July 2015

Has the Replacement of "Probable Cause" With "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?

Robert Berkley Harper

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: https://ideaexchange.uakron.edu/akronlawreview

Part of the Criminal Law Commons

Recommended Citation
Available at: https://ideaexchange.uakron.edu/akronlawreview/vol22/iss1/2

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
HAS THE REPLACEMENT OF "PROBABLE CAUSE" WITH "REASONABLE SUSPICION" RESULTED IN THE CREATION OF THE BEST OF ALL POSSIBLE WORLDS?

by

ROBERT BERKLEY HARPER*

INTRODUCTION

Kathryn Weiland was assaulted and battered by four men who broke into her apartment in a Philadelphia hotel. They stole five hundred dollars and a lamp. A hotel security officer observed four individuals run through the lobby of the hotel. He had no idea at the time that someone in the hotel had been robbed. He saw the men only for a few seconds as they ran out of the hotel. He noted that one individual was wearing a dark blue coat and that he had unusual facial features which distinguished him from the other men. There is no evidence that the security guard witnessed the crime or what description the victim gave him. Yet, he notified the police that a crime had been committed by an individual with a dark blue coat and an odd shaped head. An officer on the streets received this information from the radio dispatcher. Shortly after the receipt of the information, the officer observed an individual wearing a blue coat and with an unusual appearance due to his facial bone structure. This occurred on the public street within one-half hour of the incident at the hotel. Would this be enough information for a police officer to detain this individual to investigate this past crime?1

Justice Sandra Day O'Connor, writing for the majority of the Supreme Court in a 1985 opinion stated "[i]t is in the public interest that the crime be solved and the suspect detained as promptly as possible." 2 The Court held that law enforcement interest in solving crimes and bringing offenders to justice outweigh the individual's right to be free of a stop and detention based upon the constitutional standard of probable cause.3 This decision follows a long line of court decisions that have resulted from the public out-cry for a "war on crime." 4 Courts are re-evaluating the balance between the interest of society in controlling crime and

---

* B.S., University of Pittsburgh (1962); J.D., University of Pittsburgh School of Law (1971); Professor of Law, University of Pittsburgh.

1 These facts are derived from the case of Commonwealth v. Lumb, 288 Pa. Super. 11, 430 A.2d 1188 (1981). Although the Court found probable cause to arrest the defendant, it stated "[the] description of the appellant which was very distinctive, and which description provided them with sufficient information upon which a trained police officer could base a reasonable suspicion necessary to justify the 'intermediate response' of taking the appellant to the hotel for an identification procedure." Id. at 17, 430 A.2d at 1191.

2 United States v. Hensley, 469 U.S. 221, 229 (1985). Justice Brennan filed a brief concurrence indicating his approval of the Court's application of the Terry exception as used in this case. Id. at 236.

3 Id. at 229.

4 As Professor Yackle stated: "the Burger Court recognizes that the rising crime rate that plagues modern American life generates widespread public demand for efficiency in the criminal justice system." Yackle, The Burger Court and the Fourth Amendment, 26 U. KAN. L. REV. 335, 429 (1978).
maintaining order versus individual rights and privacy rights. Public opinion polls clearly indicate that the majority of Americans want to encourage police officers to investigate criminal activity at all stages: past, present and future. In granting greater authority to law enforcement personnel to take a more active role in investigating criminal activity, there has been a proportional decline in the zone of individual privacy that is protected by the Bill of Rights.5

The tension between liberty and order is a continuing theme in American political thought and practice. In contemporary American life, this conflict constantly arises between individuals asserting constitutional and other rights and governmental authority seeking to limit those rights in order to promote public welfare.6 The nature of the conflict is particularly striking in the criminal justice field when, on the one hand, the asserted government interest at stake is no less than the safety of society and, on the other hand, the individual accused of crime seeks to interpose constitutional safeguards — such as the fourth amendment — to avoid conviction by the suppression of evidence.7 Since the days of the “Warren Court,” there has been a propensity to criticize Supreme Court decisions, especially those in the area of criminal procedure and defendant’s rights. But solicitous students of the fourth amendment recognize the difficulty of the Court’s task in dealing with this conflict.8 The underpinnings of the perceived Court’s shortcomings in the area of defendant’s rights versus the protection of society lies in the fact that interpretation of the fourth amendment is inevitably a political task, a fact not always recognized by critics who deplore the lack of clear and consistent decisions and well-crafted opinions.9 Balancing conflicting interest in society does not always lead to “bright lines” standards in court decisions.

On this, the twentieth anniversary of Terry v. Ohio,10 it is an appropriate place

5 Any major intrusion of a citizen by governmental officials would come within the protection of the fourth amendment which 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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

U.S. Const. amend. IV. Justice Frankfurter observed, “[t]he security of one’s privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society.” Wolf v. Colorado, 338 U.S. 25, 27 (1949).


7 This is because evidence illegally obtained cannot be introduced into evidence at the defendant’s trial due to the “exclusionary rule.” “The debate within the Court on the exclusionary rule has always been a warm one.” United States v. Janis, 428 U.S. 433, 446 (1976). In this opinion, Justice Blackmun provides extensive citation to the voluminous literature on the effects (if any) of the exclusionary rule. Id. at 447-53 & nn.18-25. Recently the Court has adopted a “good-faith” exception to this rule in United States v. Leon, 468 U.S. 897 (1984).

8 Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) (lack of clarity of Court’s fourth amendment decisions reflects complexity of the task facing the justices).


10 392 U.S. 1 (1968). Terry was argued on December 12, 1967 and decided on June 10, 1968.
to begin our discussion. Justice Douglas, dissenting in *Terry*, warned that “[t]here 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.”  

*Terry* and the many cases modifying it reflect the continuing strength of those pressures. Prior to *Terry*, probable cause was the standard required for conducting searches and seizures by law enforcement officials. In 1968, in the landmark *Terry* decision, the Court gave approval to the long-standing police practice of “stop and frisk,” thus permitting police officers to search for weapons on less than probable cause. The majority in *Terry* intended their holding to be a narrowly interpreted exception to the probable cause standard in that it would apply only in situations in which there was danger from weapons to law enforcement personnel. However, the *Terry* holding has been expanded to many areas where there is little, if any, danger to law enforcement officials.

Recent history has demonstrated that the *Terry* standard has been enlarged whereby law enforcement officials may now detain and question citizens for investigation when suspicious circumstances exist. The Supreme Court has currently placed an emphasis on the reasonableness clause in defining fourth amendment requirements for a constitutional intrusion. In fact, the Court has expressly adopted the *Camara* balancing test to determine the appropriate standard of reasonableness for all cases of limited detentions. Is the interest of society best served by replacing the probable cause standard by the lesser standard of

---

11 *Id.* at 39.

12 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 (1886), 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 offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, . . . it is the invasion of [this] sacred right.”


14 The practice of frisking was recognized at common law, and was an established practice well before *Terry*. See L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 45-48 (1967) [hereinafter cited as L. TIFFANY].

15 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).

16 This expansion began in *Adams v. Williams*, 407 U.S. 143 (1972) where the officer’s suspicion concerned the suspect’s possible commission of crimes consisting of possessing items — possession of drugs and possession of a prohibited weapon.

17 See infra notes 98-127 and accompanying text.


19 New Jersey v. T.L.O., 105 S. Ct. 733, 740 (1985) where the court stated that “[t]he determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’” *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).
“reasonable suspicion” whereby assisting law enforcement officers in investigating crime and detecting criminals?

Police officers sometimes need flexibility to respond appropriately to a variety of factual situations confronting them in street encounters. It is a huge task to promulgate a set of rules which will be flexible enough to cope with the enormous variations in police-citizen encounters, but which at the same time, the police can easily and effectively apply. It is not the purpose of this article to criticize the court’s efforts in this area. It is the purpose of this article to evaluate investigatory stops by police officers as they perform their duties with this lesser standard than probable cause. The paper will trace the erosion of probable cause under the fourth amendment resulting from recent decisions of the United States Supreme Court and the rise of reasonable suspicion as the standard for investigatory stops. This is followed by a discussion of several important United States Supreme Court cases that have replaced the probable cause standard with that of a modified Terry reasonable suspicion standard. The main thesis of this article is that “reasonableness” as a standard for limited detention of citizens is appropriate in certain circumstances, but the wholesale elimination of the probable cause standard will inevitably result in an over-all disservice to society.

THE TRADITIONAL REQUIREMENT OF PROBABLE CAUSE

The Reagan Administration’s theme relating to the administration of justice has maintained an emphasis on “strict construction” of the Constitution. The Administration’s view has been clearly espoused by Attorney General Edwin Meese, III that students of the law should be taught the writers’ intent as to Constitutional meaning and not the court’s interpretations of the Constitution. Given this long standing mandate of the Reagan Administration, it is appropriate to consider the founders’ perspective of the fourth amendment. Through the fourth amendment, the United States Constitution guarantees to all citizens the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The language of the fourth amendment does not provide a remedy for violations that may occur. This has resulted in the establishing of the “Exclusionary Rule.” See Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U.L.Q. 621 (1975); Kamisar, Is the Exclusionary Rule an “Illogical” or “Unnatural” Interpretation of the Fourth Amendment?, 62 JUDICATURE 66 (1976); Yackle, supra note 4, at 337 (footnote omitted).

20 “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).


22 There are many police/citizen encounters that fall outside of the protection of the fourth amendment. This is a subject outside the objective of this article. For a discussion of police/citizen encounters that fall outside fourth amendment protection, see Murphy, Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification, 1986 ARIZ. ST. L.J. 207 (1986).

23 Address by Attorney General Designate Edwin Meese III, Association of American Law School, Washington, D.C. (January 1985). This is in contrast to Professor’s Yackle statement “no one seriously contend these days that the Court can recreate the conditions of 1791, ascertain the ‘intent of the framers,’ and resolve the case at hand consistent with the ‘original understanding.’” Yackle, supra note 4, at 337 (footnote omitted).

24 The language of the fourth amendment does not provide a remedy for violations that may occur. This has resulted in the establishing of the “Exclusionary Rule.” See Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U.L.Q. 621 (1975); Kamisar, Is the Exclusionary Rule an “Illogical” or “Unnatural” Interpretation of the Fourth Amendment?, 62 JUDICATURE 66 (1976); Yackle, supra note 4.
the Bill of Rights because the motivation behind its enactment has been well established.\textsuperscript{25} The amendment was adopted to insulate citizens, both innocent and guilty, from unreasonable and unwarranted government intrusions into their personal privacy.\textsuperscript{26}

The limitation resulted from the familiarity of the framers of the Bill of Rights with the abuses of general warrants and Writs of Assistance in England and in the American colonies prior to the American Revolution.\textsuperscript{27} These writs were issued by the British government, without any requirement of a showing of probable cause, in order for their officers to search any place suspected of concealing smuggled goods to avoid the tax laws.\textsuperscript{28} The writ, as well as the general arrest warrant, were left blank, whereby officers could arrest and search individuals on mere suspicion.\textsuperscript{29} The widespread abuse of this process by officers of the Crown has been credited as one of the major catalysts behind the American Revolution that resulted in independence.\textsuperscript{30}

One authority has stated that “the framers . . . were not at all concerned about searchers without warrants.”\textsuperscript{31} They were unconcerned with warrantless searches only because such searches simply did not occur in their world with nearly the frequency with which they occur in ours. This is because the few law enforcement officers in colonial times, including the King’s customs inspectors, did not have the broad inherent authority to search or seize that today’s police officers possess. Colonial law enforcement officers required specific authorization of a search, and the writ system was used primarily to confer that authority on them.\textsuperscript{32} Without such authority, colonial law enforcement officials were, like any citizen, liable at common law for trespass, assault, conversion, and false imprisonment.\textsuperscript{33}

By contrast, today’s law enforcement officers have sweeping powers to detain, search and seize citizens. Officers under oath\textsuperscript{34} have powers to arrest that

\textsuperscript{25} "The Fourth Amendment . . . was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures" carried out in England and in the colonies. J. LANDYNSKI, SEARCH & SEIZURE AND THE SUPREME COURT 20 (1966). It is considered one of the most essential constitutional guarantees of liberty and personal security. Boyd v. United States, 116 U.S. 616 (1886).

\textsuperscript{26} Trupiano v. United States, 334 U.S. 699, 709 (1948).


\textsuperscript{28} Boyd, 116 U.S. at 625.

\textsuperscript{29} Henry v. United States, 361 U.S. 98, 100 (1959).

\textsuperscript{30} James Otis pronounced the writ to be “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book. . . .” Boyd, 116 U.S. at 625 (quoting Cooley’s Constitutional Limitations, 301).

Referring to the famous debate in which the above statement was made, John Adams reflected that “then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” Id.

\textsuperscript{31} T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1969).

\textsuperscript{32} J. LANDYNSKI, supra note 25, at 31-32.


\textsuperscript{34} This refers to “traditional police” or public police employed by state and local governments and agencies.
are greater than that of common law officers. These powers are rarely properly controlled by either statute or regulation mainly because regulations and statutes are ill defined and thus cannot effectively proscribe improper police conduct. Also, common law limitations no longer apply in many circumstances. Thus, police officers act without mechanisms of restraint in many police-citizen encounters, unless the protection of the fourth amendment is extended to these situations.

The fifty-four words of the fourth amendment absolutely proscribe unreasonable searches and seizures while at the same time establishing standards for the issuance of search and arrest warrants. As one historian has put it, the amendment "has the virtue of brevity and the vice of ambiguity." Particularly important, and unclear, is the relationship of the "warrant clause" to the overall impact of the amendment. One view holds that the two clauses are distinct; the warrant clause addresses only those searches and seizures conducted under warrants, and says nothing about when a warrant is necessary, or about what factors can make a search or seizure reasonable. This view holds that the fourth amendment prohibits only unreasonable searches that are not based on probable cause, not searches made without a warrant. The relevant test is not whether it was reasonable or possible to have secured a warrant, but "whether the search itself was reasonable." The second view holds that the second clause explains the first; fourth amendment reasonableness turns on the presence of a validly issued warrant, except in certain specified or exceptional situations where it would not be feasible to require the police to obtain a warrant before they act. No matter

who have full police powers, and who are responsible for enforcing all state and local laws within their territorial jurisdiction. Kakalik and Wildhorn call these traditional police "public police" and define them to include "police employed by local agencies of government, such as cities and counties, who have full peace-officer status and are responsible for enforcing all state and local laws in their jurisdiction." I. J. KAKALIK & S. WILDHORN, PRIVATE POLICE IN THE UNITED STATES (1972) (prepared by Rand Corporation for United States Department of Justice).

Certain searches and seizures conducted today are reasonable whether or not they are founded on any suspicion or are conducted arbitrarily. These include search incident to arrest, routine border searches, and routine inspections at sea. See United States v. Ramsey, 431 U.S. 606, 619 (1977) (border searches); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to arrest). Although vessels at sea are private property, they may be searched without violating principles of reasonableness. The Supreme Court has held that the boarding of a vessel without articulable suspicion in waters with access to the open sea does not violate the fourth amendment. United States v. Villamonte-Marques, 462 U.S. 579, 593 (1983).


J. LADYNISKI, supra note 25, at 46.

Franks v. Delaware, 438 U.S. 154 (1978). See also S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 37 (2d ed. 1984) ("the theory of the fourth amendment is large part the theory of the warrant clause").

Wasserstrom, supra note 33, at 281.


Wasserstrom, supra note 33, at 281; the leading proponent of this view, Justice Frankfurter, put it this way: "with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant." Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting). See also Rabinowitz, 339 U.S. 56, at 70 (Frankfurter, J., dissenting) ("search is unreasonable unless a warrant authorizes it, barring only exceptions justified by absolute necessity").
which view is accepted, probable cause is the mainstay of the amendment.\textsuperscript{43}

According to the text of the fourth amendment, warrants must be based on probable cause. In the vast majority of cases in which the search or seizure does not fall within one of the exceptions to the warrant requirement, probable cause still remains the required level of suspicion.\textsuperscript{44} The protection was considered so important that it is included in most state constitutions.\textsuperscript{45} Even without state constitutional provisions, the Supreme Court has determined that the fourth amendment is applicable to state governments as well as to the federal government through operation of the due process clause of the fourteenth amendment.\textsuperscript{46} Probable cause must be present before an officer of the government can search and seize citizens. The Supreme Court has defined probable cause as "reasonable ground for belief of guilt [which is] . . . less than evidence which would justify condemnation" or conviction.\textsuperscript{47} This is a standard that requires much more than bare suspicion,\textsuperscript{48} but must be based upon an objective standard.\textsuperscript{49} Often courts will cite the reasonable man test to determine probable cause where "the facts and circumstances within the . . . [officer's knowledge] are sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.\textsuperscript{50}

Although the fourth amendment has resulted in more litigation than any other provision of the Bill of Rights in recent years,\textsuperscript{51} the Supreme Court has considered

\textsuperscript{43}See Wong Sun v. United States, 371 U.S. 471 (1963). The requirement that a warrant be issued only on probable cause flows directly from the warrant and probable cause clause of the fourth amendment. When warrants are not required, searches and seizures are judged under the first clause of the fourth amendment — people are secure "against unreasonable searches and seizures." U.S. CONST. amend. IV. But in Wong Sun the Court reasoned that to allow the reasonableness of a warrantless arrest to be judged by anything less than probable cause would mean that "a principal incentive now existing for the procurement of . . . warrants would be destroyed." Id. at 479-80. Thus probable cause was the standard in all instances.

\textsuperscript{44}New Jersey v. T.L.O., 105 S. Ct. at 743-44 (1985).

\textsuperscript{45}E.g., PA. CONST. art. 1, § 8.

\textsuperscript{46}The exclusionary rule, made applicable to federal courts in Weeks v. United States, 232 U.S. 383 (1914), and to the states in Mapp v. Ohio, 367 U.S. 643 (1961), has been described as putting teeth into the fourth amendment. See LaFave, Improving Police Performance Through the Exclusionary Rule Part I: Current Police and Local Court Practices, 30 Mo. L. REV. 391 (1965).


\textsuperscript{48}Brinegar, 338 U.S. at 175. Armentano, The Standards for Probable Cause Under the Fourth Amendment, 44 CONN. B.J. 137, 144 (1970) states that the only certain assertion of probable cause is that it "lies somewhere between bare suspicion and proof of guilt beyond a reasonable doubt."


\textsuperscript{50}Carroll v. United States, 267 U.S. 132, 162 (1925). Carroll first articulated this Supreme Court standard which upheld a warrantless search of a vehicle with probable cause.

\textsuperscript{51}Two events dramatically increased the flow of search and seizure cases to the Supreme Court. One was the adoption of the exclusionary rule, and the other was the ratification of the eighteenth amendment. Yackle,
the probable cause requirement in a relatively small number of cases. Consequently, the probable cause issue has been an unsettled area of jurisprudence. The "highwater mark" for the standard of probable cause was in Johnson v. United States, where the Court held that officers who detected opium smoke emanating from a hotel room had sufficient probable cause to search the room without first obtaining more information to secure a warrant. The Court stated that the government agents did not know whether there were several persons in the room or the one defendant, thus probable cause was not present. The Johnson rationale soon fell into disfavor primarily because many governmental activities could not comport with this traditionally rigid probable cause requirement. 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.

THE "SLIDE" FROM PROBABLE CAUSE

The Court's Use of "Balancing"

As stated earlier, prior to 1967, all searches and seizures not based on probable cause were unconstitutional. The reasonableness clause had been used to excuse the absence of a warrant, but not the lack of probable cause. The Court first modified the probable cause standard in Camara v. Municipal Court while reviewing the constitutionality of a San Francisco health and safety ordinance. In order to permit routine housing safety inspections based on less than probable cause, the Court adopted a test of balancing the government's need to search against the intrusiveness of the search. This case gave the Court its first occasion to employ a balancing test in determining fourth amendment violations. The decision resulted in holding that a governmental unit could use a lesser standard

52 Sibron v. New York, 392 U.S. 40, 74 (1968) (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." Id.
54 333 U.S. 10 (1948).
55 Id.
58 The purpose of the requirement is well stated by Justice Rutledge in Brinegar v. United States, 338 U.S. 160, 176 (1949): "These long prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection . . . Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers whim or caprice."
59 The Court had stated, "In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court [he had] probable cause." Carroll v. United States, 267 U.S. 132, 156 (1925).
60 387 U.S. at 523.
61 Id. at 536-37.
for administrative inspections. Camara in effect replaced probable cause with a reasonableness standard for administrative inspections by a balance of societal interests and needs versus a slight invasion of individual privacy.

The city of San Francisco is noted for its beauty and cleanliness. To insure that all residences conform to health and safety standards, an ordinance was passed which authorized city employees to make annual health and safety inspections of all personal residences without a warrant and without probable cause to believe that a specific violation existed. The searches were to be conducted in every house, regardless whether authorities had evidence of a specific violation — a procedure that local officials argued was necessary because violations were not detectable from the outside. Camara challenged this ordinance on constitutional grounds and the case was appealed to the Supreme Court of the United States for a final determination.

This case provided the Court with occasion to resolve two important issues: (1) whether such inspections must be conducted pursuant to a warrant; and, (2) what grounds are needed to undertake such inspections. On the warrant issue, the majority held that unconsented housing inspections could ordinarily be conducted only pursuant to a search warrant. However, utilizing the balancing test, the Court rejected the claim that such a warrant requires “probable cause to believe that a particular dwelling contains violations . . . .” Instead of a strict probable cause standard, factors such as the passage of time, the nature of the building, or the condition of the entire area, could be considered to furnish cause to justify the issuance of a warrant. The Court reached this lesser standard by “balancing the need to search against the invasion which the search entails.”

In Camara, the Court avoided the rigidity of the per se probable cause rule by remodeling the concept of probable cause. Rather than taking the standard to mean a reasonable belief that a violation had been committed, the Court defined probable cause as the standard of suspicion that reasonably justified the official procedure in light of the public’s interest and the offensiveness of the practice. In other words, so long as the degree of suspicion was reasonable — whatever its strength — toward a particular person, the Court would consider it probable

---

62See LaFave, supra note 57, at 55.
63The ordinance provided that “[A]uthorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the City to perform any duty imposed upon them by the Municipal Code.”
65Id. at 538.
66Id. at 534.
67Id. 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.
cause. Applying this standard, the Court held that area-wide searches conducted pursuant to a legislative or administrative scheme were reasonable regardless of whether there was particularized probable cause.69

Camara and its progeny changed the "what" of probable cause from the limited and objective question of whether a search will produce seizable items to the determination of whether a search is productive in a broader sociological sense.70 The test that resulted for a permissible search became whether "a valid public interest justifies the [particular] intrusion contemplated [by the authorities]."71 More importantly, this departure in Camara laid the foundation for Terry v. Ohio,72 the first Supreme Court case to sustain a search and seizure on less than probable cause that resulted in a criminal conviction.73

Camara represents the genesis of the Court's balancing approach where the "balancing" considered the public interest in housing inspections against the fourth amendment privacy interest of citizens. The language of balancing makes the process of decision making sound much easier and much more rational and objective than it is in fact. To understand the Camara decision it would be most enlightening to consider the Court's rationale in the case.

The Court's justification in Camara was threefold: the history of public and judicial acceptance of housing inspections; the public interest in code enforcement; and the limited nature of the invasion.74 In support of its first point, the Court had little authority to support its position because judicial decisions in this area are sparse. Indeed, there had been very few cases that addressed this issue. With respect to the "public interest in code enforcement" aspect, the Court is unwittingly suggesting that there is a greater public interest in housing code enforcement than there is in crime detection. With respect to the final factor relating to the limited nature of the invasion, the Court may be suggesting that the invasion is limited because the investigation is noncriminal, or because drawers and papers probably do not need to be searched. Under any of the factors, there is little support for the result reached by the Court.

The Court's analysis in Camara is the reverse of what one usually expects to encounter: Instead of beginning with a fixed notion of what probable cause means and then concluding that probable cause plus a warrant (or a sufficient ex-

69 Id. at 538. The court in See v. City of Seattle, 387 U.S. 541 (1967), a companion case to Camara, applied identical reasoning to hold that administrative searches of business premises were permissible without probable cause to believe a specific code violation existed.
70 Bacigal, supra note 49, at 777.
71 Camara, 387 U.S. at 539.
72 392 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, supra note 57, at 58.
73 Terry was formally charged and convicted of carrying a concealed weapon which was affirmed in State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).
74 The Court made provision for so-called administrative warrants not based on particularized showings of traditional probable cause.
gency) makes a search reasonable, the Court begins with a notion of what is reasonable and concludes that the notion of reasonableness must be sufficient to meet the probable cause standard. One scholar has stated that the Camara holding is regarded as the beginning of the fall of the traditional monolithic view of the fourth amendment.

*Terry v. Ohio: The Seminal Case*

Prior to 1968, the requirement of probable cause was the minimum court-approved standard which police officers could use to seize a person. A valid arrest could only be made on the basis of probable cause. However there have always been situations within the scope of a police officer’s duties that demand swift action predicted upon on-the-spot observations by the patrolling officer to stop and frisk individuals. Historically, these actions have not been, and as a practical matter could not be, subject to the warrant procedure. “Stop and frisk” refers to the time-honored police procedure of stopping suspicious persons for questioning on less than probable cause to arrest and, when necessary, searching them for dangerous weapons for the protection of the officer involved. By 1968 several states had authorized their police officers to stop and frisk suspicious persons. The Supreme Court decided the constitutionality of this issue by granting certiorari to James Terry who had been convicted of carrying a concealed weapon discovered as a result of a “frisk” conducted in Cleveland, Ohio.

The facts in *Terry* create a strong factual argument that probable cause was present, but the Supreme Court stated that it would not decide the case on the issue of the presence of probable cause. *Terry* gave the Court an opportunity to validate the investigative tool of stop and frisk, which permitted a limited search of an individual for weapons despite a lack of probable cause on the part of the police officer. The Court made it clear that a stop and frisk is a search within the mean-

---

76 Brinegar v. United States, 338 U.S. 160 (1949). The Supreme Court found probable cause to exist where the facts and circumstances within the officer’s knowledge are sufficient justification for a reasonable man to believe a crime has been committed. *Id.* at 175-76 (citing Carroll v. United States, 267 U.S. 132 (1925)). The fourth amendment probable cause standard represents the best compromise for reconciling the opposing interests of protecting citizens from unreasonable intrusions and the enforcement of the law. *Id.* at 176.
77 LaFave, *supra* note 57, at 40-47.
79 The conviction was affirmed by the Ohio court of appeals, State v. Terry, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966) and an appeal to the Ohio Supreme Court was dismissed.
80 *Terry*, 392 U.S. at 20. In *Terry*, a plainclothes policeman observed three men who appeared to be casing a store for a hold-up. *Id.* at 5. When the officer approached the men and asked what they were doing, one of the suspects “mumbled something.” *Id.* at 6-7. Suspecting imminent danger, the officer grabbed the defendant, spun him around, patted down the outside of his clothing, and discovered a concealed weapon. *Id.* at 7.
81 In its formal sense a frisk involves contact or patting of the outer clothing of a person to detect by sense of touch whether a concealed weapon is being carried. If, during the course of a justifiable stop, the officer reasonably fears for his own, or another’s safety he may conduct a limited pat-down of the detained person’s outer clothing to discover and remove weapons. *Id.* at 26-28.
ing of the fourth amendment, but nevertheless sanctioned its use on less than probable cause. The standard enunciated by the Court was the reasonableness of the action under the totality of the circumstances; the officer must be able to point to specific and articulable facts from which he can conclude, and more importantly, from which a reasonable man could conclude, that an intrusion is warranted. The Court stated that the officer may draw upon specific, reasonable inferences from the situation in light of his experience to determine if his suspicions justify a search.

The Terry Court applied a balancing test to determine the reasonableness of the governmental actions, balancing governmental interest in crime detection and officer safety against the individual’s right to personal security and freedom from arbitrary governmental interference. The Court concluded that “there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer” in spite of the absence of probable cause. Hence, the Court’s decision clearly demonstrates that reasonableness has replaced probable cause as the standard required to justify an intrusion where that intrusion qualifies as a protective frisk for weapons.

Writing for the majority, Chief Justice Warren stated the revolutionary new exception to probable cause was to be applied only in very limited circumstances.

82 Id. at 16.
83 Id. at 30-31. The Court stated:

[Where a police officer observes unusual conduct which leads him reasonably to 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, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

84 Id. at 27-28.
85 In balancing the two interests, the Court stated that a court must “focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen,” for there is “no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.” Id. at 20-21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967) (brackets in original)). The balancing process weighs three factors: the public interest of the intrusion, the extent of the intrusion into one’s privacy, and the extent the intrusion advances public interest. See Brown v. Texas, 443 U.S. 47, 50-51 (1979); Delaware v. Prouse, 440 U.S. 648, 654 (1979).
86 Terry, 392 U.S. at 27. The court justified this exception on the grounds that the detention is less intrusive than an arrest, and the search is necessary to protect the officer’s safety. Id. at 22-27.
87 Although never expressly used by the Terry majority, “reasonable suspicion” became the term associated with the quantum of evidence that the Court found necessary to conduct a stop and frisk. The term “reasonable suspicion” was first used by Justice Harlan in his concurring opinion in Sibron v. New York, 392 U.S. 40 (1968), a companion case to Terry. Justice Harlan said: “Under the decision in Terry a right to stop may indeed be premised on reasonable suspicion and does not require probable cause . . . .” Id. at 71 (Harlan, J., concurring). See Landynski, supra note 78, at 181 & n.115.
88 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 constitu-
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." Moreover, Chief Justice Warren reiterated for the Court that the protections created by the fourth amendment must be preserved by stating that the police "must, whenever practicable obtain advance judicial approval of searches and seizures." The Terry holding was a practical solution to the daily dangers faced by law enforcement officers on the streets of our major cities throughout the United States. The holding that a stop and frisk can be predicted on less than probable cause is an important attempt to provide the necessary tools to minimize those dangers faced by law enforcement personnel as they fight "street crimes."

The Terry Court 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. Despite the narrow scope the Terry Court gave to the reasonable suspicion standard and its apparent intention to limit the exceptions to situations where immediate action is required, 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.

The Burger court has taken advantage of the exception to probable cause which the Warren Court opened in Terry v. Ohio to exempt a widening variety of intrusive police conduct from the probable cause requirement of the fourth amendment. It has effectively substituted for probable cause the less rigorous standard of general reasonableness to grant police officers authority to stop, frisk and question citizens. The Burger Court has extended the use of "balancing" the cost of the intrusion to the individual interest in privacy and security against its benefits.

90 Id. at 29.  
92In Dunaway v. New York, 442 U.S. 200 (1979), the court iterated that Terry does not go so far as to allow a suspect to be picked up, taken to the station, and questioned without probable cause.  
93Terry, 392 U.S. at 45.  
94Professor LaFave suggests that Terry is only applicable to those situations in which the police must take immediate action. See 3 LAFAVE, SEARCH AND SEIZURE, § 9.3(b) at 431-32 (1987).  
96There is not doubt that the Rehnquist court will continue this trend.
to the societal interest in preventing and detecting crimes. Almost invariably, the Court has concluded that the interest in effective law enforcement predominates thus resulting in upholding challenged conduct by citizens as being "reasonable" law enforcement activity. 97

The Trend Continues

Although Terry was concerned solely with the constitutionality of investigatory stops, 98 its holding has been utilized to justify investigative detentions as well. In Adams v. Williams. 99 Mr. Justice Rehnquist, speaking for six members of 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. 100 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. 101 Heroin subsequently was found in the defendant's possession. The Adams Court indicated that an officer is not restricted to a choice between a valid probable cause arrest and inaction which may "allow a crime to occur or a criminal to escape." 102 Instead, an officer having an adequate basis for suspecting that a crime has occurred or will occur may adopt an "intermediate response" by making "a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information . . . ." 103 The Adams Court extended the Terry balancing test by applying it to investigative detentions relating to on-going crimes, even those crimes not requiring immediate action.

Adams dealt with the propriety of a police officer's search of an individual whom he reasonably believed to be carrying a weapon. The limited protective search at issue, however, was more intrusive than the public street encounter "stop and frisk" at issue in Terry. In Adams, the defendant was in his car away from the public. The officer reached into the car to remove the weapon from the person of the defendant. Therefore, the actions taken by the officer constituted a greater privacy intrusion than a mere stop and frisk. The majority reasoned, however, that brief detention of an individual to obtain more information may be reasonable in light of all circumstances. 104 Reading Adams in the background of Terry, one clearly sees that the Court has extended Terry from its original purpose of crime

---

97 Wasserstrom, supra note 33, at 264.
98 Terry, 392 U.S. at 29. Specifically, the Court stated: "We need not develop at length . . . the limitations which the Fourth Amendment places upon a protective seizure and search. These limitations will have to be developed in the concrete factual circumstances of individual cases." Id.
100 Adams, 407 U.S. at 145.
101 Id.
102 Id. The Adams Court stated: "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 escape." Id.
103 Id. at 146-46 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
104 Id. at 146-48.
prevention and protection of the officer to that of crime detection as well.\textsuperscript{105}

The Adams Court noted that the tip received by the officer failed to provide him with probable cause.\textsuperscript{106} 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."\textsuperscript{107} The extension in Adams of reasonable suspicion to unverified informant's tips have permitted lower federal and state courts to further expand the reasonable suspicion standard by using it to validate searches promulgated by informant's tips from unverified, and thus often unreliable sources.\textsuperscript{108} This holding has effectively undermined the Terry limitation that reasonable suspicion would only justify a search in dangerous situations, and therefore, has encouraged aggressive and possibly abusive police actions that the probable cause requirement would otherwise bar.\textsuperscript{109}

Adams permits police officers to carry out investigative seizures for the purpose of detention and interrogation.\textsuperscript{110} The Court held that a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."\textsuperscript{111} Consequently, after Adams, the Terry standard has been applied to the detention of suspects in the investigation of on-going crimes. According to the reasonable suspicion standard developed in Terry and applied in Adams, a police officer is justified in stopping an individual for interrogation on the basis of "specific and articulatable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."\textsuperscript{112} Reasonable suspicion is raised by actions that, although apparently innocent in themselves to the untrained observer, could be interpreted by the officer, in light of his experience, to merit further investigation.\textsuperscript{113} But detention

\textsuperscript{105} The Adams Court quoted: "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." \textit{Id} at 145.

\textsuperscript{106} \textit{Id}. at 147. Justice Rehnquist concluded: "[T]he Court's decisions indicate that this informant's unverified tip may have been insufficient for an . . . arrest or search warrant." \textit{Id}.

\textsuperscript{107} The majority noted three factors that were present to create 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. \textit{Id}. at 146.


\textsuperscript{109} 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 protection of the Fourth Amendment." \textit{Id} at 39 (Friendly, J., dissenting).

\textsuperscript{110} The Terry Court stated: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19 & n.16.

\textsuperscript{111} Adams, 407 U.S. at 146.

\textsuperscript{112} Terry, 392 U.S. at 21.

\textsuperscript{113} \textit{Id}. at 27.
must be based upon the investigation of current criminal activity.\textsuperscript{114}

The erosion of the probable cause standard of the fourth amendment was further extended in United States v. Brignoni-Ponce.\textsuperscript{115} In Brignoni-Ponce, a nighttime border patrol, looking for illegal aliens, stopped a car that was heading north about sixty-five miles from the Mexican border.\textsuperscript{116} The Court evaluated the stop on the basis that 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.”\textsuperscript{117} Rather than characterizing the stop of the vehicle as a fourth amendment “seizure,” thereby having to focus on whether the stop was based on probable cause, the Court balanced the public interest of preventing illegal aliens from entering the country\textsuperscript{118} against the intrusion on individual freedom. The Court 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.\textsuperscript{119} By holding that an investigative stop on less than probable cause was permissible, the Brignoni-Ponce Court officially recognized that a Terry “seizure” based on reasonable suspicion was applicable in situations where there is no physical danger to the police or public. Again, the court was concerned with current or future crimes, which limits police investigation to situations requiring immediate action on their part.

The Brignoni-Ponce holding can be viewed as a windfall for law enforcement officials without a great disservice to individual freedoms. The seizure was permitted upon the officer’s subjective assessment of personal and other characteristics, as well as the character of the area, which was a location where the immigration laws were often circumvented.\textsuperscript{120} This decision was a harbinger to future modifications of Terry because the immigration officials were in reality investigating a past crime, i.e. illegal entry in the United States, not illegal presence.\textsuperscript{121} This expansion of the reasonable suspicion standard to non-violent past crimes is a powerful law-enforcement tool that will increase the power of

\textsuperscript{114}Brief investigative stops must be based on the totality of circumstances if “the detaining officers . . . have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” United States v. Cortez, 449 U.S. 411, 417-18 (1981).


\textsuperscript{116}Id. at 875.

\textsuperscript{117}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).

\textsuperscript{118}Brignoni-Ponce, 422 U.S. at 881. The Court noted that the tremendous flow of illegal aliens in this country is a “significant economic and social problem.” Id. at 878.

\textsuperscript{119}Id. at 878, 880. The Court stated that the “intrusion is modest. The Government tells us that a stop by a roving patrol ‘usually consumes no more than a minute.’” Id.

\textsuperscript{120}The Terry Court authorized the police officer to assess the situation in light of his experience. 392 U.S. at 30.

\textsuperscript{121}The test applied by the Court for determining the constitutionality of the automobile stop in the case was the reasonable suspicion rationale of Terry. Probable cause or reasonable suspicion is not needed for searches
border patrol officials to stop and arrest illegal aliens. However no decision has granted law enforcement officers the power to stop and investigate as was granted in the case of United States v. Hensley.

THE HENSLEY DECISION

Since the appointments of Warren Burger as Chief Justice of the Supreme Court in 1969 and Justice Rehnquist in 1972, the Court has had a fixation on the importance of the defendant being guilty as the basis for deciding cases. The Court’s special attention to the defendant’s factual guilt is expressed in their concern for crime control and their case-by-case, fact-specific style of jurisprudence. The Burger Court really cares about the facts of the case and that this particular guilty person not be set free. This is clearly seen in United States v. Hensley.

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later a St. Bernard police officer interviewed a witness who stated that Thomas J. Hensley had driven the getaway car after the armed robbery of the tavern. The girlfriend of the brother of one of the alleged robbers gave this information. She stated that her boyfriend’s brother said that he and another had robbed the tavern and that Hensley had driven the getaway car. The investigating officer decided that he did not have probable cause to arrest Hensley, but the St. Bernard Police Department issued a flyer stating that if seen, Hensley should be stopped “for investigation only” regarding the robbery. This flyer was sent to police departments in the Cincinnati metropolitan area.

An officer of the Covington Police Department, another Cincinnati suburb, observed Hensley on December 16, 1981 and told him to move his vehicle that had been stopped in the middle of the street. As Hensley drove away, the officer inquired by radio whether there was an outstanding warrant for Hensley’s arrest. Two other officers hearing this radio call remembered that Hensley was wanted...
by some department, but they could not recall which department and for what reason. The officers, within a short period after hearing the message stopped Hensley and a companion. The officer approached Hensley’s car with his service revolver drawn and pointed into the air. One officer had Hensley and the passenger seated next to him step out of the car and place their hands on the trunk of the car until back-up units arrived. When the back-up unit arrived on the scene, a third officer observed the butt of a revolver protruding from underneath the passenger’s seat. The officer arrested the passenger and conducted a search of the entire vehicle. A second handgun wrapped in a jacket in the middle of the front seat and a third handgun in a bag in the back seat were found. After these weapons were found, Hensley was placed under arrest for weapons offenses.

At trial, Hensley argued that the guns were inadmissible evidence because they were obtained during an illegal search. He also argued that the St. Bernard police, by their own admission, believed that they lacked probable cause to arrest based on the informant’s statement, and therefore, that the Covington officers’ arrest violated the flyer’s directive to detain Hensley “for investigation only.” The United States District Court for the Eastern District of Kentucky, however, ruled that the informant’s statement constituted probable cause for Hensley’s arrest. The Court, therefore, admitted the guns into evidence resulting in the conviction of Hensley for possession of a firearm by a convicted felon.

The Court of Appeals for the Sixth Circuit reversed the trial court and held that Hensley had been illegally arrested. The Court found that probable cause was not present as the lower court decided. They also found that the officers in the case were not justified in making a Terry stop of Hensley because the Supreme Court had limited the Terry exception to the investigation of “ongoing crimes.” The Sixth Circuit distinguished Hensley from Terry and its progeny, noting that at the time of Hensley’s arrest, there was an absence of exigent circumstances justifying the Covington officers from detaining Hensley. The court also held that the St. Bernard flyer lacked sufficient information to create a reasonable suspicion in the minds of the Covington officers to warrant their Terry stop of Hensley. In addition, the Court refused to apply the “collective knowledge” doctrine because the two departments were not directly working together in the investiga-

---

128 The officer testified at trial that he feared for his safety while making the stop. 713 F.2d at 222. It’s interesting to note that the officer through his direct testimony stated that he was not sure that a warrant was outstanding for Hensley because he stated that in the absence of a warrant, he intended to release Hensley. Id.
129 Id. at 221.
130 Id. at 222.
131 Id.
132 Id.
134 713 F.2d at 225.
135 Id. at 224.
tion. 137 The Sixth Circuit, therefore, concluded that the illegality of the Covington officers’ arrest precluded the admissibility of the guns seized during the stop. 138 The Supreme Court granted certiorari to determine whether officers may stop and briefly detain a person, for whom a wanted flyer has been issued, and check whether there is also a warrant outstanding for the person’s arrest. 139

The Supreme Court held that the flyer justified a nonarrest detention of Hensley to check this identification, to “pose” questions, to tell him that the other department wished to question him, and to check to determine whether an arrest warrant had been issued. 140 The Court took little notice that the Covington officers might have intended to detain Hensley for an unreasonable time period or even transport him improperly to the station house. The Court characterized as “irrelevant” the length of the detention or other factors by summarily dismissing them. 141 Justice O’Connor’s opinion for a unanimous Court 142 concluded “[W]hat matters is that the stop and detention that occurred were in fact no more intrusive than would have been permitted an experienced officer on an objective reading of the flyer.” 143 The detention lasted only a brief period before the officers developed grounds for and made an arrest on the weapons charge; from that point on, Hensley’s detention was pursuant to the arrest.

Hensley’s language appears to adopt the post hoc approach for fourth amendment analysis; the facts of the case are important to the Court in arriving at their decision. The Court expressly rejected — without discussion of alternatives or rationales and without citing any authority — the proposition that the officers’ intention controlled or even that it was relevant. One could conclude that the officers could have detained Hensley as long as they thought was necessary, even though a reasonable person would have believed that he was under arrest in the situation. The Court paid no attention to how Hensley perceived or could reasonably have perceived the nature of his detention. 144 The Court assumed, “arguendo,” that the St. Bernard police who issued the “wanted flyer” on Hensley lacked probable cause for his arrest. 145 The Court’s only concern was whether the police officer’s actions were appropriate or “reasonable” under the circumstances.

137 Id. at 223. The combined information by the two departments did not give the officers probable cause to act. This is to say that the second department had no information to add to that given by the first department, thus there was no “collective knowledge.”

138 Id.

139 Hensley, 469 U.S. at 223.

140 Id. at 234.

141 Id.

142 Justice Brennan filed a brief in concurrence. Id. at 236.

143 Id. at 234-35.

144 This can be explained in part by the failure of the briefs to address the issue. The Government sought review on two grounds, both of which assumed that the detention was a Terry stop. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 469 U.S. 221 (1985).

145 The Court stated that “no party contends that the St. Bernard police had probable cause to arrest Hensley.” Id. at 235.
It’s interesting to note that the Court focused on the extent to which the detention directly served the state’s interest in crime prevention.\textsuperscript{146} The Court relied on preventive detentions as an apparent benchmark.\textsuperscript{147} But \textit{Hensley} is a post-offense detention situation. Since the offense had been completed, there are many investigatory methods available to police officers besides that of detention. No such alternatives exist in a preventive situation as was the case in \textit{Terry}.\textsuperscript{148} Thus the Court has granted officers greater freedom in the area of detentions that may lead to a high risk of abuse. In addition, this matter left open by \textit{Terry} is too complex and too important to be resolved without direct consideration of its merits. Nevertheless, the Court concluded that post-offense detentions sufficiently serve the interest of society to justify the intrusion upon citizens’ privacy interests.\textsuperscript{149}

The Court’s holding is very broad. “\textsl{If police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion.}”\textsuperscript{150} Where the police have been unable to locate a person suspected of involvement in a past crime, the officer now has the authority to briefly stop that person, ask questions, or check identification in the absence of probable cause.\textsuperscript{151}

Thus, the Court in expanding the \textit{Terry} doctrine held that this exception to the probable cause requirement is equally applicable to both the investigation of completed felonies and the investigation of future or ongoing crimes.\textsuperscript{152} The \textit{Hensley} Court based its conclusion on the opinion given in several earlier decisions, including \textit{United States v. Cortez}\textsuperscript{153} and \textit{United States v. Place}.\textsuperscript{154} In \textit{Cortez}, the Supreme Court noted, in dicta, that an officer may stop and investigate a suspect if there are reasonable grounds to believe that the suspect was involved in past criminal activity.\textsuperscript{155} Similarly, in \textit{Place}, the Court held that an officer may stop and question a person if the officer has a reasonable, articulable suspicion that the person was engaged in criminal activity.\textsuperscript{156} Neither case is direct authority for the Court’s broad holding in \textit{Hensley}.

The Court in \textit{Hensley} set forth a balancing test to grant the extended authority

\begin{footnotes}
\item[146] \textit{Id.}
\item[147] See \textit{id.} at 228.
\item[148] 392 U.S. 1 (1968).
\item[149] \textit{Hensley}, 469 U.S. at 229.
\item[150] \textit{Id.}
\item[151] The Court stated, “We need not and do not decide today whether \textit{Terry} stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a \textit{Terry} stop may be made to investigate that suspicion.” \textit{Id.}
\item[152] \textit{Id.} at 229, 236.
\item[155] \textit{Hensley}, 469 U.S. at 227 (citing \textit{United States v. Cortez}, 449 U.S. 411, 417 & n.2 (1981)).
\item[156] \textit{Id.} (quoting \textit{Place v. United States}, 462 U.S. 696, 702 (1983)).
\end{footnotes}
to law enforcement officers in their investigations of completed felonies.\textsuperscript{157} That
test, based on the fourth amendment's reasonableness standard, weighs the quality
and nature of the intrusion of an individual's right to privacy against the govern-
ment's interest in solving crimes and bringing offenders to justice.\textsuperscript{158} The Court
held that when a reasonableness analysis is applied to the investigations of com-
pleted crimes, probable cause need not always be present to justify an investiga-
tion.\textsuperscript{159} Accordingly, the Court held that where the police have a "reasonable suspi-
cion grounded in specific and articulable facts"\textsuperscript{160} that a person they encounter
was involved in or is wanted in connection with a completed felony,\textsuperscript{161} the strong
governmental interests in apprehending the offender and solving the crime allow
the police to make a brief stop of the person for questioning and to check his iden-
tification.\textsuperscript{162} The Court did not define what a "brief" stop is nor the extent of ques-
tioning that might take place. Officers have been granted greater authority in street
encounters without giving appropriate limitations on this new found authority.

\textbf{HENSLEY'S EXPANSION OF THE TERRY DOCTRINE}

\textit{The Expansion Will Not Necessarily Promote More Felony Arrests or Foster Interdepartmental Reliance}

Of utmost importance at common law was the immediate apprehension of
criminals. Because there were no organized police networks to apprehend
criminals, a fleeing felon who was not immediately apprehended, usually escaped
ultimate arrest. The apprehension process under the common law was formalized
by the "hue and cry,"\textsuperscript{163} an arrest procedure by which an alarm was raised upon
the commission of any felony. This practice originated in 1285 during the reign
of Edward I, when persons were known throughout the community and were easi-
ly identified and pursued. When a "hue and cry" was raised, every person had
to aid in the pursuit of the felon, or be subjected to liability.\textsuperscript{164} If the felon was
able to evade the individuals chasing him on horse or on foot, he would be able
to escape apprehension altogether.

How persuasive is the argument today that if police are not granted greater
power to detain citizens, certain criminals will evade arrest altogether? In assessing

\textsuperscript{157} Id. at 228.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 229.
\textsuperscript{161} Id. The Court declined to extend its holding to all completed crimes. Rather, it restricted its application
only to the most serious crime classification felonies. The Court stated that, "[p]articularly in the context
of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved
and the suspect detained as promptly as possible." \textit{Id.}
\textsuperscript{162} Id.
\textsuperscript{163} "Hue and Cry," under old English law, refers to the loud outcry with which robbers, burglars, and murderers
were pursued. All who heard the outcry were obliged to join in pursuit of the felon. \textit{See} 4 W. BLACKSTONE,
\textit{Commentaries} 293.
\textsuperscript{164} \textit{See} Comment, \textit{Deadly Force to Arrest: Triggering Constitutional Review}, 11 \textit{Harv. C.R.-C.L. L. Rev.} 361,
365 (1976).
the strength of this argument, one must evaluate law enforcement’s alternatives.165

The common law rationale requiring an immediate arrest has been undermined severely by the development of organized law enforcement systems at the state and the federal levels.166 These groups generally cooperate and form an effective nationwide police network. With increasing technical and scientific sophistication in law enforcement techniques, the likelihood that a known felon will escape ultimate apprehension has been reduced substantially.167 This is especially true in fact situations like that in the Hensley case. The defendant was known to the officers and was driving a registered vehicle on the highways of the state. One could question the necessity of stopping and detaining Hensley at the time it occurred.

In 1979, the national police-population ratio was 2.1 police officers per thousand citizens and a total of 2.5 police employees, including civilian employees, per thousand.168 From 1979 to 1984 there has been a decrease in crimes in cities of all sizes in the United States.169 There has also been an increase in the expenditures for police protection from $15,163,000 in 1980 to $34,707,000 in 1982.170 Police work is big business in the United States, with a large portion of the budgets of cities going to the work of public safety. Society has progressed greatly from the days of the “hue and cry” for today police departments have a wide spectrum of resources to apprehend criminals. The officers could have easily followed Hensley and his companion in order to give them time to receive complete information of the other police department’s interest in Hensley. By following proper procedure, a valid arrest would be made in appropriate situations.

The second issue the Supreme Court addressed in Hensley was the justification underlying the stop of an individual by officers of one police department in reliance on a flyer issued by another department stating that the individual was wanted for investigation for a felony.171 In Hensley, the Supreme Court employed the interdepartmental reliance standard which serves the governmental interest of effective law enforcement. Interdepartmental cooperation increases the likelihood that crimes will be solved and offenders brought to justice. The Hensley Court exhibited high regards concerning these governmental objectives in stating that, in an age when criminals have ready access to transportation and are likely to flee the investigating department’s jurisdictional boundary, interdepartment-

165 Justice Burger pointed out in United States v. Sharpe, 470 U.S. 675 (1985) "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.” Id. at 687.


170 U.S. Bureau of Justice Statistics, Justice Expenditures and Employment Extracts, annual.

171 469 U.S. at 229.
However, of utmost importance in Hensley is that the original officer decided that he did not have cause to arrest the defendant, nor was an arrest warrant issued within two weeks following the issuing of the "wanted flyer." The department’s order to hold Hensley for investigation extends police authority to a greater degree than has been recommended or granted by courts, legislatures or legal scholars. By following Hensley and relating the information of his location to the original police department, thus permitting them to act, interdepartmental reliance would have been better served. Reliance must be based on reasonable action which does not seem to be the case in Hensley.

The detention in Hensley was of such a nature that its length could possibly have extended for a long period of time because the detaining officer could not locate the department from which the flyer originated. Instead of fostering greater professional reliance, this decision may well increase unprofessional police activities. Departments investigating citizens’ conduct with less than probable cause may seek other departments to carry-out their investigations for them. The Hensley decision seems to grant the investigating department greater authority due to the information received than the authority possessed by the initial department. This new grant of authority may permit unprofessional officers to circumvent constitutional restraints.

The Expansion Will Permit Police to Engage in Unprofessional Conduct

It does not seem to be in society’s interest to relax constitutional standards to enable police officers to detain citizens for criminal investigations of past crimes. Wholesale relaxation of constitutional probable cause will deter law enforcement officers from searching for more efficient ways to conduct criminal investigations. Society should encourage officers to find better ways to perform criminal investigation. An example of modern police practices developed to ferret out criminals without hindering the rights of innocent citizens occurred in United States v. Place, which held subjecting luggage in a public place to a drug sniffing dog is not a search within the meaning of the fourth amendment. A trained

---

172 Id. at 231.
173 713 F.2d at 222.
174 The Uniform Arrest Act authorizes the detention of a person who an officer has adequate grounds to believe “is about to commit” an offense (cited in Warner, The Uniform Arrest Act, Va. L. Rev. 315, 344 (1942)). This terminology was adopted by the Model Code of Pre-Arraignment Procedure, Model Code of Pre-Arraignment Procedure § 110.2(i)(a)(i) (Final Draft 1975). In jurisdiction where the authority to make nonarrest investigatory detentions is derived from case law, the authority is often stated in a manner that grants the right to investigate on-going and future crimes. E.g., Cortinas v. State, 571 S.W.2d 932, 933 (Tex. Crim. App. 1978) (“A police officer may detain a person temporarily for investigative purposes where the circumstances reasonably indicate that the person either has or is preparing to commit a crime.”) (Emphasis added).
police dog can detect illegal drugs without revealing anything that an innocent citizen may wish to keep private. Here is a procedure that will benefit innocent citizens because drug smugglers will be deterred if they are aware of the dogs, or caught if they are not aware of them.\(^{178}\)

Today, we have a new breed of police officers who receive a large percentage of training in crime control subjects.\(^{179}\) Today, police officers are usually an able and gregarious group with social ideals, better than average physical prowess and rather conventional outlooks on life, including normal aspirations and self-interest.\(^{180}\) Officers must be given direction to lead to more effective law enforcement by promoting professionalism, and enhancing democratic values. Making their job easier by granting greater freedom to engage in investigation for past crimes will not foster greater professionalism nor develop more effective and efficient criminal investigation techniques.

When police officers stop citizens to investigate past crimes, they are basing their decisions on highly subjective standards. This has in essence eliminated the reasonable man standard for nonforcible, though intrusive, searches and seizures. When courts are confronted with such stops, they must give conclusive weight to the subjective decisions of the police officers, in total disregard of the substantiating evidence deemed significant in prior cases.\(^{181}\) Often officers' perceptions of events can be affected by their job-related values and expectations.\(^{182}\) Researchers have asked police officers and lay observers to watch films that portray people engaging in somewhat ambiguous behaviors, and to report the number of suspected crimes they identify as having been committed. They have found that when viewing such films the trained officers tend to err, and err more consistently in finding that crimes have been committed, then do the lay observers.\(^{183}\) Findings such as this have led one authority to conclude that "the police are more likely than civilians to misinterpret events because of their training and past experience,"\(^{184}\) which is directly contrary to the operative assumptions about the deference owed police judgments concerning reasonable suspicion.

It's important to note that the first officer to contact Hensley permitted him to drive away prior to inquiring whether there were outstanding warrants against him.\(^{185}\) The vehicle was stopped and the officer could have made an inquiry prior

---


\(^{179}\) Police training on a nationwide scale is a relatively recent practice in the United States. It was not until the end of the sixties that the nation took a realistic view of criminal justice and the role of the police. See Attorney Gen. First Ann. Rep. Federal Law Enforcement and Criminal Justice Assistance Activities 42 (1972).


\(^{182}\) Acker, Social Science and the Criminal Law, 23 CRIM. LAW BUL. 49, 58 (1987).

\(^{183}\) Tickner & Poulton, Watching for People and Actions, 18 ERGONOMIC 35 (1975) (cited and discussed in A. Yarney, The Psychology of Eyewitness Testimony 159-60 (1979)).

\(^{184}\) A.D. Yarney, supra note 183, at 160.

\(^{185}\) 713 F.2d at 222.
REASONABLE SUSPICION

Summer, 1988]

Reckless to approaching him. Proper police practice would seem to dictate that such an inquiry should have been made prior to the officer contacting Hensley and asking him to move. When the second group of officers approached Hensley after hearing the inquiry over the radio, they stopped Hensley and approached the vehicle with their weapons drawn and requesting a backup unit without knowing the nature or reason for the stop and detention. Thus, the stop could be classified as based on "unfound" suspicion and not reaching the level of reasonable cause. This case may be giving the wrong signal to police officers for it is permitting them to act first and ascertain the true facts later which is just the opposite of the constitutional standard.

Zealous officers often do not grasp that the point of the fourth amendment is not that it denies law enforcement the judgment as to when a stop or detention is valid. Its protection requires that a neutral and detached magistrate draw those inferences instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Law enforcement officers must understand that it is their duty to uphold the law and not view court cases as exceptions whereby they may invade the rights of citizens.

The Expansion Will Result in Increased Police/Citizen Confrontations

There is a positive side to increased police activity in nonarrest investigatory detentions. A recent study using data from sixty residential neighborhoods in three metropolitan areas found that the rate of investigatory stops by officers had a "strong negative effect" on the rate of robberies and a greater, although not stable effect on auto theft and vandalism rates. Although it is impossible to specify precisely what effect the use of nonarrest detentions has upon various offenses, there is at least some empirical reason to believe that investigatory stops have an anti-crime impact. Their availability as law enforcement techniques may be considered a matter of considerable importance.

But society should do all that is within its power to reduce unpleasant or frightening confrontations between citizens and police officers. With increased investigatory power, police will more often confront citizens and seek permission to search personal possessions as well as their persons. The frightened citizen will likely perceive that he will be detained and thus most citizens will consent. It must be recognized that the purpose of the fourth amendment is not to limit ef-


188 Id. at 403. The study also showed that there were negative but small effects on the rates of burglaries and thefts from autos. Id.

189 In United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977), the court reviewed the consent statistics for the E.E.A. drug courier enforcement program. "Of the 77 searches in which illegal drugs were found, the agents identified twenty-six consent searches. Forty-three searches were non-consensual. Illegal contraband was seized in all cases in which consent was not given and a search was made. In fifteen to twenty-five consent searches, agents did not uncover any contraband drugs." Id. at 539.
fective crime detection that has no impact on the right of privacy of citizens, but to protect citizens’ expectations of privacy where that expectation is legitimate. Once one’s legitimate expectation of privacy is breached, the entire society will suffer.

It is the lower strata of society that will be greatly impacted. Research suggests that while the police do tend to detain and arrest blacks at a higher rate than they do whites with whom they come into contact, it is probable that race, in itself is not the explanatory factor. It is more likely that poverty and low socioeconomic status, with which race tends to be associated, figure importantly into the police detention and arrest decision. It is thus in poorer neighborhoods, where the police presence is likely to be greater, where the citizens demeanor toward the police may be interpreted as offensive, and where the people with whom the police interact generally lack resources and other indicia of social power, that the police are less likely to refrain from stopping citizens for investigation.

_Hensley_is a good example of the type of citizen/police confrontation that should be avoided. Aggressive police action of pulling citizens over in vehicles, ordering them out of their cars, and holding them at gunpoint, will no doubt have a negative impact in minority communities. Also, this was a case of armed police and armed citizens, thus shooting could have resulted. In cases of urban shooting, often innocent citizens are injured or killed; therefore, this type of confrontation may result in a disservice to society at large. More importantly is the fact that Hensley was not arrested or convicted for the crime for which he was stopped. Police officers may gleam from _Hensley_ the fact that they can stop citizens to investigate past crimes and find evidence of other crimes.

Of utmost importance is the right of privacy protected by the fourth amendment that is at issue. A high-crime area is also somebody’s home. Just as the inhabitants of high-crime areas may be the victims of (or participants in) crime, they may also entertain the same desires for privacy, and to be free from unlawful

---


191 Thomas & Fitch, _supra_ note 190, at 87.


194 713 F.2d at 222.

195 Three guns were found in Hensley’s car. _Hensley_, 469 U.S. at 224-25.

196 One of the judges in the Court of Appeals hearing _Adams v. Williams_ before it reached the Supreme Court urged that stops not be permitted for “possessory” crimes. He stated: “There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true.” _Williams v. Adams_, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting).

197 _Katz v. United States_ held that the fourth amendment protects “the privacy upon which [the individual] justifiably relied.” 389 U.S. 347, 353 (1967).
interference with their activities, as do the residents of other parts of the city. The
general question, then, is whether the largely public lifestyle that is forced on ghet-
to dwellers receives the same measure of fourth amendment protection extend-
ed to the more private lifestyles available to affluent persons.198

As Justice Brennan pointed out in his dissent in Illinois v. Gates199 "words
such as ‘practical,’ ‘nontechnical,’ and ‘common-sense,’ as used in the Court’s
opinion, are but code words for an overly permissive attitude toward police prac-
tices in derogation of the rights secured by the Fourth Amendment." 200 In
response, Justice Rehnquist countered that "[t]he task of this Court, as of other
courts, is to ‘hold the balance true,’ and we think we have done that in this case." 201
"Holding the balance true," of course, requires an accurate assessment of the in-
terest of society to be balanced. The granting of increased power to investigate
may be counterproductive to the interest of a large segment of society. Those in
the lower stratum will lose fourth amendment privacy protections due to the cur-
rent expansion of Terry-type detentions.

Justice Rehnquist further stated in Gates: "[T]he most basic function of any
government: to provide for the security of the individual and of his property." 202
Yet the very purpose of the fourth amendment strictures are to impede law en-
forcement in order "to provide for the security of the individual and his proper-
ty." Both society at large and the individual are victimized when one’s property
or security is unjustifiably invaded by either police officers or criminals. "[T]he
permissibility of a particular law enforcement practice is judged by balancing its
intrusion on the individual’s Fourth Amendment interests against its promotion
of legitimate governmental interests." 203 Society has an unquestionable need for
police officers to be free of excessive inhibitions in the detection of criminals.
However, increased power for police to investigate should only be given in those
rare situations where there is a threat of irreversible physical danger to society
requiring unfettered and immediate police action. The investigation for past crimes
may not be such a situation.

The Expansion of Terry to Past Crimes Will Lessen Judicial Supervision and
Control

Since 1972 in Adams v. Williams,204 the Burger Court has created a hierar-
chy among defendants’ constitutional rights.205 At the bottom of the hierarchy is

198 Acker, supra note 182, at 53.
199 462 U.S. at 290.
200 Id. at 290 (Brennan, J., dissenting).
201 Gates, 462 U.S. at 241.
202 Id. at 237 (citations omitted).
204 407 U.S. 143 (1972).
the fourth amendment right prohibiting unreasonable searches and seizures. The majority of the justices have demonstrated some confusion about the purpose of the right itself and considerable skepticism about its remedy — exclusion.\textsuperscript{206} Thus, the Court has begun to blur some of the formerly well established rules with a new call for analysis of subtle factual differences. The Court gives lip-service to a balancing analysis because the broad interest of society will always supersede those of the individual thus validating the search and/or seizure that results.\textsuperscript{207} The constitutional expectation of privacy cannot keep the door closed when society knocks, because, when looked at in a broad sociological sense, the interest of the individual must be subordinate to those of society.\textsuperscript{208} What has resulted is an unclear standard for lower courts to follow in deciding the majority of street detention cases. It is the expressed responsibility of the judicial branch of the United States government to interpret the Constitution, and in particular, the standard of cause for governmental intrusions.\textsuperscript{209}

Supreme Court decisions have made clear that the judgment of a police officer in determining whether to seize\textsuperscript{210} persons suspected of engaging in criminal activity is entitled to considerable deference. The tone of the opinions indicate that because the variables at play are so numerous in "stop" situations,\textsuperscript{211} and the circumstances so rapidly changing and threatening,\textsuperscript{212} that the judiciary should be reluctant to second-guess the judgment of a trained officer of the law. This is clearly seen in the Court's discussion of "reasonable suspicion" where it stated:

[T]he essence of all that has been written is that the totality of the circumstances — the whole picture must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

\textsuperscript{206} Id.
\textsuperscript{208} Katz v. United States, 389 U.S. 347 (1967).
\textsuperscript{209} "Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-418 (1981). See also United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Mendenhall, 446 U.S. 544, 563 (1980) (Powell, J., concurring); Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion); United States v. Sharpe, 470 U.S. 675 (1985).
\textsuperscript{210} "Obviously, not all personal intercourse between policeman and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 & n.16 (1968).
\textsuperscript{211} "No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us." Terry v. Ohio, 392 U.S. 1, 15 (1968). See also Brinegar v. United States, 338 U.S. 160, 175-176 (1949).
\textsuperscript{212} It is now clear that the protection rationale does not limit the permissible grounds for the police to make a "stop;" the police may make investigative seizures, for example, when reasonable suspicion exists to believe that possessory and other nonviolent offenses are being committed. See United States v. Sharpe, 470 U.S. 675, 689 & n.1 (1985) (Marshall, J., concurring in the judgment); Place v. United States, 462 U.S. 696 (1983); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972).
The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior. . . . [T]he evidence thus collected must be seen and weighted not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.213

Judicial deference to the judgment of trained police officers in making judgments to stop and question individuals should be indulged only cautiously. In fact, a strong argument can be made for a heightening of the degree of scrutiny to be given by judicial officers.214

Hence, the absence of objectivity in the standard of review has inhibited the ability of reviewing courts to scrutinize effectively the scope of the governmental intrusion and to protect the fourth amendment interest of persons detained. The ultimate effect of this change that has taken place has caused an increase in the number of confrontations between police officers and citizens. Most of the encounters will never be brought to the attention of the courts due to the absence of criminal conduct on the part of the citizen accosted.215 Thus, in the case of most encounters, the intrusive conduct of the police will escape the supervision and control of the judiciary.

Occasionally, an encounter will lead to an arrest and a court will be faced with the issue of whether the defendant's fourth amendment rights were violated so as to necessitate application of the exclusionary rule. In most cases the use of prior criminal reports will enable the officer to justify his conduct by reference to a general criminal investigation.216 Because the officer will be judged by a subjective standard, whatever his explanation, he often will be able to circumvent the obstacle presented by the fourth amendment.217 The Court's new standard will encourage police officers to stop and question innocent citizens to collect information.218 An unethical police officer may reasonably expect to succeed in justi-
fying an illicit detention or arrest merely by claims that he received a dispatch that a person was wanted for questioning concerning some past crime.\textsuperscript{219} Once stopped, evidence found in the form of contraband can be admitted into evidence against the citizen under the "plain view" doctrine\textsuperscript{220} even if the evidence is located in the interior of the vehicle and the officer needs a flashlight to expose the evidence\textsuperscript{221} or the evidence is discovered in the glove compartment when opened at the officer’s request.\textsuperscript{222} Officers will be permitted to set up roadblocks whenever they wish to look into a glove compartment and accomplish that objective by asking for the driver’s registration.\textsuperscript{223}

Finally, the adoption of this increased scope permitting officers to investigate past crimes may encourage officers, in the absence of more favorable alternatives, to justify their conduct by urging the court to find that, once stopped, the defendant consented to the intrusion.\textsuperscript{224} In addressing preliminarily the issue of consent, the court may never reach the issue of the reasonableness of the invasion. Because the law does not require willing consent, but only the absence of overt coercion,\textsuperscript{225} the lesser standard with its easily justified initial stop, is particularly sensitive to abuse in this regard. Once again the judicial control of police officer’s action will be effectively diminished.

The importance of the fourth amendment cannot be underestimated. It is primarily through the fourth amendment that we as a society can govern our police, instead of our police governing us. As Anthony Amsterdam said:

"I can think of few constitutional issues more important than defining the reach of the fourth amendment — the extent to which it controls the array of activities of the police...[and] the amount of power that it [society] permits its police to use without effective control by law."

The judiciary should heighten its degree of scrutiny of police officers especially in cases of investigation of past crimes.

\textsuperscript{219}This was the case of United States v. Hensley, 469 U.S. 221 (1985). The important point of the decision is that Hensley was not guilty of the crime which was the subject of the stop. He was not convicted of his involvement in the robbery which was the subject of the police flyer. He was found guilty of a possessorary crime.

\textsuperscript{220}Item within the "plain view" of officers who are legitimately in a position to obtain that view, is permissible. Harris v. United States, 390 U.S. 234 (1968).

\textsuperscript{221}Texas v. Brown, 460 U.S. 730 (1983) the Court held: "[I]t is...beyond dispute that Maples' [the police officer] action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment." \textit{Id.} at 739-740.


\textsuperscript{223}In \textit{Brown}, the roadblock was set up on a street "which was part of a ‘medium’ area of narcotics traffic." 460 U.S. at 743.


\textsuperscript{225}Schneckloth, 442 U.S. at 228.

\textsuperscript{226}Amsterdam, \textit{supra} note 8, at 377.
CONCLUSION

As a result of the public outcry for greater protection from criminals, courts are granting police officers greater freedom to investigate criminal activity, including past crimes. In doing so, courts are disregarding two important factors that have been established to insure constitutional protections are afforded to all citizens, i.e. probable cause and a warrant. No longer is a warrant required in all cases except those in which there are "exigent circumstances" and no longer is probable cause a prerequisite for all searches and/or detentions. Currently detentions and searches in the form of stops and questioning are being conducted without either probable cause or exigent circumstances. Those of us with "round" heads, "square" heads or other "odd shaped" heads should be greatly concerned that we may be the subject of a police detention.227 "Experience ... has taught us that the power [to make arrests, searches and seizures] is one open to abuse," 228 and "the right to be secure against searches and seizures is one of the most difficult to protect." 229 One of the most important safeguards against the abuse of this power is the judiciary, which must scrutinize governmental conduct in order to preserve the rights guaranteed by the fourth amendment. 230 An inherent danger in the expansionary trend of the United States Supreme Court is an eventual undermining of the historical imperatives upon which the fourth amendment was built.

Since 1972 in Adams v. Williams,231 the Supreme Court has created a hierarchy among defendant's constitutional rights. It seems that the bottom of the hierarchy is the fourth amendment rights prohibiting unreasonable searches and seizures.232 The majority of the justices have demonstrated some confusion about the purpose of the right itself and considerable skepticism about its remedy — exclusion.233 Thus, the Court has begun to blur some of the formerly well established rules with a new call for analysis of subtle factual differences. The Court gives lip-service to a balancing analysis, but the broad interests of society will almost always supersede those of the individual and thus searches by officers have almost always been approved.234 The constitutionally protected expectation of privacy cannot keep the door closed when society knocks, because, when looked at in a broad sociological sense, the interests of the individual must be subordinate to those of society.235

The post-Terry cases have slowly dismantled the powerful buffer that the

\[227\] See supra note 1.

\[228\] United States v. Innelli, 286 F. 731, 731 (E.D. Pa. 1923) (per curiam).


\[230\] Whitebread, supra note 205, at 472.


\[232\] Whitebread, supra note 205.

\[233\] Id.


fourth amendment creates between potentially abusive police authority and the 
unwary individual. The standard has gone from allowing only purely defensive 
procedures to now permitting aggressive criminal detection and law enforcement 
techniques. This has resulted from the tremendous pressures being placed on 
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 activity are ever caught. Yet courts have 
granted great authority for police officers to investigate.236

Self protection of officers and investigation of on-going crimes are worthy 
goals to permit police officers to act in cases where probable cause is not pres-
ent. Through balancing, a determination of reasonableness is reached by com-
paring the need for a stop against the gravity of the intrusion. By extending the 
power of officers to arrest for past crimes, in most urban areas, offices are per-
mitted to stop individuals who happen to be on the streets. Accordingly, the bal-
ancing 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 im-
mediate police action.

Constitutional protections should not depend upon changes in public opinion 
as to the public's perception of the status of crime in our society. Nor should it 
be based upon the views of our founding fathers as to what sorts of governmen-
tal intrusions were permitted over two hundred years ago.237 What is important 
is our justifiable expectations of privacy in this age of space exploration and 
nuclear energy. The protection of society is of utmost importance, but we as a 
society must be constantly vigilant that our rights and privacy are not destroyed 
under the rubric of societal protection less we find that our basic constitutional 
rights guaranteed in the fourth amendment are completely lost. Permitting police 
officers to stop and detain for past crimes puts all citizens at risk because con-
stitutional protections have been lost.

236 See Saltzburg, Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open 
237 See notes 23-57 and accompanying text.