. Emery*, 97 U.S. 642 (1878) (warrant required for seizures by Internal Revenue agents); *In re Jackson*, 96 U.S. 727 (1877) (warrant required to seize mail). *Contra Murray v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1855) (warrant requirement not applicable to the recovery of debts).

20. *E.g.*, *Grumon v. Raymond*, 1 Conn. 39 (1814); *Conner v. Commonwealth (Pa.)*, 3 Binn 38 (1802).

21. *Brinegar v. United States*, 338 U.S. 160, 175 (1948). See *Spinelli v. United States*, 393 U.S. 410, 419 (1969); Bacigel, *Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 768 n.26 (1979).

22. *Brinegar v. United States*, 338 U.S. at 175. See *Stacey v. Emery*, 97 U.S. 642 (1878).

23. 338 U.S. at 175. One commentator stated that the only certain assertion of probable cause is that it "lies somewhere between bare suspicion and proof of guilt beyond a reasonable doubt." Armento, *supra* note 18, at 144.

24. *E.g.*, *Henry v. United States*, 361 U.S. 98, 99-102 (1959); See Bacigel, *supra* note 21, at 767-68.

25. *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (Court held that there was no probable cause to issue a search warrant based on affidavits of suspicion).

26. 361 U.S. at 102; *Stacey v. Emery*, 97 U.S. 642, 642 (1878). Although generally considered an objective standard, many commentators believe probable cause to be "ultimately subjectively derived." See Bacigel, *supra* note 21; Leslie, *The Graduation of Fourth Amendment Doctrine in the Context of Street Detentions*, 38 OHIO ST. L.J. 409 (1977).

27. 267 U.S. 132 (1925) (Court upheld warrantless search of vehicle with probable cause). Other cases in which the Court employed this objective test include *Henry v. United States*, 361 U.S. 98, 102 (1959); *Giordenello v. United States*, 357 U.S. 480 (1958); *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

cient in themselves to warrant a man of reasonable caution in the belief that"<sup>28</sup> an offense has been or is being committed.

Although the fourth amendment has resulted in more litigation than any other provision of the Bill of Rights,<sup>29</sup> the Supreme Court has considered the probable cause requirement in a relatively small number of cases,<sup>30</sup> consequently, the probable cause issue always has been a very unsettled area of jurisprudence.<sup>31</sup> Under the traditional approach to probable cause disputes, the Court conducted a factual inquiry by using the police officer's version of the facts that gave rise to the dispute at bar.<sup>32</sup> The Court then focused on the factual likelihood that a seizable item was present and, finally, determined whether probable cause existed to sustain a seizure.<sup>33</sup> Because the Supreme Court essentially has avoided clarifying the amount of evidence and the degree of certainty required to satisfy this vague constitutional standard, it has remained a confusingly flexible requirement.<sup>34</sup> Accordingly, the determination of whether there is probable cause to sustain a search<sup>35</sup> and seizure<sup>36</sup> can only be made through a case-by-case analysis.

Despite its ambiguity, the probable cause standard has effectively protected individuals against invasion of privacy and unfounded criminal charges while affording society sufficient law enforcement protec-

28. *Carroll v. United States*, 267 U.S. at 162. See also *Henry v. United States*, 361 U.S. at 102.

29. Landynski, *supra* note 4, at 454.

30. *Sibron v. New York*, 392 U.S. 70, 74 (1967) (Harlan, J., concurring). Justice Harlan stated that *Sibron* was "the latest in an exceedingly small number of cases in this Court indicating what suffices for probable cause."

31. Bacigel, *supra* note 21, at 771. See *Draper v. United States*, 358 U.S. 301, 313 (1959).

32. Bacigel, *supra* note 21, at 771. In *Brinegar v. United States*, 338 U.S. 160, 183 (1949), Justice Jackson suggested that the Court create a sliding scale for probable cause according to the offense committed. One commentator has indicated that the Court lowered the probable cause standard after *Mapp v. Ohio*, 367 U.S. 643 (1961), to give state law enforcement officials time to cope with the exclusionary rule. Note, *Probable Cause: The Federal Standard*, 25 OHIO ST. L.J. 505, 512 (1964).

33. Bacigel, *supra* note 21, at 771. The same probable cause analysis and standards also apply to arrests which, for fourth amendment purposes, generally are considered seizures. This notion that identical fourth amendment standards should apply to seizure of contraband as well as to the seizure of an individual was stated by Justice Powell, concurring in *United States v. Watson*, 423 U.S. 411 (1975):

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. . . . Logic . . . dictate[s] that arrests be subject to the warrant requirement at least to the same extent as searches.

*Id.* at 428-29 (Powell, J., concurring).

34. Bacigel, *supra* note 21, at 771.

35. "Search" is defined as an essentially unlimited examination of a person or his/her abode or business for any and all seizable items. *Terry v. Ohio*, 392 U.S. at 17-18 n.15 (1968).

36. "Seizure" is considered the restraint of freedom or movement by means of physical force or a show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

tion.<sup>37</sup> The utility of the probable cause requirement was probably best articulated in *Brinegar v. United States*,<sup>38</sup> where the Court stated:

The role of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of officers' whim or caprice.

Furthermore, under the traditional approach, probable cause constitutionally is required in three situations: 1) an arrest and incidental search without a warrant; 2) to issue a search warrant; 3) to issue an arrest warrant.<sup>39</sup> Moreover, searches and seizures conducted without a warrant are almost always suspect because they lack judicial review of the necessary probable cause.<sup>40</sup> These situations, not surprisingly, have given the Court the most difficulty.<sup>41</sup>

When deciding whether there is probable cause to sustain a search and seizure, the Court will first look at the facts available to the officers prior to the search and, from the evidence, then decide the probability that a crime might have been occurring.<sup>42</sup> If there is a reasonably strong possibility that criminal activity may be afoot, the search will be

37. Bacigel, *supra* note 21, at 771.

38. 338 U.S. 160, 176 (1948). *Cf.* *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The *Beck* Court stated that a "constitutionally valid [arrest] depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it."

39. Rothblatt, EVIDENCE FOR CRIMINAL TRIALS 66 (1965). *See generally* Armentano, *supra* note 18.

40. *Accord*, *Katz v. United States*, 389 U.S. 347, 357 (1967). The *Katz* Court stated:

searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

The five judicially recognized exceptions to the general warrant rule, however, must have probable cause to be sustainable.

*See* *Carroll v. United States*, 267 U.S. 132 (1925) (search of an automobile); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to valid arrest); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (searches to which the defendant has consented); *Johnson v. United States*, 333 U.S. 10 (1947) (searches under exigent circumstances); *Santana v. United States*, 427 U.S. 38 (1978) (search in hot pursuit).

41. One troublesome area where the Court has focused a lot of its attention is the warrantless search of an automobile. In *Brinegar v. United States*, 338 U.S. 160 (1948), the Court held that incriminating statements made by the defendant were sufficient probable cause to search a car without a warrant. Citing *Carroll v. United States*, 267 U.S. 132 (1925), the Court noted that the subjective belief that the car was heavily loaded and that the officer had arrested *Brinegar* five months earlier for transporting liquor also was sufficient probable cause for a non-warrant search. 338 U.S. at 169-70. Although the Court did not address whether probable cause existed to stop *Brinegar's* vehicle, it found that "the ultimate facts" within the officer's knowledge were sufficient to warrant a belief by a man of reasonable caution that a crime is being committed. *Id.* at 166, 175-176. For a discussion of the automobile exception to the fourth amendment warrant requirement, see note 158 *infra*.

42. One noted commentator believes probable cause is simply "more probable than not." LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 46, 73 (1968) [hereinafter cited as LaFave, *Street Encounters*].

sustained.<sup>43</sup> In *Brinegar v. United States*, Justice Rutledge stated the following standard for probable cause:

In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.<sup>44</sup>

Furthermore, the probable-cause standard implicitly requires that the officer scrutinize the entire situation before initiating his search. If, under the circumstances a reasonable man would conclude the presence of criminal activity is more probable than not, probable cause exists.<sup>45</sup> “[A] line . . . must be drawn by an [officer’s] act of judgment formed in the light of the particular situation and with account taken of all the circumstances.”<sup>46</sup> Thus, under the traditional standard, probable cause must be established prior to the commencement of any search and seizure. Conversely, probable cause established through investigative search and seizure procedures are impermissible. For example, in *Mallory v. United States*,<sup>47</sup> three Black men who had access to a basement where a rape occurred, and who fit the general description of the rapist, were arrested. In rejecting the constitutionality of petitioner’s seizure, the Court stated:

The police may not arrest upon mere suspicion. . . . [W]homever the police arrest, they must arrest on ‘probable cause.’ It is not the function of the police to arrest . . . at large and to use an interrogating process . . . in order to determine whom . . . should be charge[d] before a committing magistrate on ‘probable cause.’<sup>48</sup>

To establish probable cause, each search and seizure must have a strong independent showing that a particular crime has, in fact, occurred. In *Beck v. Ohio*,<sup>49</sup> the Court held that the police had no probable cause to search the defendant after stopping his vehicle simply because they knew he had a gambling record. In *Beck*, the officers ordered the defendant out of his car, arrested him and then searched his car.<sup>50</sup> Finding nothing, the officers searched the defendant and found clearing house slips in his sock.<sup>51</sup> Using a reasonable man standard, the Court found there was insufficient evidence of probable cause

43. See *Brinegar v. United States*, 338 U.S. 160, 175 (1948), discussed at note 41 *supra*, where the Court stated: “The substance of all the definitions of probable cause is a reasonable ground for the belief of guilt.”

44. *Id.*

45. LaFave, *Street Encounters*, *supra* note 42, at 74.

46. 338 U.S. at 176.

47. 354 U.S. 449 (1957).

48. *Id.* at 454, 456.

49. 379 U.S. 89 (1964).

50. *Id.* at 90.

51. *Id.*



in the record to arrest Beck without a warrant, because there "[was] not . . . a single objective fact to support belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him."<sup>52</sup>

*Beck* is typical of many Supreme Court decisions which have invalidated searches and seizures that were initiated either without a clear showing of probable cause or a search warrant allegedly based on probable cause.<sup>53</sup> Although it has long been established that a search warrant is not always required to commence a search,<sup>54</sup> there are situations where the privacy interest of an individual<sup>55</sup> is so paramount that

52. *Id.* at 95. A search incident to a lawful arrest is reasonable under the fourth amendment. See *Ker v. California*, 374 U.S. 23 (1963); *Draper v. United States*, 358 U.S. 307 (1958). *Cf.* *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

53. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (search warrant limited to a tavern and its bartender does not extend probable cause to independently search the bar's patrons); *Dunaway v. New York*, 442 U.S. 200 (1978). In *Dunaway*, the Court rejected the custodial detainment of a suspect by police without probable cause or an arrest warrant. In suppressing the incriminating statements the defendant later made while in custody, the Court refused to extend the *Terry* reasonable suspicion standard to permit custodial interrogations initiated on less than probable cause.

See also *Brown v. Illinois*, 422 U.S. 590 (1975) (inculpatory statements made by suspect formally arrested on less than probable cause suppressed); *Gerstein v. Pugh*, 420 U.S. 103 (1974) (arrest without a warrant must be based on probable cause); *Aguilar v. Texas*, 378 U.S. 108 (1964) (search warrant issued on insufficient basis for probable cause invalidated).

54. *E.g.*, *Chimel v. California*, 395 U.S. 752 (1969) (search incident to a valid arrest); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *United States v. Jeffers*, 342 U.S. 48 (1951) (search conducted under "exceptional" or "exigent" circumstances); *Johnson v. United States*, 333 U.S. 10 (1948) (valid consent for the search is given); *Carroll v. United States*, 267 U.S. 132 (1925) (impracticable to secure a warrant).

The Court, however, always has favored searches conducted with a warrant. See *Aguilar v. Texas*, 378 U.S. 108 (1964), where the Court stated:

Thus when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' . . . and will sustain the judicial determination so long as there [is a] substantial basis . . .

*Id.* at 111 (quoting *Jones v. United States*, 362 U.S. 257, 270 (1960)). *But cf.* *United States v. Ross*, 102 S. Ct. 2157, 2162-73 (1982) (legitimately stopped vehicle may be searched by police officers as thoroughly as a magistrate could authorize by a warrant).

55. The Supreme Court originally interpreted the fourth amendment as protecting property interests because any unconstitutional search and seizure of private property was considered a trespass. See *Boyd v. United States*, 116 U.S. 616 (1886), where the Court said: "[I]t is . . . incumbent upon the [government] to show the law by which this seizure is warranted. If that cannot be done, it is a trespass . . . This right of property is set aside by positive law." *Id.* at 627. See also *Goldman v. United States*, 316 U.S. 129 (1941); *Olmstead v. United States*, 277 U.S. 438 (1927). However, in the 1967 landmark case of *Katz v. United States*, 389 U.S. 347, the Court abandoned the traditional "constitutionally protected area" standard and held instead that the fourth amendment "protects people, not places." *Id.* at 351. This reinterpretation of the fourth amendment extended its protections to wherever an individual has a "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring).

For a good discussion of the general implications of *Katz*, see Note, *The Reasonable Expectation of Privacy—Katz v. United States, a postscriptum*, 44 IND. L. REV. 468 (1968); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protections*, 43 N.Y.U.L. REV. 968 (1968).

Other courts have interpreted the fourth amendment as protecting values other than privacy.

a search warrant based on probable cause is usually an absolute prerequisite to conducting a search and seizure.<sup>56</sup> The right of privacy in one's abode is where fourth amendment protections traditionally have been the strongest.<sup>57</sup> Accordingly, where a search of a home is at issue, probable cause must be the strongest because, absent exigent circumstances, a search and seizure will not be permitted without a search warrant issued by a judge or magistrate.<sup>58</sup> This privacy notion is epitomized in *Johnson v. United States*,<sup>59</sup> where the Court held that officers who detected opium smoke emanating from a hotel room had insufficient probable cause to search the room without first obtaining a warrant. The *Johnson* rationale, which generally is recognized as the "highwater mark" of the probable cause standard,<sup>60</sup> soon fell into disfavor primarily because many governmental activities could not comport with the traditionally rigid probable cause requirements.<sup>61</sup> Consequently, in order to accommodate what the Court considered important governmental objectives, it began to dilute the traditional probable cause requirements through a balancing analysis.<sup>62</sup>

The Court first employed a balancing test in determining fourth amendment violations in *Camara v. Municipal Court*.<sup>63</sup> In *Camara* a lower standard of probable cause was announced for administrative in-

*See United States v. Holmes*, 521 F.2d 859, 870 (5th Cir. 1975), *aff'd in part and rev'd in part per curiam on rehearing*, 537 F.2d 227 (1976) (right to be left alone); *Fixel v. Wainright*, 492 F.2d 480 (5th Cir. 1974) (the right of individuality).

56. *See Boyd v. United States*, 116 U.S. 616, 630 (1886) (sanctity of the home is the core value of the fourth amendment).

57. *See Payton v. New York*, 445 U.S. 573 (1980). The *Payton* Court stated: "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home are presumptively unreasonable." *Id.* at 586. *See generally* 2 LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §§ 4.1, 4.4 (1976) [hereinafter cited as LaFave, SEARCH AND SEIZURE].

58. *See generally* LaFave, SEARCH & SEIZURE, *supra* note 57 at 1 § 312. In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court articulated a two-prong test for magistrate-issued warrants. First, the magistrate must be "neutral and detached." Second, he must be able to determine if probable cause exists. *Id.* at 350. For a listing of exceptions to the warrant requirement, see note 40 *supra*.

59. 333 U.S. 140 (1947).

60. *Henry v. United States*, 361 U.S. 98, 101 (1959). A case that suggests that *Johnson* would be decided differently today is *Ker v. California*, 374 U.S. 23 (1963). In *Ker* the Court upheld the warrantless search of an apartment on the officer's suspicion that its occupants were drug dealers and that contraband was present in the apartment.

61. *Frank v. Maryland*, 359 U.S. 360 (1959). *See Bacigel, supra* note 21, at 776.

62. *Id.* Bacigel believes that the overruling of *Frank* by *Camara v. Municipal Court* generally is regarded as the beginning of the fall of the traditional monolithic view of the fourth amendment. *Id.* at 777. *See* LaFave, STREET ENCOUNTERS, *supra* note 42, at 55. Other cases in which the Court has applied a balancing test include *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (search of automobile driver after car is lawfully detained); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint stop to check for aliens); *Adams v. Williams*, 407 U.S. 143 (1972) (frisk for weapons on reasonable suspicion).

63. 387 U.S. 523 (1967). This case partially overruled *Frank v. Maryland*, 359 U.S. 360 (1959).

spections.<sup>64</sup> The *Camara* Court first stated that a search warrant must be obtained by administrative inspectors.<sup>65</sup> Probable cause to justify an inspection warrant "need not depend upon specific knowledge of the condition of the particular dwelling."<sup>66</sup> Instead, the passage of time, the nature of the building, or the condition of the entire area, may furnish probable cause to justify a warrant.<sup>67</sup> The Court reached this diluted standard of probable cause "by balancing the need to search against the invasion which the search entails."<sup>68</sup>

Therefore, the Court in *Camara* and its companion case, *See v. City of Seattle*,<sup>69</sup> advanced a lower standard of probable cause for administrative searches than that required for criminal searches.<sup>70</sup> In doing so, the Court abandoned the basic probable cause principle that an objectively perceived presence of seizable items is the exclusive justification for a search<sup>71</sup> and replaced it with a reasonableness standard which

64. See LaFave, STREET ENCOUNTERS, *supra* note 42, at 55.

65. 387 U.S. at 528-531.

66. *Id.* at 538.

67. *Id.*

68. *Id.* at 537. The Court discussed factors to be considered, noting:

First, such [inspection] programs have a long history of judicial and public acceptance . . . . Second, the public interest demands that all dangerous conditions be prevented or abated . . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

*Id.*

69. 387 U.S. 549 (1967). See applied the *Camara* rule to commercial buildings.

70. Note, *Marshall v. Barlow's Inc.: Administrative Inspections and the Fourth Amendment*, 9 ENVIRONMENTAL LAW 149, 155 (1978). [Hereinafter cited as *Admin. Inspections*].

71. After *Camara* and *See*, however, it was still unclear whether all administrative inspections had to fit within the warrant requirement. *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970), was the Court's first attempt to clarify this issue. In *Colonnade Catering*, Internal Revenue Service (IRS) agents, acting without a warrant, forcibly entered the store-room of a restaurant pursuant to a federal statute which permitted warrantless inspections of federally licensed dealers of alcohol. *Id.* at 73-74. In holding that the statute precludes forcible entries without a warrant, the *Colonnade Catering* Court implied that the federal statute could provide for warrantless searches and seizures of businesses that are regulated by the government. *Id.* at 77. The Court noted that in businesses where government regulation is pervasive, the need for a warrant based upon probable cause is unnecessary as long as it is authorized by Congress. Accordingly, in industries with a history of governmental control, the fourth amendment protections of a search warrant based on probable cause are inapplicable. *Id.* *Administrative Inspections*, *supra* note 70 at 157.

Because *Colonnade Catering* involved a forced, warrantless search and seizure, the Court did not discuss the validity of warrantless inspections without probable cause. However, in *United States v. Biswell*, 406 U.S. 311 (1971), the Court addressed the validity of surprise, warrantless inspections authorized by statute. In *Biswell* a federally licensed guns dealer was ordered by a warrantless Treasury agent to open up a storeroom containing guns. After initially protesting, the respondent unlocked the storeroom, where the agent found an unlicensed gun. *Id.* at 312. The Court, in upholding the search, stated that the fourth amendment warrant requirement was inapplicable because the statute's importance in preventing violent crime was paramount to the "negligible protections afforded by a warrant" based on probable cause. *Id.* at 315-316. Furthermore, in regulated areas where surprise is necessary for "effective enforcement," the Court concluded that a warrant "could [too] easily frustrate [the] inspection. . . ." *Id.* at 316. By completely aban-

balanced diverse societal interests. More importantly, the lesser standard for probable cause articulated in *Camara* and *See* through a balancing test formed the basis for a departure from the traditional probable cause requirement.<sup>72</sup> As later decisions will indicate, under a balancing analysis, the broad interests of society will almost always supersede those of the individual and thus the search will always be permissible.<sup>73</sup> The constitutionally protected expectation of privacy cannot keep the door closed when society knocks,<sup>74</sup> because, when looked at in a broad sociological sense, the interests of the individual must be subordinated to those of society.<sup>75</sup>

---

doing the warrant requirement in this situation, the *Biswell* Court has effectively stripped certain regulated industries of all fourth amendment protections. This exposes these enterprises to unlimited inspections, all on which may be executed without the existence of any probability that there is a statutory violation. See Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1022-1023 (1973).

However, in regulated areas where the public regulatory interest is not as pervasive, the warrant requirement must be met. In *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978), the Court considered whether the inspection provisions of the Occupational Safety and Health Act (OSHA), permitting warrantless entry onto an employer's business premises, was constitutional. The Court held that the OSHA provision authorizing warrantless inspections of business premises closed to the public was a violation of the Fourth Amendment Warrant Clause. Citing *See* and *Camara*, the Court stated that the warrant clause "protects commercial buildings as well as private homes." *Id.* at 311. The Court distinguished *Colonnade Catering* and *Biswell* by noting that these cases involved enterprises with a "long tradition of close government supervision . . . whereas the petitioner here was not engaged in any regulated or licensed business." *Id.* at 313. The Court, therefore, concluded that industries which are not closely regulated must fall within the warrant requirement.

Through its balancing analysis, the *Barlows* Court also articulated a lower standard of probable cause upon which an administrative search warrant may be issued. It concluded that, in order to prevent the warrant requirement from becoming an unmanageable administrative nightmare, traditional probable cause need not be present to issue the warrant. The *Barlows* Court stated:

Probable cause in the criminal sense is not required. For purposes of an administrative search . . . , probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.'

*Id.* at 310. Accordingly, the Court announced a diluted probable cause requirement for administrative searches. Although this weak probable cause standard provides some guarantee of judicial control over the administrative inspection process, it clearly does not afford the same protections as the traditional criminal law standard. Because an OSHA search warrant will be issued on the mere administrative showing of general OSHA criteria for the institution of an inspection, the requisite probable cause is rubber stamped by the issuing magistrate. See *id.* at 321, n.17. More importantly, *Barlows* is indicative of the general trend that the traditional probable cause standard is breaking down with no clear end to this destructive process in sight.

72. Bacigel, *supra* note 21, at 778.

73. *E.g.*, *Adams v. Williams*, 407 U.S. 143 (1972), discussed *infra* at notes 109-117 and accompanying text; *Terry v. Ohio*, 392 U.S. 1 (1968), discussed *infra* at notes 76-105 and accompanying text.

74. This result is probable because "there is no ready test for determining [fourth amendment] reasonableness." 387 U.S. at 536-37.

75. See generally *Katz v. United States*, 339 U.S. 347 (1967). In *Katz*, the Court stated that the fourth amendment protects people, not places, from arbitrary intrusions. *Id.* at 351. See note 55, *supra* for a discussion of *Katz*. Accord, Bacigel, *supra* note 21, at 778.

III. *TERRY V. OHIO: THE SEMINAL CASE*

The *Camara* balancing test laid the foundation for *Terry v. Ohio*,<sup>76</sup> the first case to sustain a search and seizure on less than probable cause. In *Terry*, a police officer observed the petitioner and two confederate "casing" a store for a long period of time. He eventually approached the three suspects, identified himself, and asked them for their names.<sup>77</sup> When they gave a mumbled response, the officer spun Terry around and frisked him by patting Terry's outer clothing.<sup>78</sup> After feeling a hard object, the officer then reached into the suspect's pocket and removed a pistol.<sup>79</sup> The trial court denied a suppression motion to exclude the gun, and Terry was convicted of carrying a concealed weapon.<sup>80</sup> The conviction was affirmed by the Ohio court of appeals<sup>81</sup> and an appeal to the Ohio supreme court was dismissed. After granting certiorari,<sup>82</sup> the Supreme Court first noted that it would not decide whether there was probable cause in this case.<sup>83</sup> Instead, the *Terry* Court focused on whether this "stop and frisk" was an unreasonable search and seizure.<sup>84</sup> The Court then defined the officer's stop and frisk of Terry within fourth amendment terminology. It noted that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."<sup>85</sup> Furthermore, the

76. 392 U.S. 1 (1968). Professor LaFave stated that *Camara* "was immediately recognized as pointing the way toward the Court's acceptance of the rationale supporting stop and frisk." LaFave, *Street Encounters*, *supra* note 42, at 58.

The "stop and frisk" doctrine was just beginning to heat up in the state courts. New York already had passed a stop and frisk law. See *People v. Taggart*, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967); *People v. Pugach*, 225 N.Y.S.2d 833, 204 N.E.2d 176 (1964), *cert. denied*, 380 U.S. 936 (1965); *People v. Rivera*, 252 N.Y.S.2d 458, 201 N.E.2d 32, *cert. denied*, 379 U.S. 978 (1965). For an excellent analysis of this issue in Pennsylvania, see Caracappa, *Terry v. Ohio and the Power of Police to Accost Citizens Absent Probable Cause: A Critical Look at the Pennsylvania Experience*, 16 DUQ. L. REV. 499 (1977-78). By 1968, the authority to stop and frisk suspicious persons had been granted in Alabama, Delaware, Illinois, Louisiana, Massachusetts, Nebraska, New Hampshire, New York, Rhode Island, and California. Landynski, *supra* note 4, at 156.

77. 392 U.S. at 7.

78. *Id.*

79. *Id.*

80. *Id.* at 7-8.

81. *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

82. *Terry v. Ohio*, 387 U.S. 929 (1967).

83. 392 U.S. at 20. The *Terry* Court thus implied that there was no probable cause here to sustain the search. The Court said: "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case." *Id.* Presumably, the above statement also implies that less than probable cause will always be insufficient to sustain a search pursuant to a warrant.

84. *Id.* The *Terry* Court proclaimed that this type of police conduct did not fall within the warrant requirement and thus it would not focus on probable cause. "Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* (footnote omitted).

85. 392 U.S. at 16.

Court characterized the “exploration of the outer surfaces of a person’s clothing” as a “search”<sup>86</sup> but rejected the state’s argument that fourth amendment protections do “not come into play” until a “technical arrest” or “full blown search” has occurred.<sup>87</sup>

The *Terry* Court then discussed what it considered the central inquiry in all fourth amendment disputes—“the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”<sup>88</sup> The Court refused to apply the probable cause standard and instead applied a *Camara* balancing test. In balancing the individual’s right against arbitrary and frivolous interference and the government’s interest in efficient and safe law enforcement,<sup>89</sup> the Court upheld the search, noting:

[T]here must be a *narrowly drawn authority* to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe he is dealing with an armed and dangerous individual, *regardless of whether he has probable cause to arrest the individual for a crime.*<sup>90</sup>

The Court also limited the police officer’s authority to search only when the officer could point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warranted the intrusion.<sup>91</sup> It added that an officer may draw upon specific, reasonable inferences from the situation in light of his experience to determine if his suspicions justify a search.<sup>92</sup> Thus, the Court created an exception to the probable cause requirement by using a “reasonable suspicion” test to sustain a stop and frisk under the fourth amendment.<sup>93</sup>

86. *Id.*

87. *Id.* at 19. The Court added: “‘Search’ and ‘seizure’ are not talismans.” *Id.*

88. *Id.*

89. *Id.* at 20-27. The Court cited *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Id.* at 21.

90. 392 U.S. at 27 (emphasis added).

91. *Id.* at 21. The Court also noted that under this reasonable man standard, the police actions must be predicated on objective, specific facts. “Inarticulable hunches” or “good faith” belief would not sustain a search or seizure. *Id.*

92. *Id.* at 27-28.

93. *See supra* notes 12-78 and accompanying text. *But see* 392 U.S. at 35 (Douglas, J., dissenting). Justice Douglas believed that the *Terry* majority should have employed a probable cause analysis to determine the fourth amendment reasonableness of the *Terry* “stop and frisk.” He stated that probable cause is an absolute requirement for all searches and seizures and, therefore, no exceptions to the standard should exist. Quoting extensively from *Brinegar v. United States*, 338 U.S. 160 (1949), and *Henry v. United States*, 361 U.S. 98 (1959), the dissent warned that by creating an exception to the probable cause requirement, the majority would be undermining the basic historical imperatives of the fourth amendment. More importantly, the dissent concluded that contrary to established authority, the *Terry* majority gave police greater authority to commence a search and seizure “than a judge has to authorize such action. . . . To give the police greater power than a magistrate is to take a long step down the totalitarian path.” Therefore, only through a constitutional amendment would Justice Douglas authorize the police to search and seize without probable cause. He stated that:

However, according to Chief Justice Warren, writing for the majority, the revolutionary new exception to probable cause was to be applied only in very limited circumstances.<sup>94</sup> He stated that the "sole justification" for the new standard was to protect the police officer and others in his immediate vicinity, and that any search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."<sup>95</sup> Moreover, the *Terry* Court reiterated the protections created by the fourth amendment and added that the police "must whenever practical obtain advance judicial approval of searches and seizures."<sup>96</sup>

While *Terry* constituted a subtle erosion of the fourth amendment guarantee<sup>97</sup> of probable cause, the *Terry* holding was a practical solution to the daily dangers faced by law enforcement officers on the street. The holding that a stop and frisk can be predicated on less than probable cause is an important attempt to provide the necessary tools to minimize those dangers.<sup>98</sup> Furthermore, the rights of the accused in these situations generally are still protected because the search must be narrow in scope and can only be initiated upon a "reasonable suspicion" that the suspect is armed and dangerous.<sup>99</sup> Thus, the *Terry* Court clearly intended, by limiting its holding, that "reasonable suspicion" not become an abusive tool of the police.

Accordingly, the narrowness of *Terry* was evinced in its companion case, *Sibron v. New York*.<sup>100</sup> In *Sibron*, an officer observed the defendant for several hours and saw him converse with at least six known

Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment . . . [I]f the individual is no longer to be sovereign, [and] if the police can . . . pick him up whenever they do not like the cut of his jib, . . . we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

*Terry v. Ohio*, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

94. The Court indicated the limitations of the *Terry* holding, noting:

[T]he narrow question posed by the facts . . . [is] 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 arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limits upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

*Id.* at 15-16.

95. *Id.* at 29.

96. *Id.* at 20 (footnotes omitted in text). The Court added "that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances."

97. See Gilligan, *Continuing Evisceration of the Fourth Amendment*, 14 SAN DIEGO L. REV. 823 (1976).

98. *Contra*, *Terry v. Ohio*, 392 U.S. 1, 35 (Douglas, J., dissenting). For a discussion of Justice Douglas' *Terry* dissent, see *supra* note 93.

99. *Id.* at 29.

100. 392 U.S. 40 (1968). The third companion case was *Peter v. New York*, 392 U.S. 40 (1968), where a frisk by a police officer which revealed burglary tools was upheld when the officer, who saw two strangers tiptoeing away from his apartment building, received unsatisfactory responses to his inquiry.

narcotics addicts. The officer approached the defendant and stated, "You know what I am after,"<sup>101</sup> and proceeded to reach into Sibron's pocket where he found heroin packets. The Court held that the search was unreasonable because it was not confined to a protective frisk for weapons, and there was insufficient probable cause to justify an arrest. The *Sibron* Court thus concluded that the reasonable suspicion exception was inapplicable to the circumstances in this case.

Despite the fact that *Terry* was the first case ever to sustain a search and seizure initiated on less than probable cause, it was in no way intended to signal the demise of the probable cause requirement. It merely created "a narrowly drawn authority" to enable police officers to protect themselves against "armed and dangerous individuals."<sup>102</sup> Moreover, the *Terry* Court noted that this "serious" intrusion upon the seized individual can be only for the discovery of weapons and may not become an excuse for a total search.

[The search] must . . . be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. . . and may realistically be characterized as something less than a "full" search . . . . [The officer may] not conduct a general exploratory search for whatever [other] evidence of criminal activity he might find.<sup>103</sup>

The *Terry* Court thus made a strong effort to preserve the probable cause requirement by strictly limiting its holding to defensive police procedures to be used only in dangerous situations. *Terry* was an attempt to make the fourth amendment more responsive to what the Court perhaps perceived as an increasingly violent society that was becoming more hostile to police officers.<sup>104</sup> However, these new protections afforded police officers clearly were designed to limit any possible erosion of the probable cause requirement in other areas of law enforcement. The Court stated the "search [in *Terry*] is not justified by any need to prevent the disappearance or destruction of evidence of crime,"<sup>105</sup> thus precluding police use of *Terry* for the prevention or discovery of crime. Accordingly, the *Terry* doctrine would have had an inconsequential effect on the fourth amendment protections against unreasonable searches and seizures if all the limitations placed on its use were adhered to, i.e., if it had been strictly applied to protection in dangerous situations, the patdown very limited in scope, and no aggressive investigatory law enforcement motives were underlying the search.

---

101. 392 U.S. at 45.

102. 392 U.S. at 27.

103. *Id.* at 26, 30.

104. *See id.* at 24 n.21.

105. *Id.* at 29.



IV. *ADAMS V. WILLIAMS*: AN EXPANSION OF TERRY TO INFORMERS

Despite the narrow scope given by the *Terry* Court to the reasonable suspicion standard,<sup>106</sup> and its apparent intention to limit the exceptions to situations where immediate action is required,<sup>107</sup> the Court later expanded *Terry* to situations where there is no danger to the officer or the public and no need for immediate police action.<sup>108</sup> The extension of the *Terry* reasonable suspicion standard to informants' tips clearly illustrates this trend.

In *Adams v. Williams*<sup>109</sup> the Court upheld a stop and frisk based on an unverified informant's tip that the defendant, who was sitting in a parked car, possessed drugs and a weapon.<sup>110</sup> The officer approached the car, tapped on the window, and when the defendant rolled down his window, reached in and seized a gun from Adams' waist.<sup>111</sup> Heroin subsequently was found in the defendant's possession. The *Adams* Court noted that the tip failed the probable cause test.<sup>112</sup> However, the majority held that the unverified tip was sufficient, under the reasonable suspicion standard, to form the belief that Adams was armed and dangerous because the tip was supported by a "sufficient indicia of reliability."<sup>113</sup> The majority noted three factors that were present to create

106. *Id.* at 62-65.

107. Professor LaFave suggests that *Terry* is only applicable to those situations in which the police must take immediate action. See 3 LaFave, SEARCH AND SEIZURE, *supra* note 57, at 25.

108. *E.g.*, *United States v. Watson*, 423 U.S. 411 (1976) (Court upheld warrantless search of person suspected of stealing credit cards); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (Court upheld warrantless search of a car impounded for parking violations). For commentators' views on the expansion of *Terry* to nondangerous situations, see Gilligan, *supra* note 97; Yackle, *The Burger Court and the Fourth Amendment*, 25 KAN. L. REV. 437 (1978).

109. 407 U.S. 143 (1972).

110. *Id.* at 145. The officer was patrolling a high-crime neighborhood when an informant approached the officer's car and told him that an individual seated in a nearby car had a gun and drugs.

111. *Id.*

112. *Id.* at 147. Justice Rehnquist concluded: "[T]he Court's decisions indicate that this informant's unverified tip may have been insufficient for a[n] . . . arrest or search warrant."

113. *Id.* at 147. *Contra, id.* at 157 (Marshall, J., dissenting). Justice Marshall stated:

[A] search and seizure cannot be justified on the basis of conclusory allegations of an unnamed informant who is allegedly credible . . . . Since the testimony of the arresting officer in the instant case patently fails to demonstrate that the informant was known to be trustworthy and since it is also clear that the officer had no idea of the source of the informant's 'knowledge,' a search and seizure would have been illegal.

In *Spinelli v. United States*, 393 U.S. 410 (1969), the Court articulated a two-prong test for probable cause based on informers' tips. First, the tip must contain sufficient information having sufficient grounds that the person giving the tip is reliable, i.e., the person must be responsible and credible. Second, the tip must contain a sufficient statement of the circumstances from which the informer drew his conclusion that the suspect was engaged in criminal conduct, i.e., there must be enough information for the informer to conclude that the suspect was engaging in a criminal activity. *Id.* See generally *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. McLeroy*, 584 F.2d 746, 748 (5th Cir. 1978).

reliability. First, the informant was known to the officer; second, the informant previously had provided information to the officer; and third, the informant gave information that could be personally verified at the scene.<sup>114</sup>

The extension in *Adams* of reasonable suspicion to unverified informers' tips triggered a further dilution of the probable cause standard in this area.<sup>115</sup> Lower federal and state courts have further expanded the reasonable suspicion standard by using it to validate searches promulgated by informants' tips from unverified, and thus often unreliable sources.<sup>116</sup> These holdings have effectively undermined the *Terry* limitation that reasonable suspicion would only justify a search in dangerous situations, and therefore, have encouraged aggressive and possibly abusive police actions that otherwise would be barred by the probable cause requirement.<sup>117</sup>

Despite the increasing expansion of the *Terry* doctrine by the lower courts, the Supreme Court continually has refused to decide whether an anonymous tip may furnish reasonable suspicion to conduct a search.<sup>118</sup> By constantly denying certiorari to state and circuit court cases,<sup>119</sup> the Court, presumably, is approving the continual expansion of reasonable suspicion in state and federal courts to anonymous and

114. 407 U.S. at 146.

115. *E.g.*, *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973). *Cf.* *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). Both cases are discussed *infra* at notes 159-166 and accompanying text.

116. The test for informant tips is stated in note 113 *supra*. *See, e.g.*, *United States v. Cage*, 494 F.2d 740, 742 (10th Cir. 1974); *United States v. Hernandez*, 486 F.2d 614, 616 (7th Cir. 1973), *cert. denied*, 419 U.S. 959 (1974); *United States v. Jefferson*, 480 F.2d 1004 (4th Cir.), *cert. denied*, 414 U.S. 1001 (1973); *United States v. Legato*, 480 F.2d 408, 410 (5th Cir. 1973), *cert. denied*, 414 U.S. 979 (1973). *Accord*, *United States v. Gorin*, 564 F.2d 159 (4th Cir. 1977); *United States v. Preston*, 468 F.2d 1007 (6th Cir. 1972). *Contra*, *United States v. DeVita*, 526 F.2d 81, 82 (9th Cir. 1975).

*See also* *People v. Tooks*, 403 Mich. 568, 271 N.W.2d 503 (1978); *State ex rel. H.B.*, 75 N.J. 243, 381 A.2d 759 (1977); *People v. Kinlock*, 43 N.Y.2d 832, 402 N.Y.S.2d 573, 373 N.E.2d 327 (1977). *But see* *Commonwealth v. Anderson*, 481 Pa. 292, 392 A.2d 1298 (1978); *Jackson v. State*, 157 Ind. App. 662, 301 N.E.2d 370 (1973). Three decisions have disapproved stops based on information received from a police dispatcher, the source of which was unknown. *See Price v. State*, 37 Md. App. 248, 376 A.2d 1158 (1977); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), *cert. denied*, 434 U.S. 833 (1977); *United States v. Robinson*, 536 F.2d 1298 (9th Cir. 1976).

117. *See Williams v. Adams*, 436 F.2d 30, 35 (2d Cir. 1971) (Friendly, J., dissenting), where the circuit court upheld the search. Justice Friendly states: "I greatly fear that if the decision here should be followed, *Terry* will have opened the sluice gates for serious and unintended erosion of the Fourth Amendment." *Id.* at 39 (Friendly, J., dissenting).

118. *See* dissent of Justice White from a denial of certiorari in *Jernigan v. Louisiana*, 377 So. 2d 1222 (La. 1979), *cert. denied*, 446 U.S. 958 (1980). *See also* *United States v. Gorin*, 564 F.2d 159 (4th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *United States v. Hernandez*, 486 F.2d 614 (7th Cir. 1973), *cert. denied*, 415 U.S. 959 (1974).

119. *See, e.g.*, *United States v. Gorin*, 564 F.2d 159 (4th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659, *cert. denied*, 434 U.S. 833 (1977); *United States v. Legato*, 480 F.2d 408 (5th Cir. 1973), *cert. denied*, 414 U.S. 979 (1973); *United States v. Hernandez*, 486 F.2d 614 (7th Cir. 1973), *cert. denied*, 415 U.S. 959 (1974). *See also* *Jernigan v.*

uncorroborated tips.<sup>120</sup> Since there are growing divisions in the state and federal courts on this issue,<sup>121</sup> it should only be a matter of time before the Supreme Court officially extends reasonable suspicion to anonymous tipsters.

The use of reasonable suspicion to conduct a search based on anonymous information, furthermore, is a dangerous law enforcement technique.<sup>122</sup> Anonymous tips merely raise a weak possibility of criminal conduct,<sup>123</sup> and, therefore, should not justify widespread investigatory searches in the absence of probable cause that a crime is about to take place.<sup>124</sup> These investigatory stops based on less than probable cause clearly are not within the narrow scope of *Terry*. The fourth amendment rights of the individual are at the mercy of the police officer who may stop and search an individual at will upon the suggestion by a usually unreliable, unknown, or, perhaps, vengeful third person that the suspect is committing a crime. Moreover, the expectation that the police officer will limit his search to a light patdown of the suspect under the *Terry* guidelines is impossible to enforce.<sup>125</sup>

Reasonable suspicion based on an informant's tip, the reliability, motive, and credibility of which is always suspect, was clearly not within the narrow guidelines promulgated in *Terry*. Under the *Terry* rationale, there is little basis to extend reasonable suspicion to situations where there is no apparent danger and the crime is possession of

Louisiana, 377 So. 2d 1222 (La. 1979), *cert. denied*, 446 U.S. 958 (1980); *United States v. Walker*, 294 A.2d 376 (D.C. App. 1972), *cert. denied*, 414 U.S. 1007 (1973).

120. *But cf.* *Adams v. Williams*, 407 U.S. 143 (1972), discussed *supra* at notes 106-127 and accompanying text; *Draper v. United States*, 358 U.S. 307 (1959) (informers were known to the officer and had provided reliable information in the past).

121. *See, e.g.*, *Jernigan v. Louisiana*, 377 So. 2d 1222 (Sup. Ct. La.), *cert. denied*, 446 U.S. 958 (1980). In *Jernigan* the New Orleans police received an anonymous phone call that a black man fitting a certain description and wearing a gun, could be found at a bar. An officer was dispatched to the bar, conducted a *Terry* search on the petitioner, and located a firearm. *Jernigan* was convicted of illegal possession of a gun, and the Louisiana Supreme Court affirmed.

*See* Justice White's dissent from the denial of certiorari. *Id.* at 958. The circuit courts are divided on whether *Terry* stops are permissible from an anonymous tip. *Compare* *United States v. McLeroy*, 584 F.2d 746 (5th Cir. 1978), *and* *United States v. Robinson*, 536 F.2d 1298 (9th Cir. 1976), *with* *United States v. Hernandez*, 486 F.2d 6114 (7th Cir. 1973) (*per curiam*), *cert. denied*, 415 U.S. 959 (1974).

122. *See* *People v. Taggart*, 283 N.Y.S.2d 1, 9, 229 N.E.2d 581, 586 (1967). The Court stated: "It is recognized . . . that using anonymous information as a basis for intrusive police action is highly dangerous. It should not extend to all contraband or criminal violations." *Id.*

123. *LaFave, Street Encounters, supra* note 42, at 78. Professor LaFave does not believe that anonymous tips should be completely ignored. He suggests they only should be used to survey the scene or the individual and if the necessary probable cause arises, a search then should be conducted.

124. In possession violations, for example, no dangerous act is about to take place, nor is there a need for immediate action to negate an apparently dangerous situation. *See* *People v. Taggart*, 283 N.Y.S.2d 1, 9, 229 N.E.2d 581, 586 (1967).

125. *See* *People v. Taggart*, 283 N.Y.S.2d 1, 6, 229 N.E.2d 581, 584 (1967) (Fuld, J., dissenting).

contraband.<sup>126</sup> The protections afforded by the fourth amendment probable cause standard should not be at the mercy of an unverified and unreliable informer. The government, when it relies on a tip to justify a *Terry* stop, should either reveal the name of the informer or prove that his "name is unknown and could not otherwise have been ascertained."<sup>127</sup> This minimal requirement would, at least, help prevent abusive and discretionary police actions by removing the "temptation for police to go on fishing expeditions for contraband."<sup>128</sup>

## V. REASONABLE SUSPICION AT THE BORDER AND INWARD

*Adams* and its lower-court progeny implicitly rejected the *Terry* notion that the reasonable suspicion exception will be strictly limited to the type of crime under suspicion.<sup>129</sup> This effectively has laid the groundwork for the dilution of the probable cause standard in other law enforcement areas. In these situations the crime is much less threatening to the officer's safety than those of *Terry* or *Adams* and clearly are not within the limited "stop and frisk" scope of the *Terry* guidelines.<sup>130</sup> Illustrative of this expansion is border patrol searches.

After initially rejecting the validity of searches by border patrols on less than probable cause,<sup>131</sup> the Court later extended the reasonable

126. LaFave, *Street Encounters*, *supra* note 42, at 66. Professor LaFave states that *Terry* explicitly deals with prevention of crime and *not* its detection. *Id.*

127. 436 F.2d at 39 (Friendly, J., dissenting).

128. See LaFave, *Street Encounters*, *supra* note 42, at 65-66. Professor LaFave states that the present stop and frisk standards should be renamed "stop and fish." *Id.* at 66.

129. See Caracappa, *supra* note 76, at 511. This commentator states that *Adams* failure to address this question after it had been raised below "suggests the Court has no intention of placing [any] limitations on this police investigatory tool." *Id.* at 511. See dissent of Judge Friendly at note 117, *supra*. *Contra*, *Dunaway v. New York*, 442 U.S. 200 (1979). In *Dunaway* the police detained the defendant on less than probable cause based on implicating statements made by a jail inmate. After being taken into custody, but not arrested, the petitioner made incriminating statements which later led to his indictment and conviction for felony murder. The *Dunaway* Court rejected New York's contention that the police could detain the defendant on a reasonable suspicion that he had committed a crime and held that probable cause was required to detain a suspect for custodial interrogations. *Id.* at 207, 216. It noted that it would be "careful [to maintain the narrow scope] of *Terry*" and refused to employ a balancing test in investigatory seizure situations where there are severe intrusions on individual liberty. *Id.* at 215, 216.

See also *Brown v. Illinois*, 422 U.S. 590 (1975) (investigatory arrest on less than probable cause rejected); *Davis v. Mississippi*, 394 U.S. 721, 726-727 (1969) (fingerprints taken from suspect detained without probable cause violates fourth amendment).

130. See *Terry v. Ohio*, 329 U.S. at 30 (1968). The *Terry* Court said that when an officer reasonably suspects that a suspect is *armed and dangerous*, he may conduct a stop and *protective search only* on less than probable cause. *Id.* (emphasis added).

131. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Almeida-Sanchez*, the petitioner, a Mexican citizen who was legitimately in the United States on a work permit, was stopped approximately 25 miles from the Mexican border by a Border Patrol searching for illegal aliens under the authority of the Immigration Nationality Act, which provides for searches of vehicles within 100 air miles of the United States border. The petitioner's car was searched and marijuana was discovered. The Court rejected the *Camara* balancing approach and held that the warrantless search of the petitioner's car away from the border without probable cause or consent was unrea-

suspicion standard to this area through a *Camara-Terry* balancing test in *United States v. Brignoni-Ponce*.<sup>132</sup> In *Brignoni-Ponce*, a nighttime border patrol, looking for illegal aliens, stopped a car that was heading north about 65 miles from the Mexican border.<sup>133</sup> The Court rejected the stop because the patrol's reason for pulling over the respondent's car was that its three occupants, two of whom turned out to be illegal aliens, "appeared to be of Mexican descent."<sup>134</sup> In characterizing the stop of the vehicle as a fourth amendment "seizure," the Court, rather than focusing on whether the stop was based on probable cause, instead balanced the public interest of preventing illegal aliens from entering this country<sup>135</sup> against the intrusion on individual freedom. It found that the Government had made a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border, relative to the "limited" intrusion on civil liberties.<sup>136</sup> By holding that an investigative stop on less than probable cause was permissible,<sup>137</sup> the *Brignoni-Ponce* Court officially recognized that a *Terry* "seizure" based on reasonable suspicion was applicable in situations that were not dangerous to law enforcement officials.

Citing *Terry*, the Court also noted that in determining whether sufficient reasonable suspicion to stop a car beyond the border existed, the officer had to point to several specific, articulable and objective facts indicating that criminal activity was afoot.<sup>138</sup> Accordingly, it invali-

sonable under the fourth amendment. *Id.* at 269-275. Justice White, in dissent, approved of this search pursuant to the statute authorizing such searches. *See id.* at 285-299 (White, J., dissenting).

132. 422 U.S. 873 (1975). For further discussion of the *Brignoni-Ponce* holding, see Note, *Reasonable Suspicion for Border Patrol Stops*, 15 THE COLUMBIA JOURNAL OF TRANSNATIONAL LAW 277 (1976).

In *United States v. Ortiz*, 422 U.S. 891 (1975), the Court later applied the *Almeida-Sanchez* probable cause standard to checkpoint searches beyond the border or its functional equivalent. In *Ortiz*, the defendant's car was stopped for no apparent reason at a traffic checkpoint about 60 miles from the border. A subsequent search of the car trunk revealed three illegal aliens. *Id.* at 892. The Court held that vehicle searches must be based on probable cause, but refrained from deciding whether probable cause is required to stop a car. *Id.* at 895, 897 n.3. This issue was later adjudicated in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), discussed *supra* and *infra* at notes 127-137 and accompanying text.

133. *Id.* at 875.

134. *Id.* *See* *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (racial appearance to support reasonable suspicion rejected).

135. *Id.* at 881. The Court noted that the tremendous flow of illegal aliens in this country is a "significant social and economic problem." *Id.* at 878.

136. *Id.* at 878, 880. The Court stated that the "intrusion is modest. The Government tells us that a stop by a moving patrol consumes no more than a minute!" *Id.* (emphasis added).

137. *See infra* notes 138-139.

138. *Id.* at 883. Prior to *Brignoni-Ponce*, the Court had limited searches and seizures on less than probable cause to situations that were potentially dangerous to the police officer. *See, e.g.*, *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 110 (1968); *Terry v. Ohio*, 329 U.S. 1 (1968). It has been long established that searches at the border or its functional equivalent do not need probable cause or a warrant and are *per se* reasonable. *See Carroll v.*

dated the *Brignoni-Ponce* seizure because the officer's reliance on only one factor, the apparent Mexican ancestry of the vehicle's occupants, was insufficient to justify a stop on reasonable suspicion grounds.<sup>139</sup> The *Brignoni-Ponce* majority emphasized that "in all situations the officer is entitled to assess the facts in light of his experiences and the search must be reasonably related in scope to the justification for . . . [its] initiation."<sup>140</sup> In *Brignoni-Ponce*, therefore, the Court placed two limits upon border patrols in their determination of whether there is reasonable suspicion to sustain a stop. First, the seizure is permissible only in the absence of less intrusive or more practical alternatives. Second, the suspicion must be based solely on the officer's personal observations of the vehicle and its occupants.<sup>141</sup>

*Brignoni-Ponce*, however, is indicative of the Court's further weakening of the probable cause standard.<sup>142</sup> Reasonable suspicion now is applicable to situations in which there is no physical danger to the police or public.<sup>143</sup> Therefore, the exception can be used to justify broad-

United States, 267 U.S. 132 (1925); *King v. United States*, 348 F.2d 814 (9th Cir. 1965), *cert. denied*, 382 U.S. 826 (1965); *Mansfield v. United States*, 285 F.2d 14 (9th Cir. 1960); *Landau v. United States Att'y*, 82 F.2d 285 (2d Cir. 1936), *cert. denied*, 298 U.S. 665 (1936). The rationale for this exception is set forth in *Carroll*:

Travelers may be so stopped in crossing an international boundary, because of national self-protection requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

267 U.S. at 154.

139. 422 U.S. 884. The courts have recognized many other factors in determining whether a border stop was based on probable cause. They include:

1) The characteristics of the area in which the vehicle is travelling, particularly its proximity to the border, *Accord*, *United States v. Barnard*, 553 F.2d 389 (5th Cir. 1977) (Barnard's car was from another country, but was spotted in an area where business or tourist traffic was unlikely); *United States v. Lara*, 517 F.2d 209 (5th Cir. 1975) (stop in a sparsely populated area 314 miles from the border upheld). *Contra*, *United States v. George*, 567 F.2d 643 (5th Cir. 1978) (stop of an out-of-state vehicle early in the morning close to the border invalid); *United States v. Lopez*, 564 F.2d 710 (5th Cir. 1977) (stop 55 miles from border invalid);

2) The usual traffic patterns of the roadway. *See United States v. Sperow*, 551 F.2d 808 (10th Cir. 1977);

3) Previous experience with illegal aliens. *Compare United States v. Barnard*, 553 F.2d 389 (5th Cir. 1977) (heavily loaded automobile justification for a stop), *and United States v. Larios-Montes*, 500 F.2d 941 (9th Cir. 1974) (underlying circumstances and experience of officer enough to justify founded suspicion), *with United States v. Escamilla*, 560 F.2d 1229 (5th Cir. 1977) (appearance of vehicle on highway heading away from border did not constitute reason to believe car was in fact coming from border with illegal aliens);

4) Characteristics of the vehicle and appearance of these suspects. *Accord*, *United States v. Barnard*, 553 F.2d 389 (5th Cir. 1977).

140. 422 U.S. at 881 (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

141. 422 U.S. at 881; *see supra* note 119 and accompanying text. This personal observation requirement is apparently more stringent than the standards articulated in *Adams* and its lower court progeny which permitted suspicion to emanate from informants. *See supra* note 94-117 and accompanying text.

142. 422 U.S. 873 (Douglas, J., concurring). *See generally* Note, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968).

143. This result contradicts *Terry*, where the Court stated:

ranging investigative seizures. More importantly, the *objective* facts creating a "reasonable suspicion" to justify a stop have evolved into the officer's *subjective* assessment of personal and other characteristics, many of which are consistent with innocent behavior.<sup>144</sup>

Thus, the *Brignoni-Ponce* holding is a windfall for law enforcement at the expense of individual freedoms. Its expansion of the reasonable suspicion standard to non-violent crimes is a powerful law-enforcement tool.<sup>145</sup> The potential for police abuse of this new standard is made evident by the following characterization of the suspicion test: "[T]he nature of the test permits the police to interfere with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude."<sup>146</sup>

Traditional fourth amendment protections were eviscerated further in *United States v. Martinez-Fuerte*,<sup>147</sup> where the Court, using a *Brignoni-Ponce* balancing test, held that vehicles may be stopped at fixed checkpoints far away from the border in the absence of any articulable suspicion. In *Martinez-Fuerte*, the petitioner was passing through a checkpoint about 60 miles from the border where all cars were visually screened.<sup>148</sup> He was instructed to proceed to a secondary inspection area by an officer where it was discovered that his two passengers were illegal aliens.<sup>149</sup> The petitioner argued that his fourth amendment rights were violated because there was a clear lack of rea-

---

We . . . hold today that where a police officer observes unusual conduct which leads him to reasonably conclude in *light of his experience* that criminal activity may be afoot and that the persons with whom he is dealing may be *armed and presently dangerous* . . . he is entitled *for the protection of himself* to conduct a *carefully limited search* in an attempt to discover weapons which might be used to assault him.

397 U.S. at 30 (1968) (emphasis added).

144. The *Terry* Court authorized the police officer to assess the situation in light of his experience. *Id.* at 30. See *supra* notes 126-27 and accompanying text.

145. See *United States v. Mendenhall*, 446 U.S. 544 (1980) (stop based on profile of narcotics couriers); *Delaware v. Prouse*, 440 U.S. 648 (1979) (automobile may be stopped on reasonable suspicion); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (search pursuant to a legal detention of an automobile).

146. 422 U.S. at 889 (Douglas, J., concurring). In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court created a civil remedy for individuals whose fourth amendment rights had been violated. *Bivens* permitted the plaintiff to sue federal agents for injuries resulting from the illegal break-in and search of his apartment as well as his subsequent arrest without probable cause. See generally Gilligan, *The Federal Tort Claims Act—An alternative to the exclusionary rule?* 66 J. CRIM. L. 1 (1975).

147. 428 U.S. 543 (1976). See generally Note, *Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches*, 2 HASTINGS CONST. L.Q. 251 (1975).

148. *Id.* at 547. The procedures at these checkpoint areas were as follows: All traffic was funnelled into two lanes and a "point" agent visually screened all traffic as it passed by. The Court noted that traffic was slowed enough to be considered "seized." *Id.* at 546, n.1. The point man subjectively decided which cars were to be directed into a secondary inspection area where citizenship or immigration status was to be revealed. *Id.*

149. *Id.* at 547. *Martinez-Fuerte* was charged with two counts of illegally transporting aliens in violation of 8 U.S.C. § 1324(a)(2). *Id.* at 547-48.

sonable suspicion to warrant a stop. The Court responded, however, that there was no automatic application of the *Terry* standard and guidelines because reasonable suspicion was “a question to be resolved by balancing the interests at stake.”<sup>150</sup> Through a balancing analysis, the Court concluded that reasonable suspicion was too impractical and burdensome a standard for checkpoint stops.<sup>151</sup> Accordingly, it noted that the inconvenience of the secondary checkpoint stop was minimal, relative to the public interest it serves, and that the inspection was limited to a “plain view” search.<sup>152</sup>

Consequently, the Court refused to extend the diluted fourth amendment standard of reasonable suspicion afforded roving patrol stops and instead held that stops and questioning at checkpoints may be made totally in the absence of any “individualized suspicion.”<sup>153</sup> In doing so, the *Martinez-Fuerte* Court completely eliminated all fourth amendment protections at arbitrarily established checkpoints, most of which are scores of miles from any border. Motorists now may be stopped, questioned, visually inspected and detained without any objective standards.<sup>154</sup>

Because all “seizures,” even those of a brief duration, are covered by the reasonableness protections of the fourth amendment,<sup>155</sup> the *Martinez-Fuerte* holding is the most radical dilution of the probable cause standard since *Terry*. It condones official arbitrary conduct by permitting the subjective biases of checkpoint guards to pull over whomever they want, whenever they want.<sup>156</sup> Furthermore, because the checkpoint stop involves essentially the same intrusions as the *Brignoni-Ponce* roving patrol stop, it is difficult to reconcile these two holdings. These two holdings are especially difficult to distinguish because the *Brignoni-Ponce* Court held that Mexican appearance is insufficient to justify a roving patrol stop, and *Martinez-Fuerte* permits unlimited “seizures” of any vehicles appearing to carry citizens of Mexican

150. *Id.* at 556.

151. *Id.* at 557. The majority stated that the flow of traffic was too heavy “to allow the particularized study of a given car that would enable it to be identified as a possible courier of illegal aliens.” *Id.* The Court also noted that the reasonable suspicion requirement would negate any deterrent effect that these checkpoints have on “well-disguised smuggling operations.” *Id.*

152. *Id.* at 558. *But see* *United States v. Ortiz*, discussed at note 132 *supra*, where a subsequent search could be conducted under probable cause.

153. *Id.* at 562-563. *Cf.* *United States v. Brignoni-Ponce*, 422 U.S. at 885-887, discussed *supra* at notes 132-146 and accompanying text.

154. 428 U.S. 543, 569 (Brennan, J., dissenting).

155. *Accord, id.* at 570 (Brennan, J., dissenting). In *Terry*, the Court stated: “the inestimable right of personal security belongs as much to the citizen of the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” 392 U.S. at 8-9. *Cf.* *Ybarra v. Illinois*, 444 U.S. 648 (1979) (fourth amendment protections exist in all public places); *Delaware v. Prouse*, 440 U.S. 663 (fourth amendment protections in transportation).

156. 428 U.S. at 572 (Brennan, J., dissenting).



ancestry.<sup>157</sup>

## VI. AUTOMOBILE SEARCHES AND SEIZURES: A COROLLARY OF BRIGNONI-PONCE AND ITS PROGENY

Ever since *Carroll v. United States*,<sup>158</sup> the automobile has been an exception to the traditional warrant requirement of the fourth amendment.<sup>159</sup> Although the *Carroll* Court maintained that probable cause was required to search a vehicle, the Court never expressly articulated

157. Justice Brennan declared that this process would unfairly discriminate against citizens of Mexican descent. He stated Mexicans, aliens, or descendants would now travel "at the risk of being subjected not only to a stop, but also to a detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists." *Id.*

158. 267 U.S. 132 (1925). In *Carroll*, the Court upheld the conviction of two bootleggers. It noted that because a vehicle can be quickly removed from a jurisdiction before a warrant can be secured, it is not unreasonable to permit warrantless searches of vehicles. *Id.* at 147. See note 158 *infra*.

159. See note 40 *supra* for discussion of other exceptions to the warrant requirement. This exception permits a warrantless search of a vehicle stopped on the street or highway if there is probable cause to believe that the vehicle contains evidence of a crime. *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979). In *United States v. Ross*, 102 S. Ct. 2157, 2164 (1982), the Court stated: "the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely the subjective good faith of the police officers." Although the special treatment of automobiles was justified because of the exigency that the vehicle may be removed to another jurisdiction, *Carroll v. United States*, 267 U.S. 132, 147 (1925), warrantless searches have been permitted when the vehicle has been immobilized and is under police control. See, e.g., *Texas v. White*, 423 U.S. 67 (1975) (per curiam) (car was not searched until forty-five minutes after being stopped by police); *Chambers v. Maroney*, 399 U.S. 42 (1970) (search permitted under non-exigent circumstances). The Court's recent justifications for the warrantless search of a vehicle under non-exigent circumstances is the diminished expectation of privacy the individual enjoys in an automobile as well as the administrative problems of temporarily detaining a vehicle until a warrant is issued. 442 U.S. 753, 765, n.14.

After *Carroll* and until 1970, the Court decided relatively few cases under the automobile exception. See *Brinegar v. United States*, 338 U.S. 160 (1949), discussed at note 41 *supra*; *Scher v. United States*, 305 U.S. 251 (1938) (warrantless search of a car sitting in a garage appurtenant to a private dwelling upheld); *Husty v. United States*, 282 U.S. 694 (1931) (warrantless search of bootlegger's car based on identified informant tip); *United States v. Lee*, 274 U.S. 559 (1927) (warrantless search of a boat incident to lawful arrest based on probable cause).

In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court upheld the validity of an automobile that had been searched without a warrant at the police station subsequent to the arrest of its driver. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court decided whether an automobile in police custody searched pursuant to an invalid warrant could then fall within the automobile exception, as a search incident to an arrest. The *Coolidge* Court found that there was a lack of exigent circumstances to search without a valid warrant and held that the search did not fit under the *Chambers* doctrine. *Id.* at 463. In *Cardwell v. Lewis*, 417 U.S. 583 (1974), however, the Court held that a warrantless seizure of an automobile in a public parking lot and the subsequent warrantless examination of its exterior at a police impoundment area was permissible. The automobile exception does not extend to the search and seizure of luggage located within the vehicle. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court noted that the individual does not have a lesser expectation of privacy in luggage located in an automobile and held that a search warrant was required to search any luggage seized from an automobile. *Id.* at 763-765 n.14. See also *Robbins v. California*, 453 U.S. 420 (1981) (warrantless search of opaque container in lawfully stopped vehicle rejected), *overruled*, *United States v. Ross*, 102 S. Ct. 2157 (1982)).

This privacy notion in automobile luggage was severely limited by the Court in its landmark opinion in *United States v. Ross*. The *Ross* Court attempted to clear-up the "troubled" automo-

whether this standard also applied to automobile stops and subsequent searches of automobile occupants and its contents. Since *Terry*, however, the Court has used a balancing analysis to erode slowly the implicit probable cause standard for searches and seizures involving the automobile.

Police authority to search suspects placed under a valid arrest is absolute.<sup>160</sup> It was not until *United States v. Robinson*<sup>161</sup> and *Gustafson v. Florida*,<sup>162</sup> however, that the Court held that expansive searches of custodial traffic violations arrestees could be conducted on less than probable cause.<sup>163</sup> In *Robinson* the defendant was placed in custody for driving with a revoked operator's permit. When he was frisked, the officer found a crumpled cigarette package which contained heroin. In *Gustafson*, the defendant was stopped for a moving violation and placed into custody because he was unable to produce a driver's license. Although a limited *Terry* frisk revealed no suspicious objects, the officer placed his hand in Gustafson's pocket, retrieved a cigarette box, opened it, and found marijuana cigarettes.<sup>164</sup>

---

bile exception area by holding that a widespread warrantless search of a car by police officers may be conducted in the presence of probable cause. *Id.* at 2168-2171. The *Ross* Court stated:

When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

*Id.* at 2157-58. In his *Ross* dissent, Justice Marshall sharply disagreed with the majority's holding since its rationale subordinated traditional Fourth Amendment values and standards to efficient law enforcement procedures. *Id.* at 2174 (Marshall, J., dissenting). Justice Marshall reasoned that "by equating a police officer's estimation of probable cause with a magistrate . . . the majority not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself." *Id.* at 2173 (Marshall, J., dissenting). The *Ross* holding, therefore, adds to the importance of the probable cause requirement because once probable cause is present, a full scale search of a vehicle and all of its contents may be commenced. *See id.* at 2182, n.14 (Marshall, J., dissenting).

Inventory and car-care functions of police departments do not necessarily require a warrant. *See South Dakota v. Opperman*, 428 U.S. 364 (1976); *Harris v. United States*, 390 U.S. 234, 236 (1968); *Cooper v. California*, 386 U.S. 58, 62 (1967).

For holdings indicative of the lesser fourth amendment protections afforded automobiles, see *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973). *See generally* Note, *Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, 70 J. OF CRIM. L. AND CRIMINOLOGY 498 (1979).

160. *United States v. Robinson*, 414 U.S. 218, 233 n.3 (1973); *Chimnel v. California*, 395 U.S. 752 (1969). *See* T. Taylor, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION*, 44-45 (1969). The traditional rationale to justify this exception to the Warrant Clause is: 1) to protect the arresting officer from concealed weapons, and 2) to preserve criminal evidence that the arrestee may destroy. *See* Note, *Personal Search of Suspect Incident to Custodial Arrest is Per Se "Reasonable" and Requires No Additional Justification*, 49 WASH. L. REV. 1123, 1123 (1974).

161. 414 U.S. 218 (1973).

162. 414 U.S. 260 (1973).

163. *Contra*, *Dunaway v. New York*, 442 U.S. 200 (1979) (probable cause for custodial arrest required).

164. 414 U.S. at 262.

Although the traditional reasons for conducting an extensive search are not present in traffic-arrest situations,<sup>165</sup> the *Robinson* and *Gustafson* Courts effectively held that in the absence of any dangerous circumstances, police officers would have an absolute right to conduct *extensive* personal searches incident to custodial traffic arrests. The Court in both cases discarded the *Terry* limited search doctrine by distinguishing an arrest from a stop;<sup>166</sup> it considered a prolonged custodial arrest more dangerous than a brief stop and frisk situation.

More importantly, the absence of guidelines for determining when a custodial arrest for traffic violations is warranted gives police officers tremendous discretionary authority. The effect of this *ad hoc* approach to traffic violators is that it permits an arresting officer to choose whether or not he wishes to conduct a full-scale search of the subject. Because there is nothing to prevent new police department regulations from lumping seizures normally considered routine traffic stops into a category which requires full custodial arrest, the potential for investigatory abuse of *Robinson* and *Gustafson* is widespread. One commentator stated: "As *Robinson* allows an extensive search without probable cause or warrant upon full custody arrest, it is not unlikely that the custodial arrest option will be exercised on an officer's hunch that the suspect might have something illegal in his possession."<sup>167</sup> Accordingly, any alleged traffic violation potentially exposes the vehicle's operator to a full blown investigatory search by the detaining officer, regardless of the underlying circumstances.

In *Pennsylvania v. Mimms*,<sup>168</sup> the Court, through a balancing analysis, extended *Robinson-Gustafson* to permit the search of a motorist who had been detained for a traffic offense. In *Mimms* the respondent was stopped by police officers for driving with an expired license plate.<sup>169</sup> He was asked to step out of the car and show his license and registration. The officer, noticing a bulge in *Mimms*' pocket, frisked the respondent and discovered a revolver.<sup>170</sup> In its analysis, the *Mimms* Court refused to focus on the seizure of the vehicle or the defendant's subsequent patdown.<sup>171</sup> Instead, the Court applied a *Terry-Brignoni-*

165. See *supra* note 41. See also *Robinson v. United States*, 414 U.S. 218, 252-55 (Marshall, J., dissenting) (need to conduct a weapons search for traffic arrests is low relative to intrusion on individual privacy).

166. *Id.* at 235.

167. Antoun, *United States v. Robinson: Chipping Away at the Fourth Amendment*, 1 OHIO N. U.L. REV. 334, 337 (1974).

168. 434 U.S. 106 (1977).

169. *Id.* at 107.

170. *Id.* The Court stated that the "respondent alighted, whereupon the officer noted a large bulge under respondent's sports jacket." *Id.*

171. *Id.* at 109. "This intrusion must . . . focus . . . on the incremental intrusion resulting from the request to get out of the car once the vehicle is stopped." *Id.*

*Ponce* balancing analysis limited only to the reasonableness of the officer's order that the respondent exit the car.<sup>172</sup> It concluded the procedure requiring traffic violators to get out of the car was a minimal intrusion on individual freedom, relative to the safety interests of the officer.<sup>173</sup> Although the state admitted that there was nothing suspicious or unusual about the driver and no apparent danger to the officer, the Court, citing *Terry* dicta stated: "certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."<sup>174</sup>

The *Mimms* Court, by distinguishing the procedure of leaving the car from the subsequent search,<sup>175</sup> not only circumvented the *Terry* requirement of articulable dangerous circumstances in order to justify the search, but its holding triggered a further dilution of the probable cause standard by the lower courts.<sup>176</sup> Once a citizen is out of the car, then the reasonable suspicion standard is applicable to invoke a search.<sup>177</sup> Accordingly, the bulge in the pocket, under the suspicion test, permitted the officer to conduct a *Terry* patdown.<sup>178</sup>

In *Mimms*, the majority bypassed the narrow holding of *Terry* and effectively extended the reasonable suspicion test to automobile "seizures" in situations where there is no articulable danger to the officer and no crime about to be committed. The *Mimms* balancing test holding creates a lower privacy standard for traffic offenders, thus dissolving their fourth amendment protections.<sup>179</sup> By forcing a traffic offender out of his car, he is exposed to wider and closer law enforcement scrutiny. Once removed from the constitutionally protected environment of the automobile, the detainee is subject to a full-scale search on reasonable suspicion grounds.<sup>180</sup>

172. *Id.*

173. *Id.* at 109-111.

174. *Id.* at 110 (quoting *Terry v. Ohio*, 329 U.S. 1, 23 (1968)). The officer in *Mimms* acknowledged that the only reason he asked the defendant to get out of his car was because it was standard procedure. *Id.* at 109-110.

175. *Id.* at 111.

176. *See, e.g.*, *United States v. Thompson*, 597 F.2d 187, 190 (9th Cir. 1979) (driver's reaching toward pocket permitted subsequent probe of pocket); *United States v. Belle*, 593 F.2d 487, 498 (3d Cir. 1979) (totality of circumstances justify patdown of defendant); *United States v. Rainone*, 586 F.2d 1132 (7th Cir. 1978) (search of occupants of suspicious-looking vehicle); *United States v. Ullrich*, 580 F.2d 765 (5th Cir. 1978).

177. *Mimms*, 434 U.S. at 112.

178. *Terry* required that dangerous circumstances must justify the intrusion. 392 U.S. at 28-30.

179. In *Katz v. United States*, 389 U.S. 347 (1967), the Court held that there exists a legitimate expectation of privacy. *See* note 55 *supra* for discussion of *Katz*. *Cf.* *Mancusi v. DeForte*, 392 U.S. 364 (1968) (expectation of privacy at place of work).

180. *But see* *Warden v. Hayden*, 387 U.S. 294 (1967). The *Warden* Court said that the scope of the search and seizure must be strictly tied to and justified by the circumstances initiating it. In *Warden*, the Court held that a warrantless entry into the defendant's house was permissible be-

The Court further extended its *Mimms* holding in *Delaware v. Prouse*<sup>181</sup> by noting that an automobile may be detained on less than probable cause. Because the detaining officer had no articulable reason for stopping the defendant, however, the Court held that the car's seizure did not fall within the "reasonable suspicion" exception to probable cause.<sup>182</sup> In *Prouse*, a police cruiser randomly stopped the respondent's vehicle to check documents without observing any traffic violations or suspicious activity, and seized marijuana in "plain view" on the car floor.<sup>183</sup> In affirming the Delaware Supreme Court's suppression of the marijuana, the Court noted that the vehicle stop was a fourth amendment "seizure." In again employing its balancing test, the Court cited *Brignoni-Ponce*, *Martinez-Fuerte*, and *Terry* for guidance.<sup>184</sup> Although the Court noted that the state had a vital safety and regulatory interest in its roads, it refused to extend the *Martinez-Fuerte* no articulable suspicion standard to motor vehicles traveling on roadways away from the border.<sup>185</sup> It also refused to apply the traditional probable cause standard to car seizures and instead adopted a *Terry-Brignoni-Ponce* test. The Court stated:

We hold that except in those situations in which there is at least articulable and reasonable suspicion [of illegal conduct], stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.<sup>186</sup>

Although the majority noted that vehicle spot checks, such as at roadblocks and other inspection checkpoints are permissible, the seizure of an automobile is now judged on a reasonable suspicion standard.<sup>187</sup>

*Mimms* and *Prouse* signify the beginning of the end of fourth amendment probable cause protection for the automobile and its occu-

cause "the exigencies of the situation made that course [of action necessary] . . . Speed here was essential." *Id.* at 298-99.

181. 440 U.S. 648, 663 (1979).

182. See quote accompanying text at note 185 *infra*.

183. 440 U.S. at 650. The patrolman also "was not acting pursuant to any standards, guidelines, or procedures. . . ." *Id.* The random stop was routine procedure. The marijuana was in "plain view" and contraband in "plain view" may always be seized without a warrant. See *Cardwell v. Lewis*, 417 U.S. 583, 592 (1974) (scraping car paint off bumper is permissible plain view seizure); *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (chimney in plain view); *Cady v. Dombrowski*, 433 U.S. 413, 449 (1973) (plain view seizure of bloodied sock and floor mat).

184. *Id.* at 653. *Accord* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

185. 440 U.S. at 656-57. For a discussion of the *Martinez-Fuerte* holding, see notes 147-157 *supra* and accompanying text.

186. 440 U.S. at 663 (emphasis added).

187. *Id.* See also *id.* at 663 n.26. The Court stated: "Nor does our holding today cast doubt on the permissibility of roadside truck weight-stations and inspection checkpoints. . . ."

pants. With both reasonable suspicion to detain a vehicle as well as to search its occupants, law enforcement officials now have tremendous authority to make widesweeping investigatory searches for contraband that may be unrelated to the enforcement of traffic laws.<sup>188</sup> Once seized on suspicion grounds, the vehicle and its occupants come under plain view scrutiny. The minor intrusion which forms the basis for a reasonable suspicion stop can now legitimately expand into a full blown investigatory search of the vehicle's occupants which, in turn, may lead to a probable cause search of the vehicle's interior.<sup>189</sup> Thus, by extending the *Terry* doctrine to permit vehicular stops on less than probable cause, the Court also has eroded probable cause protections to all subsequent and intervening events after the initial stop. The detainee may be ordered out of his car and subjected to a *Terry* frisk, which if fruitful for the officer, may result in an extended vehicular search.<sup>190</sup> Accordingly, in automobile search and seizure situations, the reasonable suspicion standard will eventually replace the probable cause requirement.<sup>191</sup>

## VII. THE LATEST EROSION: THE AIRPORT DRUG COURIER PROFILE PROGRAM

Large metropolitan airports have been identified by the Drug Enforcement Administration (DEA) as major drug transportation centers.<sup>192</sup> In an attempt to disrupt the large flow of narcotics, the DEA has assigned a number of highly skilled agents to selected airports as

188. See, e.g., *United States v. Ross*, 102 S. Ct. 2157, 2181-82 (1982), discussed *supra* note 158, where Justice Marshall noted that courts "rarely disturb" decisions by police officers who claim they had probable cause to search a vehicle for contraband. He stated that when "police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car . . . contain contraband. In practice [this] . . . amount[s] to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband." *Id.* at 2182, n.14 (Marshall, J., dissenting). See also *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) where the panel noted that "pulling an automobile over to the side of the road constitute[s] a seizure that [is] impermissible without reasonable suspicion." *Id.* at 592.

189. Passengers in the car may not even have standing to challenge any subsequent search. See *Rakas v. Illinois*, 439 U.S. 128 (1979); *Jones v. United States*, 362 U.S. 257, 261-62 (1960).

190. Probable cause still remains the standard for vehicular searches, unless they are for custodial or inventory purposes, contraband is in plain view, or exigent circumstances exist. See *Robbins v. California*, 453 U.S. 420 (1981); *Texas v. White*, 423 U.S. 67 (1975) (custodial warrantless search of a car is permissible); *Chambers v. Maroney*, 399 U.S. 42 (1970); *South Dakota v. Opperman*, 428 U.S. 364 (1967); *Carroll v. United States*, 267 U.S. 132 (1925) (exigent circumstances). For a listing of plain view cases, see note 183 *supra*.

191. But see note 190 *supra*. Probable cause still is required to search an automobile.

192. EDISON, DRUG ENFORCEMENT ADMINISTRATION, LEGAL PROBLEMS IN AIRPORT INTERCEPTIONS OF DOMESTIC DRUG COURIERS, 1 (1980) [hereinafter cited as DEA LEGAL PROBLEMS]. This book, written by the legal coordinator of the DEA Airport Program, serves as an instructional manual for DEA field agents. It is a guide to making successful airport seizures which will lead to subsequent prosecutions.

part of a nationwide program to intercept illicit narcotics being transported by drug couriers.<sup>193</sup> Many drug courier arrests emanate from investigations<sup>194</sup> and informants' tips,<sup>195</sup> but the majority of arrests stem from the use of a drug courier profile developed by the DEA for identifying possible drug smugglers.<sup>196</sup> The profile is an informally compiled abstract of characteristics thought to be "typical" of persons carrying illicit narcotics.<sup>197</sup> The courier profile is utilized by closely observing departing and arriving passengers. If a passenger portrays one or more of the profile characteristics, an agent will then observe the individual and follow him through the airport concourse.<sup>198</sup> If the "suspect" exhibits sufficient characteristics, he will be stopped by the agent, who will identify himself, ask the person if he is transporting any drugs, and if he will consent to a search.<sup>199</sup> The critical determinations in these cases is whether there has been "reasonable suspicion" to warrant a *Terry* stop and, if a fourth amendment "seizure" of the individual has taken place.

193. *Id.*, Fact Sheet 1 (August 14, 1978). For a description of the program, see *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Elmore*, 595 F.2d 1036 (1979). Drug couriers or "mules" are persons specifically employed to transport large amounts of drugs to supply local wholesalers and dealers. Couriers commute from city to city using commercial air transportation, either carrying the narcotics on their persons or in their luggage.

194. *See, e.g.*, *United States v. Van Lewis*, 409 F. Supp. 535, 538 (E.D. Mich. 1976), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977). For further discussion of this case, see notes 209-215 *infra* and accompanying text.

195. *See, e.g.*, *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979). *See* notes 106-127 *supra* and accompanying text for a discussion of the constitutionality of informants' tips.

196. *See* DEA LEGAL PROBLEMS, *supra* note 191.

197. *United States v. Mendenhall*, 446 U.S. 544, 547, n.1. The profile was compiled from interviews with cooperating defendants and informers as well as the DEA agents' personal experience in airport arrests. Kadish, *Drug Courier Characteristics: A Defense Profile*, 15 TRIAL May 1979, at 47, 48. The 7 primary characteristics of a drug courier profile include:

- 1) arrival from or departure to an identified drug source city;
- 2) carrying little or no luggage, or large quantities of empty suitcases;
- 3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip;
- 4) use of an alias;
- 5) carrying unusually large amounts of currency, usually on their person, in briefcases or bags;
- 6) purchasing airline tickets with a large amount of small denomination currency;
- 7) unusual nervousness beyond that normally exhibited by passengers.

Secondary characteristics include:

- 1) exclusive use of public transportation, particularly taxicabs, in departing from the airport;
- 2) immediately making a telephone call after deplaning;
- 3) leaving a false or fictitious call-back telephone number with the airline . . .
- 4) excessively frequent travel to source or distribution cities;
- 5) being a minority, particularly Black or Hispanic.

*United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979). *See also*, *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978), for a discussion of a drug courier profile.

198. *See, e.g.*, *United States v. Van Lewis*, 409 F. Supp. 535, 536-539 (E.D. Mich. 1976), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977). For further discussion of this case, see notes 209-215 *infra*, and accompanying text.

199. *E.g.*, *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979).

Airport profile stops are the most recent—and perhaps most tenuous—use of the reasonable suspicion test. Nonetheless, the constitutionality of stopping suspects on the basis of a subjectively derived drug courier profile has been analyzed within the limits of *Terry*, as extended by *Adams*, *Brignoni-Ponce*, and more recently, *Mimms* and *Prouse*. The *Brignoni-Ponce* Court laid the basis for application of the *Terry* test to airport profile stops by noting that certain physical characteristics might be considered by law enforcement officials to determine whether reasonable suspicion exists.<sup>200</sup> Moreover, essentially the same kinds of policy decisions which influenced the *Brignoni-Ponce* majority to extend *Terry* to investigative stops are present in the drug courier profile situations.<sup>201</sup> Despite a legal basis for extending the reasonable suspicion standard to the airport stops under the drug courier profile, there is a marked division in the federal courts as to when reasonable suspicion is present as well as when a “seizure” has occurred.<sup>202</sup>

The Second Circuit has upheld the validity of investigative stops initiated from characteristics consonant with the drug courier profile solely on reasonable suspicion grounds.<sup>203</sup> In *United States v. Rico*,<sup>204</sup> the defendant and his two companions were stopped in a New York airport on the basis of the profile.<sup>205</sup> The court held that the initial stop was constitutional partly because the appellants’ characteristics fit the profile.<sup>206</sup> It stated that the profile alerted the DEA agent to initiate the surveillance and the stop was reasonable under an adapted version of the *Terry* test.<sup>207</sup> The *Rico* court held that the stop was permissible, not

200. 422 U.S. at 884-85.

201. See generally H. LEVINE, LEGAL DIMENSIONS OF DRUG ABUSE IN THE UNITED STATES (1974). In *Brignoni-Ponce*, the Court was concerned with the magnitude of the illegal alien problem and considered the government interest in combatting this situation important. 422 U.S. at 873. See also *United States v. Ortiz*, 422 U.S. 891, 900-15 (Burger, C.J., concurring).

202. Compare *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979), discussed *infra* at notes 204-208 and accompanying text, and *United States v. Price*, 599 F.2d 494 (2d Cir. 1979) (sufficient cause to justify a stop), with *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977) (profile alone insufficient to justify an investigatory stop), and *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979) (insufficient cause to justify a stop, but defendant’s subsequent voluntary consent to search of luggage permissible). Much of the drug courier litigation has emanated from the Fifth and Sixth Circuits because Detroit and Atlanta, with airports serving as connecting hubs, are the two major sites of the drug courier profile program. See Kadish, *supra* note 196, at 49.

See generally, Constantino, Cannavo and Goldstein, *Drug Courier Profile and Airport Stops: Is the Sky the Limit?* 3 W. NEW ENG. L. REV. 175 (1980).

203. E.g., *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Price*, 599 F.2d 494 (2d Cir. 1979).

204. 594 F.2d 320 (2d Cir. 1979).

205. The defendants, who were Hispanics, appeared nervous, were constantly looking around the terminal, walked “oddly,” and did not openly associate on their way to the baggage claim area. *Id.* at 321-23.

206. *Id.* at 326.

207. *Id.* at 326-27. The court articulated the following test: Would the facts available to the officer at the moment of the search or seizure make an experienced and cautious officer suspicious that the travellers were transporting narcotics.



solely upon the basis of the courier profile, but because the "conduct the agent observed and described would have made an experienced and reasonably cautious law enforcement officer suspicious that the three travellers were transporting narcotics."<sup>208</sup>

The fifth and sixth circuits, however, have not deferred to the drug courier profile and have required that some additional factual information be present to create the requisite reasonable suspicion.<sup>209</sup> In *United States v. Lewis*,<sup>210</sup> for example, DEA agents became suspicious of the defendant after an airline ticket agent told them that Lewis had exhibited profile characteristics. A quick investigation found that Lewis was making a quick return, was using an alias, and had been previously arrested for heroin possession. An interrogation and subsequent search revealed that Lewis was carrying heroin.<sup>211</sup> The trial court noted that the "drug courier profile" in and of itself could not supply the necessary suspicion to permit an investigative stop under *Terry*.<sup>212</sup> On appeal, the court of appeals held that the drug courier profile could be used as a valid investigative and law enforcement tool,<sup>213</sup> but required a showing of reasonable suspicion based on the profile plus some additional factual justification to initiate a *Terry* stop.<sup>214</sup> Because the DEA agent had gone beyond the scope of the profile by checking the defendant's background, the necessary additional objective facts were present to create a reasonable suspicion to initiate a stop.<sup>215</sup>

The sixth circuit's *Lewis* rationale that the profile alone is insufficient to justify a reasonable suspicion search, and that additional objective information is needed also has been followed in the fifth circuit.<sup>216</sup> In *United States v. Ballard*,<sup>217</sup> the fifth circuit reversed the defendant's conviction on the grounds that DEA agents had stopped Ballard on only two profile characteristics and without any other outside objective facts.<sup>218</sup> The court rejected the Government's conten-

208. *Id.*

209. *See, e.g.*, *United States v. Berry*, 670 F.2d 583 (5th Cir. 1981); *United States v. Lewis*, 556 F.2d 385, 389-90 (6th Cir. 1977); *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977).

210. 556 F.2d 385 (6th Cir. 1977).

211. *Id.* at 386-87. *See United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977) for a detailed narrative of the facts.

212. *Id.* at 389. The court stated: "the 'drug courier profile' could not even provide the founded suspicion to justify an investigative stop under *Terry*. . . ."

213. *Id.* at 389-90.

214. *Id.* at 389.

215. *Id.* The court noted the DEA agent knew that the defendant was using an alias, had taken a very short round trip to a distant city, had a prior arrest for possession of heroin, and had used a virtually empty suitcase.

216. *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *see United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979).

217. 573 F.2d 913 (5th Cir. 1978).

218. *Id.* at 914. The Government was informed by an anonymous tip that a man fitting the defendant's description would be arriving that night from Los Angeles. When he deplaned, the

tion that the objective facts were furnished by an uncorroborated tip, noting that "the elements of the courier profile that were present in this case . . . do not in any significant way operate to distinguish Ballard from the general public."<sup>219</sup>

Although reasonable suspicion is now accepted as the established standard in airports,<sup>220</sup> what exactly is necessary to permit an investigatory *Terry* stop is quite unclear from the circuit court case law.<sup>221</sup> Some circuits rely totally on the drug profile to furnish less than probable cause suspicion, while others require specific objective facts, independent of the profile, to justify a stop.<sup>222</sup> The trend in recent cases, however, is that fewer objective facts are necessary to link a suspect to drug smuggling. Consequently, there is increasing judicial deference to the DEA, an administrative agency which has an obvious institutional bias toward airport stops.<sup>223</sup>

In *United States v. Mendenhall*,<sup>224</sup> although given the opportunity, the Supreme Court refused to clarify some of the issues in the drug courier profile program. In *Mendenhall*, DEA agents stopped the defendant for questioning because she exhibited several profile characteristics.<sup>225</sup> Although no additional objective information was available to the officers prior to the stop, subsequent questioning revealed that the name on her driver's license differed from that on her airplane ticket.<sup>226</sup> Mendenhall then accompanied the DEA agents to a special interroga-

DEA agent observed that the defendant appeared to be very nervous and that he was carrying no luggage.

219. *Id.* at 916.

220. *See* *United States v. Rico*, 594 F.2d 320, 324-26 (2d Cir. 1979) ("The standard of reasonableness remains that of *Terry*"); *United States v. Ballard*, 573 F.2d 913, 915 (5th Cir. 1978) (the required reasonable suspicion must be more than a hunch); *United States v. Oates*, 560 F.2d 45, 56-63 (2d Cir. 1977); *United States v. Garcia*, 450 F. Supp. 1020, 1023-24 (E.D.N.Y. 1978); *United States v. Taibe*, 446 F. Supp. 1142, 1146 (E.D.N.Y. 1978).

221. *Compare* *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), and *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977), and *United States v. Scott*, 545 F.2d 38 (8th Cir. 1976), *cert denied* 429 U.S. 1066 (1977) with *United States v. Forero-Rincon*, 626 F.2d 218 (2d Cir. 1980), and *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). Although the former group of cases presented to the court an array of specific facts, the latter do little more than recite typical characteristics of the drug profile.

222. *See* latter cases cited in note 220 *supra*.

223. *See* *United States v. Sentovich*, 677 F.2d 834 (11th Cir. 1982), where the court believed a DEA agent who claimed that he had the same sense of smell as a dog which is specially trained to detect hidden drugs. The panel stated: "We now learn that among (Agent) Markonni's many talents is an olfactory sense we in the past attributed only to canines." *Id.* at 835. *See also* *Constantino, supra* note 202, at 188. Judicial deference to subjective DEA profile characteristics is, however, not without critics. *See* *United States v. Klein*, 592 F.2d 909, 911-912, n.3 (5th Cir. 1979).

224. 446 U.S. 544 (1980).

225. The defendant arrived in Detroit from Los Angeles, which is considered a "source city." She appeared nervous, constantly scanned the airport, and claimed no luggage. 446 U.S. at 547 n.1.

226. *Id.* at 547-548.

## EROSION OF PROBABLE CAUSE

tion room where she eventually "consented" to a body search which revealed she was carrying heroin.<sup>227</sup>

In a plurality opinion, the Supreme Court reversed the court of appeals and held that there was no violation of the respondent's fourth amendment rights. The *Mendenhall* Court, however, vigorously disagreed on the reasonableness of the initial investigatory stop. Justice Stewart, writing for the Court, first looked at whether the defendant had been seized when initially approached by the DEA agents<sup>228</sup> by examining the record of the *Mendenhall* case.<sup>229</sup> Citing *Sibron*, the plurality first stated that not every encounter between a citizen and a police officer is a seizure.<sup>230</sup> It then articulated the following test to determine whether *Mendenhall* was seized by the DEA agents: "[I]n view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>231</sup> In holding that *Mendenhall* was not seized by the DEA agents who detained the respondent,<sup>232</sup> the plurality noted that 1) the stop had occurred in a public area; 2) the agents were in plain clothes and displayed no weapons; 3) the agents did not summon the defendant but approached her; 4) the respondent was requested, not ordered, to produce identification.<sup>233</sup>

In his concurring opinion, Justice Powell did not address the seizure issue and instead assumed that a seizure had occurred when the agents approached the respondent.<sup>234</sup> The concurrence then invoked a balancing test to determine whether the investigatory stop was reasonable. Citing *Terry*, *Brignoni-Ponce*, and *Prouse*, the concurrence looked at the public interest in the stop, the nature and scope of the intrusion,

227. *Id.* at 548-549. *Mendenhall* was asked to submit to a strip search and was told she could refuse. When asked to remove her clothes, she protested. She then was advised that if she wasn't carrying drugs, there would be no problem. Whereupon, *Mendenhall* disrobed and the heroin was found in her undergarments. *Id.* For a discussion of the consent issue in this case, see *infra* notes 239-40 and accompanying text.

228. 446 U.S. at 551. Only Justice Rehnquist joined Justice Stewart on the issue of whether a seizure took place. *Id.* at 546.

229. This was an unusual approach because neither the district court nor the court of appeals heard arguments on the seizure issue. 446 U.S. at 569, n.2 (White, J., dissenting). Instead, the lower courts focused on whether the seizure was a reasonable *Terry* stop. Justice Stewart, however, stated that the seizure question was raised because the lower courts' ruling rested on a "serious misapprehension of federal constitutional law." *Id.* at 551, n.5.

230. *Id.* at 553 citing *Sibron v. New York*, 392 U.S. 40 (1968). Justice Stewart noted "not every encounter . . . is an intrusion requiring an objective justification."

231. *Id.* at 554. The Court also stated that the subjective intention of the officer to detain *Mendenhall*, had she attempted to leave, was irrelevant. *Id.* at n.6.

232. *Id.* at 555.

233. *Id.* The Court did not consider whether *Mendenhall* was physically touched by the agents or whether the claim by the agents that they were narcotics officers was a sufficient demonstration of authority, thus invoking the defendant's fourth amendment protections. *See id.* at 552.

234. *Id.* at 560 (Powell, J., concurring in part and in the judgment). Justice Powell was joined by Chief Justice Burger and Justice Blackmun.

and the objective factors upon which a law enforcement official relies in light of his knowledge and experience.<sup>235</sup> Justice Powell noted that the public interest in "detecting those who traffic in deadly drugs" is "compelling," in comparison with the "modest" intrusion of the stop.<sup>236</sup> Furthermore, he concluded that in light of the agents' experience, there was sufficient reasonable suspicion to justify stopping the defendant.<sup>237</sup> Accordingly, the concurrence expanded on the parameters of *Terry* to justify the stop through a balancing analysis.

Furthermore, a majority of the Court held that the respondent's fourth amendment protections were not violated when she went from the airport concourse, where she originally was detained, to the DEA office, where she later consented to a search.<sup>238</sup> The Court concluded that Mendenhall accompanied the agents to the office "voluntarily in a spirit of apparent cooperation" and, therefore, "it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention."<sup>239</sup> More importantly, the Court also found that despite the respondent's lack of education, she knowingly had consented to the search which led to the discovery of the heroin.<sup>240</sup> Accordingly, the Court found the entire procedure leading up to the discovery of the illegal drugs reasonable under the fourth amendment.

In *Reid v. Georgia*,<sup>241</sup> the Court, in a per curiam opinion, addressed the issue of whether the drug courier profile alone could furnish reasonable suspicion to permit a stop. In *Reid*, the defendant was stopped by DEA agents based solely on profile characteristics and without any objective facts.<sup>242</sup> The Court, citing *Terry*, noted that to detain a sus-

235. *Id.* at 561 (Powell, J., concurring in part and in the judgment).

236. *Id.* at 561-563 (Powell, J., concurring in part and in the judgment).

237. *Id.* at 563-64 (Powell, J., concurring in part and in the judgment). The concurrence said that it would use an objective police officer standard in determining whether there is enough information to justify a stop on reasonable suspicion. Justice Powell stated: "In reviewing the factors that led the agents to stop and question the respondent, it is important to recall that a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Id.* at 563 quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979) (Powell, J., concurring in part and in the judgment).

238. *Id.* at 557.

239. *Id.* Consent to a search is always constitutionally valid. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Katz v. United States* 389 U.S. 347, 358 (1967). The consent must be voluntarily given, uncoerced, and with the understanding that it could be freely and effectively withheld. The question of whether consent is voluntarily given is to be determined by the "totality of the circumstances." See *United States v. Mendenhall*, 446 U.S. 544, 557 (1980); *Schneckloth v. Bustamonte*, 412 U.S. at 227. The Government has the burden of proving that the consent was not the product of express or implied duress or coercion. See *id.* at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

240. 446 U.S. at 558. The Court noted that Mendenhall twice was told she could decline to consent to the search. *Id.*

241. 448 U.S. 438 (1980) (per curiam).

242. *Id.* at 439. The defendant was stopped on the basis of four profile criteria:

1) he arrived from Fort Lauderdale, a source city for drugs;

pect without probable cause, the DEA agent must have an articulable suspicion that the person is engaging in criminal activity.<sup>243</sup> Correspondingly, the Court held that because the DEA profile on Reid could not point to any objective justifications for suspecting criminal activity, it found no reasonable suspicion to stop him.<sup>244</sup> The Court stated that the characteristics relied on “describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures.”<sup>245</sup> Although the Court appeared to have adopted the Fifth Circuit view that additional objective information beyond the profile is needed to justify a stop,<sup>246</sup> it did not pass on the per se validity of the profile.<sup>247</sup> Rather, it concluded that the defendant’s activity was not enough to justify a seizure based upon reasonable suspicion.

The *Mendenhall* and *Reid* holdings indicate that a majority of the Court is willing to expand the reasonable suspicion to widespread investigatory stops far beyond the parameters of *Terry*. Although these holdings did little to clarify the general confusion in the circuit courts on the drug courier profile program,<sup>248</sup> the Court implied that the pro-

- 2) he arrived early in the morning, when law enforcement activity is low;
- 3) the defendant and his companion appeared to be trying to conceal the fact that they were traveling together;
- 4) he had no luggage other than a shoulder bag.

*Id.* at 441.

243. *Id.* The Court stated that the agent’s suspicion was no more than an “inchoate and unparticularized suspicion or ‘hunch’ that was too slender to support the seizure in this case.” *Id.* (quoting *Terry*, 392 U.S. at 27).

244. 448 U.S. at 441.

245. *Id.*

246. For a discussion of the Fifth Circuit view, see notes 209-219 *supra* and accompanying text.

247. Although the *Mendenhall* Court did not discuss this issue, the concurrence found that the DEA agents had enough information from the profile to stop the defendant. See 446 U.S. 544, 560 (Powell, J., concurring in part and concurring in the judgment).

248. The different views articulated by the Justices in *Mendenhall* reiterated the competing rationales previously expressed by the second, fifth, and sixth circuits. The Justices, moreover, could not even agree on whether a seizure had taken place. See, e.g., *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982), where the fifth circuit, sitting en banc, stated: “The fractured legal conclusions of the majority in *Mendenhall* leave us without guidance in deciding whether an initial airport stop such as that in this case constitutes a seizure. *Id.* at 592. In *Berry*, a DEA agent initiated a stop of the defendant outside of the airport terminal based upon the profile characteristic of nervousness and a “vague . . . aware[ness] of having seen a photograph of” the appellant. *Id.* at 588. In affirming his conviction the fifth circuit, in an exhaustive opinion, tried to establish some rules from the “confusing thicket of” caselaw in this area. *Id.* at 593. The *Berry* panel first held that initial airport stops based on the profile if extremely restricted in scope and conducted in a noncoercive manner, do not invoke fourth amendment protections. *Id.* at 594. The court then considered the role of the drug courier profile, which it noted was nothing more than an administrative tool of the police. *Id.* at 600 and n.21. In finding reasonable suspicion to justify a stop, the panel held that it would assign no characteristic greater or less weight merely because the characteristic is present on, or absent from the profile. *Id.* at 601. Lastly, the court decided that probable cause—and not reasonable suspicion—was necessary, absent consent by the defendant, to detain further a suspect who initially had been stopped in a limited interrogation. *Id.* at 602. Thus, according to the fifth circuit, reasonable suspicion may justify an initial stop and interroga-

file could be used as a general basis to justify a stop on less than probable cause. More importantly, by tacitly approving of the drug courier profile program in *Mendenhall*, the Court has greatly expanded the *Terry* exception to permit very aggressive police activities on the weak basis of a subjective profile that purportedly distinguishes the guilty from the innocent. Thus, *Mendenhall* and *Reid* signal a further erosion of *Terry's* absolute requirement that the presence of several specific and objective facts are needed to justify a stop on reasonable suspicion grounds.<sup>249</sup> Instead, a computer profile, using general physical characteristics and behavioral traits, linked with a few, if any, objective factors now form the basis for a *Terry* stop. Furthermore, the fact remains that the DEA program subjects everyone observed by the agent to some form of surveillance—and possibly to an investigatory stop as well as a subsequent search. Because the DEA program essentially encourages agents to initiate as many encounters as possible,<sup>250</sup> the abusive potential of this program is unusually great.<sup>251</sup> Hence, the narrow exception to the probable cause standard announced in *Terry* now has evolved to permit widescale governmental scrutiny and intrusion of anyone who enters an airport. More importantly, the ramifications of *Mendenhall* and *Reid* extend far beyond the terminal as long as investigatory stops on less than probable cause are characterized as “modest” intrusions upon personal privacy.<sup>252</sup>

### VIII. CONCLUSION

The post-*Terry* caselaw indicates that the once absolute probable cause requirement to justify searches and seizures has undergone a

---

tion, but it will not be extended to permit further investigatory questioning which requires the suspect to leave the public areas of the airport.

249. The Court noted that something more than the four very general profile characteristics used by the agents in *Reid* to justify the stop would be necessary to justify further seizures. However, the *Reid* Court did not specifically mention what other types of objective information should be present to justify a *Terry* stop.

250. The more encounters initiated by agents, the more chances there are of discovering contraband.

251. The *Mendenhall-Reid* standard allows police to ask intrusive questions of any unwary or unknowledgeable citizen based on a subjective suspicion. It is, therefore, unrealistic to believe that the average individual, who is unaware of most of his constitutional rights when confronted by someone with governmental authority, will simply feel free to ignore the official and walk away. In *Mendenhall*, the Court's belief that the defendant should have known she was free to walk away as well as to refuse consent to the body search is theoretically justifiable, but in reality, clearly erroneous. *But cf.* *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982), discussed at note 247, *supra*, where the court observed the following: “We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs and even show where they have hidden drugs.” *Id.* at 598, n.16. *See also* *United States v. Seltzer*, 654 F.2d 354 (5th Cir. 1981); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980).

252. *But see* *Dunaway v. New York*, 442 U.S. 200 (1979) (custodial arrest on less than probable cause unreasonable).

rapid process of erosion.<sup>253</sup> Because the reasonable suspicion exception created by *Terry* requires a lower quantum of proof than traditional probable cause, fourth amendment protections are seriously diluted whenever the suspicion standard is used.<sup>254</sup> The narrow holding of *Terry*, which was to be limited to very dangerous criminal situations, reflects the *Terry* Court's original reluctance to make an exception to the probable cause requirement. However, the fear expressed by Justice Douglas, *Terry's* lone dissenter, that this holding would mark the beginning of a general erosion of the probable cause standard, clearly has been borne out by subsequent decisions.<sup>255</sup> The several requirements articulated in *Terry* for a fourth amendment intrusion on less than probable cause have been relaxed, thereby permitting an expansion of the *Terry* exception to other areas.

An inherent danger in this expansionary trend is an eventual undermining of the historical imperatives upon which the fourth amendment was built. The importance of preserving the traditional probable cause requirement was well-stated in the passage below by Justice Brennan, who dissented strongly from the *Martinez-Fuerte* holding:

The cornerstone of this society, indeed of any free society, is orderly procedure. The Constitution, as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment by citizens by government. But to permit . . . police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government, for, as Mr. Justice Frankfurter reminded us, 'the history of American freedom is in no small measure, the history of procedure.'<sup>256</sup>

The post-*Terry* cases, however, have been slowly dismantling the powerful buffer that the fourth amendment creates between potentially abusive police authority and the unwary individual. Moreover, this erosion has been accomplished by expanding the parameters established by *Terry* for a stop based on a reasonable suspicion.

*Adams* and other lower courts have held that reasonable suspicion will justify a stop and frisk, although the police officer cannot point to the *Terry* requirement of specific objective and articulable personal ob-

253. For a discussion of traditional probable cause, see notes 12-62 *supra* and accompanying text.

254. *United States v. White*, 648 F.2d 29, 42 (D.C. Cir. 1981).

255. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 888 (1974) (Douglas, J., concurring); *Terry v. Ohio*, 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting).

256. *United States v. Martinez-Fuerte*, 428 U.S. at 578 (Brennan, J., dissenting).

servations that a crime is about to occur. This dilution of probable cause not only permits arbitrary police conduct but encourages police to go fishing for contraband.<sup>257</sup> Under *Terry*, a frisk justified on less than probable cause is supposed to be extremely limited in scope and does not permit close scrutiny of a suspect's person. In reality, however, this limitation has been, and perhaps always will be, impossible to administer. A court will inevitably defer to an officer's opinion that he was making a "thorough" limited search or that he felt or saw something suspicious which, in turn, can justify a further intrusion into the suspect's pocket.

Furthermore, the border and automobile cases expand a *Terry* stop to situations where there clearly is no danger to police or persons in the vicinity, thus permitting the suspicion test to become a powerful "legal construct for the regulation of a general investigatory police power."<sup>258</sup> With the diminution of the *Terry* requirement that specific objective facts be prerequisite to searches and seizures on less than probable cause, the investigative utility of the reasonable suspicion test has greatly enhanced the power of police to intrude upon the individual; civil liberties, conversely, have become weakened. As Justice Douglas once said: "police power exercised without probable cause is arbitrary. . . . To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may accost and detain citizens at their whim."<sup>259</sup>

Airports are the latest area of erosion for the probable cause standard. In airports, the *Terry* exception is stretched beyond its original parameters to permit almost random coercive stops of individuals suspected of being drug smugglers.<sup>260</sup> The clear absence of objective standards in the courier profile indicts almost anyone of a nonconformist appearance or attitude and, perhaps, a large majority of the general population at one time or another.

The primary vehicle for the Supreme Court's erosion of the probable cause standard in these cases has been the balancing test, which was announced in *Camara* and employed by *Terry* and its progeny. Through balancing, a determination of reasonableness is reached by comparing the need for a stop against the gravity of the intrusion. The major flaw with the balancing test is that it is inconsistent with the major objectives and traditional bases of the fourth amendment, which was designed to shield the individual against all unreasonable govern-

257. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. White*, 648 F.2d 29 (D.C. Cir. 1981).

258. *United States v. Brignoni-Ponce*, 422 U.S. 873, 889 (Douglas, J., concurring).

259. *Id.* (Douglas, J., concurring).

260. One commentator has suggested that the absence of objective standards in the drug courier cases indicates that *Terry* is now inapplicable. Constantino, *supra* note 201, at 187.



mental intrusions. The fourth amendment protects individuals, whereas the balancing test apparently always favors society, primarily because societal intrusions are usually limited in nature or always labeled as such. This favoritism also occurs because governmental power and interests historically expand; when compared directly to the privacy interests of an individual, society inevitably wins. Thus, the inherent bias of the balancing test is to dilute the probable cause standard, thereby threatening to replace it with reasonable suspicion. Accordingly, the balancing test should only be used in those rare situations where there is a threat of irreversible physical danger to society which would require unfettered and immediate police action.

In contrast, however, when government intrusion is clearly necessary and societal interests paramount, the Court should avoid using a balancing test. Instead, it prudently should designate certain zones where traditional fourth amendment protections are inapplicable. Presently, such an area is the national border where searches and seizures may take place without probable cause.<sup>261</sup> By designating other such zones, e.g., national airports, public areas of apartment houses, kitchens of public restaurants,<sup>262</sup> the Court will no longer create more and more exceptions to the probable cause standard. The inevitable result of this dangerous process is the exception swallowing the rule. Since "The Rule" in this case is an explicit constitutional standard, its foundation must be reinforced and the policies behind its enactment preserved.

"The Rule," furthermore, clearly is threatened because the reasonable suspicion standard is being adopted more and more by the courts when there is a clear lack of probable cause to sustain a search and/or seizure. The standard has gone from allowing only purely defensive procedures to now permitting aggressive criminal detection and law enforcement techniques. The dilution of probable cause is, perhaps, due to the tremendous pressures being placed on the courts and law enforcement officials to reduce the large amount of undetected and unprosecuted crime present in American society. In the illegal narcotics field, for example, this is exacerbated by the fact that a relatively small percentage of individuals involved in drug-related activities are ever caught. Consequently, the traditional probable cause standard of the fourth amendment is being balanced away to aggressive, arbitrary, and procedurally efficient police actions<sup>263</sup> and the utility of the search and

261. See *Carroll v. United States*, 267 U.S. 132 (1925).

262. See note 70 *supra*, for a discussion of administrative searches.

263. See, e.g., *United States v. Ross*, 102 S. Ct. 2157 (1982), where the Court recently noted that "when a legitimate (warrantless automobile) search is underway, . . . nice distinctions between . . . glove compartments, . . . trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* at 2170-71 (emphasis added). *But see* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

seizure at hand is becoming more important than the traditional protections given to individuals by the fourth amendment. Therefore, the Pandora's Box opened by *Terry* must be closed before the probable cause standard is completely balanced away.

FREDERICK D. UNGER\*

---

\* Class of 1983, Emory University School of Law.