The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it "may become impracticable" to secure the person's presence by subpoena. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case.

In considering these issues, it is important to bear in mind that the Material Witness Statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the Material Witness Statute. If material witness warrants do not qualify as "Warrants" under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.

Justice Ginsburg wrote a separate opinion concurring in the judgment, joined by Justices Breyer and Sotomayor. Justice Sotomayor wrote a separate opinion concurring in the judgment, joined by Justices Ginsburg and Breyer.

B. STOP AND FRISK

There are numerous situations in which the police recognize that they do not have probable cause to act, but want to stop a suspicious person for preliminary questioning to determine whether a crime has or is about to occur. From the police perspective, if officers have to wait for probable cause to develop before conducting these preliminary investigations, they would be severely hampered in their efforts to prevent and detect crime. In their view, a standard of proof less demanding than probable cause is needed to nip a crime problem in the bud. Following the adoption in 1964 of a New York statute that became known as the "stop and frisk" law and the conclusion of several important studies of what police do in the real world, the United States Supreme Court placed its first imprimatur on searches and seizures of persons and things on a standard of proof less than probable cause.

1. Stop and Frisk Established

TERRY V. OHIO

Supreme Court of the United States, 1968.
392 U.S. 1.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. * * * He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked

west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. * * * When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe * * * that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the

right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

* * *

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated * * *." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. * * *

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

* * *

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer * * * to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk')." But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. [The Court suggests that the exclusionary rule may not deter all Fourth Amendment violations. For example, where an officer is bent on harassment, and doesn't care about whether he finds evidence, the exclusionary rule cannot deter the officer because the exclusionary rule is dependent on litigation-oriented disincentives.]

* * *

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a

rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. * * *

* * *

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

* * *

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

* * *

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure or that in most

instances failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests 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." Camara v. Municipal Court, 387 U.S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. * * * And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple good faith on the part of the arresting officer is not enough. * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police.

RPP

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that 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. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on

a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

* * *

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of

the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

* * *

We need not develop at length in this case * * * the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. Suffice it to note that such a search, unlike a search without a warrant incident to arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore 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.

The scope of the search in this case presents no serious problem in light of these standards. * * *

V

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that 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. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in Katz v. United States and the concurring opinion in Warden v. Hayden.

MR. JUSTICE HARLAN, concurring.

* * *

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. * * *

* * * The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

* * *

MR. JUSTICE WHITE, concurring.

* * * I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. * * *

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

* * *

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. * * *

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. * * *

NOTE ON THE IMPACT OF TERRY

It would be hard to overestimate the effect of *Terry* on Fourth Amendment jurisprudence. The Court not only permitted stops and frisks on less than probable cause; it also explicitly invoked the reasonableness clause over the warrant clause as the governing standard. Perhaps the Court intended to limit use of the reasonableness clause and its balancing approach to the area of stop and frisk; but once that balancing process was launched in one area, it became difficult to prevent its application to other searches and seizures. See Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*, 72 Minn.L.Rev. 383 (1988) (noting that *Terry* has led, in time, to a general diminution of Fourth Amendment protection).

Critique of Terry

Professor Maclin provides a critique on *Terry*, and assesses the impact of that decision on minorities, in Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, 72 St.John's L.Rev. 1271, 1278 (1998):

> After *Terry*, police intrusions would be controlled by a malleable "reasonableness" standard that gave enormous discretion to the police. When this reasonableness norm was applied to street encounters between the police and urban residents, the result was predictable—expanded police powers and diminished individual freedom. One of the flaws of *Terry* was that this shift in constitutional doctrine was implemented without a full examination of the consequences for blacks and other disfavored persons most affected by police investigatory methods. Moreover, the result in *Terry* provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions. For some, the *Terry* Court made the right choice. The need for police safety justified the loss of Fourth Amendment freedom. But those that have been the most vocal defenders of *Terry* tend to come from socioeconomic and racial backgrounds that are predominantly free from police harassment. For many blacks and other disfavored groups, however, the *Terry* Court wrongly subordinated their Fourth Amendment rights to police safety. The Court's failure to treat as dispositive the clear correlation between stop and frisk and the violation of their Fourth Amendment rights only served to remind blacks and other minorities of their second-class status in America.

An Early Application of Terry—Adams v. Williams

The *Terry* decision with its companion cases—Sibron v. New York, and Peters v. New York, 392 U.S. 40 (1968)—was only the first step in the articulation of what the Fourth Amendment permits the police to do without probable cause. The Supreme Court's first post-*Terry* effort was Adams v. Williams, 407 U.S. 143 (1972). Williams was convicted of illegal possession of a handgun and possession of heroin, after unsuccessfully challenging a stop and frisk. Justice Rehnquist, writing for the Court, set forth the facts surrounding the stop and frisk as follows:

> Police Sgt. John Connolly was alone early in the morning on car patrol duty in a high-crime area of Bridgeport, Connecticut. At approximately 2:15 a.m. a person known to Sgt. Connolly approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

Williams argued that the informant's tip was not a reliable basis on which to conduct the initial stop. But Justice Rehnquist disagreed:

> [W]e believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.
>
> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability.

Justice Rehnquist also held that the search of Williams' person was permissible in light of the safety risks presented to the officer:

> While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear of his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden

constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable.

Finally, Justice Rehnquist concluded that the search of the passenger compartment of the car, which led to discovery of the heroin, was permissible in light of everything that had gone before—not as a *Terry* search but rather as a search supported by probable cause to arrest Williams.

Justice Douglas, joined by Justice Marshall, dissented in *Williams*. He argued that Williams was illegally arrested, because there was no indication at the time of arrest that it was illegal for Williams to possess a gun.

Justice Brennan wrote a separate dissent in *Williams*, arguing that *Terry* should not be applicable to crimes like narcotics possession, because "[t]here is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."

Justice Marshall, joined by Justice Douglas, also wrote a separate dissent in *Williams*. He observed that the informant, on whom the officer relied to stop Williams, had no track record of giving reliable information. He concluded as follows:

> The Court explains what the officer knew about respondent before accosting him. But what is more significant is what he did not know. With respect to the scene generally, the officer had no idea how long respondent had been in the car, how long the car had been parked, or to whom the car belonged. With respect to the gun, the officer did not know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally. And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.
>
> Unable to answer any of these questions, the officer nevertheless determined that it was necessary to intrude on respondent's liberty. I believe that his determination was totally unreasonable. As I read *Terry*, an officer may act on the basis of *reliable* information short of probable cause to make a stop, and ultimately a frisk, if necessary; but the officer may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of liberty. *Terry* never meant to approve the kind of knee-jerk police reaction that we have before us in this case.

Do you see anything in the language or tone of *Terry* indicating that the Court never meant to approve the kind of police conduct at issue in

Williams? Or is Justice Marshall simply regretful that he didn't join Justice Douglas in dissent in *Terry*?

Bright Line Rules Under Terry—Pennsylvania v. Mimms

Another case in the Court's early development of the *Terry* doctrine was the per curiam decision in Pennsylvania v. Mimms, 434 U.S. 106 (1977). While on routine patrol, two Philadelphia police officers observed Mimms driving a car with an expired license plate. The officers stopped the car to issue a traffic summons. One of the officers approached and told Mimms to step out of the car and produce his owner's card and operator's license. When Mimms got out of the car, the officer noticed a large bulge under his sports jacket. Thinking that Mimms might be carrying a weapon, the officer frisked Mimms and found that the bulge was a loaded revolver. Mimms unsuccessfully moved to suppress the gun, and was convicted for firearms violations.

The Court held that the officer had acted properly under the *Terry* doctrine, and therefore that the revolver was properly admitted at Mimms' trial. The Court noted that the parties agreed (1) that the officer was justified in stopping Mimms for the traffic violation, and (2) that the officer had sufficient cause to frisk Mimms for a weapon once he observed the bulge. The question in dispute was whether the officer was justified in ordering Mimms to get out of the car. If this seizure was unlawful under *Terry*, then the subsequent frisk would be unlawful as well. But the Court held that officers in the course of a legal stop of an automobile have an *automatic* right under *Terry* to order the driver out of the vehicle. The Court came to its bright line rule in the following analysis:

> We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty. * * * According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. * * *
>
> The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.
>
> Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the

> order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. * * * What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Justice Marshall dissented in *Mimms*. He argued that *Terry* requires a nexus between the reason for the stop and the need for self-protection that justifies a further intrusion. He found no nexus between the traffic violation and a subsequent order to get out of the car.

Justice Stevens, joined by Justices Brennan and Marshall, wrote a separate dissent in *Mimms*. He argued that the bright-line rule chosen by the Court could not be supported by safety concerns:

> [Ordering the suspect out of the car] could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this area of human behavior strongly recommend that the police officer "never allow the violator to get out of the car * * *."

Justice Stevens strenuously objected to the Court's adoption of a bright line rule to cover all vehicle stops, regardless of the circumstances:

> Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment. * * * [T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.

QUESTIONS ABOUT MIMMS

Are the safety concerns cited by the *Mimms* majority likely to arise so often that the Court is justified in adopting a bright line rule? The dissenters consider the safety concerns overstated; but they do not argue that the Court's assessment of the individual right at stake is understated. Given the minimal nature of the intrusion at issue in *Mimms*, why are the dissenters so upset?

What if the driver of the car *wants to get out,* and the officer (perhaps thinking it the safest procedure) *wants the driver to stay in the car*? Is this an additional seizure for Fourth Amendment purposes? Is the dissent's position that the driver can do whatever she wants? What if the officer permits the

driver to remain in the car, but says "keep your hands where I can see them"? Does the officer have the automatic right to so order?

Mimms and Passengers

In Maryland v. Wilson, 519 U.S. 408 (1997), the Court considered whether the automatic rule established in *Mimms* applied to passengers as well as drivers. An officer stopped a car traveling on Interstate 95. The car was going 64 miles per hour in a 55 mile per hour zone. The officer ordered the driver and Wilson, a passenger, to get out of the car. The officer did not have reasonable suspicion to believe that Wilson was up to anything special. When Wilson stepped out of the car, a quantity of cocaine allegedly fell to the ground. The state court had held that the *Mimms* rule did not apply to passengers, and therefore that Wilson could not be ordered out of the car in the absence of reasonable suspicion to believe he was involved in a crime. But the Supreme Court, in an opinion by Chief Justice Rehnquist for seven members of the Court, disagreed and held that the bright-line rule of *Mimms* applied to passengers. The Chief Justice balanced the factors discussed in *Mimms*:

> On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger. Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. In the case of passengers, the danger of the officer's standing in the path of oncoming traffic would not be present except in the case of a passenger in the left rear seat, but the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.
>
> On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car.

Justice Stevens, joined by Justice Kennedy, dissented in *Wilson*. He argued that police officers are rarely at risk from passengers during routine automobile stops, and that any "limited additional risk to police officers must be weighed against the unnecessary invasion that will be imposed on innocent citizens under the majority's rule in the tremendous number of routine stops that occur each day." He asserted that "the aggregation of thousands upon thousands of petty indignities has an

impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority."

Justice Kennedy wrote a separate dissent in which he stated that officers should be able to order a passenger out of a car only if necessary under the circumstances to investigate a crime or to protect the officer.

Protective Frisk of Passengers: Arizona v. Johnson

In the later case of Arizona v. Johnson, 555 U.S. 323 (2009), the Court upheld the next step of a process begun by *Mimms*: the protective search of a passenger, when the driver has been lawfully stopped for a traffic violation. The Court stated that "officers who conduct routine traffic stops may perform a patdown of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." But unlike the seizure involved in making drivers and passenger come out from the car, the power to frisk is not automatic. As the *Johnson* Court notes, the officer must have reasonable suspicion that the passenger or driver is armed and dangerous.

Mimms Applied: New York v. Class

The Court authorized a limited investigative entry into a car during the course of a stop in New York v. Class, 475 U.S. 106 (1986). Class was stopped for a traffic violation. Officers peered through the windshield of Class's car to obtain the vehicle identification, but the number was covered by papers on the dashboard. One officer entered the car to move the papers away, and at that point discovered a gun, which was admitted against Class at his trial for firearms violations. The Court, in a 6–3 opinion by Justice O'Connor, relied on *Mimms* and held that the officer acted reasonably. The Court held that "in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car." Justice O'Connor reasoned that "[t]he VIN is a significant thread in the web of regulation of the automobile" and that "[a] motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished," especially for a driver who has committed a traffic violation.

Justice O'Connor noted that the Court's holding "does not authorize a police officer to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile," because "[i]f the VIN is in

the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it."

Justice Powell, joined by Chief Justice Burger, concurred in *Class*, emphasizing the important governmental interest in the VIN, and concluding that "the Fourth Amendment question may be stated simply as whether the officer's efforts to inspect the VIN were reasonable." Justice Brennan, joined by Justices Marshall and Stevens, dissented. He argued that "the mere fact that the state utilizes the VIN in conjunction with regulations designed to promote highway safety does not give the police a reason to *search* for such information every time a motorist violates a traffic law." Justice White, joined by Justice Stevens, also dissented, stating that he was unprepared to accept the Court's reasoning that "the governmental interest in obtaining the VIN by entering a protected area is sufficient to outweigh the owner's privacy interest in the interior of the car."

Car manufacturers now place a second VIN plate somewhere secret in the interior of the car—this is a response to the fact that car thieves often replace the visible VIN plate with a fake. Under *Class*, can an officer conduct a search of the car's interior to look for that second VIN plate?

Detention of Occupants of a Residence During Legal Law Enforcement Activity: Note on Michigan v. Summers, Muehler v. Mena, and Bailey v. United States

In Michigan v. Summers, 452 U.S. 692 (1981), the Court held, 6–3, that police officers with a search warrant for a home can require occupants of the premises, even if leaving when the police arrive, to remain while the search warrant is executed. The Court held that such a seizure would *always* be reasonable, given the state's interest in preventing flight, and the risk that persons leaving the premises would attempt to destroy evidence. The Court noted that the detention in *Summers* was less serious than the street stops sanctioned in *Terry*, because the occupant was being detained inside his home. The Court also observed that the search warrant provided protection against overreaching by the police officers. Does *Mimms* lend support to the result in *Summers*?

The Court applied *Summers* in Muehler v. Mena, 544 U.S. 93 (2005), to uphold a more serious detention—including handcuffing—of a person during the warranted search of the home of a suspected gang member. The Court also found it permissible for the officers to question the detainee about her alienage during the time it took to conduct the search. Officers obtained a search warrant for a premises after a gang-related driveby shooting, based on information that at least one of the gang

members lived there. The warrant authorized a broad search for deadly weapons and evidence of gang membership. Because of the violent gang connection, a SWAT team was used to secure the premises during the search. The proceedings started at 7 a.m.. Officers found Mena asleep in her bed and she was handcuffed and placed in a garage that had some furniture. While the search proceeded, officers guarded Mena and three other residents in the garage, all of them remaining in handcuffs for between two and three hours. The officers also notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During Mena's detention in the garage, she was asked her name, date and place of birth, and immigration status. The INS officer later asked her for her immigration documentation. Mena's status as a permanent resident was confirmed by her papers. In their lengthy search, the officer found some ammunition, a gun, and some gang paraphernalia, but did not find the gang members they were looking for. Mena was released at the end of the search. She brought a § 1983 suit against the officers, alleging that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment.

Chief Justice Rehnquist, writing for the Court, relied on *Summers* to conclude that Mena's Fourth Amendment rights were not violated by her detention and interrogation.

> Mena's detention was, under *Summers*, plainly permissible. An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.
>
> Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Indeed, *Summers* itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation."

The Court noted that while the detention in handcuffs was "more intrusive than that which we upheld in *Summers*" it was nonetheless reasonable given the risk to officer safety presented by a search of the premises.

> [T]his was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both

officers and occupants. Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

* * * The duration of a detention can, of course, affect the balance of interests * * *. However, the 2- to 3-hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.

Chief Justice Rehnquist found Mena's interrogation during detention to be reasonable as well, explaining that it was not necessary for the officers to have independent reasonable suspicion in order to question Mena concerning her immigration status. He noted that the Court had "held repeatedly that mere police questioning does not constitute a seizure." Because the detention was not prolonged by the questioning, "there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status."

Justice Kennedy wrote a concurring opinion in *Mena*. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, wrote an opinion concurring in the judgment.

There are differences between *Summers* and *Mena*. Arguably *Mena* states an overbroad principle. See Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("Suppose that police officers have a search warrant to search a house for a gun belonging to X. They arrive and discover that a Lamaze birthing class is being conducted in a den by X's spouse. According to *Mena,* the officers executing the warrant have a per se right to detain all of the pregnant mothers-to-be and their coaches while the warrant is executed. This is indefensible.").

For a case applying *Summers* and *Mena,* see Los Angeles County v. Rettele, 550 U.S. 609 (2007) (detention at gunpoint of two people found in bed held reasonable even though those detained did not fit the description of those to be arrested: "The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets.").

In Bailey v. United States, 133 S.Ct. 714 (2013), police officers prepared to conduct a warranted search of an apartment, and saw the defendant leave the apartment and get into a car. They stopped him a mile away from the apartment and brought him back to the apartment

while the search was being conducted. That seizure led to evidence and the defendant moved to exclude. The lower court relied on the categorical *Summers* rule—which does not require reasonable suspicion that a resident is involved in a crime—to justify the detention. But the Supreme Court, in an opinion by Justice Kennedy for six Justices, held that the *Summers* rule did not extend to a detention that was made so far away from the premises being searched. Justice Kennedy reasoned that the reasons for the *Summers* rule—to preserve the integrity of the search by detaining the residents—did not apply to a resident who had left the premises and was a mile away when the search began. He also noted that the seizure of Bailey was more intrusive than in *Summers,* where the resident was merely forced to stay on the premises. In contrast, Bailey was stopped in public, placed in a police car, and driven back to the premises. Justice Kennedy summed up as follows:

> Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe.

The *Bailey* Court found it unnecessary to decide how far beyond the premises the *Summers* power to detain residents could extend. Justice Kennedy explained as follows:

> Here, petitioner was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question; and so this case presents neither the necessity nor the occasion to further define the meaning of immediate vicinity. In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors.

Justice Scalia, joined by Justices Ginsburg and Kagan, wrote a concurring opinion in *Bailey.* He emphasized the categorical nature of the *Summers* rule. Justice Breyer, joined by Justices Thomas and Alito, dissented. He argued that while the majority purportedly applied a categorical rule, it will be difficult to determine where the line is drawn between residents who are near enough to the premises to be detained, and those who are too far away. He stated that "the majority has substituted a line based on indeterminate geography for a line based on realistic considerations related to basic Fourth Amendment concerns such as privacy, safety, evidence destruction, and flight. In my view, these

latter considerations should govern the Fourth Amendment determination at issue here."

2. When Does a Seizure Occur? The Line Between "Stop" and "Encounter"

In *Terry,* it was not difficult to determine the precise point at which the stop occurred: the officer physically grabbed Terry and spun him around. However, the Court has had more difficulty determining whether a stop has occurred when the police conduct is not as affirmatively coercive or as physically intrusive as in *Terry*.

The Mendenhall "Free to Leave" Test

In United States v. Mendenhall, 446 U.S. 544 (1980), Mendenhall was observed by Drug Enforcement Administration agents at the Detroit Airport as she arrived on a flight from Los Angeles. They suspected her of being a drug courier. The agents approached her as she was walking through the concourse, identified themselves as DEA agents, and one agent asked to see her identification and airline ticket. The driver's license she produced was in her name, but her ticket was not. She became extremely nervous. The agent gave her back her license and ticket and asked Mendenhall to accompany him to the airport DEA office for further questions. Without saying anything, she did so. In the office the agent asked Mendenhall if she would allow a search of her person and handbag. She said yes. In a strip search of her person drugs were found. Mendenhall was arrested, prosecuted, and convicted.

Justice Stewart, joined only by Justice Rehnquist, addressed an argument that the government had not made in the lower courts and concluded that when Mendenhall was approached in the airport, no "seizure" had occurred, and therefore this initial police-citizen contact was outside the scope of the Fourth Amendment. Just Stewart explained:

> The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. * * *

This conclusion resulted from application of the following rule:

> A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a

seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Justice Stewart's "free to leave" test did not command a majority of the Court in *Mendenhall;* seven Justices found that the question of whether a seizure had occurred was not properly raised in the lower court. But subsequent cases have established the "free to leave" test as the initial benchmark for determining whether a person has been stopped within the meaning of *Terry.*[13]

Applying the "Free to Leave" Test: Florida v. Royer

A plurality of the Court applied the Stewart "free to leave" test in Florida v. Royer, 460 U.S. 491 (1983). Justice White, writing for himself and Justices Marshall, Powell, and Stevens, stated the facts:

> On January 3, 1978, Royer was observed at Miami International Airport by two plain-clothes detectives of the Dade County, Florida, Public Safety Department assigned to the County's Organized Crime Bureau, Narcotics Investigation Section. Detectives Johnson and Magdalena believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile." Royer, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination, "LaGuardia". As Royer made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a "moment" to speak with them; Royer said "Yes."
>
> Upon request, but without oral consent, Royer produced for the detectives his airline ticket and his driver's license. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license carried respondent's correct name, "Royer." When the detectives asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact

[13] As will be seen later in this section, the Stewart test has been modified by more recent cases, such as *Bostick* and *Hodari,* to accommodate some specific fact situations arising in police-citizen encounters. But it still remains the basic test for determining whether a person has been stopped under *Terry.*

narcotics investigators and that they had reason to suspect him of transporting narcotics.

The detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately forty feet away, adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked to do. The room was later described by Detective Johnson as a "large storage closet," located in the stewardesses' lounge and containing a small desk and two chairs. Without Royer's consent or agreement, Detective Johnson, using Royer's baggage check stubs, retrieved the "Holt" luggage from the airline and brought it to the room where respondent and Detective Magdalena were waiting. Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which the detective then opened without seeking further assent from Royer. Drugs were found in that suitcase. According to Detective Johnson, Royer stated that he did not know the combination to the lock on the second suitcase. When asked if he objected to the detective opening the second suitcase, Royer said "no, go ahead," and did not object when the detective explained that the suitcase might have to be broken open. The suitcase was pried open by the officers and more marihuana was found. Royer was then told that he was under arrest. Approximately fifteen minutes had elapsed from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband.

Justice White observed that Royer had testified that he believed he was not free to leave the officers' presence and that Detective Johnson stated that he did not believe he had probable cause to arrest until after he opened the suitcases. Justice White summarized some of the law regarding "stops."

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no

> detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

The plurality found that a seizure occurred when the officers took Royer's ticket and driver's license and started walking away:

> Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them. In *Mendenhall,* no luggage was involved, the ticket and identification were immediately returned, and the officers were careful to advise that the suspect could decline to be searched. Here, the officers had seized Royer's luggage and made no effort to advise him that he need not consent to the search.

Justice Brennan concurred in the result. Four Justices dissented in *Royer* on the ground that, while Royer may have been seized, the seizure was supported by reasonable suspicion and the police lawfully obtained Royer's consent. Thus, none of the Justices disagreed with the proposition that Royer was seized within the meaning of the Fourth Amendment when the officers retained Royer's ticket and identification.

Does the *Royer* Court give sufficient guidance to the police to determine what type of conduct triggers a Fourth Amendment seizure? Lower courts have tried to impart some guidance. See Johnson v. Campbell, 332 F.3d 199 (3rd Cir. 2003) (motorist was stopped when officer persisted in telling him to roll his window down even after motorist refused: "At that time, Campbell made it clear that Johnson was not free to ignore him and would not be left alone until he complied."); United States v. Madden, 682 F.3d 920 (10th Cir. 2012) ("In this case, what began as a consensual encounter became an investigative detention when Officer Balderrama asked Madden to step out of the vehicle and then * * * directed Madden to sit in the back of his patrol car while he obtained Madden's personal information and ran it through the computer."); United States v. High, 921 F.2d 112 (7th Cir.1990) (suggesting that officers "preface their questions with a statement that the encounter is consensual and that the citizen is free to go"); United States v. Espinoza, 490 F.3d 41 (1st Cir. 2007) (ordering a driver to turn off the engine of his car is a seizure).

Factory Sweeps: INS v. Delgado

A majority of the Court adopted and applied the *Mendenhall* test in Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984), which held that INS officers did not seize workers when they conducted factory surveys in search of illegal aliens. Justice Rehnquist described the surveys as follows:

> At the beginning of the surveys several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.

Four employees questioned in one of the surveys filed suit, claiming that the factory sweeps violated the Fourth Amendment and seeking declaratory and injunctive relief. The employees lost in the district court, prevailed in the court of appeals, and lost again in the Supreme Court.

Justice Rehnquist noted that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." He rejected the argument that the employees were seized during the entire survey because of the guards being placed at the exits. Because the employees were at work and thus were not going to leave the factory in any event, Justice Rehnquist concluded that the guards at the exit could not have had a coercive or custodial effect. The majority reasoned that "[t]his conduct should have given [the employees] no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." And the majority also rejected an argument that individual employees were seized when they were questioned—because, generally, simple questions from a police officer do not amount to a seizure.

Justice Powell concurred in the result. Justice Brennan, joined by Justice Marshall, dissented from the holding that the individual interrogations were not seizures and argued that the testimony in the case "paints a frightening picture of people subjected to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers."

Put yourself in the workers' place. Would you feel free to leave, or to terminate the questioning? Would you assume the armed guards at the exits were placed there to keep you inside the factory? Would it affect you

if, as is likely, all of the other factory members were "cooperating" by answering the officers' questions?

Can Failure to Cooperate Lead to Reasonable Suspicion to Justify a Stop?

Would you think that the failure to cooperate in an encounter might be treated by the officers as suspicious conduct that would give rise to a more extensive investigation? The Court in *Royer* stated that the failure to cooperate in a consensual encounter cannot be treated as suspicious conduct that would justify a *Terry* stop. Otherwise, the officers would have it both ways: an encounter would be permissible because it is consensual, and yet a stop would be permissible when the individual refuses to consent. But how many people actually *know* that officers cannot treat as suspicious a person's refusal to cooperate in an encounter? And even if not permitted under the law to treat non-cooperation as suspicious, how many officers do *in fact* treat non-cooperation as a reason for detaining an individual?

Street Encounters

Officers in police cars, marked and unmarked, often seek to question people on the street. When officers pull up to question a person on the street in the absence of any articulable reasonable suspicion, have they violated the person's Fourth Amendment rights? This will depend on whether the officer's conduct amounts to a seizure, or is rather simply an encounter. United States v. Cardoza, 129 F.3d 6 (1st Cir.1997), provides an example. Cardoza arranged a gun purchase for his friend Ragsdale. At the time of the encounter with police officers, Ragsdale was carrying the gun fully loaded, and Cardoza had possession of an extra bullet. The court describes the encounter as follows:

> Sometime after the transaction was completed, Cardoza and Ragsdale began walking along Humboldt Avenue. As they walked, Ragsdale had the handgun in his waistband and Cardoza carried the single round of ammunition in his hand. By this time it was approximately 2:00 a.m. on the morning of July 15. They were spotted walking along Humboldt Avenue by four officers of the Boston Police's Youth Violence Strike Force who were patrolling the area in an unmarked police car. * * * Moving slowly, the police car approached Cardoza and Ragsdale from behind. As the patrol car approached, Cardoza and Ragsdale crossed Humboldt Avenue in order to walk up the sidewalk of Ruthven Street, a one-way thoroughfare that emptied onto Humboldt Avenue. As they crossed in front of the car, Officer Brown, who was sitting in the back seat on the driver's side, recognized Cardoza and directed the driver to make

a left turn off Humboldt, and proceed the wrong way up Ruthven for a short distance. Officer Brown testified that he wanted to ask Cardoza some questions concerning a shooting incident that had occurred some days earlier. The driver took the left turn, and pulled over to the curb just off Humboldt, facing the wrong way on Ruthven Street.

Officer Brown, whose window was rolled down, called out to Cardoza, asking "What's up Freddie? What are you doing out this time of night?" Cardoza stopped, turned, and approached the patrol car. Ragsdale continued walking a short distance. Officer Brown remained in the car conversing with Cardoza through the open car window. As he talked with Officer Brown, Cardoza began to gesture with his hand, exposing the round of ammunition. Seeing the round of ammunition, Brown exited the patrol car, and began to pat-frisk Cardoza. At the same time, two other officers exited the car and approached and pat-frisked Ragsdale, discovering the handgun loaded with eight rounds of ammunition.

Cardoza was convicted of being a felon in possession of a firearm and ammunition. He argued that the evidence should be suppressed because, by the time the officer saw the ammunition, he had been stopped by the officer without reasonable suspicion. But the court disagreed, and found that Cardoza had not been seized within the meaning of the Fourth Amendment. It explained as follows:

To begin with, no sirens or flashing lights were used by the officers to indicate to Cardoza that he should stop in his tracks. Similarly, the police cruiser pulled over and stopped at the curb before Officer Brown called out to Cardoza. And Officer Brown remained in the car when he called out to Cardoza. * * * Officer Brown did not ask Cardoza to stop, or even to approach the car. He simply called out through an open car window with the question "what are you doing out at this time of night?" Those words do not objectively communicate an attempt to restrain Cardoza's liberty. We are therefore unpersuaded that the police officers' actions transformed mere police questioning into a seizure.

If a police car pulled up against traffic on a one-way street to speak to you, would you feel free to leave or to refuse to reply to the officers? Would any person in their right mind (much less reasonable mind) feel free to leave? Obviously not. But the *Cardoza* court had a response to this argument:

We recognize, of course, the import of Cardoza's observation that few people, including himself, would ever feel free to walk away from any police question. Under this reasoning, however, * * * every police-citizen encounter [is transformed] into a seizure. The "free to

> walk away" test, however, must be read in conjunction with the Court's frequent admonitions that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." What emerges between the two imperatives, therefore, is the directive that police conduct, viewed from the totality of the circumstances, must objectively communicate that the officer is exercising his or her official authority to restrain the individual's liberty of movement before we can find that a seizure occurred. Because there was no such objective communication in the instant case, we affirm the district court's denial of Cardoza's motion to suppress.

So the court held that the test for a *Terry* stop is not really whether a reasonable person would feel free to leave, but rather whether the police officer was acting coercively. That description of the test seems more realistic, and appears to track the case law: for example, there was a stop in *Royer* because police officers acted coercively when they took Royer's ticket and identification and walked away with the documents. But applying that test to the facts of *Cardoza*: isn't an officer acting coercively when he drives the wrong way down a one-way street at 2 a.m., pulls over, and asks the citizen what he is up to? That's not the kind of conduct you would expect from an ordinary citizen, is it? Compare United States v. Camacho, 661 F.3d 718 (1st Cir. 2011) (seizure found where the officers blocked the defendant's path with their Crown Victoria; both officers were wearing jackets labeled "New Bedford Police" and "Gang Unit"; one officer stepped out of the car and confronted the defendant with "accusatory" questions; and another officer ordered him to place his hands on the hood of the car).

Problem with the "Freedom to Walk Away" Test

Professor Steinbock takes the Court's "freedom to walk away" test to task in The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine, 38 San Diego L.Rev. 507 (2001):

> There are legal fictions and there are legal fictions. One means of differentiating good from bad legal fictions is their relationship to reality * * *. By that measure, in light of the available evidence, the consensual encounter doctrine paints a false picture of reality as applied to encounters involving investigation of the individual being questioned. In so doing, it mislocates the dividing line between freedom and restraint, including on the "freedom" side of this line many people who are effectively restrained or—to put it another way—are restrained in all but the eyes of the law.

> * * * The obscurity of the line between freedom and detention bespeaks an uncivil distrust of the persons whose liberty is at stake. It plays on their ignorance and understandable sense of powerlessness in relation to law enforcement officers. Moreover, attempts by citizens to clarify their status, or assert the rights they believe they have, produce additional incivility and friction on both sides. The consensual encounter doctrine virtually invites citizens, as an initial response, to question or rebuff police approaches. * * * Rudeness and confrontation by citizens, which are virtually required in order for citizens to determine whether they are free to go, stimulates rudeness and confrontation in response. This, in turn, poisons the relationship between citizens and their government, creating social friction and disunity.

But what is the alternative? Should it be considered a stop whenever a police officer approaches a citizen to ask questions? See also Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("A better approach is to focus on the conduct of law enforcement officers rather than on the reactions of individuals to law enforcement officers. This approach asks law enforcement officers to pay attention to their own actions, not to predict how reasonable civilians would respond to those actions.").

Bus Sweeps: Florida v. Bostick and United States v. Drayton

In the following case, the Court considers the permissibility of a "bus sweep" in the absence of reasonable suspicion. The case discusses and applies the Court's first analysis of this subject in Florida v. Bostick.

UNITED STATES v. DRAYTON

Supreme Court of the United States, 2002.
536 U.S. 194.

JUSTICE KENNEDY delivered the opinion of the Court.

The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse. Florida v. Bostick, 501 U.S. 429 (1991). This case requires us to determine whether officers must advise bus passengers during these encounters of their right not to cooperate.

* * * On February 4, 1999, respondents Christopher Drayton and Clifton Brown, Jr., were traveling on a Greyhound bus en route from Ft. Lauderdale, Florida, to Detroit, Michigan. The bus made a scheduled stop in Tallahassee, Florida. The passengers were required to disembark so the bus could be refueled and cleaned. As the passengers reboarded, the

driver checked their tickets and then left to complete paperwork inside the terminal. As he left, the driver allowed three members of the Tallahassee Police Department to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges.

Once onboard Officer Hoover knelt on the driver's seat and faced the rear of the bus. He could observe the passengers and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn went to the rear of the bus. Blackburn remained stationed there, facing forward. Lang worked his way toward the front of the bus, speaking with individual passengers as he went. He asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

According to Lang's testimony, passengers who declined to cooperate with him or who chose to exit the bus at any time would have been allowed to do so without argument. In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel. Lang could recall five to six instances in the previous year in which passengers had declined to have their luggage searched. It also was common for passengers to leave the bus for a cigarette or a snack while the officers were on board. Lang sometimes informed passengers of their right to refuse to cooperate. On the day in question, however, he did not.

Respondents were seated next to each other on the bus. Drayton was in the aisle seat, Brown in the seat next to the window. Lang approached respondents from the rear and leaned over Drayton's shoulder. He held up his badge long enough for respondents to identify him as a police officer. With his face 12-to-18 inches away from Drayton's, Lang spoke in a voice just loud enough for respondents to hear:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Both respondents pointed to a single green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," and Brown responded, "Go ahead." Lang handed the bag to Officer Blackburn to check. The bag contained no contraband.

Officer Lang noticed that both respondents were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics. The officer thus asked Brown if he had any weapons or drugs in his

possession. And he asked Brown: "Do you mind if I check your person?" Brown answered, "Sure," and cooperated by leaning up in his seat, pulling a cell phone out of his pocket, and opening up his jacket. Lang reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects similar to drug packages detected on other occasions. Lang arrested and handcuffed Brown. Officer Hoover escorted Brown from the bus.

Lang then asked Drayton, "Mind if I check you?" Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a pat-down of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him from the bus. A further search revealed that respondents had duct-taped plastic bundles of powder cocaine between several pairs of their boxer shorts. Brown possessed three bundles containing 483 grams of cocaine. Drayton possessed two bundles containing 295 grams of cocaine.

[The defendants were charged with drug crimes. The trial court denied motions to suppress the drugs on the ground that the entire procedure was a consensual encounter.]

The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions to grant respondents' motions to suppress. The court held that this disposition was compelled by its previous decisions in United States v. Washington, 151 F. 3d 1354 (1998), and United States v. Guapi, 144 F. 3d 1393 (1998). Those cases had held that bus passengers do not feel free to disregard police officers' requests to search absent "some positive indication that consent could have been refused."

We granted certiorari. The respondents, we conclude, were not seized and their consent to the search was voluntary; and we reverse.

* * *

The Court has addressed on a previous occasion the specific question of drug interdiction efforts on buses. In *Bostick,* two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine. In doing so it adopted a *per se* rule that due to the cramped confines onboard a bus the act of questioning would deprive a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment.

This Court reversed. *Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." The Court noted next that the traditional

rule, which states that a seizure does not occur so long as a reasonable person would feel free "to disregard the police and go about his business," is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive. The proper inquiry "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Finally, the Court rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. The reasonable person test, the Court explained, is objective and "presupposes an *innocent* person."

In light of the limited record, *Bostick* refrained from deciding whether a seizure occurred. The Court, however, identified two factors "particularly worth noting" on remand. First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search.

Relying upon this latter factor, the Eleventh Circuit has adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. * * *

The Court of Appeals erred in adopting this approach.

Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

* * * There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure

in his or her decision not to cooperate with police on a bus than in other circumstances.

Respondents make much of the fact that Officer Lang displayed his badge. In Florida v. Rodriguez, 469 U.S., at 5–6, however, the Court rejected the claim that the defendant was seized when an officer approached him in an airport, showed him his badge, and asked him to answer some questions. Likewise, in INS v. Delgado, 466 U.S. 210, 212–213 (1984), the Court held that INS agents' wearing badges and questioning workers in a factory did not constitute a seizure. And while neither Lang nor his colleagues were in uniform or visibly armed, those factors should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

Officer Hoover's position at the front of the bus also does not tip the scale in respondents' favor. Hoover did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear. * * *

Finally, the fact that in Officer Lang's experience only a few passengers have refused to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. * * * [B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them. * * *

Drayton contends that even if Brown's cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter with the officers after Brown had been arrested. * * * The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. * * * And, as the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.

* * *

* * * Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

* * *

* * * [F]or reasons unexplained, the driver with the tickets entitling the passengers to travel had yielded his custody of the bus and its seated travelers to three police officers, whose authority apparently superseded the driver's own. The officers took control of the entire passenger compartment, one stationed at the door keeping surveillance of all the occupants, the others working forward from the back. With one officer right behind him and the other one forward, a third officer accosted each passenger at quarters extremely close and so cramped that as many as half the passengers could not even have stood to face the speaker. None was asked whether he was willing to converse with the police or to take part in the enquiry. Instead the officer said the police were "conducting bus interdiction," in the course of which they "would like . . . cooperation." The reasonable inference was that the "interdiction" was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer "cooperation" but would not let the lack of it stand in their way. There was no contrary indication that day, since no passenger had refused the cooperation requested, and there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established by this introduction. Later requests to search prefaced with "Do you mind . . ." would naturally have been understood in the terms with which the encounter began.

It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one. * * *

NOTE ON BUS SWEEPS

Professor Nadler, in No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup.Ct. Rev. 153, argues that the Court's bus sweep cases, while understandable after 9/11, are out of line with social science evidence concerning coercion and consent. She concludes as follows:

> It may be the case that, on balance, it is desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons, especially with the current need to be vigilant about potential risks of terrorism. In this way, it is understandable that the *Drayton* Court scrupulously avoided announcing rules in drug cases that would restrict the ability of police to investigate terrorism and other serious threats to public security.
>
> On the other hand, in its effort to be sensitive to the order-maintenance needs of the government, the Court has promulgated a standard to determining the bounds of consensual police-citizen encounters and voluntary searches that struggles against a wealth of social science evidence, that subjects many innocent people to suspicionless searches and seizures against their will, and that produces disagreement and confusion in the lower courts. It may be that large-scale, suspicionless searches of passengers on common carriers is a price that we ought to be willing to pay to stem the flow of illegal narcotics transported on intercity buses and trains. If this is the determination that underlies the decision in *Drayton*, then the Court should have explicitly stated it and justified it—rather than relying on the implausible assertion that bus passengers, when they are individually confronted by armed police officers who want to search them, feel free to ignore the police or outright refuse their requests.

State of Mind Required for a Stop: Brower v. County of Inyo

Must an officer have a certain state of mind in order to seize a person? Justice Scalia wrote for the Court in Brower v. County of Inyo, 489 U.S. 593 (1989), where officers set up a "blind" roadblock in an attempt to apprehend a fleeing suspect. The suspect, approaching the roadblock from around a curve, was not able to stop before crashing into it. The suspect died in the crash and a wrongful death action was brought alleging that the suspect had been illegally "seized" by the roadblock.

Justice Scalia agreed with the plaintiff that a seizure had occurred. He declared that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement * * *, nor even whenever there is a governmentally *desired* termination of an individual's freedom of movement * * *, but only when there is a governmental termination of freedom of movement *through means intentionally applied.*" In this case, the officers placed the roadblock with the intent to stop the suspect; and in fact the suspect was

stopped by means of the roadblock. Therefore, the suspect was seized, even though he was not stopped in precisely the way that the officers intended for him to stop. The means used to stop him were intentionally applied.[14]

Elaborating on this intent-based test, Justice Scalia posed the following hypothetical: suppose police officers park and leave their squad car on a hill, the parking brake accidentally disengages, the car rolls down the hill and just happens to pin a suspected criminal against a wall. Has the criminal been seized? Justice Scalia's answer was "no", because the officers never intentionally applied any means to stop the suspect's freedom of movement. They just got lucky.

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concurred in the judgment. He objected to Justice Scalia's emphasis on an intentional acquisition of physical control as marking the onset of a seizure, and suggested that, since it was clear in the instant case that the roadblock was intended to stop the deceased, "[d]ecision in the case before us is thus not advanced by pursuing a hypothetical inquiry concerning whether an unintentional act might also violate the Fourth Amendment."

How would the *Brower* test apply in the following circumstance? A gunman commandeers a school bus and takes a student as a hostage. A police standoff ensues, and a police officer fires into the bus in an attempt to kill the gunman. The bullet, however, hits the student instead. Has the student been seized under the Fourth Amendment? The court in Medeiros v. O'Connell, 150 F.3d 164 (2d Cir.1998), held that the police conduct did not constitute a seizure of the student, and therefore that summary judgment was properly granted to the officer in a section 1983 case. The court declared that a police officer's deliberate decision to shoot for the purpose of stopping the *gunman* "does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern." The court noted that the officer's intent was not to restrain the hostage's movement—far from it. The court also observed that the instant case was distinguishable "from those in which the police shoot an innocent victim mistakenly believing that he is the suspect whom they are pursuing." In such cases, a seizure occurs because "the victim was indeed the object of an intentional act of seizure, even if the police were mistaken as to the victim's identity." But where a hostage is hit by a bullet intended for the hostage-taker, there is no intentional seizure of the hostage within the meaning of *Brower*.

For an application of the *Brower* test, see Brendlin v. California, 551 U.S. 249 (2007), in which evidence was found on a passenger in a car that

[14] The Court in *Brower* remanded for a determination of whether the seizure was unreasonable under the circumstances.

was intentionally stopped by police. The government argued that the passenger was not seized by the mere stop of the car, because the intent of the police was to stop *the driver*. The Court rejected this argument, stating that the intent that counts under the Fourth Amendment "is the intent that has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." In this case, the officers intended to stop the car, and therefore, under *Brower* a stop occurred with respect to everyone in the car. The Court noted that a reasonable passenger would certainly think that he was not free to walk away when the officers intentionally stop the car in which he is sitting.

The Suspect Who Does Not Submit: California v. Hodari D.

In California v. Hodari D., 499 U.S. 621 (1991), the Court determined that the *Mendenhall* "freedom to walk away" test needed to be modified when applied to a suspect who refuses to submit to a show of authority. The case arose when officers encountered a group of youths who were huddled around a car and who fled when they saw the officers. Hodari, one of the group who ran, threw away a small rock as a pursuing officer was about to catch him. One officer tackled Hodari, handcuffed him and radioed for assistance. Subsequently, the officer discovered that the discarded rock was crack cocaine. Hodari claimed that the pursuit was a seizure, and because there was no legal cause for the pursuit there was a Fourth Amendment violation, requiring suppression of the fruits including the cocaine.

Justice Scalia, writing for the majority, "consulted the common law" and cited law dictionaries to support the notion that the word "seizure" has meant a "taking possession." Justice Scalia separated seizures into two types: those in which the officer has physically touched the citizen, and those in which the officer has used a non-physical show of authority. As to the former category, Justice Scalia noted that "[t]o constitute an arrest, * * *—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." However, although "an arrest is effected by the slightest application of physical force," Justice Scalia rejected the idea that "there is a *continuing* arrest during the period of fugitivity."

As to the latter category of *non-physical* displays of authority, at issue under the facts of *Hodari,* Justice Scalia framed the question before the Court as "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." The answer was "that it does not."

Justice Scalia observed that *Mendenhall* dealt with non-physical displays of authority, and focused only on whether a reasonable person would feel that he or she was free to leave, rather than on actual submission. Justice Scalia concluded, however, that the "free to leave" test was a necessary, but not sufficient, test for determining whether a seizure occurs. He stated that the *Mendenhall* test when "read carefully" says that a person has been seized "only if", not "whenever" the officer uses a show of authority. Thus, where the officer engages in a non-physical show of authority, it must be such that a reasonable person would not feel free to leave, *and* the citizen must actually submit. This is in contrast to physical touching or grasping, which if intentional is a seizure in any case.

As a matter of policy, Justice Scalia reasoned that the public should be encouraged to comply with police orders; therefore it would not do to reward suspects like Hodari for noncompliance by finding a seizure. Justice Scalia rejected the argument that police officers would abuse a rule that they may automatically chase non-complying suspects. The perceived risk of abuse was that officers, having no reasonable suspicion to support a stop, would routinely use non-physical displays of authority in the hope that suspects would disobey them and evidence would be found. Justice Scalia found this risk overrated. He reasoned that police do not issue orders expecting them to be ignored. Thus, officers would not take the risk that suspects would comply with their orders and render the seizure illegal in the absence of reasonable suspicion.

Justice Stevens, joined by Justice Marshall, dissented. He criticized the majority's "narrow construction" of the term "seizure" as meaning "that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target." The dissenters argued that the common law distinction between touching and a show of force was not determinative for Fourth Amendment purposes. Justice Stevens suggested that the common law ought not to govern analyses of current law enforcement practices.

Justice Stevens concluded that the majority erred in focusing on the citizen's reaction to an officer's conduct rather than on the officer's conduct itself. He noted that under the majority's test, police officers could take advantage of citizens by using all their conduct against them in the seconds before they actually submit to authority. For example, an officer could flash his lights to stop a car without adequate cause, and then use any observations made before the car comes to a complete stop. Similarly, a drug enforcement agent could approach a group of passengers in an airport with a drawn gun, announce a baggage search, and then rely on the passengers' reaction to justify a subsequent investigative stop.

Justice Stevens contended that it was "anomalous, at best" to establish different rules for seizures effected by touching and those effected by a show of force. He argued that it was important for an officer to know in advance whether certain conduct would constitute a seizure, and that the majority's test makes this impossible when the officer is using a non-physical show of force.

QUESTIONS AFTER HODARI

Suppose an officer fires a warning shot in the air and a fleeing suspect stops suddenly and a package falls from his pocket as a result of this sudden stop? Is the package the fruit of a seizure? See Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("Apparently, Justice Scalia would hold that if an officer shot at a suspect to stop him from fleeing, but the bullet missed the suspect because he lunged away to avoid being shot, there would be no seizure. There is little logic to the result that the touch of a finger that fails to restrain a suspect is a seizure, while an unsuccessful attempt to shoot a suspect is not."). See also Mettler v. Whitledge, 165 F.3d 1197 (8th Cir.1999) (sending in an attack dog to subdue the suspect did not constitute an unreasonable seizure, where the citizen shot the dog before the dog got to him).

It should be noted that Hodari was a young, African American, urban male. How suspicious is it for such a person to run when a number of uniformed police come around the corner? See generally Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val.U.L.Rev. 243 (1991) (arguing that the Court should take account of the race of the citizen in assessing the legality of a police-citizen confrontation under *Terry*).

When Does Submission Occur?

One of the problems left for police officers and the courts after *Hodari* is to determine when, precisely, a suspect has submitted to a non-physical show of authority—i.e., when does the seizure begin. This is important when a citizen tries to dispose of evidence in response to a show of authority. Exemplary is United States v. Lender, 985 F.2d 151 (4th Cir. 1993). The court set forth the pertinent facts as follows:

> At approximately 12:50 a.m., [Officers Hill and Thornell] were patrolling an area in Kinston, North Carolina. The officers knew the area to be one where heavy drug traffic occurred. As they crossed an intersection, the officers observed a group of four or five men, including the defendant, huddled on a corner. The defendant had his hand stuck out with his palm up, and the other men were looking down toward his palm.

> Suspecting a drug transaction, the officers stopped their car, got out, and approached the men. Although the officers wore plain clothes and drove an unmarked car, they were readily identifiable as police officers because of their firearms and badges worn at belt-level. As the officers approached, the group began to disperse, and the defendant walked away from the officers with his back to them. Officer Hill called out for the defendant to stop, but the defendant refused. As he walked, the defendant turned and told Hill, "You don't want me; you don't want me."
>
> While Lender continued to walk away, both officers observed him bring his hands to the front of his waist as though reaching for or fumbling with something in that area. Officer Hill again called for the defendant to stop. At this point, the defendant stopped, and a loaded semi-automatic pistol fell from his waist to the ground. [Lender was convicted of possession of a firearm by a felon.]

Lender moved to suppress the gun, arguing that he had been seized without reasonable suspicion by the time he dropped it. But the court disagreed.

> Lender argues * * * that he submitted to Officer Hill's second order to stop by coming to a complete halt, and that the gun fell to the ground only after he stopped. Therefore, according to the defendant, the gun fell into plain view after he had been seized.
>
> We do not believe, however, that Lender's momentary halt on the sidewalk with his back to the officers constituted a yielding to their authority. Between Officer Hill's first and second commands for the defendant to stop, both officers heard the defendant say, "You don't want me; you don't want me." They also observed him fumbling with his hands in the area of his waist as if reaching for or adjusting a weapon. Defendant asks us to characterize as capitulation conduct that is fully consistent with preparation to whirl and shoot the officers.
>
> The defendant's actions after he dropped the pistol indicate further that he had not yielded. Lender had stopped for at most an instant when the gun fell. Instead of stopping and standing still, the defendant quickly moved to pick up the weapon. Under the circumstances it cannot be said that the defendant had yielded, and therefore been seized, before the gun fell into the plain view of the officers.

See also United States v. Griffin, 652 F.3d 793 (7th Cir. 2011) (rejecting the defendant's argument that "a seizure does not necessarily occur at a discrete point in time but is better conceived of as a continuing event" that starts at the show of authority and ends when the subject submits; that analysis is directly contrary to *Hodari*; therefore the defendant had

not been seized when he refused to pull over when directed to do so by police, and evidence he threw out of the car in a subsequent ""low speed chase" was properly admitted).

Summary of Seizure Cases

Professor Sundby has set forth the following "Accidental Tourist's guidebook" on the state of the law concerning seizures of persons under *Terry*:

> Travel is a considerable problem. One should be aware that law enforcement officers may stop someone and ask permission to look in his luggage even if the traveler has not acted in a fashion that would provoke articulable suspicion of wrongdoing. This is true whether traveling by land, air, or sea. If approached, the innocent traveler should not be alarmed but should state to the officer that he or she has no desire to converse and has other, more important appointments to keep. Although this might strike the traveler at first as rude and abrupt, and perhaps a bit frightening if the questioner is armed, the Supreme Court has made clear that the Fourth Amendment is not for the timid. Consequently, the wise traveler should carry a copy of the Fourth Amendment and display it to the questioner and thus avoid any unnecessary discourse. It is this writer's fervent hope that travel agents soon shall issue copies of the Fourth Amendment as standard procedure when writing airplane, bus, or train tickets.

Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum.L.Rev. 1751, 1793 (1994). Is Professor Sundby's assessment overly critical, or just about right?

3. Grounds for a Stop: Reasonable Suspicion

The degree of suspicion required to make a stop is referred to as "reasonable suspicion" by the courts. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975). As with the higher standard of probable cause, two separate questions arise in determining whether reasonable suspicion exists. The court must investigate the *source* of information upon which reasonable suspicion is based; and the court must evaluate whether that information is *sufficiently suspicious* to justify a stop.

a. Source of Information

In Adams v. Williams, supra, the Court held that the informant's tip could be credited toward reasonable suspicion. *Adams* did not consider, however, whether reasonable suspicion could be based on a tip from an *anonymous* informant.

Anonymous Tips: Alabama v. White

The Court relied heavily on *Adams* and Illinois v. Gates (discussed in the material on probable cause) in Alabama v. White, 496 U.S. 325 (1990), and held that an anonymous informant's tip that was "significantly corroborated" by a police officer's investigation provided reasonable suspicion for a stop. Police received an anonymous tip that White would be leaving a particular apartment in a brown Plymouth station wagon with the right taillight broken, and would be driving to Dobey's Motel with a brown attache case containing cocaine. The officers went to the apartment, and saw White enter a brown Plymouth station wagon with a broken right taillight. She was not carrying an attache case. They followed the station wagon as it took the most direct route toward Dobey's Motel. White was stopped just short of Dobey's Motel, and consented to the search of a brown attache case that was in the car. The officers found marijuana in the attache case, and three milligrams of cocaine in White's purse, which was searched during processing at the station. White argued that the stop was illegal because the officers did not have reasonable suspicion, and the evidence should therefore have been excluded as a product of the illegal stop.

Justice White, writing for a six-person majority, held that the stop was supported by reasonable suspicion, derived from the informant's tip and the officers' corroboration of that tip. He noted that under the *Gates* "totality of the circumstances" approach to probable cause, an informant's veracity and basis of knowledge remain "highly relevant" in determining the value of the report of an informant. Justice White stated: "These factors are also relevant in the reasonable suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard."

Even given the lesser showing required, Justice White acknowledged that the anonymous tip did not itself provide reasonable suspicion, because it failed to show that the informant was reliable (given the fact that the informant was unknown), and it gave no indication of the informant's basis for concluding that White was involved in a drug transaction. But the majority stated: "As there was in *Gates,* however, in this case there is more than the tip itself."

Justice White determined that the corroboration in *White* (i.e., the car was accurately identified and White was going *toward* Dobey's Motel) was not as substantial as that in *Gates.* Yet this was not fatal, because reasonable suspicion is a less stringent standard than probable cause. Justice White explained as follows:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content

than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

The Court found that reasonable suspicion existed even though the corroboration of the tip was not complete, and even though the tip was not correct in some details. Justice White acknowledged that the officer's corroboration of the existence of the car was insignificant, since "anyone could have predicted that fact because it was a condition presumably existing at the time of the call." However, the caller's ability to predict White's future behavior (i.e., getting in the car and driving toward Dobey's Motel) was "important" because:

> [I]t demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. * * * When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Justice Stevens wrote a short dissenting opinion, joined by Justices Brennan and Marshall. The dissenters argued that the activity predicted by the informant and corroborated by the police (leaving an apartment and driving toward a motel) was completely innocent. Justice Stevens concluded as follows:

> Millions of people leave their apartments at about the same time every day carrying an attache case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attache case described by the tipster.

QUESTIONS AFTER WHITE

Does it make sense that the reasonable suspicion standard is less demanding than probable cause as to both quantity and *quality* of information? Does the Court mean that certain information may be too unreliable to credit toward probable cause, but reliable enough to credit

toward reasonable suspicion? How universal is the Court's premise that an informant's accurate prediction of future innocent activity makes it more likely that the informant is correct in his conclusion about the suspect's criminal activity? See generally Rudstein, White on *White:* Anonymous Tips, Reasonable Suspicion, and the Constitution, 79 Ky.L.J. 661 (1991).

Anonymous Tips Concerning Guns

In the following case, the Court considered whether an anonymous tip concerning possession of a gun constitutes reasonable suspicion when it is not corroborate by any predicted activity.

FLORIDA v. J.L.

Supreme Court of the United States, 2000.
529 U.S. 266.

JUSTICE GINSBURG delivered the opinion of the Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

* * *

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing. J.L., who was at the time of the frisk 10 days shy of his 16th birthday, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for

reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's "not easily predicted" movements. The tip leading to the frisk of J.L., the court observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. Two justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips.

* * * We granted certiorari, and now affirm the judgment of the Florida Supreme Court.

* * *

In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White, 496 U.S., at 329. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

[Justice Ginsburg points out that in *White*, the Court said it was a "close case."]

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. * * * These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

A second major argument advanced by Florida and the United States as amicus is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. Several Courts of Appeals have held it per se foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White*, the Fourth Amendment is not so easily satisfied.

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, and schools, see New Jersey v. T.L.O., 469 U.S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

* * *

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

On the record created at the suppression hearing, the Court's decision is correct. The Court says all that is necessary to resolve this case, and I join the opinion in all respects. It might be noted, however, that there are many indicia of reliability respecting anonymous tips that we have yet to explore in our cases.

* * *

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. * * *

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. * * *

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

Tips and Corroboration After J.L.

One court has distilled the following factors for determining whether reasonable suspicion can be found from an informant's tip after *J.L.*:

> Although no single factor is dispositive, relevant factors include: (1) whether the informant lacked "true anonymity" (i.e., whether the police knew some details about the informant or had the means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant.

United States v. Chavez, 660 F.3d 1215 (10th Cir. 2011).

J.L. and a Tip About Reckless Driving

How does the Court's analysis in *J.L.* apply if police receive an anonymous tip that a car is engaged in reckless driving and, when police officers observe the car on the road the driver is not at that point driving recklessly? Can the officers stop the car despite the lack of corroboration of any predictive activity? The court in United States v. Wheat, 278 F.3d 722 (8th Cir. 2001) considered this question and upheld the stop of the identified car. It relied on the language in *J.L.*, implying that the decision would be different if public safety were in imminent risk:

> An erratic and possibly drunk driver poses an imminent threat to public safety. Of course, arguably so too does a citizen armed with a gun, yet the Supreme Court firmly declined to adopt an automatic firearm exception to the reliability requirement on that basis. However, there is a critical distinction between gun possession cases and potential drunk driving cases. In the possessory offense cases, law enforcement officers have two less invasive options not available to officers responding to a tip about a drunk driver. First, they may initiate a simple consensual encounter, for which no articulable suspicion is required. Needless to say, that is not possible when the suspect is driving a moving vehicle.
>
> Alternatively, officers responding to a tip about a possessory violation may quietly observe the suspect for a considerable length of time, watching for other indications of incipient criminality that would give them reasonable suspicion to make an investigatory stop—as, for example, in *Terry*, where an experienced officer witnessed several men casing a joint. By contrast, where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice. * * * [H]e can intercept the vehicle immediately and ascertain whether its driver is operating

under the influence of drugs or alcohol. Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. In contradistinction to *J.L.*, where the suspect was merely standing at the bus stop, in this context the suspect is extremely mobile, and potentially highly dangerous. A drunk driver is not at all unlike a "bomb," and a mobile one at that. Thus, we think that there is a substantial government interest in effecting a stop as quickly as possible.

J.L. and a Tip About Domestic Violence

For similar reasons, tips by anonymous informants about domestic violence and related emergencies have been found to be sufficient for a stop even without corroboration through predictive activity. Thus, in United States v. Hicks, 531 F.3d 555 (7th Cir. 2008), a 911 caller reported that "a guy is beating up a woman" and was threatening to shoot her. The caller gave an address, police responded, and they stopped and eventually found a gun on Hicks. Hicks relied on *J.L.*, arguing that the tip was not reliable because it lacked predictive information that would have allowed the officer to test it. But the court distinguished *J.L.* and declared that "police delay while attempting to verify an identity or seek corroboration of a reported emergency may prove costly to public safety and undermine the 911 system's usefulness." The court elaborated as follows:

> A rule requiring a lower level of corroboration before conducting a stop on the basis of an emergency report is not simply an emergency exception to the rule of *J.L.* It is better understood as rooted in the special reliability inherent in reports of ongoing emergencies. * * * Surely, anonymous tips about emergencies cannot always be trusted—although frequency data does not exist, fraudulent 911 calls are agreed to be a dangerous problem. See Rana Simpson, Misuse and Abuse of 911 at 5–7 (U.S. Dept. of Justice, Problem-Oriented Guides for Police Series, No. 19, 2002). But any body of law requiring 911 operators to carefully make credibility determinations would unacceptably delay the necessary responses to *all* emergency calls, including genuine ones.

See also United States v. Wooden, 551 F.3d 647 (7th Cir. 2008) (anonymous tip about domestic violence was sufficient to seize the defendant even though when officers arrived, the couple was chatting amicably; there was a "need for dispatch" that excused any requirement for corroborative evidence, and "domestic violence comes and goes—a man

who pulls gun on his wife or girlfriend may do it again at any moment" or may have threatened the woman to "act naturally").

J.L. and "Anonymity"

The Court in *J.L.* distinguishes between known informants (whose tips can be sufficient without corroboration) and anonymous ones. Justice Kennedy points out, however, that under certain circumstances the identity of a tipster may be unknown but the informant is not really "anonymous." For example, in United States v. Heard, 367 F.3d 1275 (11th Cir. 2004), an officer saw Heard and a woman having a loud argument at a train station. The woman accused Heard of owing her money. The officer intervened; Heard admitted owing the woman money, and the officer encouraged Heard to pay her. Heard did so and walked away. The officer walked off in the same direction as the woman. The woman then told the officer that Heard was carrying a weapon. The officer then proceeded back toward Heard, and told the woman to remain at the station to make a statement. But the woman jumped on a waiting train and was never seen again. The officer proceeded to frisk Heard, and found a weapon.

Appealing his conviction for possession of a firearm by a felon, Heard argued that under *J.L.*, there was no reasonable suspicion for the officer to stop and frisk him. The government argued that the woman's tip was more reliable than the purely anonymous tip in *J.L.*, because she spoke face-to-face with the officer.

The court agreed with the government and affirmed the conviction. It explained as follows:

> A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant.
>
> In this case, [Officer] Gore had an opportunity to judge the demeanor and credibility of the unknown woman. Gore stated that the woman seemed frightened when she reported Heard's weapon, and Gore reasonably presumed that Heard and the unidentified woman had some sort of relationship—they were arguing over money and Heard paid the woman the amount she demanded. Thus, reasoning that Heard knew the woman, Gore could reasonably conclude that she would have reliable information about whether Heard possessed a weapon.

Heard argued that whatever assurance of reliability was obtained by a face-to-face report, it was lost when the informant jumped on the train and fled the scene. But the court rejected this argument as well:

> The reliability of a tip is considered in light of all relevant circumstances, which include—but is not limited to—a consideration of whether the officer can track down the tipster again. In this case, although the unknown woman fled the MARTA station, because she and Heard apparently knew each other, she may have subjected herself to reprisal from Heard based on the tip she gave to Gore—which makes her more reliable. Considering the totality of the circumstances in this case, Gore reasonably concluded that the unknown woman's tip was reliable.

See also United States v. Brown, 496 F.3d 1070 (10th Cir. 2007) (911 caller was not anonymous, and therefore the caller's tip could suffice for reasonable suspicion: "The officers in this case knew the caller was a friend of the alleged victim and was present when the armed man entered her apartment. * * * An unnamed individual who divulges enough distinguishing characteristics to limit his possible identity to only a handful of people may be nameless, but he is capable of being identified and thus is not anonymous."); United States v. Chavez, 660 F.3d 1215 (10th Cir. 2011) (caller was not anonymous even though he refused to provide the police his name: "he stated that he was a Wal-Mart employee at a specific Wal-Mart store and thereby provided the police with information to discover his identity"); United States v. Copening, 506 F.3d 1241 (10th Cir. 2007) (where 911 calls were made from an unblocked number, the caller was not anonymous).

b. *Quantum of Suspicion*

The Supreme Court in United States v. Cortez, 449 U.S. 411 (1981), set forth the following oft-cited test for determining whether reasonable suspicion exists in a given set of circumstances:

> [T]he 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. * * * [P]articularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and considerations of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> 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; * * *.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

Comparison to Probable Cause

The Court in *Terry* reasoned that, because a stop was less intrusive than an arrest, it could be justified upon a lesser showing of proof than the probable cause required for an arrest. Courts have struggled with the meaning of reasonable suspicion and with how the reasonable suspicion standard differs from that of probable cause. It is clear, however, that the standards are materially different. There are many cases in which the courts have held that reasonable suspicion existed but probable cause did not. See Florida v. Royer, 460 U.S. 491 (1983) (consent tainted where it was obtained while Royer was under arrest and officers had only reasonable suspicion and not probable cause to believe that Royer was involved in drug activity); United States v. Anderson, 981 F.2d 1560 (10th Cir.1992) (reasonable suspicion but not probable cause existed, where the defendant was twice seen leaving a house in which narcotics were sold, and parked his car a few blocks from the house, near a truck where narcotics were stored; because the defendant was arrested rather than stopped, the evidence obtained as a result of the detention should have been suppressed).

The analytical framework used by the courts in assessing reasonable suspicion is similar to that employed in assessing probable cause. Thus, a court will undertake a common sense analysis of the facts presented; it will give deference to the expertise of law enforcement officers, who may know through experience that certain facts are indicative of criminal activity (e.g., that drug dealers often carry beepers or cellular phones, or speak in code); and it will consider the totality of the circumstances because, while each fact may seem innocent if considered individually, the factors considered in their totality may not be so easily explained away; and it will not expect the officers to be infallible.

The most important difference between reasonable suspicion and probable cause is that reasonable suspicion is a *less demanding standard of proof*—a stop is permissible upon something less than the fair probability standard that defines probable cause. Some courts have defined reasonable suspicion as a fair *possibility* (as opposed to probability) of criminal activity. It is appropriate to think of reasonable suspicion as "possible cause."

A probability-based example of the difference between reasonable suspicion and probable cause is presented by the facts of United States v. Winsor, 846 F.2d 1569 (9th Cir.1988). Officers chased suspected bank

robbers fleeing from the bank into a hotel. The hotel had approximately 40 guest rooms, and the officers had no idea where in the hotel the robbers were hiding. The question was whether there was probable cause to search each of the hotel rooms for the suspects. The court found that a one-in-forty probability was too small to support probable cause, but that the low probability did amount to reasonable suspicion: "The odds on discovering the suspect in the first room upon whose door the police knocked were high enough to support a founded suspicion. The odds favoring discovery increase as rooms are searched. At some point, perhaps at the last two or three unsearched rooms, probable cause may be said to exist." Conversely, at some point of improbability, reasonable suspicion would not have existed—for example, if the hotel had 600 rooms, there would not have been reasonable suspicion to believe that the suspects were in any particular room. Because there was only reasonable suspicion and not probable cause in *Winsor*, the court held that the search of the hotel room in which the suspects were actually found was illegal. A search for law enforcement purposes requires probable cause and cannot be justified under *Terry*. What should the police do in a case like Winsor where suspects might be in any of 40 rooms?

Assessment of Probabilities

The Court applied the *Cortez* totality of circumstances test in United States v. Arvizu, 534 U.S. 266 (2002), which involved the stopping of a minivan by a border patrol agent. After stopping the minivan, the agent asked for and obtained permission to search. He found drugs and arrested the driver. The district court denied a motion to suppress evidence, but the Ninth Circuit reversed.

The court of appeals analyzed 10 factors that the district court had considered in denying the motion. Of these, it held that 7 factors—including the driver's slowing down, his failure to acknowledge the agent, the raised position of children's knees in the car, and their odd waving—were entitled to little or no weight in assessing reasonable suspicion. The court of appeals found that other factors—use of the road by smugglers, the temporal proximity between the timing of the trip and the agents' shift change, and the use of minivans by smugglers—were not enough to render the stop permissible.

The Supreme Court reversed in an opinion by Chief Justice Rehnquist, who wrote:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. This process allows officers to draw on

their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." Although an officer's reliance on a mere "hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. But we have deliberately avoided reducing it to a neat set of legal rules. * * *

We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard [the agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."

The Court of Appeals' view that it was necessary to "clearly delimit" an officer's consideration of certain factors to reduce "troubling . . . uncertainty," also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field.

* * * Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no special circumstances rendering innocent avoidance . . . improbable." We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). * * * Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. To the extent that a totality of the circumstances approach may render appellate review less

circumscribed by precedent than otherwise, it is the nature of the totality rule.

Having considered the totality of the circumstances and given due weight to the factual inferences drawn by the law enforcement officer and District Court Judge, we hold that Stoddard had reasonable suspicion to believe that respondent was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally * * * Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

Examples of Reasonable Suspicion

Here are the facts of a case in which reasonable suspicion was found:

At 1:00 p.m. two Boston police detectives in an unmarked car were patrolling that portion of Boston known as the "Combat Zone." The Combat Zone is a high crime area known for prostitution and drug-dealing. As the officers were stopped at a light, they noticed a grey Thunderbird automobile stopped on the curb of Washington Street with a man at the wheel. As the officers watched, a second man approached the Thunderbird from the sidewalk and engaged the driver in a twenty second conversation through the open passenger-side window. The second man got into the car and had an additional five or ten second conversation with the driver. The car then pulled out and proceeded for two blocks until it made a right turn onto Hayward Place, a short street which connects Washington Street and Harrison Avenue. The officers followed in their unmarked car. Hayward Place was deserted. The Thunderbird parked on Hayward Place, and the officers parked well behind it with an unobstructed view. The officers observed the driver and passenger engaged in a

thirty second discussion with their heads inclined toward each other. The passenger then got out of the car and walked back toward Washington Street. One officer approached the car, ordered the driver out, noticed a bulge, and pursuant to a pat-down frisk uncovered a spring-activated knife. The officer arrested the driver for carrying an illegal weapon, and in a search incident to arrest eleven grams of cocaine were uncovered.

The court confronted with these facts in United States v. Trullo, 809 F.2d 108 (1st Cir.1987), stated that the officer's seizure of the driver went to the "outermost reaches of a permissible *Terry* stop," and that "today's satisfactory explanation may very well be tomorrow's lame excuse." But the court did uphold the police conduct, relying on the high crime area, the officers' expertise in determining whether drug activity was afoot, the short nature of the conversation between the driver and passenger, and the fact that the passenger walked back toward the place where he had met the car. This latter factor meant that it was "unlikely that the man was seeking transportation." The court concluded that while it would be possible to "hypothesize some innocent explanation" for the conduct, the test for a stop is whether there is reasonable suspicion of criminal activity, and not whether the facts can be construed as innocent. Judge Bownes, in dissent, asked the following question: "If a citizen lets another person into his car on Washington Street, where must he let him off to avoid an armed stop by the police?" Judge Bownes claimed that the majority "seems to allow armed stops of individuals who meet in the Combat Zone on the basis of unlimited deference to police discretion." Who has the better of the argument? Who has more accurately applied the *Cortez* test? See also United States v. Green, 691 F.3d 960 (8th Cir. 2012) (Bank robber described as a black male with a medium build and facial hair wearing white Nike tennis shoes, and Green, who fit the description was found walking two blocks from the bank shortly after the robbery; reasonable suspicion for a stop was found "[g]iven Green's similarities to the description of the suspected robber and his proximity in both time and place to the crime.").

Example of Reasonable Suspicion Lacking

While most of the reported cases assessing reasonable suspicion have found that the officers in question had sufficient proof to justify a stop, there are a few cases in which the facts are so innocent that the reviewing court finds the stop invalid. An example is United States v. Rodriguez, 976 F.2d 592 (9th Cir.1992). Officers sitting in a marked car alongside Interstate 8 in California saw Rodriguez drive toward them in a 1976 Ford Ranchero. They noticed that he looked Hispanic, sat up straight, kept both hands on the wheel, and looked straight ahead. He did not "acknowledge" the agents' presence, which they thought suspicious

because all the other traffic passing by had acknowledged the presence of the officers. The agents testified that Interstate 8 is a "notorious route for alien smugglers" and that Ford Rancheros have a space behind the seat where illegal aliens can be concealed. The agents followed Rodriguez. They testified that his car responded sluggishly when it went over a bump, as if heavily loaded, rather than with a "crisp, light movement" that was typical of a Ford Ranchero. They also noted that, while being followed, Rodriguez looked often into his rear view mirror and swerved slightly within his lane. On the basis of this information, the officers stopped Rodriguez's vehicle. A subsequent search pursuant to consent yielded 168 pounds of marijuana. Rodriguez argued that the consent was tainted as a product of an unlawful stop.

The court held that reasonable suspicion did not exist to stop Rodriguez, and therefore the evidence was illegally obtained. It first noted that the testimony of the officers at the suppression hearing was eerily similar to that provided in other cases, so similar that "an inquiring mind may wonder about the recurrence of such fortunate parallelism in the experiences of the arresting agents." The court stated that it could not accept "what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." According to the court, the factors cited by the agents "describe too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity." The court concluded as follows:

> In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16 year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California.

Is the court's finding of no reasonable suspicion sustainable after *Arvizu*? Are the facts of *Arvizu*, in their totality, more suspicious? See also United States v. Peters, 10 F.3d 1517 (10th Cir.1993) (where two Nigerians in a Ryder truck were pulled over for a traffic violation, and consented to a search that uncovered no evidence, they could not be stopped later down the road on the basis that they appeared nervous when being followed by another marked police car).

In United States v. Manzo-Jurado, 457 F.3d 928 (9th Cir. 2006), the officer saw a group of six Hispanic men and became suspicious that they were illegal aliens. The men were attending a high school football game. The officer testified that he was suspicious because "the group members appeared out of place at the football game." Specifically, "they did not mingle with other attendees, did not appear associated with either high

school, and were not familiar to" the officer. The court found that the officer's "unsupported intuition that a group of men keeping to themselves at a football game is indicative of the men's illegal status in this country is not a rational inference that helps establish reasonable suspicion." Is it ever suspicious that a person or group appears "out of place"? What if an obviously destitute person is walking on the street in a wealthy neighborhood?

Reasonable Suspicion of a Completed Crime: United States v. Hensley

Most of the cases discussed above evaluated whether the officer had reasonable suspicion that the suspect was either committing a crime or about to commit a crime. Can a *Terry* stop be made on the basis of reasonable suspicion to believe that the suspect has *already* committed a crime? The Court in United States v. Hensley, 469 U.S. 221 (1985), confronted these facts:

> Several days after a tavern robbery in St. Bernard, Ohio (a Cincinnati suburb), a St. Bernard police officer interviewed an informant who stated that Hensley drove the getaway car. The officer obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the metropolitan area. The flyer stated that Hensley was wanted for investigation of an aggravated robbery, described Hensley and the date and location of the robbery, warned that Hensley should be considered armed and dangerous, and asked other departments to pick up and hold Hensley for the St. Bernard police.
>
> In a Kentucky suburb of Cincinnati, an officer who had heard the flyer read aloud several times stopped a car driven by Hensley. Although the officer let Hensley drive away, he inquired whether there was an outstanding warrant for his arrest. Two other officers in separate patrol cars interrupted to say that there might be an Ohio warrant on Hensley. The three officers then looked for Hensley while the dispatcher looked for the flyer and mistakenly telephoned Cincinnati to inquire about the flyer. One of the officers spotted Hensley's car and, after being advised by the dispatcher that Cincinnati was hunting for a warrant, he pulled the car over and approached with a drawn service revolver. A second officer arrived at the scene, saw a gun under the seat of a passenger known to be a convicted felon, arrested the passenger, and searched the car. When another gun was found, Hensley was arrested for illegal handgun possession.

Justice O'Connor, writing for a unanimous Court, held that *Terry* was not confined to prospective crimes; the power granted by *Terry* may

also be exercised to investigate completed crimes. Her opinion approved stops where "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." Relying on the "collective knowledge" doctrine established in Whiteley v. Warden, [discussed in the materials on probable cause], Justice O'Connor concluded that one department or officer could act to make a stop if another officer or department had reasonable suspicion to stop the defendant and asked for assistance. She applied her analysis to the facts and concluded that the St. Bernard police had a reasonable suspicion that Hensley committed a crime, that the Kentucky officers properly relied on the flyer, and that the stop was carried out in compliance with *Terry*.

Relevance of the Race of the Suspect

The court in *Rodriguez, supra,* expressed concern that an overly broad test of reasonable suspicion could result in a dragnet for Hispanics. Can the suspect's race *ever* be taken into account explicitly in determining whether reasonable suspicion exists?

When the question is whether the suspect sufficiently matches the description of a perpetrator of a completed crime, the suspect's race must obviously be considered relevant. For example, if a bank teller describes a robber as an Asian male in his 40's, an officer assessing reasonable suspicion must necessarily consider a person's race in determining whether to stop a person for that crime.

More difficult questions arise, however, when an officer considers a person suspicious simply because he is found in an area ordinarily not frequented by members of the suspect's racial group. Is it appropriate to consider it suspicious that an African-American male is walking down the street of an affluent suburb at 11 p.m., where the same conduct from a white male would not be suspicious in the least? Similarly, difficult questions exist when officers argue that certain crimes are more commonly committed by certain races (such as men of Arab descent and crimes of terrorism). In these cases, police officers essentially argue that activity of a member of a certain race is more suspicious than the same activity by a member of a different race.

The following facts present an example of an officer finding a person's race to be a suspicious factor:

> A St. Paul police officer observed Uber's vehicle at about 2:15 a.m. The officer saw the vehicle again about 30 minutes later in the same area. At that time the officer ran a check on the license number and determined that the vehicle was registered to a person in Moundsview, Minnesota, a suburb about 20 miles from St. Paul. Upon learning this information, the officer decided to stop the

> vehicle, because he thought the driver was seeking to solicit a prostitute. The Summit-University area, in which Uber's car was spotted, is well known as one where prostitution flourishes. The officer did not at that time see prostitutes in the area, nor had Uber slowed down or talked to anyone.

The court in City of St. Paul v. Uber, 450 N.W.2d 623 (Minn.App.1990), held that this information did not create reasonable suspicion to support a stop. The court stated as follows:

> We know of no authority that requires a resident of the State of Minnesota to have any reason to be on the public streets of another town * * *. No one from any suburb needs to justify his or her lawful presence on a public street in Minneapolis or St. Paul. * * * The officer's assumption that [Uber] was seeking prostitution was an inadvertent, but nevertheless invidious, form of discrimination. We would not tolerate the blatant discriminatory proposition that any member of a minority group found on a public street in Edina [an affluent suburb] had better live there, or be required to stop and justify his or her presence to the authorities. * * * Once we clear away the smoke from this case, it is clear that the stop of [Uber] is premised on the belief that after midnight, Caucasian males from the suburbs are only in the Summit-University area for no good, and that after midnight, no good is all the Summit-University area has to offer. Neither the residents of Summit-University nor the residents of Moundsview deserve the implications of this case. * * * Simply being on a public street in an area where one "might" find a prostitute or a drug dealer does not, without more, meet any constitutional standard for a stop by the authorities. See e.g. Brown v. Texas, 443 U.S. 47 (1979) (defendant's mere presence in a neighborhood frequented by drug users held insufficient to justify a stop).

While a person's race, or the existence of a high crime area, may not "without more" constitute reasonable suspicion, how much more is required? What if Uber had been driving ten miles below the speed limit and looking out along the street? Would such conduct be sufficiently suspicious, given the neighborhood, regardless of the suspect's race?[15] For a case consistent with *Uber*, see State v. Barber, 118 Wn.2d 335, 823 P.2d 1068 (1992) ("racial incongruity, i.e., a person of any race being allegedly out of place in a particular geographic area," could not be considered in the reasonable suspicion inquiry).

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[15] Professor Harris, in Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind.L.J.659 (1994), argues that *Terry* stops have a disproportionate effect on minorities, even if race is not explicitly taken into account in determining reasonable suspicion. This is because in many courts "an individual's presence in a high crime location plus evasion of the police equals suspicion reasonable enough to allow a stop under *Terry*." Professor Harris argues that minorities, because of where they usually live and how they understandably react toward police, are more likely to trigger these two "suspicious" factors.

Some courts, in contrast to *Uber*, have found it permissible for an officer to consider the race of a person in determining whether the person's conduct is suspicious. These courts hold that while the suspect's race cannot be the *only* factor supporting a stop, it can be considered together with other suspicious factors. In other words, these courts appear to permit a form of racial profiling, so long as race is not the only basis for the stop. As the court put it in United States v. Weaver, 966 F.2d 391 (8th Cir.1992), a case in which the defendant, the only African-American male on a flight from Los Angeles to Kansas City, was stopped on suspicion of drug trafficking:

> Had [Officer] Hicks relied solely on Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that Hicks had knowledge * * * that young black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, [i.e., that Weaver came from a source city for drugs, had no identification, and appeared unusually nervous when encountered by police officers] was a factor in the decision to approach and ultimately detain Weaver. We wish it were otherwise, but we take the facts as they are presented to us, and not as we would like them to be.

Should the court in *Weaver* have taken the facts as they would have liked them to be, instead of how they were presented? Would it be worth it to hold a person's race to be non-suspicious as a matter of law, regardless of "reality"? Would that encourage the police to be more "race-blind" in their use of the *Terry* power?

What about considering a suspect's Middle Eastern appearance as relevant to terrorism? The court in United States v. Ramos, 629 F.3d 60 (1st Cir. 2010), a case in which the defendants were seized while parked in a van outside a Boston train station, held that officers could take into account that the occupants of the van appeared to be Middle Eastern. The stop was made shortly after bombing attacks on trains in Madrid. The court reasoned as follows:

> While in other situations there may be merit to the argument that a description of ethnic appearance is irrelevant and nothing more than impermissible profiling, the argument fails on the facts here. The MBTA attempted to learn from the lessons of Madrid and had so trained its employees. * * * [E]xplicit warnings * * * of future strikes by the same groups in the United States, meant it was material for the officers to consider, among other facts, the risk of terrorist attacks on train stations in major urban centers and that the persons they were investigating had a Middle Eastern

appearance. This is not a case about stereotyping or selective prosecution.

The *Ramos* court emphasized that its holding on ethnic-based stops could not be taken too far:

> We wish to be very clear. Just as it cannot be said that the appearance, even ethnic appearance, of a suspect is never relevant, it certainly cannot be said that it is always or even generally relevant. If the events in this case took place at a different time or place or under other circumstances, an attribution of "Middle Eastern" appearance may not necessarily be as relevant a fact.

The *Ramos* court also emphasized that the van occupants' Middle Eastern appearance was not the only basis for suspicion. Other factors included the fact that they were in a van, that they were in a commuter parking lot for an extended period of time without dropping anyone off or picking anyone up, that the van had tinted windows, and that it had a temporary, paper license plate from Texas. Would you have found reasonable suspicion on the basis of the facts independent of ethnicity?

Can an officer stop a Hispanic person on suspicion that he is undocumented? In Melendres v. Arpaio, 695 F.3d 990 (9th Cir.2012), the court found that Latino motorists were entitled to a preliminary injunction prohibiting Arizona police officers from detaining individuals based solely on reasonable suspicion that an individual was unlawfully present in the United States. The court noted that "unlike illegal reentry, mere unauthorized presence in the United States is not a crime." Because *Terry* is based on reasonable suspicion of crime, it followed that officers could not conduct a *Terry* stop solely on the basis of suspicion that a Hispanic person is an undocumented alien.

Use of Profiles

In several of the cases above it is apparent that the officers were comparing the activity of the suspect to a profile of a person engaged in certain criminal activity. Officers often use profiles to determine whether the conduct of citizens is sufficiently suspicious to justify a stop. A profile is a list of characteristics compiled by a law enforcement agency, which have been found through experience to be common characteristics of those engaged in a certain type of criminal activity. The most common example is a drug courier profile, but officers also employ other profiles for specific criminal activity, including terrorism. See United States v. Malone, 886 F.2d 1162 (9th Cir.1989) (officer stops the defendant on the basis of a gang member profile).

The use of drug courier profiles was discussed extensively in United States v. Berry, 670 F.2d 583 (5th Cir.1982) (en banc):

* * * We conclude that the profile is nothing more than an administrative tool of the police. The presence or absence of a particular characteristic on any particular profile is of *no* legal significance in the determination of reasonable suspicion.

Two consequences stem from this holding. First, a match between certain characteristics listed on the profile and characteristics exhibited by a defendant does not automatically establish reasonable suspicion. * * * Any checklist of suspicious characteristics cannot be mechanically applied by a court to determine whether a particular search or seizure meets the Supreme Court's standards. A profile does not focus on the particular circumstances at issue. Nor does such a profile indicate in every case that a specific individual who happens to match some of the profile's vague characteristics is involved in actions sufficiently suspicious as to justify a stop.

The second consequence of our holding flows from the first. Although a match between a defendant's characteristics and some of the characteristics on a drug courier profile does not automatically support a finding of reasonable suspicion, the fact that a characteristic of a defendant also happens to appear on the profile does not preclude its use as a justification providing reasonable suspicion for a stop. * * * Our holding is only that we will assign no characteristic greater or lesser weight merely because the characteristic happens to be present on, or absent from, the profile.

The Supreme Court has essentially adopted the *Berry* approach toward profiles. Thus, in United States v. Sokolow, 490 U.S. 1 (1989). DEA agents stopped Sokolow after they learned that he paid $2100 for two airplane tickets from a roll of $20 bills, he traveled under a name that did not match the name under which his telephone was listed, he traveled to Honolulu from Miami and stayed only 48 hours even though a round-trip flight takes 20 hours, he appeared nervous during the trip, and he checked no luggage. Chief Justice Rehnquist wrote for the majority, which found that the above facts, taken together, amounted to reasonable suspicion. The Chief Justice reviewed the facts known to the officers concerning Sokolow, and recognized that "any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel." But he stated that the relevant inquiry "is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts."

The Chief Justice rejected Sokolow's argument that the officer's use of a drug courier profile tainted the stop:

A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that

> conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

The Chief Justice also rejected Sokolow's argument that agents were obligated to use the least intrusive means available to verify or dispel their suspicions—in this case by engaging in an encounter rather than a stop. The majority reasoned that any rule requiring a least intrusive alternative approach would hamper the police in making on-the-spot decisions.

Justice Marshall, joined by Justice Brennan, dissented and complained about the officers' use of the drug courier profile.

> Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's chameleon-like way of adapting to any particular set of observations.

Overbroad Profile Factors

It is clear that some profile factors relied on by police are far too broad to support reasonable suspicion in the courts. For example, in United States v. Beck, 140 F.3d 1129 (8th Cir.1998), an officer sought to justify the stop of a motorist in part because he was driving through Arkansas in a car from California, and California was a "source state" for drugs. The criteria for considering the entire state of California to be a profile factor was unexplained. Indeed, the officer testified that he considered not only California to be a drug source state, but also Arizona, Texas, New Mexico, Florida, and Louisiana. The court held that the profile factor was far too broad to be useful in a consideration of reasonable suspicion.

> While we do not suggest that geography is an entirely irrelevant factor, we do not think that the entire state of California, the most populous state in the union, can properly be deemed a source of illegal narcotics such that mere residency in that state constitutes a factor supporting reasonable suspicion. * * * We conclude, in the circumstances of this case, that no specific, articulable basis warranting a reasonable belief that Beck's Buick contained contraband can be gleaned from the mere fact that Beck's Buick was registered and licensed in California.

Note that the *Beck* court does not prevent the officer from using the California profile factor in *deciding* whether to stop a motorist. He simply cannot justify the stop by this factor. If the officer had reasonable

suspicion to stop the car on other grounds, the use of the California profile factor would not raise a Fourth Amendment issue.

Reasonable Suspicion and Flight from the Police

If a person runs upon seeing the police, is this enough to justify a stop of that person? This was a question presented in Illinois v. Wardlow, 528 U.S. 119 (2000). Wardlow fled upon seeing a caravan of police vehicles converge on an area of Chicago known for heavy narcotics trafficking. When Officers Nolan and Harvey caught up with him on the street, Nolan stopped him and conducted a protective pat-down search for weapons because in his experience there were usually weapons in the vicinity of narcotics transactions. Discovering a handgun, the officers arrested Wardlow. The Illinois appellate courts reversed Wardlow's conviction for a firearm violation, reasoning that his flight from the police in a high crime area did not constitute reasonable suspicion. The Supreme Court, in an opinion by Chief Justice Rehnquist for five Justices, found that the officers did have reasonable suspicion under the circumstances, and reinstated Wardlow's conviction.

The Chief Justice analyzed the relevance of Wardlow's flight in a high crime area in the following passage:

> An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a high crime area among the relevant contextual considerations in a Terry analysis. Adams v. Williams.
>
> In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police. * * * Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

> Such a holding is entirely consistent with our decision in Florida v. Royer, where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not going about one's business; in fact, it is just the opposite. * * * Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. * * * *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute.

Justice Stevens concurred in part and dissented in part in an opinion joined by Justices Souter, Ginsburg and Breyer. Justice Stevens stated that the defendant was pressing for a rule that flight from police officers would *never* equal reasonable suspicion, while the State was pressing for a rule that flight from police officers would *always* equal reasonable suspicion. He agreed with the majority that neither per se rule was appropriate, and that the relevance of flight in the reasonable suspicion inquiry depends on the circumstances. He dissented, however, from the Court's ruling that Wardlow's flight in a high crime area was sufficiently suspicious to justify a *Terry* stop under the circumstances. Justice Stevens emphasized why flight from the police might not be suspicious, particularly in minority communities and high crime neighborhoods:

> Among some citizens, particularly minorities and those residing in high crime areas, there is * * * the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." * * *

4. Limited Searches for Police Protection Under the *Terry* Doctrine

Terry and *Adams* indicate that an officer can frisk a suspect, and pull out objects found on the suspect, if there is reasonable suspicion to believe that the search is necessary to protect the officer or others from bodily harm during the course of an otherwise legal stop. See United States v. Preston, 685 F.3d 685 (8th Cir. 2012) ("Officers may conduct a protective pat-down search for weapons during a valid stop when they have objectively reasonable suspicion that a person with whom they are dealing might be armed and presently dangerous."). One obvious concern is that an officer may use the *Terry* frisk doctrine as a pretext to search for evidence of a crime. Thus, the officer may testify that he felt a fear of bodily harm, when in fact he was looking for evidence without having probable cause. Is there an easy way to distinguish *Terry* frisks from impermissible searches for evidence?

Frisk Cannot Be Used to Search for Evidence: Minnesota v. Dickerson

In Minnesota v. Dickerson, 508 U.S. 366 (1993), the Court reaffirmed the principle that *Terry* frisks are justified only for protective purposes and that a search for evidence is not permitted under *Terry*. The officer in *Dickerson*, suspecting drug activity, conducted a lawful stop and patdown, and felt a small, hard object in Dickerson's pocket. The officer determined that it was not a weapon, but nonetheless continued to squeeze and prod the object. This additional investigation led him to the conclusion that the object was crack cocaine. The officer then pulled the object out from Dickerson's pocket, and found that his conclusion was correct. Justice White, writing for the Court, declared that "the police officer in this case overstepped the bounds of the strictly circumscribed search for weapons allowed under *Terry*." He concluded as follows:

> Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, and that we have condemned in subsequent cases.

See also United States v. Miles, 247 F.3d 1009 (9th Cir. 2001) (officer exceeded scope of *Terry* frisk by shaking a small box found in the outer pocket of the suspect's clothing, where the box clearly could not have contained a weapon); United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2008) (en banc) (unzipping a suspect's jacket, in order to facilitate of showup identification, was not justified by *Terry* because it was not a search for self-protection but rather was done to obtain information about

a crime; therefore the gun found inside the suspect's jacket was illegally obtained).

Suspicion Required to Support the Right to Frisk

Evaluate the following facts in light of *Terry* and *Adams*.

> The officer received a radio report of an anonymous 911 call in which the informant stated that he had seen a woman in a blue car with a white top parked in front of 123 West 112th Street, a high crime area in New York City. The woman had passed a handgun to a man seated in the car with her. Finding defendant in a car meeting the description at the specific location indicated by the informant, the officer ordered the defendant out of the car, frisked her, and took a pistol from the area of her waistband.

The New York Court of Appeals held that while the stop was permissible, the frisk was not. The court reasoned as follows:

> A frisk requires reliable knowledge of facts providing reasonable basis for suspecting that the individual to be subjected to that intrusion is armed and may be dangerous. Here, there was no such predicate either in the information received, which indicated that defendant had given a gun to the man but provided no basis for inferring that she had another or that it had been returned to her, or in what occurred during the officer's encounter with defendant. No inquiry was made of defendant so she neither refused to answer nor answered evasively; no suspicious bulge was perceived in her clothing; no furtive movements were made by her; her appearance and movements were not concealed by darkness.

People v. Russ, 61 N.Y.2d 693, 472 N.Y.S.2d 601 (1984). If you were a police officer, would you have found it superfluous to frisk Russ for a gun, after she had already passed a gun in a high crime area?

Most courts have given considerably more deference to police concerns about the risk of harm involved in making a stop. Consider United States v. Rideau, 969 F.2d 1572 (5th Cir.1992) (en banc). Two officers were on patrol in a high crime area of Beaumont, Texas, "where people often carried weapons and transacted drug deals on the street, and where public drunkenness was a recurrent problem." The officers saw a man standing in the road. They flashed a bright light at him. The man turned to step up to the curb, and he stumbled. Officer Ellison, suspecting that the man was drunk, got out of his car and approached. Ellison asked the man his name. The man appeared nervous, did not answer, and began to back away. Ellison "immediately closed the gap and reached out to pat the man's outer clothing." The first place he touched was the man's right front pants pocket, where he felt a gun. The officer put the man up

against the patrol car, removed the gun, and arrested him. The man, subsequently identified as Rideau, was convicted for felon firearm possession.

Judge Higginbotham, writing for the majority of the en banc court of appeals, held that the frisk was justified because Officer Ellison had reasonable cause to believe that Rideau posed a threat of harm:

> Rideau's specific moves took place after a detention, at night, in a high crime area where the carrying of weapons is common. * * * Stripped from their context, the backward steps offer no threat, but to a police officer in Ellison's situation, they become very significant in the matrix of the general facts. * * * Of course, that an individual is in a high crime neighborhood at night is not in and of itself enough to support an officer's decision to stop and frisk him. But when someone engages in suspicious activity in a high crime area, where weapons and violence abound, police officers must be particularly cautious in approaching and questioning him.

Judge Smith, together with four other judges of the en banc panel, dissented in *Rideau*. He argued that under the majority's permissive approach, Rideau could have been frisked no matter what he did when Officer Ellison approached: if he had moved forward, this would have been deemed threatening as well; if he had moved to the side, this would have been deemed nervousness or flight; if he had remained motionless, it would have been viewed as "abnormal behavior caused by drugs or alcohol." Judge Smith concluded as follows:

> Perhaps if Rideau had graduated from charm school and had been taught how to look "cool and collected" in the face of approaching uniformed officers, he could have managed to avoid the patdown. Otherwise, he was doomed to the intrusion that in fact occurred. * * *
>
> * * * Rideau was searched not because of anything he did but because of his *status*—a person in a "bad part of town" where, presumably, people do not belong late at night, on the street, unless they are "up to no good." By that measure, almost any person in the vicinity of Martin Luther King Boulevard and Bonham Street that night could have been stopped and frisked.

Arguably, the New York court in *Russ* gave too little credence to an officer's concern for his safety in making a stop explicitly on a weapons charge. Did the majority in *Rideau* give too much credence to an officer's concern for his safety where the stop had nothing to do with weapons and was at least purportedly an attempt to help Rideau, who appeared drunk?

Frisking Based on the Type of Crime for Which the Person Is Suspected

Note that reasonable suspicion to conduct a frisk will depend in part on the nature of the crime for which the citizen is suspected. Thus, if there is reasonable suspicion to believe that a person is going to commit a crime of violence with a weapon, there will automatically be reasonable suspicion to frisk that person. On the other hand, if the citizen is suspected of a financial crime, it is less likely that reasonable suspicion to frisk will be found. See Leveto v. Lapina, 258 F.3d 156 (3rd Cir. 2001) (frisk of person suspected of tax offense was illegal, as there was no reason to think that the person was armed and dangerous); United States v. McKoy, 428 F.3d 38 (1st Cir. 2005) (no reasonable suspicion for a pat-down, even though the defendant was in a high crime area, where the basis for the stop was a parking and license plate violation: "this is not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected.").

Courts have expanded the assumption that certain crimes are weapons-related, beyond those crimes that by definition require a weapon (like armed robbery). Thus, in United States v. Snow, 656 F.3d 498 (7th Cir. 2011), officers frisked a person suspected of burglary, even though the person was completely cooperative during the stop and even though the stop occurred during the day in a low-crime area. The court stated that "[b]ecause the facts known to the officers supported a *Terry* stop to investigate whether he in fact had attempted a residential burglary, and because burglary is the type of offense that likely involves a weapon, Andrews' decision to order Snow out of the truck for purposes of a protective frisk was reasonable despite the absence of additional facts suggesting that Snow in particular might be armed." Snow argued that because he was being cooperative, the officers could have simply questioned him about whether he was carrying anything, rather than resorting to a frisk. But the court rejected that suggestion, stating that there was no requirement that officers must take a less onerous alternative in conducting a stop when they have reasonable suspicion that the suspect is armed and dangerous in light of the crime for which he is suspected.

Protective Searches Beyond the Suspect's Person: Michigan v. Long

The Court held in Michigan v. Long, 463 U.S. 1032 (1983), that the power to search under *Terry* can extend to protective examinations of areas beyond the person of the suspect. Long was stopped by officers who saw him driving erratically before he swerved into a ditch. When the officers stopped him, Long was out of his car and he appeared to be under

the influence of drugs or alcohol. Long failed to respond to initial requests that he produce a license and registration and then began to walk toward the passenger compartment of his car. An officer flashed a light into the car and saw a hunting knife. A protective search for weapons was conducted in the passenger compartment and marijuana was found and seized.

Justice O'Connor's opinion for the Court reasoned that *Terry* permits a limited examination of an area from which a person, who police reasonably believe is dangerous, might gain control of a weapon. While Long may not have been able to reach a weapon *during* the stop, Justice O'Connor explained that because a stop is only a temporary intrusion, the suspect "will be permitted to reenter his automobile, and he will then have access to any weapons inside." Thus the officers had a legitimate concern that Long might gain access to a weapon, and use it on the officers, *once he returned to his car after the stop was completed.* Accordingly, it was permissible under the circumstances for the officers to do a cursory inspection of areas in the car from which a weapon could be quickly obtained after the stop was over.[16] Thus while the doctrine is called "stop and frisk", *Long* permits a protective search beyond the suspect's person. After *Long* the more accurate description of *Terry* is "stop and protective search."

The New York Court of Appeals, in People v. Torres, 74 N.Y.2d 224, 544 N.Y.S.2d 796 (1989), rejected the reasoning in *Long* as a matter of state constitutional law. The *Torres* court declared:

> [I]t is unrealistic to assume, as the Supreme Court did in Michigan v. Long, that having been stopped and questioned without incident, a suspect who is about to be released and permitted to proceed on his way would, upon reentry into his vehicle, reach for a concealed weapon and threaten the departing police officer's safety. Certainly, such a far-fetched scenario is an insufficient basis upon which to predicate the substantial intrusion that occurred here.

Is it "far-fetched" to believe that a suspect could present a risk of harm to the officer in a post-stop situation? Would you think it far-fetched if you were a police officer?

Applying Michigan v. Long

Is it reasonable to assume that those suspected of drug dealing *always* present a risk of harm to the officer when stopped—justifying a protective search of areas that the suspect could reach after a stop? In United States v. Brown, 913 F.2d 570 (8th Cir.1990), the court relied on

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[16] Justice Blackmun concurred in part and in the judgment. Justice Brennan, joined by Justice Marshall, and Justice Stevens filed dissenting opinions.

Long to uphold a search of a locked glove compartment, when the officers had reasonable suspicion of drug activity. The court concluded that "since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous." Is there now a per se rule that a search of a passenger compartment for weapons can be conducted upon reasonable suspicion to believe the driver is a drug dealer? See also United States v. Sakyi, 160 F.3d 164 (4th Cir.1998) (finding it permissible to frisk all occupants of a car after a cigar box of marijuana was found in the car; court reasons that "guns often accompany drugs").

For interesting questions about the scope of a search under *Long*, see United States v. McGregor, 650 F.3d 813 (1st Cir. 2011). Officers had reasonable suspicion that gang members in a car were going to commit an act of reprisal after one of their members was shot. They pulled the car over and frisked the suspects and found nothing. Nor was there any weapon laying about in the car. But officer Feeney saw a magnet that he had been trained to suspect as part of a weapons "hide"—which is a series of programmed signals that will open up a secret compartment where a weapon was hidden. The officer, using his expertise, figured out how the "hide" worked, described by the court as follows:

> Put the key in the ignition, fasten a seatbelt, switch on the cruise-control, turn on the rear-window defroster, tug on the emergency brake, move the ceiling-light switch to the middle position, move a magnet around a spot on the dashboard (which would trigger a magnetic switch behind the dashboard), and press the sunroof button—doing this activates a series of switches, which starts up a motor under the center console, which opens up the hide so one can reach right through the bottom of the console and into a secret compartment. Feeney did the steps and found [a] round of ammo tucked inside the hide.

The court found that Officer Feeney's inspection of the car, and finding of the "hide" was permissible under *Long* because "McGregor and his buddies could have grabbed the weapon from the console hide in a flash had they gotten back into the car." Feeney had testified that the process took about 20 seconds. Is that within the post-stop parameters of *Long*?

The *Long* rationale is not limited to protective searches of cars. Thus, in United States v. Johnson, 932 F.2d 1068 (5th Cir.1991), the court upheld a cursory inspection of a pair of overalls located a few feet away from a suspect who appeared to be attempting to burglarize a house. The court found that merely separating the suspect from his effects during the stop would not provide sufficient protection to the officers, because if the

stop was terminated without an arrest, the officers would have to return the property to the suspect.

Protective Searches of Persons Other Than the Suspect

In the course of detaining suspects either by a stop or an arrest, officers are often confronted with whether they can frisk persons other than the suspect. In Ybarra v. Illinois, 444 U.S. 85 (1979), the Court refused to uphold the frisk of a patron of a bar who happened to be present when the police arrived to conduct a search of the bar pursuant to a valid search warrant. The Court noted that the patron's mere presence in the bar was not enough to provide a reasonable belief that he posed a risk of harm to the officers, and that no specific facts were shown to indicate that Ybarra was armed and dangerous.

How much information does an officer need, other than mere presence, to support a frisk of a person in the vicinity of an arrest? See United States v. Reid, 997 F.2d 1576 (D.C.Cir.1993) (defendant could be frisked after officers saw him exit from a suspected crack house that they were about to search: "Common sense suggests that there is a much greater likelihood that a person found in a small private residence containing drugs will be involved in the drug activity occurring there than an individual who happens to be in a public tavern where the bartender is suspected of possessing drugs.").

Inspecting Objects During the Course of a Protective Frisk

Assume that an officer has properly stopped a person and has reasonable suspicion to believe that the person presents a safety risk. The officer then conducts a pat-down and feels an object inside the suspect's coat. Can the officer pull the object out and inspect it? Under *Dickerson*, the answer is that the officer can inspect the object only if it is reasonably likely to be a weapon—*Terry* does not justify a search for evidence. But sometimes there is a dispute about whether an object felt by the officer during a pat-down could reasonably be a weapon.

A case in point is United States v. Swann, 149 F.3d 271 (4th Cir.1998). Officers responded to a report of a theft of a wallet in an office building. Witness reports indicated that the thief had been detained by employees, but broke free and tossed the wallet in the direction of three black males standing near the elevator. One of the men retrieved the wallet and all three men fled the scene. An officer spotted two black males in the basement parking garage. According to the officer, they appeared "really nervous and uneasy and kind of edgy; didn't want to hang around." When the officer told them that he needed to speak with them, one of them tried to circle around him to get behind his back. The officer felt threatened by this action and called for back-up. When another

officer arrived, the men were patted down. The officer patting down Swann found a hard object in Swann's left sock. The officer pulled it out and it turned out to be five credit cards belonging to the victim of the theft.

Swann moved to suppress the credit cards on the ground that *Terry* did not permit the officer to inspect the object found in his sock. But the court disagreed, concluding that a reasonable officer "could justifiably have believed that the item was a weapon." The court elaborated:

> [T]he object in Swann's sock was approximately the same size and shape as a box cutter with a sharp blade, which is often used as a weapon.
>
> The location of the object in the sock, as well as its hard character and its shape, made it suspicious. A similarly shaped hard object in Swann's pocket surely would have raised no alarms, as there could be innumerable innocent explanations for it. And a hard rectangular object in one's sock might not be suspicious on a jogger or someone similarly dressed. But these men were both fully dressed, and Swann's pants had pockets that could have contained an item of that size and shape.
>
> Given all the circumstances, it was objectively reasonable for the officer to believe that this particular hard object could likely be a weapon and to seize the item to satisfy himself that it was not something that could be used to inflict harm. Officers making *Terry* stops must make quick decisions as to how to protect themselves and others from possible danger. Were we to disapprove of Officer Martin's actions, we would require an officer to allow a suspicious object to remain within easy reach of demonstrably nervous and potentially aggressive subjects. Our respect for the privacy rights of citizens does not require such an increase in the danger that police officers must face.

Why is it relevant that Swann had pockets and yet decided to use his sock as a storage space? Does that fact indicate that he was trying to hide a weapon? Or rather that he was trying to hide evidence of a crime? Would the result in *Swann* change if the object in Swann's sock was soft to the touch?

Protective Sweeps: Maryland v. Buie

In Maryland v. Buie, 494 U.S. 325 (1990), the Court considered the legality of a "protective sweep," which it defined as a "quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others." Officers had probable cause to believe that Buie and an associate committed an armed robbery. They arrested

Buie at his home, and conducted a protective sweep of the premises. During the sweep, the officers discovered clothing that tied Buie to the robbery. At the time of the sweep, the officers had reasonable suspicion, but not probable cause, to believe that a dangerous person such as Buie's associate might be hiding in the premises. Buie argued that a protective sweep could not be conducted in the absence of probable cause to believe that there were individuals on the premises who would harm the officers or others. But the Court, by a 7–2 vote, rejected Buie's argument. Justice White, writing for the majority, relied heavily on *Terry* and *Long* to find that a protective sweep could be justified by an officer's reasonable suspicion "that the area swept harbored an individual posing danger to the officer or others." According to Justice White, the reasonable suspicion standard was an appropriate balance between the arrestee's remaining privacy interest in the home and the officer's interest in safety. Justice White emphasized that a protective sweep is a relatively limited intrusion because it "may extend only to a cursory inspection of those spaces where a person may be found," and the sweep can last "no longer than is necessary to dispel the reasonable suspicion of danger." Justice Stevens concurred to emphasize that a protective sweep could only be conducted for safety purposes, not to prevent destruction of evidence.[17] Justice Brennan, joined by Justice Marshall, dissented and noted his continuing criticism "of the emerging tendency on the part of the Court to convert the *Terry* decision from a narrow exception into one that swallows the general rule that searches are 'reasonable' only if based upon probable cause."

Compare *Buie* with United States v. Colbert, 76 F.3d 773 (6th Cir.1996), where the court found that a protective sweep after an arrest was not permitted where there was no indication that anyone other than the arrestee was on the premises: "The facts upon which officers may justify a *Buie* protective sweep are those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual."

Protective Sweep Other Than During an Arrest

Courts have held that the self-protective principles of *Buie* and *Terry* can permit a protective sweep *even when no arrest is involved.* That is, if the officers are acting in the course of legal activity, and they have reasonable suspicion to believe that a person in the area can obtain access to a weapon and use it on the officers or others, the officers are permitted to conduct a protective sweep for weapons. See, e.g., United States v. Gould, 364 F.3d 578 (5th Cir. 2004) (en banc), in which officers were given

[17] See United States v. Hogan, 38 F.3d 1148 (10th Cir.1994) ("[I]t appears that once inside Hogan's property, officers went on a fishing expedition for evidence linking Hogan to the murder. This greatly exceeded the permissible scope of a protective sweep.").

consent to search a particular room in a home. They were concerned, under the circumstances, that they might be walking into a trap, and so conducted a cursory inspection of the entire house. The court found the inspection to be a permissible protective sweep.

> We decline to adopt any across-the-board rule that a protective sweep can never be valid where the initial entry to the home is pursuant to consent, even where the consent does not of itself legally authorize the entry into the area swept. Any such rule either would require officers to forego any and all consent entries or would prevent them, once having so entered, from taking reasonable, minimally intrusive, means for self-protection when reasonable suspicion of danger of ambush arises. * * * [W]e hold that the Fourth Amendment imposes no such Hobson's choice.

5. Brief and Limited Detentions: The Line Between "Stop" and "Arrest"

Terry allows a stop upon a standard of proof less than probable cause, in part because a stop is less intrusive than an arrest. But it is often difficult to determine when an intrusion crosses over from a stop to an arrest requiring probable cause. What is it about an arrest that makes it different from a stop? Is it that the officers force the suspect to move to a detention area? Is it that the officers draw their guns or use handcuffs? Is it the length of the detention? This section considers the factors found relevant by the courts.

a. Forced Movement of the Suspect to a Custodial Area

In Florida v. Royer, supra, Royer was taken from the public area of an airport into a small room, where the officers sought and obtained Royer's consent to a search of his luggage. The plurality in *Royer* held that the consent was invalid because it was obtained as the result of an arrest without probable cause. Justice White, writing for the plurality, explained as follows:

> [A]t the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.
>
> By the time Royer was informed that the officers wished to examine his luggage, he had identified himself when approached by the officers and had attempted to explain the discrepancy between the name shown on his identification and the name under which he had purchased his ticket and identified his luggage. The officers were not satisfied, for they informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs. They

> requested him to accompany them to the police room. Royer went with them. He found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airlines. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. * * * As a practical matter, Royer was under arrest. * * *

Justice White noted that some forced movements of a suspect might be justifiable during a *Terry* stop; he emphasized, however, that probable cause is required if the officer forces the suspect to move in order to further the investigation or to place more pressure on the suspect:

> [T]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area. There is no indication in this case that such reasons prompted the officers to transfer the site of the encounter from the concourse to the interrogation room. It appears, rather, that the primary interest of the officers was not in having an extended conversation with Royer but in the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated to the police room.

Justice Blackmun dissented in *Royer* and argued that Royer was only detained for 15 minutes, the officers were polite, and the intrusion was minimal. He concluded that Royer was only stopped, not arrested, when he gave consent to the luggage search.

Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, also dissented, arguing as follows:

> Would it have been more "reasonable" to interrogate Royer about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved, in the busy main concourse of the Miami Airport, rather than to find a room off the concourse where the confrontation would surely be less embarrassing to Royer? If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts?

See also United States v. Ricardo D., 912 F.2d 337 (9th Cir.1990) (taking person by the arm and placing him in squad car for questioning held impermissible under *Terry*, where there was no showing that the police procedure was "necessary for safety or security reasons").

b. Forced Movement for Identification Purposes

In *Royer*, the Court held that an arrest occurred when Royer was forcibly moved to a custodial atmosphere, for purposes of extracting consent to search. The Court noted, however, that an officer can, within the confines of a *Terry* stop, force the suspect to move for purposes of safety and security. Are there any other legitimate reasons to force a suspect to move without probable cause to arrest? Many courts have found that if reasonable suspicion exists, it is permissible to transport the suspect a short distance for purposes of identification by witnesses. In People v. Hicks, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986), the New York Court of Appeals found that coercive movement to the crime scene for purposes of identification was within the confines of a permissible *Terry* stop. It explained as follows:

> There were witnesses within a quarter mile of the place of inquiry—approximately one minute away by car—who had just seen the perpetrators and would either identify defendant (in which event he would be arrested) or not identify him (in which event he would be released). A speedy on-the-scene viewing thus was of value both to law enforcement authorities and to defendant, and was appropriate here. The transportation did not unduly prolong the detention. Defendant might, alternatively, have been momentarily detained where he had been stopped and the witnesses brought there, but such a procedure would have entailed first securing defendant and his companion and then arranging transportation for the witnesses, possibly even a more time-consuming process than that chosen. At all events, given the time and distance involved this is a difference without constitutional significance.

See also United States v. Benson, 686 F.3d 498 (8th Cir. 2012) ("The exigencies were such that the officers could not dispel their suspicions that had prompted the *Terry* stop until they transported [the suspect] to the bank for the show-up identification.").

c. Investigative Techniques That Are Permissible Within the Confines of a Terry Stop

The purpose of a *Terry* stop is to permit an officer to investigate the facts on which reasonable suspicion is based, in order to determine whether the suspect is involved in criminal activity. It therefore follows that some preliminary investigation, designed to clear up or develop reasonable suspicion, is permissible within the confines of a stop.

However, probable cause will be required if the officers are using the stop for some purpose beyond that which justified the stop.

The most common investigative techniques permitted pursuant to a *Terry* stop are 1) preliminary investigation of the suspect's identity, and 2) questioning concerning the suspicious circumstances giving rise to the stop. See United States v. Guzman, 864 F.2d 1512 (10th Cir.1988) ("An officer conducting a routine traffic stop may request a driver's license and vehicle identification."). The officer may also verify the information obtained from the suspect by communicating with others, or by conducting preliminary investigations such as a vehicle registration check, license check, or a computer search for outstanding warrants. See United States v. Mendez, 118 F.3d 1426 (10th Cir.1997) ("An officer conducting a routine traffic stop may run computer checks on the driver's license, the vehicle registration papers, and on whether the driver has any outstanding warrants or the vehicle has been reported stolen").

Courts have also permitted officers to detain suspects on reasonable suspicion in order to conduct a canine sniff or to conduct a preliminary investigation of other suspicious circumstances. See United States v. Bloomfield, 40 F.3d 910 (8th Cir.1994) (where officers had reasonable suspicion that drugs were in a car, it was proper to detain the suspects while a dog was brought to the scene to sniff the vehicle, because the investigation was "reasonably related in scope to the circumstances that justified the interference in the first place").

Criminalizing the Refusal to Provide Identification During a Terry Stop: Hiibel v. Sixth Judicial District Court of Nevada

In Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004), Hiibel was stopped on reasonable suspicion of being involved in a domestic assault. He refused to provide identification. He did not contest the stop, but contended that the state had no power to criminalize his refusal to provide identification during the stop. The Court, in an opinion by Justice Kennedy, upheld the conviction and stressed that an officer has a right to demand identification as part on an investigation during a *Terry* stop. Justice Kennedy explained as follows:

> Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. * * *

> The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration, or its location.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented in *Hiibel,* arguing that while the officer can legitimately demand identification during a *Terry* stop, it is unreasonable to criminalize the suspect's refusal.

d. Overly Intrusive Investigation Techniques

Some investigative techniques are themselves so intrusive or extensive as to require probable cause. The most obvious example is a search for evidence, which, as stated above, goes beyond the scope of a *Terry* stop. Also, some courts have held that probable cause is required before a suspect can be subjected to a series of demanding physical tests to determine whether he is intoxicated. See People v. Carlson, 677 P.2d 310 (Colo.1984) (holding that the full battery of tests employed was so intrusive as to constitute an arrest). Roadside sobriety tests that are less demanding may be permissible under *Terry*, however. See State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984) (limited field sobriety test permissible on reasonable suspicion).

e. Investigation of Matters Other Than the Reasonable Suspicion That Supported the Stop: Stop After a Stop

Many courts have held that a *Terry* stop must end when the reason for the stop has come to an end. If the reasonable suspicion supporting the stop has been cleared up (e.g., an identification checks out) or the person has been processed (e.g., the traffic ticket has been issued), then the stop is at an end and the suspect must be released. So for example, an officer who stops someone for a traffic violation cannot continue the stop in order to investigate for drug or gun crimes, in the absence of reasonable suspicion to support such an independent inquiry. A *Terry* stop cannot be used as an excuse for a fishing expedition. United States v. Santiago, 310 F.3d 336 (5th Cir. 2002) (detention after a valid traffic stop was impermissible: "Once a computer check is completed and the officer either issues a citation or determines that no citation should be issued, the detention should end and the driver should be free to leave. In order to continue a detention after such a point, the officer must have a reasonable suspicion supported by articulable facts that a crime has been or is being committed.").

See also United States v. Jenson, 462 F.3d 399 (5th Cir. 2006) (when a traffic stop was completed, an officer was not permitted to ask the defendant where he worked, and then rely on an implausible answer to justify continuing the stop).

Reasonable Suspicion as to Another Crime

Note that the rulings in the above cases are based on the fact that the officers had no reasonable suspicion to investigate any matter other than the one for which the suspect was stopped. If, however, in the course of a stop to investigate crime "A", the officer obtains reasonable suspicion to investigate crime "B", then the detention can be extended to investigate crime "B" even though the initial justification for the stop no longer exists. There will then be a permissible "stop after a stop." Thus, in United States v. Erwin, 155 F.3d 818 (6th Cir.1998) (en banc), officers pulled Ervin over because they had reasonable suspicion to believe that he was driving while intoxicated. While going through the drill of the traffic stop, it became apparent that Ervin was not intoxicated. But this investigation also uncovered evidence indicating that Ervin was a drug dealer. The court analyzed the situation as follows:

> After the deputies satisfied themselves that Erwin was not drunk or otherwise impaired, they were justified in continuing to detain Erwin if, by then, they had reasonable and articulable suspicion that Erwin was engaged in other criminal activity. We think, as the district court did, that the deputies were reasonably entitled to conclude that Erwin may have been a drug dealer, based on the facts that he (1) was nervous, (2) seemed to try to avoid being questioned by attempting to leave, (3) seemed to have used or was preparing to use a pay telephone to make a call when a cellular telephone was available, (4) seemed to have drug paraphernalia in his vehicle, (5) had a large amount of cash, (6) had no registration or proof of insurance, (7) had a criminal record of drug violations, and (8) had an out-of-place backseat cushion. Although many of these facts are consistent with innocence, all that is required is that the deputies' suspicion be "reasonable" and "articulable," as determined by the totality of the circumstances. We find this standard was met.

See also United States v. Estrada, 459 F.3d 627 (5th Cir. 2006) (continued detention of occupants of a vehicle stopped for a traffic violation was permissible; while waiting for the license check to clear, the officer noticed fresh marks and scratches around the fuel tank, as well as other information raising a reasonable suspicion to believe that the gas tank had a hidden compartment).

Consensual Encounters After a Stop Has Ended: Ohio v. Robinette

As discussed above, a suspect cannot be detained for investigation of matters different from those which support a stop, in the absence of reasonable suspicion as to those other matters. But what if the suspect is simply *asked* about another crime while the initial stop is ending? Can there be a permissible *encounter* after a stop? The Supreme Court addressed this question in Ohio v. Robinette, 519 U.S. 33 (1996). Robinette was legally stopped for speeding and given a verbal warning. When the officer returned Robinette's license, he said: "One question before you get gone: Are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Robinette answered "no" to these questions, after which the officer asked if he could search the car. Robinette consented. The officer found drugs and arrested Robinette.

Robinette argued that before valid consent could be obtained, the officer had to tell him that he was free to leave. Otherwise, the detention would still be continuing, and would amount to an illegal arrest as it was a continuing investigation on a matter other than that which gave rise to the initial stop. But Chief Justice Rehnquist, in an opinion for seven members of the Court, disagreed. The Court held that Robinette voluntarily consented to the search, and rejected any bright-line requirement that the suspect be told that the stop is over and he is free to go. The test for whether the continuing discussion was a consensual encounter was based on a totality of the circumstances and not on any one factor—therefore it was not dispositive that Robinette was never specifically told that the stop was over and he was free to go. Justice Ginsburg concurred in the judgment. Justice Stevens dissented.

f. Interrogations and Fingerprinting

Interrogation Beyond the Confines of Terry

In Dunaway v. New York, 442 U.S. 200 (1979), the Court distinguished *Terry* stops from cases in which the police detain a suspect for sustained interrogation. The Court emphasized that *Terry* was a narrow decision and concluded that police cannot detain a suspect and transport him to the stationhouse for questioning without probable cause, even if the detention is not deemed to be an arrest under state law (and there would be no arrest record or formal booking procedure). Justice Brennan, writing for the Court, concluded that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." He noted that "any

'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are reasonable only if based upon probable cause."[18]

Fingerprinting

In Davis v. Mississippi, 394 U.S. 721 (1969), the Court held that a round-up of twenty-five African-American youths for questioning and fingerprinting—in an effort to match prints found around a window entered by a rape suspect—violated the Fourth Amendment. Justice Brennan wrote for the Court that "[i]t is arguable * * * that because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." He explained that fingerprinting is less serious an intrusion on liberty than other searches, and that it can be done at a convenient time and does not offer opportunities for harassment. In this case, however, the fingerprinting did not comply with the Fourth Amendment because, among other things, "petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted * * * but also subjected to interrogation." And officers did not have probable cause for the fingerprinting dragnet.

Isn't fingerprinting simply a means of identification, and isn't investigation of the suspect's identity permitted in a *Terry* stop? If there is reasonable suspicion but not probable cause, and the officer who makes a stop knows that there were fingerprints found at the scene of a crime, is it permissible for the officer to take fingerprints and delay the suspect long enough to obtain a match?

Justice White addressed some of these questions as he wrote for the Court in Hayes v. Florida, 470 U.S. 811 (1985). Police officers who were investigating a series of rapes had reasonable suspicion but not probable cause to believe that Hayes was the perpetrator. The officers took Hayes to the stationhouse, without his consent, to be fingerprinted. Justice White concluded that this procedure amounted to an arrest. He indicated that the Court adhered to the view that when police forcibly remove a person to the stationhouse, they are making a seizure that must be considered an arrest, requiring probable cause. Justice White added, however, that the Court's reasoning did not imply "that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." He relied on *Davis* and noted that fingerprinting in itself is a relatively minimal intrusion and a

[18] Justice White wrote a short opinion concurring in the judgment. Justice Stevens also wrote a brief concurring opinion. Justice Rehnquist, joined by Chief Justice Burger, dissented.

means of identification not unlike other methods of identification permitted under *Terry*.[19]

Would you permit fingerprinting as part of a *Terry* stop? Would you permit the police to photograph persons who are stopped? What about taking DNA samples of persons who are stopped?

g. Time Limits on Terry Stops

The Supreme Court rejected an absolute time limit for *Terry* stops in United States v. Sharpe, 470 U.S. 675 (1985). The facts are described in the next two paragraphs.

> A Drug Enforcement agent was on patrol in an unmarked car on a coastal road in North Carolina at approximately 6:30 a.m. when he saw a blue pickup truck with an attached camper "traveling in tandem with a blue Pontiac Bonneville." The agent saw that the truck was riding low, the camper did not bounce or sway appreciably around turns, and that a quilted material covered the rear and side windows of the camper. The agent followed the vehicles for 20 miles into South Carolina where he decided to make an "investigative stop." He radioed the highway patrol for help and a trooper in a marked patrol car responded to the call. Almost immediately after the trooper caught up with the vehicles, the Pontiac and the pickup turned off the highway onto a campground road. The agent and trooper followed the two vehicles as they sped along the road at double the legal speed until they returned to the main road. The trooper pulled alongside the Pontiac, which was in the lead, turned on his flashing light and motioned for the driver to pull over. As the Pontiac moved to the side, the pickup truck cut between it and the trooper's car, nearly hitting the latter. The trooper pursued the truck while the agent approached the Pontiac and requested identification.
>
> The agent examined the driver's license. After unsuccessfully attempting to radio the trooper, he radioed the local police for assistance. Two local officers arrived and the agent asked them to "maintain the situation" while he went to find the trooper. The trooper had stopped the pickup, removed the driver from the truck, examined his license and a bill of sale for the truck, and patted him down. When the trooper told the driver that he would be held until a DEA agent arrived, the driver became nervous, stated that he wanted to leave, and asked for the return of the driver's license. Approximately 15 minutes after the truck was stopped, the DEA agent arrived and learned that the name on the registration was the

[19] Justice Brennan, joined by Justice Marshall, concurred in the judgment. He objected to "the Court's strained effort to reach the question" of "[t]he validity of on-site fingerprinting." Justice Blackmun concurred in the judgment without opinion. Justice Powell did not participate in the case.

same as the name on the driver's license of the Pontiac's driver. The driver of the pickup denied two requests for permission to search the truck before the agent examined the truck and stated that he could smell marijuana. Without asking again for permission, he removed the keys from the ignition, opened the rear of the camper, and observed a large number of burlap-wrapped bales resembling marijuana. The agent arrested the driver and returned to the Pontiac to arrest its occupants. The total time between his initial stop of the Pontiac and the arrests of its occupants was between 30 and 40 minutes.

The defendants in *Sharpe* argued that the evidence was illegally obtained, because the officers had only reasonable suspicion and not probable cause and by the time of the search of the camper, the defendants had been detained beyond the time limit of a *Terry* stop.

Chief Justice Burger wrote for the Court and held that the detention did not exceed the time limits of a permissible *Terry* stop; therefore the search of the camper was permissible because by that time the officer had smelled the marijuana. The Chief Justice noted the "difficult linedrawing problems in distinguishing an investigative stop from a de facto arrest". He recognized that "if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." Defendants suggested a bright-line time limit on *Terry* stops of 20 minutes. But the Court rejected a "hard-and-fast time limit" and concluded that it was "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." The officers satisfied that test, because there was no delay that was "unnecessary to the legitimate investigation of the law enforcement officers"; in part this was because the suspects contributed to the delay through their own actions, by refusing to pull over.

Justice Marshall concurred in the judgment because the evasive actions of the suspects turned a brief encounter with the officers into an extended one. He emphasized, however, that *Terry* stops must be brief "no matter what the needs of law enforcement in the particular case."

Justice Brennan dissented. He objected to treating the brevity limitation upon a stop as an "accordion-like concept that may be expanded outward depending on the law enforcement purposes to be served by the stop." He criticized the officers' handling of the investigation and found that the stop was unduly and unnecessarily lengthy. Justice Stevens dissented without reaching the merits.

QUESTIONS AFTER SHARPE

After *Sharpe* what kind of conduct, if any, will be considered impermissible delay, as opposed to diligent investigation? See United States v. Davies, 768 F.2d 893 (7th Cir.1985) (reasonable to detain suspects for an additional thirty minutes to await advice from superiors, where detaining officers were inexperienced); United States v. Bloomfield, 40 F.3d 910 (8th Cir.1994) (en banc) ("The one-hour period between the time Roberts pulled Bloomfield over and the time Roberts arrested Bloomfield was not an unreasonable period to wait for a drug dog to verify Roberts' suspicion."); Embody v. Ward, 695 F.3d 577 (6th Cir. 2012) (after Embody was found with a loaded gun in a state park, a two-and-a-half hour detention was not unreasonable under *Terry;* Embody "points to no lack of diligence by [the officer] in trying to confirm (or allay) his suspicions. The officers took the time they needed to determine whether the AK-47 was a handgun, whether Embody had a permit for it, whether he had illegally modified it and whether he posed any other safety threats. A good part of the detention, moreover, came at the beck and call of Embody, who asked to speak to the police supervisor, even after being told it would delay his release.").

h. Show of Force During a Terry Stop

A traditional arrest is sometimes accompanied by the officer's use of handcuffs and drawn gun. Can the officer use such coercive tactics within the confines of a *Terry* stop? Courts have routinely relied on *Terry* and *Adams* to uphold the use of handcuffs and guns where there is reasonable suspicion to believe that they are necessary to protect the officer from harm during the course of a stop. See People v. Allen, 73 N.Y.2d 378, 540 N.Y.S.2d 971 (1989) (officers handcuffed suspect who matched the description of an armed bank robber, after chasing him down a dark alley in a high crime area); United States v. Merkley, 988 F.2d 1062 (10th Cir.1993) ("because safety may require the police to freeze temporarily a potentially dangerous situation, both the display of firearms and the use of handcuffs may be part of a reasonable *Terry* stop"; use of such tactics was found permissible in this case where the defendant was suspected of threatening to kill someone).

In United States v. Alexander, 907 F.2d 269 (2d Cir.1990), the court held that officers acted properly when they unholstered their guns to detain two men suspected of purchasing drugs. The two men were in a Jaguar at 6:00 p.m., parked in an area known for drug activity. The court emphasized the "dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose." Has the court established a per se rule for those who are reasonably suspected of drug activity? Compare United States v. Novak, 870 F.2d 1345 (7th Cir.1989), where nine law enforcement officers working in an airport stopped two suspected drug couriers. One officer

drew her gun and pointed it directly at one suspect's head at close range. The court found that an arrest had occurred. The action was clearly excessive given the fact that the suspects had just deplaned and could not have been carrying weapons.

6. Detention of Property Under *Terry*

Terry concerned seizures of the person, but its principles have been applied to seizures of property as well. The Court in United States v. Van Leeuwen, 397 U.S. 249 (1970), held that some detentions of property could occur upon reasonable suspicion. Officers, acting upon reasonable suspicion, detained a mailed package for more than a day, while an investigation was made for purposes of developing probable cause and obtaining a warrant. A unanimous Court recognized that detention of mail could at some point become an unreasonable seizure, but found that in the instant case the investigation was conducted promptly and diligently. The Court concluded that "[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route." The Court emphasized that the privacy interest in the packages was "not disturbed or invaded until the approval of the magistrate was obtained." See also United States v. Ramirez, 342 F.3d 1206 (10th Cir. 2003) (officers were permitted, on reasonable suspicion, to remove a package from the "mail stream" for 28 hours in order to conduct a canine sniff and investigate other leads). Compare United States v. Daoo, 849 F.2d 414 (9th Cir.1988) (reasonable suspicion does not justify detention of mail for 7–23 days, where the delay could have been reduced to 32 hours if officers had acted diligently); United States v. Aldaz, 921 F.2d 227 (9th Cir.1990) (three-day detention of mail permissible upon reasonable suspicion, where drug-sniffing dogs were 700 air miles away, and other delays were caused by remoteness of post office).

The Court in *Van Leeuwen* upheld a one-day detention without probable cause, while an investigation was conducted. Recall the facts of *Sharpe*. Do you think the Court would have allowed the suspects to be detained without probable cause for more than a day, while a diligent investigation was being conducted?[20] If not, what is the difference between the seizure in *Sharpe* and that in *Van Leeuwen*? Could it be argued that the detention in *Van Leeuwen* was no seizure at all, because a person to whom mail is sent has no legitimate expectation of receiving it on a particular day? See United States v. Va Lerie, 424 F.3d 694 (8th Cir.2005) (en banc) (no seizure where officers removed checked luggage from the luggage compartment of a bus and transported it into the bus

[20] See United States v. $191,910.00 in Currency, 16 F.3d 1051, 1060 n. 16 (9th Cir.1994) ("[I]f a police officer had sufficient reasonable suspicion to detain a person, he could not hold that person for 24 hours before obtaining probable cause, even if the government was working as quickly as it could to gather evidence establishing probable cause.").

terminal in order to obtain consent to search; officer's removal of the luggage did not delay the passenger's travel or impact his freedom of movement); United States v. Terriques, 319 F.3d 1051 (8th Cir. 2003) (handling and observation of package by mail clerk was not a seizure as it did not delay the time of delivery).

Unreasonably Lengthy Detention of Property: United States v. Place

The Court in United States v. Place, 462 U.S. 696 (1983), noted that it is often necessary to seize property upon reasonable suspicion, while an investigation of criminal activity continues. The Court recognized, however, that if a person is traveling with his property, then a seizure of that property "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." It concluded that "the limitations applicable to investigative detentions of the person should define the permissible scope of the person's luggage on less than probable cause."

On the facts, the Court held that the officers detained Place's luggage for such a long period that probable cause was required to support the detention; because the officers had only reasonable suspicion, the detention was illegal. Police officers seized Place's luggage as he arrived at LaGuardia Airport on a flight from Miami. 90 minutes later, they subjected the luggage to a canine sniff. Justice O'Connor, writing for the Court, stated that the 90 minute detention was unreasonable in the absence of probable cause, because the delay was caused by the failure to transport the drug detecting dog from one New York metropolitan airport to another. She reasoned that the dog could have been transported while Place was in the air en route to New York, since the officers had reasonable suspicion during that time. She concluded that the officers had not diligently pursued the investigation, and that "we have never approved a seizure of the person for the prolonged 90-minute period involved here." Finally, the Court noted that the Fourth Amendment violation was "exacerbated by the failure of the agents to inform the respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion." Under these circumstances, the detention of Place's luggage was tantamount to a detention of Place himself.

Justice Brennan, joined by Justice Marshall, concurred in the result. He argued that the *Terry* balancing approach "should not be conducted except in the most limited circumstances." Justice Blackmun also concurred in the result, similarly expressing concern "with what appears to me to be an emerging tendency on the part of the Court to convert the

Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."

QUESTIONS AFTER PLACE

Does *Place* mean that a 90-minute detention of luggage in transit is *always* unreasonable in the absence of probable cause? The Court in United States v. $191,910.00 in Currency, 16 F.3d 1051 (9th Cir.1994) held that a two-hour detention of a traveler's luggage, pending a dog sniff, violated the Fourth Amendment solely because of its length. Even if "an unforeseeable canine virus" had suddenly afflicted all the available drug-sniffing dogs, that court would have invalidated the two-hour seizure of the person's luggage. Do you agree, or should the officer's diligence in pursuing the investigation be the only factor for determining the reasonableness of the length of the seizure?

Does *Place* mean that officers must have the drug sniffing dog on the premises at the time the luggage is seized? See United States v. Frost, 999 F.2d 737 (3d Cir.1993) (80-minute detention of luggage pending dog sniff was reasonable: "It does not demonstrate a lack of diligence on the part of the detectives that a drug-sniffing unit was not on duty that day, so that he had to be summoned to the airport"; *Place* distinguished because officers in that case had substantial time to bring the dog to the airport before the luggage arrived).

Seizure of Property with No Deprivation of a Liberty Interest

In United States v. LaFrance, 879 F.2d 1 (1st Cir.1989), police had reasonable suspicion to believe that a Federal Express package, addressed to LaFrance, contained drugs. The package was guaranteed for delivery that day by noon. The officers arranged for a dog sniff, but the dog was several miles away. The sniff began at 1:15 p.m., and was completed by 2:15; the test was positive. Then a warrant was obtained to search the package. LaFrance challenged the reasonableness of the detention of the package. He testified at the suppression hearing that on the basis of prior experience, he expected to receive the package by 11:00 a.m. The court held that "LaFrance's anticipation that he would receive the goods soon after 11 a.m., though based on earlier experiences, is irrelevant. It is hornbook contract law that where a delivery time is agreed upon, a court should not intrude to imply a different reasonable time for delivery." The court recognized that "once noon arrived, the constitutional chemistry was altered" but that the detention from that point was for a limited time, and that the police were diligent in their investigation during that time.

In *LaFrance*, the detention of the package on reasonable suspicion was longer than that held impermissible in *Place*; however, the court reasoned that unlike the traveler in *Place*, LaFrance's liberty interest was

not impaired by the detention of the Federal Express package. Place could not really go anywhere without his luggage, whereas LaFrance was at home and free to go wherever he wanted. Because the intrusion was not as severe as that in *Place*, the court reasoned that the somewhat longer detention of the package was permissible so long as the police were acting diligently. Do you agree with the court that LaFrance's liberty interest was not impaired by the detention of the package? Wasn't LaFrance essentially confined to his home by his need to wait for the package?

7. Limited Searches for Evidence by Law Enforcement Officers Under *Terry*

Terry allows limited investigative seizures of the person or property on the basis of reasonable suspicion. *Terry* also allows limited searches *for self-protection* on the basis of reasonable suspicion. Does *Terry* permit limited, cursory inspections by law enforcement officers searching for *evidence* on the basis of reasonable suspicion rather than probable cause? This was one question encountered by the Court in Arizona v. Hicks, 480 U.S. 321 (1987). Police lawfully entered premises from which a weapon had been fired, and noticed two sets of expensive stereo components in an otherwise squalid apartment. Suspecting that the components were stolen, one officer moved a turntable in order to read the serial number that was on the underside of the unit. The serial number matched that of a turntable that had been reported stolen. The State did not argue that probable cause existed to move the turntable, but rather that the movement and inspection was a "cursory" search that was justified by reasonable suspicion.

Justice Scalia, writing for the Court, rejected the State's argument that a search for evidence could be justified upon reasonable suspicion. He declared that probably cause was required for the search of the turntable, even though it was cursory and minimally intrusive. Justice Scalia stated that "a search is a search, even if it happens to disclose nothing but the bottom of a turntable." He concluded that "we are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a full-blown search. Nothing in the prior opinions of this Court supports such a distinction." Why doesn't the prior opinion of the Court in *Terry* support the distinction that Justice Scalia rejected?

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, dissented. She argued that police officers who have reasonable, articulable suspicion that an object they come across in a lawful search is evidence of crime may make a cursory inspection of the object to verify their suspicion. Justice Powell added a dissenting opinion, joined by the Chief Justice and Justice O'Connor, that suggested that the majority's

distinction between observing a serial number while searching (permissible) and moving an object to read a serial number (impermissible) trivialized the Fourth Amendment and would cause uncertainty. See also Minnesota v. Dickerson, 508 U.S. 366 (1993) (*Terry* protective search can be conducted if the officer has reasonable suspicion that the suspect poses a risk of harm to the officer or others; however, a search for contraband by law enforcement officers is outside the *Terry* doctrine and requires probable cause).

QUESTIONS AFTER HICKS

The State in *Hicks* did not argue that the presence of two new stereos in a squalid apartment constituted probable cause to believe they were stolen. Should this argument have been made?

The holding in *Hicks* has not prevented the government from arguing that cursory inspections can be conducted on reasonable suspicion. In United States v. Winsor, 846 F.2d 1569 (9th Cir.1988) (en banc), officers chased suspected bank robbers fleeing from the crime into a hotel. Given the large number of rooms in the hotel, the court found that there was reasonable suspicion, but not probable cause, to believe that the robbers were in any particular room. At each room, the officers knocked on the door and announced "Police, open the door." After checking a few rooms, they knocked on a door answered by Dennis Winsor. They recognized him as the robber. At this point, the police had probable cause to enter, whereupon they found Peter Winsor, the other robber, as well as incriminating evidence. The Winsors argued that under *Hicks*, the police conducted a search of their room when they knocked on the door, commanded that it be opened, and looked inside. The government argued that the officers had not conducted a full-blown search for evidence, but rather only a cursory inspection that was justified by reasonable suspicion. The court of appeals held that the evidence the officers discovered when the door was opened (and all evidence found in the room thereafter) was illegally obtained:

> We refuse the government's invitation to decide this case by balancing the competing interests at stake. Instead, we adhere to the bright-line rule that *Hicks* appears to have announced: The Fourth Amendment prohibits searches of dwellings without probable cause.

Other courts have taken the contrary view and held—despite *Hicks*—that a minimally intrusive search for evidence is permissible if supported by reasonable suspicion. For example, in United States v. Concepcion, 942 F.2d 1170 (7th Cir.1991), officers took a key found on the defendant, and inserted it into a lock on a door to an apartment in which drugs had been found. The court held that this was a search, because the use of the key in the lock gave the officers information they did not otherwise have, i.e., that the defendant had a key to the apartment. But the search was upheld even though, at the time they used the key, the officers had only reasonable suspicion and not probable cause to connect the defendant with the apartment. The court

reasoned that the search was minimally intrusive. It distinguished *Hicks* on the ground that the information uncovered in *Hicks* was more private: the officers in *Concepcion* could have connected the defendant with the apartment in a variety of ways. Is this a meaningful distinction?

8. Application of the *Terry* Reasonableness Analysis Outside the Stop and Frisk Context—To Probationers and Parolees

The *Terry* analysis balances the nature of the individual interest at stake in a search and seizure against the interest of the government in investigating and preventing crime. *Terry* applied this reasonableness analysis in the context of the limited intrusion known as stop and frisk. But it is possible that the balancing analysis could be applied in a wide variety of contexts to allow intrusions on less than probable cause, and without a warrant. To do so, however, would raise tension with the Court's position in *Hicks* and *Dickerson* that searches for evidence of a crime, even if not particularly intrusive, require probable cause.

In United States v. Knights, 534 U.S. 112 (2001), Chief Justice Rehnquist wrote for the Court as it held that no more than reasonable suspicion is required to search a probationer's home. He reasoned that "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." The Court appeared to apply a reasonableness balancing approach even though the search was for evidence of a crime (as opposed to a *Terry* frisk for the protection of the officer. The Chief Justice declared as follows:

> [W]e conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances," with the probation search condition being a salient circumstance.
>
> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. Knights's status as a probationer subject to a search condition informs both sides of that balance. * * * Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens * * * Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution

when the balance of governmental and private interests makes such a standard reasonable. See, e.g., Terry v. Ohio. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

QUESTIONS ABOUT KNIGHTS

Does the result in *Knights* mean that the reasonableness of *every* search—and accordingly the necessary standard of proof—is based on a balance of the needs of the state and the privacy interests of the individual? If so, what is left of its declaration in *Hicks* that "a search is a search" that requires probable cause even though the particular search is cursory and relatively unintrusive? And what is left of the *Terry* Court's statement that officers during a stop can conduct a search upon reasonable suspicion, but only for self-protection and not to search for evidence?

Suspicionless Searches of Parolees Found Reasonable: Samson v. California

In Samson v. California, 547 U.S. 843 (2006), the Court answered a question it left open in *Knights*: whether a condition of a parolee's release could so diminish or eliminate his reasonable expectation of privacy that a *suspicionless* search by a law enforcement officer would be permissible under the Fourth Amendment. The case involved a California statute providing that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Samson so agreed and was paroled. While on parole he was searched without suspicion, and was found in possession of drugs. The Court, in an opinion by Justice Thomas, found that the search was reasonable.

Justice Thomas relied heavily on *Knights,* even though the search in that case was conducted upon reasonable suspicion. Justice Thomas emphasized that the parolee's expectation of privacy is substantially diminished, because his very liberty is conditional. In contrast, the state's interest in conducting a suspicionless search was found "substantial" because "parolees are more likely to commit future criminal offenses." He explained that, "most parolees require intense supervision" and that "a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders". In Justice Thomas's view, a reasonable suspicion standard would be deleterious to these state

interests, because it "would give parolees greater opportunity to anticipate searches and conceal criminality."

Justice Thomas rejected the argument that the California law permitted "a blanket grant of discretion untethered by any procedural safeguards." He stated that "[t]he concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on arbitrary, capricious or harassing searches."

Justice Thomas emphasized that the Court did not "address whether California's parole search condition is justified as a special need," [see the discussion of "special needs" searches later in this Chapter] because "our holding under general Fourth Amendment principles renders such an examination unnecessary."

Justice Stevens, joined by Justices Souter and Breyer, dissented in *Samson*. He noted that the search at issue could not possibly have been justified as a "special needs" search, because it was done for criminal law enforcement purposes. Yet the majority, in Justice Stevens's view, unaccountably found a suspicionless search to be reasonable in this case. Justice Stevens elaborated as follows.

> Ignoring just how closely guarded is that category of constitutionally permissible suspicionless searches, the Court for the first time upholds an entirely suspicionless search unsupported by any special need. And it goes further: In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion. Here, by contrast, there are no policies in place—no standards, guidelines, or procedures—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.

Can the Knights/Samson Balancing Test Be Extended Beyond Probationers and Parolees?

Knights and *Samson* could be broadly read to allow searches for evidence on less than probable cause whenever the state interest supporting the search outweighs the individual's interest in preventing it—in other words, a free-form balancing test that would allow any number of searches that would, under traditional Fourth Amendment theory (as applied in *Hicks* and *Dickerson, supra*) require probable cause.

The lower courts had generally read *Knights* and *Samson* narrowly, to searches of probationers and parolees, and even then the courts have required something in the probation/parole conditions that authorize a search on less than probable cause. *See, e.g.,* United States v. Freeman, 479 F.3d 743 (10th Cir. 2007) ("We interpret the *Knights-Samson* line of cases as resting on the parolee's diminished expectation of privacy stemming from his own parole agreement and the state regulations applicable to his case."). But the Supreme Court, in Maryland v. King, 133 S.Ct.1958 (2013), seemed to rely on a *Knights/Samson*-like free-form balancing in upholding DNA testing of arrestees. *King* is set forth in full after the treatment of "special needs" searches, infra.

C. SEARCH INCIDENT TO ARREST: THE ARREST POWER RULE

A warrantless search incident to a valid arrest was an accepted practice at the time the Bill of Rights was adopted. While the principle was and is well-accepted, the application of the arrest power rule to various fact situations, and even the rationale underlying the exception, have been subject to dispute and inconsistent application in the Supreme Court. In the following case, the Court sought to explain the rationale of the search incident to arrest exception, and to limit the scope of an incident search to the rationale supporting the exception.

1. Spatial Limitations

CHIMEL v. CALIFORNIA

Supreme Court of the United States, 1969.
395 U.S. 752.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that "on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.