INVESTIGATIVE STOPS IN ALASKA: CAN *COLEMAN* SURVIVE A MULTIFACTORED BALANCE?

I. INTRODUCTION

Investigative stops are a prime example of the basic conflict underlying most fourth amendment[1] jurisprudence: how both to limit inappropriate police behavior and facilitate law enforcement.[2] The conflict originates in an evenly matched ideological tug-of-war. One policy pulls toward protecting citizens from the terrors of crime and destructive behavior and anchors its concerns with a leniency toward police conduct in pursuing this protection. Tugging in the opposite direction with equal strength stands the desire to protect individuals from intrusion by law enforcement personnel into private and personal areas.[3] Courts must reflect a concern for freedom from police intrusion by limiting the circumstances under which police may act to those in which such action is truly necessary.

Alaska seemed to resolve the conflict between public safety and private rights in *Coleman v. State,*[4] in which the court limited investigative stops to those situations in which there was "reasonable suspicion that imminent public danger [existed] or serious harm to persons or property [had] recently occurred."[5] *Coleman* did not authorize a police procedure for all circumstances, only for those in which a stop was truly necessary. The *Coleman* court enunciated a restrictive criteria of imminent public danger rather than a broad criteria such as "reasonable suspicion of any crime or wrongdoing."

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1. 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.

2. Bradley, *Two Models of the Fourth Amendment,* 83 MICH. L. REV. 1468, 1500-01 (1985).

3. These competing ideologies have been identified in other writings as the "Crime Control Model" and the "Due Process Model." *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).

4. 553 P.2d 40 (Alaska 1976).

5. *Id.* at 46.

The pronouncement of the *Coleman* standard failed to silence the debate over investigative stops in Alaska. Instead, the battle has shifted to how this standard should be administered. Two primary methods for implementing *Coleman* are available. The two methods are ideologically neutral and should not necessarily be paired with either the law and order or individual liberty ideology. Under one methodology, *Coleman* could be administered as a categorical exclusion in which investigative stops can be performed only if there is a reasonable suspicion of certain offenses, regardless of other circumstances. The other methodology would implement *Coleman* on a case-by-case basis in which the court considers all the circumstances of a particular police and citizen contact to determine whether the stop was reasonable.

After initially using a categorical exclusion, Alaska courts have settled on a case-by-case analysis. Although *Coleman* is still cited as Alaska's seminal case for investigative stops, the courts have largely failed to administer it in a way that requires the imminent public danger or serious harm standard to be met. The recital of the *Coleman* standard is thus inappropriate. If the Alaska courts wish to continue to apply the *Coleman* doctrine as the investigative stop standard, they should be careful to give special weight to *Coleman's* limitations in their case-by-case balancing. If, however, the *Coleman* standard is deemed no longer appropriate, it should be overruled.

II. THE INVESTIGATIVE STOP DEFINED

For the purposes of search and seizure law, courts have identified three fundamental types of contact between the police and private citizens: (1) a generalized request for information; (2) an investigative stop;[6] and (3) an arrest.[7] A "request for information" is an on-the-scene investigation of bystanders[8] or a request for identification.[9] Such an encounter is not a fourth amendment "seizure" because it is deemed to be an insignificant intrusion.[10] An "arrest" occurs when the individual contacted is taken into formal police custody in order

6. This procedure is also known as an investigatory stop, a *Terry* stop or a pre-arrest investigative detention.

7. Howard v. State, 664 P.2d 603, 608 (Alaska Ct. App. 1983); Note, *The Eroding Force of the Investigatory Stop Under Fourth Amendment Constitutional Doctrine,* 17 VAL. U.L. REV. 471, 476 (1983) [hereinafter *Eroding Force*].

8. *See* Palmer v. State, 604 P.2d 1106, 1112 (Alaska 1979) (Rabinowitz, C.J., concurring).

9. *See* United States v. Hensley, 469 U.S. 221 (1985).

10. *See* United States v. Mendenhall, 446 U.S. 544, 555 (1980). A request for identification may become a seizure if it satisfies the criteria in other ways. *See* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.2(f), at 375 n.112 (2d ed. 1987); *Eroding Force, supra* note 7, at 476. *But see*

that the person may be held to answer for the commission of a crime.[11] The investigative stop, lying somewhere in between a request for information and an arrest, has no simple, fixed definition in constitutional criminal procedure law.

The investigative stop is distinguished from a request for information by the objective belief of the individual contacted that he or she is not free to leave the scene of the contact and is under a duty to abide fully with the commands of the law enforcement officials.[12] The distinction between an investigative stop and an arrest, both "seizures" for the purposes of the fourth amendment and its counterpart in the Alaska Constitution,[13] is much less clear.[14] Generally, the investigative stop is distinguished from an arrest based on the stop's investigatory purpose and lower magnitude of intrusion. The practical result is that the investigative stop requires only a "reasonable suspicion," whereas an arrest requires "probable cause."[15]

The police procedure of "stop and frisk," from which investigative stops originate, has existed in some form since early English common law.[16] However, the procedure was not accorded constitutional status in the United States until the Supreme Court's 1968 decision in

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Waring v. State, 670 P.2d 357, 364 n.16 (Alaska 1983) (declining to decide whether a request for identification is a seizure).

11. ALASKA STAT. § 12.25.160 (1990). *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963).

12. *Waring*, 670 P.2d at 364-65; Howard v. State, 664 P.2d 603, 608 (Alaska Ct. App. 1983). *See* Florida v. Royer, 460 U.S. 491, 497-98 (1983); *Mendenhall*, 446 U.S. at 554; Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring). *See also Eroding Force*, *supra* note 7, at 478-79. *See generally* 3 W. LAFAVE, *supra* note 10, § 9.2(h), at 401-22.

13. Alaska Constitution article I, section 14 provides:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. 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.

ALASKA CONST. art. I, § 14.

14. Howard v. State, 664 P.2d 603, 608 (Alaska Ct. App. 1983); Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 777 (1982).

15. Williamson, *supra* note 14, at 777. *See* State v. Moran, 667 P.2d 734, 735 (Alaska Ct. App. 1983); Terry v. Ohio, 392 U.S. 1, 20 (1968); 3 W. LAFAVE, *supra* note 10, § 9.2(e), at 370. *See also* Blake v. State, 763 P.2d 511, 515 (Alaska Ct. App. 1988) (investigative stop does not require reading of *Miranda* rights). *See generally* UNIF. ARREST ACT §§ 2, 3 (1942); Williamson, *supra* note 14, at 802-17.

16. Lippman, *Stop and Frisk: The Triumph of Law Enforcement over Private Rights*, 24 CRIM. L. BULL. 24, 24-25 (1988); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 532, 532 (1967).

Terry v. Ohio.[17] The *Terry* court acknowledged that a "stop and frisk" was a "seizure" for the purposes of the fourth amendment.[18] The Court, however, went on to exempt investigative stops from the probable cause requirement of arrests.[19] Interpreting the fourth amendment broadly, the Court found that the probable cause requirement applied only to the warrant clause,[20] while other searches and seizures were subject only to a "reasonableness" requirement.[21]

III. THE ALASKA INVESTIGATIVE STOP DOCTRINE: *COLEMAN* AND "IMMINENT PUBLIC DANGER"

In interpreting article I, section 14 of the Alaska Constitution, the courts in Alaska began, independently of the federal courts,[22] to formulate a court-sanctioned standard for brief investigative detentions. Prior to *Terry*, the Alaska Supreme Court had permitted investigative detentions in *Goss v. State*[23] and *Maze v. State*.[24] In each case, the court held that police officers could stop and question a person when

17. 392 U.S. 1 (1968). *See* 3 W. LAFAVE, *supra* note 10, § 9.1, at 334. *See also* Camara v. Municipal Court, 387 U.S. 523, 536-38 (1967) (balancing the need to search against intrusiveness and establishing a standard of probable cause for inspection warrants); Brinegar v. United States, 338 U.S. 160, 175-78 (1949) (establishing a groundwork for the recognition of temporary detentions).

18. 392 U.S. at 19.

19. *Id.* at 20.

20. "[A]nd 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.

21. Terry v. Ohio, 392 U.S. 1, 20 (1968). The "reasonableness clause" in the fourth amendment of the United States Constitution 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 . . . ." U.S. CONST. amend. IV. *See* Lippman, *supra* note 16, at 28; *Eroding Force*, *supra* note 7, at 474. *See also* 3 W. LAFAVE, *supra* note 10, § 9.1(d), at 340-41 (discussing the confusing relationship between the warrant clause and the reasonableness clause). *See generally* Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 395-97 (1988).

22. It is not unusual for states to provide broader protection against searches and seizures than the United States Supreme Court does, even when the language of the state constitution is virtually identical to the federal provision. *See* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 2.6 (2d ed. 1989). States are allowed to develop rules governing searches and seizures, provided that such rules are consistent with the individual's federal constitutional rights. Ker v. California, 374 U.S. 23, 38-39 (1963); 1 J. VARON, SEARCHES, SEIZURES & IMMUNITIES 81 (2d ed. 1974). *See also* Oregon v. Hass, 420 U.S. 714, 719 (1975) (noting that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this court holds to be necessary upon federal constitutional standards") (emphasis in original).

23. 390 P.2d 220, 224 (Alaska 1964), *cert. denied*, 379 U.S. 859 (1964), *overruled on other grounds*, Glasgow v. State, 469 P.2d 682, 687 (Alaska 1970).

24. 425 P.2d 235, 238 (Alaska 1967).

there were "suspicious circumstances" which warranted further investigation of that person by the police officer.[25] In neither case, however, did the court articulate any standard for reasonableness under article I, section 14.[26]

After the reasonable suspicion standard was announced by the United States Supreme Court in *Terry*, the Alaska courts also articulated a doctrine for "investigative stops." In *Coleman v. State*,[27] the first Alaska case[28] after *Terry* to examine the stop and frisk doctrine, the Alaska Supreme Court cautiously adopted the *Terry* rationale but pronounced a stricter standard.[29]

In *Coleman*, the police officers stopped a car after it was seen leaving a seldom-used area near which a rape and burglary had just been reported. The driver appeared to match the description of the assailant.[30] Considering *Goss*, *Maze*, *Terry* and *Adams v. Williams*,[31] the court stated a principle "permitting temporary detention for questioning in *certain cases*, i.e., cases where the police officer has a reasonable suspicion that *imminent public danger* exists or *serious harm to*

25. *Id.* at 238.

26. *See* Feldman, *Search and Seizure in Alaska: A Comprehensive Review*, 7 UCLA-ALASKA L. REV. 75, 103 (1977).

27. 553 P.2d 40 (Alaska 1976).

28. The Alaska Supreme Court had previously expressed some dissatisfaction with *Terry* and its progeny in Mattern v. State, 500 P.2d 228, 233 n.15 (1972). In that case, the court noted that many members of the United States Supreme Court had begun to reevaluate *Terry*. The *Mattern* court also retreated somewhat from *Goss*, citing the lack of a statute permitting investigative stops. The court did not consider fully *Terry* or *Goss* because it concluded that the police actions at issue did not amount to an investigative stop. *Id.* In a concurring opinion, however, Justice Erwin, who would later write for the court in *Coleman*, applied *Terry*, *Goss*, *Maze* and Adams v. Williams, 407 U.S. 143 (1972), and stated that it was proper to stop an "obviously suspicious individual" as part of a legitimate stop and frisk. *Mattern*, 500 P.2d at 235-36 (Erwin, J., concurring).

29. *Coleman*, 553 P.2d at 46.

30. *Id.* at 42-43.

31. 407 U.S. 143 (1972). *Adams* was the first case to apply the *Terry* stop doctrine to a reasonable suspicion of the commission of mere possessory offenses rather than imminent, violent offenses. In *Adams*, the stop was based on an unverified informant's tip that Williams, the occupant of a nearby vehicle, was transporting illegal drugs and had a gun at his waist. The investigating officer approached the vehicle and requested that Williams open the door. When Williams rolled down the window, the officer reached in and removed a revolver from Williams' waistband. Williams was arrested for unlawful possession of the pistol. A subsequent search incident to the arrest uncovered substantial quantities of heroin and additional weapons. *Id.* at 144-45. The Supreme Court upheld the admission of all evidence discovered in the search. *Id.* at 149. The Court rooted its investigative stop analysis on the practical circumstances of daily police work, a belief whereby the police are to be afforded greater latitude in order to solve difficult or frustrating crimes. *Id.* at 148. Compare this concern with the rationale in *Terry* that stops are justified by "necessarily swift action" required to abate dangerous situations. 392 U.S. at 20.

persons or property has recently occurred."[32] Thus, the investigative stop doctrines articulated in *Coleman* and *Terry* defined "unreasonable searches and seizures" differently. Under the *Coleman* doctrine, the Alaska Supreme Court recognized that an investigative stop would be "reasonable" only in the prevention of imminently dangerous crimes or in solving recently perpetrated serious harms.[33]

The *Coleman* standard was more restrictive than *Terry* and was apparently intended to apply to only a narrow range of situations.[34] In a footnote, the court wrote that the *Terry* doctrine should not be extended beyond "situations requiring immediate police response to protect the public."[35] The court was addressing the concerns expressed by Justice Brennan in *Adams v. Williams*[36] and by Judge Friendly in the lower court opinion in that case.[37] Judge Friendly, dissenting from the lower court's opinion in *Adams*, expressed concern that the expansion of *Terry* to reasonable suspicion of offenses that did not require immediate police response, such as drug possession, would open "the sluicegates for serious and unintended erosion of the protection of the Fourth Amendment."[38] Since Coleman's actions and the nature of the alleged offense clearly fit within the narrow criterion, the court did not examine further the concern for *Terry*'s potential overexpansiveness.[39]

The Alaska standard articulated in *Coleman* is also distinguishable from the standards of other states. Several states have included

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32. *Coleman*, 553 P.2d at 46 (emphasis added).

33. *See* Ebona v. State, 577 P.2d 698, 700 (Alaska 1978); Feldman, *supra* note 26, at 105 ("Thus, in Alaska, the police officer may make a stop and frisk on less than probable cause only within a narrow range of situations . . . ."). Later cases also reflected the belief that Alaska had adopted *Terry* only on a limited basis. *See, e.g.*, Ozenna v. State, 619 P.2d 477, 479 (Alaska 1980). The idea of limiting *Terry* stops to certain offenses had been previously suggested by federal criminal procedure commentators. United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Douglas, J., concurring) (citing LaFave, *"Street Encounters" and the Constitution*, 67 MICH. L. REV. 39, 65-66 (1968)).

34. The *Coleman* standard is also more in line with some of the commentators on investigative stops. *See* 3 W. LAFAVE, *supra* note 10, § 9.2(c), at 360 ("The *Terry* rule should be expressly limited to investigation of serious offenses.").

35. *Coleman*, 553 P.2d at 46 n.17.

36. 407 U.S. 143, 151-53 (1972) (Brennan, J., dissenting).

37. Williams v. Adams, 436 F.2d 30, 35-39 (2d Cir. 1970) (Friendly, J., dissenting).

38. *Id.* at 39. Judge Friendly's dissent also appears to be the source of the *Coleman* court's limiting language. Explaining the preferred limits of *Terry*, Judge Friendly stated that "[i]t was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property." *Id.* In his dissent, Justice Brennan quoted Judge Friendly's opinion at length. *Adams*, 407 U.S. at 151-53.

39. *Coleman*, 553 P.2d at 45 n.17. *See* Feldman, *supra* note 26, at 104-05.

investigative stop guidelines in their criminal procedure codes.[40] Alaska's *Coleman* doctrine, however, is rare among state investigative stop standards, since it is more restrictive than *Terry* without a statutory commandment.[41] The Alaska Legislature acknowledged the *Coleman* procedure during the discussion of "lawful stops," and referred to *Coleman* in the commentary,[42] but gave no guidance as to how *Coleman* should be administered.

IV. THE *COLEMAN* STANDARD: TWO POSSIBLE APPLICATIONS

As with many court-announced doctrines, *Coleman* appeared to be a satisfactory resolution of the investigative stop issue only until attempts were made to apply it. The element of "imminent public danger or serious harm to persons or property" lends itself to two plausible administrative interpretations.[43] The first is a categorical exclusion. All offenses that do not meet the "danger" requirement cannot provide the basis for the reasonable suspicion needed for a legal

40. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1981 & Supp. 1990) (originally limited to felonies and class A misdemeanors, but later amended to include all misdemeanors); OR. REV. STAT. § 131.615(1) (1984) (no preventive stops; stops limited to completed crimes); Note, *What Standard Governs Investigative Stops in Virginia?*, 9 GEO. MASON U.L. REV. 313 (1987). *Cf.* MODEL CODE OF PREARRAIGNMENT PROC. § 110.2(1)(a)-(c) (allowing stops of: (a) those suspected of offenses involving danger of forcible injury to persons or damage to property; (b) witnesses to such offenses; and (c) those suspected of previously committing offenses. In all situations the stop must be necessary for the purpose of identification or verifying information.). *See also* 1 W. RINGEL, *supra* note 22, § 2.6, at 2-41 to 2-42 (2d ed. 1989) (discussing the varying nature of state doctrines).

41. *See* 3 W. LAFAVE, *supra* note 9, § 9.2(c), at 357 ("With rare exception, cases declaring that the stop was improper because of the nature of the offense under investigation have been decided upon a statutory provision limiting stops to the investigation of certain crimes."). *Cf.* State v. Blankenship, 757 S.W.2d 354, 357 (Tenn. Crim. App. 1988) (stating *Terry* should apply to all crimes); State v. Kennedy, 107 Wash.2d 1, 6, 726 P.2d 445, 448 (1986) (an offense need not be serious to warrant an investigative stop). Alaska's only stablemate with respect to investigative stops is West Virginia, whose court-enunciated doctrine limits investigative stops to the investigation of violent criminal activity. State v. Duvernoy, 156 W. Va. 578, 195 S.E.2d 631 (1973). Most courts have restricted *Terry* to criminal activity. 1 W. RINGEL, *supra* note 22, § 13.1(c), at 13-5. For a review of the policy as practiced by the Ninth Circuit, see Note, *Criminal Law in the Ninth Circuit*, 13 LOYOLA L.A.L. REV. 591, 622-27 (1980). A stop and frisk statute was recommended by the President's Commission in 1967. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967).

42. ALASKA STAT. § 11.81.370 (1989). *See* 2 S. JOURNAL SUPP. No. 47, at 129-31 (June 12, 1978).

43. Numerous interpretations are possible. However, it has been suggested for other areas of fourth amendment procedure that these two may be the only successful tactics. Bradley, *supra* note 2, at 1472. *But see* Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through The Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1177 (1988) (proposing that the investigative stop

investigative stop. Such an application is commonly known as a "bright lines" or "clear rules" approach. The second option makes imminent public danger merely a factor in a case-by-case analysis. This method is often labeled the "sliding scale" approach.[44]

These administrative approaches should not be confused with the previously discussed ideological dichotomy between law and order and individual rights. On the contrary, these two administrative approaches to applying *Coleman* are ideologically neutral, generic models.[45] The bright lines approach reflects a specific ideology only by virtue of where the lines are drawn. For example, an advocate of individual privacy may draw the line at reasonable suspicion of "recently perpetrated capital offenses." An advocate of the law and order approach may draw the bright line at reasonable suspicion of "any crime or misdemeanor of any class." Similarly, the sliding scale will reflect an ideology only upon the evaluation of a particular case and the determination of what is reasonable police behavior.[46] Although a court using a sliding scale has the potential to condone *all* police conduct, it also has the power to condemn it.

Administering *Coleman* through a bright lines approach would result in a unique stop procedure. To the extent *Coleman* ordained a categorical exclusion of investigative stops not involving an "imminent public danger," the *Coleman* doctrine would be a true limitation on police procedure, as compared to the generally permissive federal doctrine.[47] To obtain such a categorical exclusion, the *Coleman* test would have to be administered as a two-pronged test. The first necessary condition would be a suspicion of imminent public danger or serious danger to persons or property. If and only if that condition were satisfied could a court move on to the next prong: examining the reasonableness of the suspicion.

Using a sliding scale approach, the imminent public danger requirement would become merely one of the factors that are analyzed in determining the overall reasonableness of a stop. Through this method, several broad factors, such as imminence, necessity and degree of danger, would all be considered and balanced against each other to determine if the police conduct was proper. The problem with this approach is that the imminent public danger factor could

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doctrine will be manageable if restricted to the least intrusive alternative action of law officers). *See generally* Sundby, *supra* note 21, at 414-47 (offering several theoretical models).

44. *See*, LaFave, *"Case-by-case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127 (1975). *See generally* Bradley, *supra* note 2, at 1481-98.

45. Bradley, *supra* note 2, at 1472 n.17, 1501.

46. *See generally* Bradley, *supra* note 2, at 1498-1501.

47. Feldman, *supra* note 26, at 103-04.

easily be balanced away by any other factor. Such a result is not necessarily bad, but it lessens *Coleman*'s distinctive quality[48] and could lead to the "serious erosion" of constitutional protections that Justice Brennan and Judge Friendly were concerned about in *Terry*.[49]

The Alaska courts need to choose one of these two methods. The alternative is the confusion in which the federal system finds itself, as the courts attempt to use a bright lines approach and maintain a flexible approach at the same time.[50] The United States Supreme Court has repeatedly stated the necessity of clear rules.[51] In *Dunaway v. New York*,[52] the Court specifically recognized the importance of clear rules with respect to *Terry* stops: "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[53] Nonetheless, the Court has simultaneously obscured these rules with broad ranging exceptions when a specific application of the rules appears unjust.[54] This confusion is as prevalent in investigative stop law as in other areas of fourth amendment jurisprudence. The evolution of the *Terry* doctrine illustrates how numerous exceptions have obscured the clear rules; exceptions have expanded the doctrine from a narrow exclusion to one describing a broad range of activity.

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48. *See supra* notes 40-41 and accompanying text.

49. *See supra* notes 34-39 and accompanying text.

50. *See* Bradley, *supra* note 2, at 1470. In commenting on the entirety of Supreme Court fourth amendment jurisprudence, Professor Bradley wrote:

> [T]he Court strives to justify such police behavior by stretching existing doctrine to accommodate it. Herein lies the inherent contradiction, and source of confusion, in fourth amendment law: The Court tries on the one hand to lay down clear rules for the police to follow in every situation while also trying to respond flexibly, or 'reasonably,' to each case because a hard-line approach would lead to exclusion of evidence. Since the rules are not clear and since, even if they were, it is virtually impossible to lay down a rule that anticipates all potential cases, the police engage in behavior that does not conform to the rules but that strikes the Court as having been essentially reasonable. Given the Court's predilection for clear-cut rules, however, simply declaring such conduct "reasonable" and leaving it at that is not enough. Instead, the Court offers a detailed explanation as to how the police behavior really did conform to the old rule (and in so doing, changes the contours of the old rule), or creates a new rule to justify the behavior. Naturally, such a holding spawns a new litigation, which leads to a new opinion, which leads to a new rule, etc.

Id. (footnote omitted).

51. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 181 (1984); New York v. Belton, 453 U.S. 454, 458 (1981).

52. 442 U.S. 200 (1979).

53. *Id.* at 213-14.

54. Bradley, *supra* note 2, at 1470. *See also*, California v. Carney, 471 U.S. 386 (1985) (automobile exception).

The *Terry* holding was very limited.[55] It allowed a "narrowly drawn authority" to permit a brief pat-down search for weapons based on a police officer's reasonable suspicion that the party being searched was armed and dangerous.[56] The Court created this exception because it was thought necessary for police to be able to respond to potentially life-threatening situations in which there was no time to develop probable cause to arrest.[57]

The Supreme Court subsequently expanded the *Terry* stop doctrine beyond imminently violent offenses to possessory offenses.[58] The *Terry* stop ceased to be based on the "necessarily swift action"[59] required to confront dangerous situations.[60] Later decisions continued to emphasize convenience over immediacy,[61] as the Court expanded *Terry* from a narrowly drawn exception to a doctrine descriptive of a wide range of activity.[62] In *United States v. Place*, the Court employed

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55. 3 W. LAFAVE, *supra* note 10, § 9.1(b), at 338. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) ("Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.").

56. *Terry*, 392 U.S. at 27.

57. *Id.* at 30. The authorization of *Terry* stops can be seen as an implicit prioritization of the crime control model. *See* PACKER, *supra* note 3, at 184-85. Note the similar concern of Alaska courts, expressed in Waring v. State, 670 P.2d 357, 366 (Alaska 1983).

58. Adams v. Williams, 407 U.S. 143 (1972). *See infra* note 65 and accompanying text.

59. *Terry*, 392 U.S. at 20.

60. Under *Adams*, the stop could be based on a tip. Therefore, the party stopped need not have acted suspiciously nor even been observed directly by the detaining officer. Lippmann, *supra* note 16, at 32. Compare the *Adams* rationale to *Terry*'s condition that the police action be "predicated upon the on-the-spot observations of the officer on the beat." 392 U.S. at 20. *See Eroding Force*, *supra* note 7, at 494 n.132. It also appears that the reliance on an unverified tip contravenes the requirement of *Terry* for reasonable suspicion based on "specific and articulable facts" and the officer's personal observation. 392 U.S. at 21. *See Eroding Force*, *supra* note 7, at 494.

61. For example, the doctrine was extended to completed crimes. *See* United States v. Hensley, 469 U.S. 221 (1985) (allowing the investigative stop of a suspect for an armed robbery that had been committed two weeks earlier). In such cases, the threat of immediate danger to the police is not nearly as great as the threat which the *Terry* court found so compelling. In *Hensley*, the court realized that *necessity*, the essential element in *Terry*, was often absent in the investigation of completed crimes. The *Hensley* court wrote:

> A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards.

Id. at 228.

62. Spillane, *Frisking the Fourth Amendment*, HUM. RTS., Spring 1982, at 23. *See* United States v. Sharpe, 470 U.S. 675, 704 (1985) (Brennan, J., dissenting). This trend

a test which balanced "the nature and quality of the intrusion on [personal security] against the importance of the governmental interests alleged to justify the intrusion."[63]

The Court has identified several important governmental interests which justify investigative stops and has used these interests to outweigh the intrusiveness of relatively severe police conduct.[64] These interests are often associated with general crime prevention and detection.[65] The Supreme Court gave special emphasis to the goals of stemming the flow of illegal aliens[66] and narcotics.[67] In one case, the Court stretched the doctrine to include school discipline, preservation of order and security in schools as sufficiently important governmental interests.[68] As with other fourth amendment law issues,[69] the Supreme Court's investigative stop doctrine is replete with various exceptions. These exceptions are frequently so concerned with the goal of preserving "clear rules" that they fail to make practical sense. The "no seizure doctrine," demonstrates this phenomenon.[70] That doctrine provides that as long as a person being questioned remains free to disregard the questions and walk away, "there has been no intrusion

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is also common among state doctrines. Spillane, *supra*, at 25, 47-48. Indeed, Spillane describes it as a "trend gone out of control." *Id.* at 48.

63. 462 U.S. 696, 703 (1983) (seizure of luggage violated fourth amendment). *See also Hensley*, 469 U.S. at 228.

64. *See, e.g.*, United States v. Montoya deHernandez, 473 U.S. 531, 538 (1985) (governmental interest in stopping smuggling outweighed intrusiveness of detention of a traveler at the boarder and a rectal examination). *See also* Comment, *An Emerging New Standard for Warrantless Searches and Seizures Based on* Terry v. Ohio, 35 MERCER L. REV. 647, 672-73, 679 (1984) [hereinafter *New Standard*]. *But see* United States v. Brignoni-Ponce, 422 U.S. 873, 889 (1975) (Douglas, J., concurring). Justice Douglas objected to any type of expansive test for non-intrusiveness, stating that "the 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." *Id.*

65. *See* Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). Other important interests include the safety of the police officers and the public.

66. *See, e.g.*, United States v. Martines-Fuerte, 428 U.S. 543, 551-64 (1976); *Brignoni-Ponce*, 422 U.S. at 878-79. *See also* Immigration & Nat. Serv. v. Delgado, 466 U.S. 210 (1984) (factory surveys conducted to identify illegal aliens working without authorization found not violative of fourth amendment rights).

67. *See, e.g.*, United States v. Montoya deHernandez, 473 U.S. 531, 538-39 (1985); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980).

68. New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985).

69. *See* Bradley, *supra* note 2 and accompanying text.

70. *See generally* Lippman, *supra* note 16, at 34-38; Butterfoss, *Bright Line Seizures: The Need For Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988).

upon that person's liberty or privacy that would under the Constitution require particularized and objective justification."[71] With it, the Court expanded the scope of brief encounters between police and individuals in which no fourth amendment rights were implicated. The Court held that certain police activity, usually when directed at combatting topically sensitive behavior, such as drug smuggling, does not amount to a stop at all.[72]

A. Policy Favoring Each Approach

Sound policy arguments can be made for both the bright lines and the sliding scale approach. Proponents of the bright lines approach argue that the fluid analysis of general reasonableness underlying the sliding scale approach is unacceptable because the delicate balance between efficient police work and the individual's rights requires specific guidelines.[73] They contend that a fluid standard is ill-suited to facilitating police fieldwork. Although it may be geared toward validating practical police activity, a flexible standard offers little guidance to law enforcement officers on how to model behavior in the field.[74] The result is uncertainty.[75] Treating the investigative stop as a strict exclusion or bright line would better allow for quick and consistent decisions in the field.[76]

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71. Mendenhall v. United States, 446 U.S. 544, 554 (1980).

72. *Id.* at 553-54. *See also* Michigan v. Chesternut, 486 U.S. 567 (1988); Reid v. Georgia, 448 U.S. 438, 441 (1988); 3 W. LAFAVE, *supra* note 10, § 9.2(h), at 401-22; Lippman, *supra* note 16, at 34-38. *But see* Anderson, *Everything You Always Wanted to Know About* Terry *Stops — But Thought It Was a Violation of the Fourth Amendment to Stop and Ask*, ARMY LAW., Feb. 1988, at 25, 29 (noting that *Mendenhall*, as a plurality opinion, has uncertain effect).

Many of these cases involve investigative stops in airports of individuals fitting drug courier profiles. These "airport stop" cases generally allow considerable latitude in law enforcement agents to question persons based only on their fitting a standard, generalized description of previous drug couriers. *See Mendenhall*, 446 U.S. at 547 n.1; Spillane, *supra* note 64, at 48. *But see* Florida v. Royer, 460 U.S. 491, 503 (1983) (circumstances amounted to arrest). Perhaps because of Alaska's dependency on air travel, Alaska courts frequently confront this issue. *See, e.g.*, State v. Garcia, 752 P.2d 478 (Alaska Ct. App. 1988); Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985).

73. Sundby, *supra* note 21, at 416-17.

74. 3 W. LAFAVE, *supra* note 10, § 9.1(d), at 343-44 (noting that ad hoc "slide rule" determinations are ill-suited for day-to-day police work). *See* Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 448 (1967).

75. Sundby, *supra* note 21, at 416-17.

76. 3 W. LAFAVE, *supra* note 10, § 9.1(d), at 343-44; Sundby, *supra* note 21, at 416-17. *See generally* Butterfoss, *supra* note 70, at 437-43.

Proponents of a case by case analysis argue that a multifactored sliding scale is better because the police constantly face unique combinations of circumstances.[77] Permitting an officer broad discretion in the field based on his or her training and experience better suits the reality of police work than does trying to pigeonhole a situation into a bright line category.[78] Moreover, proponents of a case-by-case analysis contend that an inquiry into general reasonableness better conforms to the demands of the fourth amendment.[79]

B. *Ebona*: The Bright Lines Approach

The initial applications of the *Coleman* doctrine appeared to favor the bright lines approach. The Alaska Supreme Court first reiterated the *Coleman* standard in *Ebona v. State*[80] in which it employed a two-pronged analysis for examining the validity of an investigative stop. First, a court must "satisf[y] the *Coleman* investigative stop prerequisite which requires that the officer have a suspicion that imminent public danger exists."[81] Second, the court must independently[82] examine the reasonableness of the suspicion using the objective test of *Terry*.[83] The two analyses were separate and distinct: the imminent public danger condition (the *Coleman* prerequisite) had to be fulfilled before the court could turn to the reasonable suspicion analysis.

Subsequent rulings on the *Coleman* doctrine reaffirmed the bright line by employing *Ebona*'s two-pronged analysis.[84] In *Howard v.*

77. Bradley, *supra* note 2, at 1481; 3 W. LAFAVE, *supra* note 9, § 9.1(d), at 343-44.

78. Bradley, *supra* note 2, at 1483.

79. *Id.* at 1481-83.

80. 577 P.2d 698 (Alaska 1978).

81. *Id.* at 701. In *Ebona*, the police officers noticed a man who appeared intoxicated enter an automobile and drive away; an hour and twenty minutes later they observed his car at an intersection. The court stated that driving while intoxicated was adequately serious and imminently dangerous. *Id.* at 699-701.

82. "Remaining for resolution is the question whether Officer Smith's suspicion that an imminent public danger existed was reasonable in light of all the facts known to the officer prior to the investigative stop of Ebona's vehicle." *Id.* at 701. *See* Larson v. State, 669 P.2d 1334, 1336 (Alaska Ct. App. 1983); Metzker v. State, 658 P.2d 147, 149 (Alaska Ct. App. 1983); Hubert v. State, 638 P.2d 677, 685-87 (Alaska Ct. App. 1981).

83. That is, whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (citing Beck v. Ohio, 379 U.S. 89, 96 (1964)). *Accord* Brown v. State, 684 P.2d 874, 879 (Alaska Ct. App. 1984).

84. *See, e.g.*, Waring v. State, 670 P.2d 357, 365 (Alaska 1983); Metzker v. State, 658 P.2d 147, 149-50 (Alaska Ct. App. 1981); Hubert v. State, 638 P.2d 677, 685 (Alaska Ct. App. 1983).

State,[85] the court of appeals identified five factors distinguishing investigative stops from arrests. It stated the "*Coleman* prerequisite" was an absolute condition which *must* be fulfilled: "First, the court must consider the purpose for the stop and, specifically, the kind of criminal activity being investigated. In Alaska investigatory stops are limited to the investigation of crimes of violence or crimes involving serious and substantial loss to property."[86]

In *Brown v. State*,[87] the court of appeals also applied *Coleman* as a two-part test and implied that *Coleman* may call for a categorical exclusion for less serious offenses.[88] After holding that a very recent burglary was sufficiently serious harm to property to satisfy the *Coleman* prerequisite,[89] the court implied that the *Coleman* doctrine may categorically exclude less serious property offenses such as "shoplifting or other casual theft."[90]

C. Obscuring the Bright Lines

Initially, Alaska courts construed the *Coleman* doctrine to allow investigative stops only in cases where an imminent public danger was easily demonstrable. These dangers included violent crimes,[91] armed robbery[92] and drunk driving.[93] As discussed below, Alaska gradually obscured this bright line approach, however, abandoning a strict two pronged analysis and allowing factors such as the amount of intrusion and degree of suspicion to override weaknesses in the *Coleman* prerequisite.

One result of the equal consideration of all these factors was that if a particular factor was very compelling, it could compensate for the weaknesses of the others. For example, police were allowed to be highly intrusive during a stop, provided that the stop was based on a

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85. 664 P.2d 603 (Alaska Ct. App. 1983).

86. *Id.* at 609. The court continued:

> Second, the stop must be for a limited and specific inquiry . . . . Third, the stop must be of brief duration . . . . Fourth, the stop must not require the person stopped to travel an appreciable distance. Fifth, the force used in effectuating the stop must be proportional to the risk reasonably foreseen by the officer at the time he makes the stop.

Id. at 609-10.

87. 684 P.2d 874 (Alaska Ct. App. 1984).

88. *Id.* at 878-79.

89. *Id.*

90. *Id.* at 879.

91. *See, e.g.*, Brown v. State, 684 P.2d 874 (Alaska Ct. App. 1984); Howard v. State, 664 P.2d 603 (Alaska Ct. App. 1983).

92. *See, e.g.*, Uptegraft v. State, 621 P.2d 5 (Alaska 1980).

93. *See, e.g.*, Effenbeck v. State, 700 P.2d 811 (Alaska Ct. App. 1985); Larson v. State, 669 P.2d 1334 (Alaska Ct. App. 1983); State v. Moran, 667 P.2d 734 (Alaska Ct. App. 1983).

high degree of suspicion of a serious harm.[94] Valid investigative stops have included blocking off an exit by police cars[95] and being handcuffed and held at gunpoint.[96] Courts have also allowed searches of checked luggage at airports on a fairly low quantum of suspicion, citing the relatively low level of intrusion which results from examining property not attached to the person.[97]

Perhaps the most significant change from the initial strict two-part analysis of *Coleman* came when courts began treating *Coleman* as no more restrictive than the federal investigative stop doctrine. That is, the distinctive requirement limiting stops to certain suspected offenses became increasingly insignificant. Despite a stated adherence to Justice Brennan's concern for extension of investigative stops to possessory offenses,[98] and despite the repeated assertion that Alaska's *Coleman* doctrine is more restrictive than the federal law,[99] courts have authorized *Coleman* stops of persons suspected of crimes such as drug possession[100] and receipt of stolen property.[101] Such offenses had been inappropriate for investigative stops under a bright line, imminent public danger requirement: even in examining practical necessity, the *Coleman* court apparently said that mere possession of contraband would not create a situation requiring immediate law enforcement when there was less than probable cause.[102]

In order to include possessory crimes among those suitable for investigative stops, the courts have interpreted *Coleman* inconsistently. This inconsistency is most acute in cases concerning drug possession.[103] In *T. Gibson v. State,*[104] the court rejected Gibson's

94. Courts generally allow substantial force to be used during the course of an investigative stop, because *Coleman* stops are limited to situations creating great risks of violence. *Howard,* 664 P.2d at 610.

95. Hubert v. State, 638 P.2d 677, 681 (Alaska Ct. App. 1981). *See* 3 W. LAFAVE, *supra* note 10, § 9.2(d), at 364-66.

96. *Howard,* 664 P.2d at 609, 611.

97. *See* Pooley v. State, 705 P.2d 1293, 1307 n.9 (Alaska Ct. App. 1985). For a federal case on this point see United States v. Place, 462 U.S. 696, 717-18 n.5 (1983) (Brennan, J., concurring in the result).

98. *See Coleman,* 553 P.2d 40, 46 n.17 (Alaska 1976); State v. G.B., 769 P.2d 452, 454 (Alaska Ct. App. 1989). For a discussion of State v. G.B., see *infra* notes 115-35 and accompanying text.

99. Waring v. State, 670 P.2d 357, 365 (Alaska 1983) (concluding that the *Coleman* test is more restrictive than the federal *Terry* doctrine); Effenbeck v. State, 700 P.2d 811, 815 (Alaska Ct. App. 1985); Brown v. State, 684 P.2d 874, 879 (Alaska Ct. App. 1984).

100. *See, e.g.*, T. Gibson v. State, 708 P.2d 708 (Alaska Ct. App. 1985).

101. *See, e.g.,* Brown v. State, 684 P.2d 874 (Alaska Ct. App. 1984).

102. *Coleman,* 553 P.2d 40, 46-47 (Alaska 1976).

103. Ironically, drug possession is used in Judge Friendly's dissent in *Adams* as an example of an offense which should not be the predicate for an investigative stop. Williams v. Adams, 436 F.2d 30, 38 (2d Cir. 1970), *rev'd,* 407 U.S. 143 (1972). This

argument that possession of small quantities of drugs was not a sufficiently imminent public danger to satisfy the *Coleman/Ebona* doctrine.

> Properly understood the restrictions [*Coleman* and *Ebona*] place on investigatory stops are aimed at preventing unreasonable interference with the "person" of the suspect . . . . Brennan's argument as advanced and as adopted by the Alaska Supreme Court relates primarily to the "frisk" aspect of the stop and frisk, not the initial stop.[105]

The possible ramifications of this dicta are numerous. If the imminent public danger requirement were to apply only to frisks, then seizures, even of individuals, could occur on a fairly permissive reasonable suspicion standard. This would be inappropriate, because the danger of "pretext seizures" is equal to that of "pretext searches."[106] The concerns for unreasonable police intrusion apply equally to the stop and the frisk. Moreover, applying an equal standard to stops and frisks is more consistent with previous Alaska decisions.[107] The Alaska courts have previously applied the *Coleman* standard to stops independent of searches.[108] The application of a dual standard for stops and frisks is unprecedented.

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concern was later reiterated in Justice Brennan's dissent in Adams v. Williams, 407 U.S. 143, 151 (1972).

104. 708 P.2d 708 (Alaska Ct. App. 1985) (This case will be referred to as *T. Gibson* so as not to confuse it with W. Gibson v. State, 789 P.2d 383 (Alaska Ct. App. 1990), which is discussed *infra* at notes 138-42 and accompanying text.). In *T. Gibson*, an airline employee alerted drug enforcement officials of a package that the employee suspected contained drugs. The drug enforcement officials brought the package before a scent-detection dog which signalled positive. A search warrant was issued on the basis of this evidence. *Id.* at 709-10.

105. *Id.* at 711. *See* Christianson v. State, 734 P.2d 1027, 1029 (Alaska Ct. App. 1987) (citing *T. Gibson* for this proposition and holding that the defendant could not argue the invalidity of the stop of a third person because *Coleman* protects only against unreasonable stops "of [the defendant's] person," not somebody else's).

106. Pretext searches, where the individual is searched in hope of finding evidence of criminal activity other than that which prompted the stop, caused Justice Brennan concern in his *Adams* dissent. Adams v. Williams, 407 U.S. 143, 153 (1972) (Brennan, J., dissenting) (quoting 436 F.2d 30, 38-39 (2d. Cir. 1971) (Friendly, J., dissenting)). The crux of Judge Friendly's opinion was that *Terry* intended only "to free a police officer from the rigidity of a rule that would prevent his doing anything to a man reasonably suspected of being about to commit or having just committed a crime of violence, no matter how grave the problem or impelling the need for swift action." *Id.*

107. *See, e.g.*, Metzker v. State, 658 P.2d 147, 149 (Alaska Ct. App. 1983) (implying *Terry* should be limited in Alaska to crimes of danger); Effenbeck v. State, 700 P.2d 811, 815 (Alaska Ct. App. 1985) (*Coleman* doctrine limits investigative stops to situations where "police action is necessary to intercept and prevent injurious conduct" and not to "seize drugs or gambling paraphernalia.").

108. *See* Free v. State, 614 P.2d 1374, 1378 (Alaska 1980).

The court of appeals has similarly held that receiving stolen property, even though a possessory offense, is a valid prerequisite offense for a *Coleman* stop.[109] The courts have justified such a ruling on the grounds that possession of stolen goods constitutes serious harm to property. However, *Coleman* requires that serious harm to property have *recently* occurred. Again, the lack of immediacy of the investigation might invalidate the stop under an *Ebona*-style bright lines test.[110]

The court of appeals has further obscured the imminent public danger bright line by holding an investigative stop valid even though it was predicated only on part of the investigation of a recent, serious, dangerous offense. The court held that the incident immediately precipitating the stop need not itself be dangerous.[111] With this holding, many possessory and minor offenses may be brought under the *Coleman/Ebona* doctrine as ancillary to more serious offenses.

Courts must be wary of stretching the doctrine to fit troubling scenarios, because such stretching sets the precedent for broad-ranging police conduct.[112] Although illegal possession of drugs and stolen goods makes an emotionally compelling case for special treatment, such cases would fall outside the exception to the probable cause requirement provided by *Coleman*. *Coleman* did not intend to validate a police procedure for use in the investigation of all crimes. Rather, *Coleman* meant to validate a practice for use only in situations in which the reasonable suspicion was of an imminent public danger or serious harm to persons or property. Absent a legislative empowerment, it is difficult to see how narcotics possession, although admittedly a *potential* public danger if it should amount to distribution, is an *imminent* danger requiring immediate attention. Ruling out such narcotic-related stops does not render peace officers incapable of fighting

109. *See, e.g.*, Brown v. State, 684 P.2d 874, 878 (Alaska Ct. App. 1984); Hubert v. State, 638 P.2d 677, 685 (Alaska Ct. App. 1981).

110. *But see Hubert*, 638 P.2d at 686 (receiving stolen property from robbery the night before satisfied the recency requirement since the public has "a strong and vital interest in recovering property stolen . . . within the period of time immediately following commission of the offense.").

111. *Id. See also* MODEL CODE OF PREARRAIGNMENT PROC. § 110.2(1)(b) (1975).

112. The court of appeals recently acknowledged this danger, reversing the conviction of a known drug trafficker because of an illegal seizure. Peschel v. State, 770 P.2d 1144, 1149-50 (Alaska Ct. App. 1989). The court noted the importance of preserving an individual's right to be free from unreasonable police intrusion, even at the expense of a conviction: "In hindsight, Peschel can be seen as a drug trafficker who was deservedly stopped before his destination. There may seem to be little need for concern over his convenience as a traveler. Yet procedures that we approve today will inevitably become common practice tomorrow." *Id.* at 1149-50. *See also* Waring v. State, 670 P.2d 357, 366 (Alaska 1983) ("The public has an interest in solving crime . . . however, we think that this laudable end does not outweigh [the defendant's] constitutional right not to be unlawfully seized.").

the war on drugs. Recourse remains available in the ability of the police to ask for identification and conduct an on-the-scene investigation question without detention, or by way of an arrest based on probable cause.

It thus appears that the Alaska courts have not been completely successful in administering *Coleman* as a bright line test. The two-part analysis seems meaningless if the courts stretch it to include socially unpopular activities that are not *imminently* dangerous. As will be discussed below, Alaska courts have allowed other factors to balance against the *Coleman* prerequisite; *Ebona* has been decreasingly cited as the courts have actually applied a test comprised of a case-by-case determination of reasonableness.

D. *G.B.* and the "Flexible" *Coleman* Doctrine

Recent applications of the *Coleman* test have clearly followed a multifactored, general reasonableness approach. In the twenty-four years since *Coleman*, the Alaska Supreme Court and the Alaska Court of Appeals have failed to provide significant guidance regarding what suspected offenses are required for an "imminent public danger" or "serious harm."[113] Instead, the courts have focused on delineating generally acceptable and reasonable police conduct in light of the particular circumstances of each case. This delineation occurred through the modification of *Coleman* to a four-factored balancing test.[114]

The strongest statement of *Coleman* as a multifactored balancing test came recently in *State v. G.B.*[115] In *G.B.*, a young man was seen behind the counter of a video rental store. When confronted by an employee, the young man ran from the store. The employee reported a suspected theft to the police and an officer was dispatched to the area. Soon after, the police officer spotted G.B., who matched the description of the store intruder. The officer stopped G.B. and asked him to get inside the police car. Recognizing G.B.'s name in connection with a previous trespass, the officer conducted a pat-down search which eventually led to the discovery of eight hundred dollars which G.B. had stolen from the video store.[116]

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113. That is, the "bright lines" are not that bright. This guidance was called for previously in the Alaska Law Review. *See* Feldman, *supra* note 26, at 120.

114. The balancing test initially was introduced into each prong of *Coleman* separately. Within the reasonable suspicion prong, the extent and duration of the seizure must be weighed against the reliability of the information available to the police. Dionne v. State, 766 P.2d 1181, 1183 (Alaska Ct. App. 1989). In the imminent public danger prong, imminence and severity of danger were balanced to obtain a general quantum of necessity. Hubert v. State, 638 P.2d 677, 685-86 (Alaska Ct. App. 1981).

115. 769 P.2d 452 (Alaska Ct. App. 1989).

116. *Id.* at 453-54.

In ruling on the validity of the investigative stop, the court, as it had in *Coleman*, invoked Brennan's dissent in *Adams*. The court offered a new, limiting interpretation of Brennan's dissent, however, finding Brennan to have been primarily concerned with the extension of *Terry* to possessory offenses.[117] The court also noted that no prior case had been overturned solely because of the minor character of the underlying offense.[118] The court, noting that *Brown* should not be read too literally,[119] held that minor theft was sufficiently serious harm to property to justify a police stop.[120]

The *G.B.* court characterized *Coleman* as being concerned primarily with good faith police activity, noting that "the *Coleman* rule is ultimately rooted in common sense and practicality."[121] The court continued:

> In each case, compliance with *Coleman*'s requirement of recently committed serious harm must be evaluated with a view toward the fundamental concern of the *Coleman* court: the risk that an investigative stop based on mere suspicion may be used as a pretext to conduct a search for evidence. As indicated in *Coleman*, the fundamental inquiry in each case is whether "a prompt investigation [was] required . . . as a matter of practical necessity."[122]

The most significant result of *G.B.* and its progeny has been the transformation of *Coleman* from a two-part test to a case-by-case analysis for overall reasonableness. *G.B.* interpreted *Coleman* as "espousing a flexible approach based on practical necessity, rather than a rigid standard of categorical exclusion."[123] The court stated: "*Coleman* requires a determination of the issue based on the circumstances in each case. While the theoretical seriousness of the crime for which reasonable suspicion exists is a significant factor in each case, it is not in itself determinative."[124]

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117. *Id. Cf. supra* notes 34-35 and accompanying text extending *Coleman* to possessory offenses. Perhaps this statement by the *G.B.* court signals the reestablishment of a bright line test for possessory offenses.

118. *Id.* at 455. *But see* Waring v. State, 670 P.2d 357, 365-66 (Alaska 1983) (impression that "something was wrong" not enough to satisfy first prong of *Coleman*); Metzker v. State, 658 P.2d 147, 149 (Alaska Ct. App. 1983) (fails both prongs of *Coleman* test; moose poaching not adequately harmful).

119. "That is not to say that the *Coleman* standard categorically precludes all investigative stops based on reasonable suspicion of minor theft." *G.B.*, 769 P.2d at 455.

120. It was, apparently, not significant to the court that the officer did not know the magnitude of the theft until after the money had been recovered. *See id.* at 456.

121. *Id.*

122. *Id.* (citation omitted).

123. *Id.* at 455.

124. *Id.*

The *G.B.* court delineated a sliding scale which considered four factors: (1) the gravity of the threat to public safety; (2) the imminence of the threat; (3) the strength of the officer's suspicion; and (4) the intrusiveness of the investigative stop.[125] Thus, "[a] minimally intrusive stop based on solid information indicating that a crime is actually in progress or has just been completed may be justified under *Coleman* even when the crime itself is not a felony and involves harm that in other contexts might not seem particularly serious."[126]

The *G.B.* court disputed the notion that the *Coleman* prerequisite could ever be a "bright line." Rather, it held that the "imminent public danger or serious harm" standard required a case-by-case analysis in order to be justly applied. The court stated:

> The determination of the seriousness of harm to persons or property in any given case is inherently relative. . . . From one perspective, the line between misdemeanor and felony offenses may seem a sensible distinction between serious and nonserious harm; from another, the fact that the legislature has chosen to characterize certain conduct as criminal, subjecting offenders to incarceration, would require that the harm resulting from all such criminal conduct be deemed serious rather than inconsequential.[127]

The *G.B.* sliding scale of reasonableness thus differs from the narrow exclusion from probable cause which *Coleman* apparently advocated. The effect of *G.B.* is that the imminent public danger requirement, critical in the early interpretations of *Coleman,*[128] can now be easily balanced away in situations involving strong suspicion, although this cannot yet be done in situations of probable cause or minor intrusiveness. In this way, the Alaska doctrine is identical to the federal *Terry* doctrine.[129] The distinctive characteristic of imminent public danger is lost.

E. *G.B.*'s Flexible Approach

Recently, the Alaska Court of Appeals has followed *G.B.*'s flexible *Coleman* analysis rather than the categorical exclusion suggested by *Ebona.*[130] In *W. Gibson v. State,*[131] the police made an investigative

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125. *Id.* at 456.

126. *Id.*

127. *Id.* at 455.

128. *See supra* notes 80-90 and accompanying text.

129. *See infra* notes 154-165 and accompanying text. Both doctrines will allow generally reasonable activity. Although this is consistent with a literal reading of the reasonableness clause, it ignores the fact that the *Coleman* court limited what it considered reasonable.

130. Indeed, *G.B.* is cited almost every time *Coleman* is cited. *See, e.g.,* Gutierres v. State, 793 P.2d 1078, 1080 (Alaska Ct. App. 1990). *But see* State v. Kendall, 794 P.2d 114, 115 n.2 (Alaska Ct. App. 1990) (citing *Coleman* only to define investigatory stops; validity of stop not at issue).

stop based upon the reasonable suspicion that Gibson had just vandalized a pay telephone.[132] Applying *Coleman*, the court focused on the "sole issue . . . [of] whether the crime of vandalizing a pay telephone constituted imminent public danger or serious harm to property so as to justify the investigative stop."[133]

The *W. Gibson* court, however, did not actually confine its analysis to this question. Rather, the court held that *G.B.* was controlling and quoted extensively from that opinion.[134] The court then used a balancing approach to remove any doubts about the seriousness of the crime, noting that the crime had just occurred, the stop was minimally intrusive, and the potential for an abusive, pretextual search was minimal under the circumstances of the case.[135] The stop was thus held reasonable and valid.

As stated previously, the adoption of a case-by-case sliding scale is not necessarily a victory for either fourth amendment ideology.[136] Nevertheless, cases like *W. Gibson* suggest that the court of appeals has not strictly enforced the "imminent public danger or serious harm" factor, thus creating a sliding scale skewed toward the law enforcement goals. In light of recent decisions, it would be inappropriate to refer to the requirement for imminent public danger or serious harm as the *Coleman* "prerequisite" as was done in *Ebona*.[137] It is now more appropriately called the *Coleman* "factor."[138]

The recent case of *Hayes v. State* demonstrates this "prerequisite" misnomer.[139] In *Hayes*, the court affirmed the validity of an investigative stop based on a reasonable suspicion of outstanding traffic warrants — an offense not even the most law-and-order-minded citizen would consider an imminent public danger or serious harm.[140] The

131. 789 P.2d 383 (Alaska Ct. App. 1990). This case will be referred to as *W. Gibson*, to avoid confusion with *T. Gibson v. State*, 708 P.2d 708 (Alaska Ct. App. 1985). *See supra* note 105.

132. *W. Gibson*, 789 P.2d at 383.

133. *Id.*

134. *Id.* at 384.

135. *Id.*

136. *See supra* note 44 and accompanying text.

137. Ebona v. State, 577 P.2d 698, 701 (Alaska 1978). *See supra* note 82.

138. *See G.B.*, 769 P.2d 452, 455 (Alaska Ct. App. 1989). There may be two *Coleman* "factors" if imminence and severity of danger or harm are considered separately, as *G.B.* suggests. *Id.*

139. 785 P.2d 33 (Alaska Ct. App. 1990).

140. In *Hayes*, the police were dispatched to break up a loud party. One of the officers recognized Hayes, who was helping to disperse the party, from an arrest two years earlier. The officer remembered running a check two months earlier which had indicated Hayes' outstanding traffic warrants. The officer detained Hayes while he ran another check. During the detention, a tab of LSD fell out of Hayes' shirt. Hayes was charged with possession of a controlled substance. Hayes sought to suppress the LSD as the result of an illegal seizure. *Id.* at 35.

court once again quoted extensively from *G.B.*[141] and applied the four-factored balance. The court held that the stop was valid and satisfied the *Coleman* standard.[142] However, the court's balancing appears dubious. Only one factor weighed strongly in favor of validation — the relative lack of intrusion.[143] Degree of suspicion weighed lightly; it was based on a two-year-old identification and a two-month-old perusal of the warrant file.[144] The other two factors, imminence and severity of danger or harm, however, weigh heavily against the validation of the stop. Outstanding traffic warrants are hardly a serious harm or danger and there was no reason to believe that there was any imminent threat in this situation.

Moreover, the stop in *Hayes* seems inappropriate in light of the "fundamental inquiry" of "practical necessity."[145] It was not necessary to arrest Hayes at the party; it was merely convenient. It seems that the court must have considered other factors weighing in favor of the validity of the stop, such as the seriousness of the ultimate offense. Also, it may have been significant that Hayes had a prior felony conviction and was on probation at the time of the stop. However demonstrative of Hayes' true character these factors may have been, they have no place in an analysis which is supposed to examine the objective beliefs of the police officer at the time the contact is first made.[146]

The *Hayes* analysis is therefore one of generic reasonableness without special consideration for the *Coleman* factor. The investigative stop procedure which the court validated bears little resemblance to the limited police procedure described in *Coleman* and originally confined in case law to dangerous felonies.[147] True, the detention was minimally intrusive. It was, however, a *seizure*[148] and thus should have been subject to *Coleman*'s strict standards. The *Hayes* court thus

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141. *Id.* at 37.

142. *Id.*

143. Hayes was detained for only two minutes. *Id.*

144. *Id.* at 35. Note that suspicion may have been reasonable but not so much as to outweigh weaknesses in other factors.

145. *G.B.*, 769 P.2d 452, 456 (Alaska Ct. App. 1989). *See supra* note 129 and accompanying text.

146. The investigative stop must satisfy the *Coleman* criteria for the police officer's original purpose and suspicion.

> Although it is crucial for law officials to continue an investigation when suspicious facts warrant it, they cannot embark upon an investigatory course of action 'in hope that something might turn up.' The public has an interest in solving crime . . . [but] this laudable end does not outweigh [the accused's] constitutional right not to be unlawfully seized.

Waring v. State, 670 P.2d 357, 366 (Alaska 1983) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

147. *See supra* note 34 and accompanying text.

148. *Hayes*, 785 P.2d at 36.

blurred any bright line which may have existed between seizures and other, less intrusive, brief detentions.

Some other recent cases illustrate a similar lack of emphasis on the requirement of imminent public danger as a dominant factor in the investigative stop analysis. Although these cases purport to apply *Coleman*, they are more appropriately labeled "*G.B.* stop" cases.

In *Smith v. State*,[149] for example, the court of appeals held that driving while license suspended ("DWLS") was an adequate imminent public danger to satisfy the *Coleman* prerequisite. In *Smith*, a state trooper stopped Smith, the driver of "an automobile for which a 'locate' had been issued."[150] Upon learning that Smith was not the registered owner of the car, for which the locate order had been issued, the trooper continued to detain and investigate Smith, eventually learning that she was DWLS.[151]

The court included Smith's stop under the coverage of its broad *Coleman* doctrine. The court held that although DWLS does not always mean imminent public danger, DWLS can be enough on which to base a reasonable suspicion of imminent public danger.[152] This seriousness was demonstrated by the fact that the legislature had made DWLS a class A misdemeanor and not a minor traffic infraction.[153]

The problem with a legislative intent argument such as this is that it over-broadens the scope of *Coleman*. It could be argued that any criminal legislation is enacted to prevent public danger. Any statutory offense, except perhaps for the most innocuous, could be reasoned to be a sufficient basis for an investigative stop. Such a proposition runs counter to the language of *Coleman*. The *Coleman* court could easily have chosen terms like "crimes" or even "felonies." But it did not. To hold otherwise is substantially to ignore the requirement of "imminent public danger" or "serious harm."

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149. 756 P.2d 913 (Alaska Ct. App. 1988).

150. *Id.* at 914.

151. *Id.* at 915.

152. *Id.* at 915-16. After the officer learned that Smith was not the owner of the car, the "locate" on the automobile's owner was no longer the basis of the stop. The officer needed to establish an independent basis for Smith's investigative stop for the detention to continue. *See* Howard v. State, 664 P.2d 603, 610 (Alaska Ct. App. 1983) (quoting State v. Watson, 165 Conn. 577, 585, 345 A.2d 532, 537 (1973), *cert. denied*, 416 U.S. 960 (1977)). In *Smith*, Smith was detained because she was unable to produce her driver's license.

153. *Smith*, 756 P.2d at 916. The court found it dispositive that an officer may not know the reason for which the driver's license was suspended. The suspension possibly could have been for a serious driving offense like reckless driving and the driver's operation of the vehicle at any time "could then be" imminently dangerous. Thus, any suspicion of imminent public danger could in fact be reasonable. Such reasoning is consistent with the administration of *Coleman* as a single, fluid test, instead of as a bifurcated *Ebona* analysis.

The *Smith* court's neglect of *Coleman*'s definition of "reasonable" seizures is demonstrated by the following statement: "Little purpose would be served in requiring an officer . . . to confirm his reasonable suspicion . . . by postponing any action until probable cause can be obtained."[154] The purpose served would be that of protecting the constitutional rights of all people to be free from unreasonable seizures. This goal is the fundamental interest balanced against crime prevention activity in the investigative stop balance. However, instead of giving the *Coleman* factor preeminent consideration as was done in the early cases, the *Smith* court held that DWLS was potentially dangerous enough based on the fact that a driver's license could be suspended because of an inability to drive safely. Although this is a plausible conclusion under a generic reasonableness analysis, it is less consistent with *Coleman* reasonableness, which includes a special concern for the severity of the underlying conduct.

Ozhuwan v. State[155] illustrates that the *Coleman* factor has become a secondary consideration in the investigative stop analysis. In *Ozhuwan*, a police officer boxed in two cars legally parked in a campground area which was reputedly a common location for underage drinking.[156] During the seizure, the officer discovered cocaine in the possession of the defendant.[157] The court of appeals invalidated the stop based on lack of reasonable suspicion; it did not suggest that underage drinking might have been an inadequately severe offense to justify a stop in most situations.[158] It is possible, however, that under the totality of the circumstances, the suspicion would have been reasonable had it involved a more serious suspected offense.[159]

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154. *Id.* *Compare* this statement in *Smith* to those of the court of appeals in Peschel v. State, 770 P.2d 1144, 1150 (Alaska Ct. App. 1989), and Waring v. State, 670 P.2d 357, 366 (Alaska 1983), both of which are quoted *supra* note 113. *See also* State v. Geiger, 430 N.W.2d 346 (N.D. 1988) (defendant stopped for driving while license suspended). Justice Douglas warned in his *Terry* dissent that the investigative stop doctrine would become expansive at the expense of fourth amendment protections. *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) ("There have been powerful hydraulic pressures throughout our history that bear heavily on the court to water down constitutional guarantees and give the police the upper hand.").

155. 786 P.2d 918 (Alaska Ct. App. 1990).

156. *Id.* at 920.

157. *Id.*

158. *Id.* at 922.

159. The fact that the stop was not invalidated solely on the basis of the lack of severity of underage drinking as an offense demonstrates the apparent lack of significance of the *Coleman* factor. Underage drinking, a violation of Alaska Statute section 4.16.050.125, hardly seems like a *public* danger. Yet, the court focused its decision on the defect in reasonable suspicion. Compare the *Ozhuwan* court's analysis with that of the court of appeals in Metzker v. State, 658 P.2d 147 (Alaska Ct. App. 1983), which was decided under an *Ebona*-style two-pronged analysis. *Id.* at 149. The court found that both prongs of the test were not satisfied. Although the *Ozhuwan* court later

It is interesting to note how the court of appeals' treatment of the *Coleman* standard changed within the same opinion. After initially stating both the *Coleman* doctrine[160] and the *G.B.* test,[161] the *Ozhuwan* court modified the applicable inquiry with each restatement. The court restated the standard as both "suspicion of wrongdoing"[162] and "reasonable suspicion of criminality"[163] before holding that the stop was not, as *G.B.* requires, "a practical necessity."[164]

Coleman now stands as a doctrine to be cited and quoted by the courts but without any real effect on the generic reasonableness inquiry. Despite the language in *Coleman* that its procedure is limited to "certain cases,"[165] it now appears that any suspected illegal activity can be the basis for an investigative stop. Dangerous activities such as sexual assault, drug trafficking and burglary are joined by vandalism of a pay telephone, driving with a suspended license and outstanding traffic warrants.

V. CAN *COLEMAN* SURVIVE?

It may be too early, however, to completely relegate *Coleman* to the doctrinal graveyard. It is possible that the imminent public danger or serious harm element can be preserved as a significant factor in a case-by-case sliding scale even if it is not a strict categorical exclusion. To accomplish this, the courts must analyze this factor with precision and give it special weight in each case, respecting the fact that the

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stated that reasonable suspicion was absent, it initially and definitively holds that moose poaching is not a valid *Coleman* prerequisite. *Id.* at 149-50. *Ozhuwan* thus illustrates that courts are no longer as willing to address the imminent public danger even when it appears to be a susceptible target.

Although the court invalidated the stop in *Ozhuwan*, investigative stops based on reasonable suspicion of underage drinking are a fairly common procedure. *See, e.g.*, State v. Blount, No. 1 JU-S89-542 Cr (1st Jud. Dist. Juneau, filed July 28, 1989, dismissed by prosecutorial discretion Sept. 12, 1989); State v. O'Halloran, Case No. 1JU-S89-541 Cr (1st Jud. Dist. Juneau, filed Sept. 8, 1989) (motion to suppress dismissed on legality of arrest; investigative stop not addressed).

160. The *Coleman* doctrine prohibits investigative stops unless there is a "reasonable suspicion that imminent public danger existed or that serious harm to persons or property had recently occurred." *Ozhuwan*, 786 P.2d at 920 (citing *Coleman*, 553 P.2d 40, 46 (1976)).

161. "The fundamental inquiry is whether 'a prompt investigation [was] required . . . as a matter of practical necessity.' " *Id.* (quoting *G.B.*, 769 P.2d 452, 456) (Alaska Ct. App. 1989).

162. *Id.*

163. *Id.* at 922.

164. *Id.*

165. *Coleman*, 553 P.2d at 46. For an additional example see Miller v. Dept. of Motor Vehicles, 761 P.2d 117 (Alaska 1988), in which a *Coleman* stop investigating "threats" was deemed valid.

Coleman court considered it an integral requirement of "reasonableness."

The *Coleman* factor of imminence was helpful in invalidating an investigative stop in *Allen v. State*.[166] The main defect of the stop was its reliance on an anonymous and unverifiable tip, a basis which weakened the strength of the reasonableness of the suspicion.[167] However, the court also held that it was significant that harm was not imminent. The court stated: "There was nothing to suggest that police could not have observed the subject's vehicle in order to corroborate some of the details of the informant's claim without endangering the public."[168]

Allen is significant in that the court even considered whether there was any imminent threat in the commission of minor or victimless offenses.[169] This was uncommon in previous decisions even though imminence is necessarily a factor which a test based on practical necessity should consider. Thus, consciously preserving the *Coleman* factors in the sliding scale may help ensure that a true test of practical necessity prevails.

VI. CONCLUSION

The *Coleman* standard for investigative stops will never be the categorical exclusion it might have become. Instead, with the pronouncement of a flexible standard in *G.B.* and subsequent applications of the multifactored balance, the police may perform investigative stops when there is suspicion of virtually any illegal activity. The Alaska doctrine is thus, in practice, no more restrictive than the federal doctrine.

It is possible that *Coleman* can survive as a factor in a sliding scale analysis. However, even if a court does consider the factors of imminent public danger or serious harm to persons or property, it is likely to find the factors of reasonableness of suspicion and proportionality of intrusion as more determinative than the other factors of the *G.B.* balance. As it stands, the *G.B.* doctrine, calling for a test of practical necessity and generic (not *Coleman*) reasonableness, prevails. As applied, the test is generally permissive toward police behavior and only secondarily concerned with article 1, section 14 protections. A

166. 781 P.2d 992 (Alaska Ct. App 1989).

167. *Id.* at 994.

168. *Id.* In *Allen*, the court used the following test: "The imminence and nature of the danger presented by the conduct being investigated must be evaluated in light of (1) the strength of an officer's reasonable suspicion and (2) the actual intrusiveness of the investigative stop." *Id.* at 993. The *Allen* court also cautioned against using a stop as a pretext for an evidence search. *Id.*

169. Compare *Allen* with the stop in *Smith*, *supra* notes 153-55 and accompanying text.

proper reading of *Coleman*, at least until it is explicitly and completely overruled, requires that the imminent danger and harm factors be specifically considered and given special weight in the reasonableness analysis.

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