University of Richmond Law Review

Volume 25 | Issue 3 Article 7

1991

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Recommended Citation

Esther J. Windmueller, *Reasonable Articulable Suspicion - The Demise of Terry v. Ohio and Individualized Suspicion*, 25 U. Rich. L. Rev. 543 (1991).
Available at: http://scholarship.richmond.edu/lawreview/vol25/iss3/7

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REASONABLE ARTICULABLE SUSPICION—THE DEMISE OF *TERRY v. OHIO* AND INDIVIDUALIZED SUSPICION

Presume not that I am the thing I was.[1]

I. INTRODUCTION

The plethora of law review articles[2] and cases[3] on search and seizure demonstrates the confusion and frustration in fourth amendment stop-and-frisk jurisprudence. The fourth amendment to the Constitution guarantees that persons will be free of "unreasonable searches and seizures . . . and no Warrants shall issue but upon probable cause."[4] A "stop-and-frisk" is a warrantless detention and search of a person by a police officer to investigate for unlawfulness.[5] Although the United States Supreme Court has issued many investigative stop decisions, the Court has failed to promulgate a coherent and practical stop-and-frisk procedure for law enforcement personnel to follow. In short, "[t]he Fourth Amendment cases are a mess."[6]

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1. W. SHAKESPEARE, II HENRY IV, V.v.

2. 3 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 9.1 (1987); *see, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Anderson, *Everything You Wanted to Know About* Terry *Stops—But Thought It Was a Violation of the Fourth Amendment to Stop Someone and Ask*, ARMY LAW., Feb. 1988, at 25; Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763 (1979); Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13 (1988); Kuh, *In-Field Interrogation: Stop, Question, Detention, and Frisk*, 3 CRIM. L. BULL. 597 (1967); Wiseman, *The "Reasonableness" of the Investigative Detention: An "Ad Hoc" Constitutional Test*, 67 MARQ. L. REV. 641 (1984). Professors Amsterdam, Bacigal, Harper, Wiseman, and Kuh acknowledge the potential danger of the amorphous balancing test, but each scholar advocates a different solution to the problem; *see infra*, text accompanying notes 151-154.

3. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Sharpe, 470 U.S. 675 (1985); United States v. Hensley, 469 U.S. 221 (1985); Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210 (1984); Michigan v. Long, 463 U.S. 1032 (1983); Florida v. Royer, 460 U.S. 491 (1983); Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967). This is not an exhaustive list of the Supreme Court cases examining stop-and-frisk; discussing all of them is more redundant than enlightening.

4. U. S. CONST. amend. IV.

5. Terry v. Ohio, 329 U.S. 1, 10 (1968).

6. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973). Professor Dworkin supports the adoption of precise rules

The Supreme Court first began tampering with the rigid "probable cause" requirement that protects individual privacy rights in *Camara v. Municipal Court*,[7] which involved an administrative search. The Court in *Camara* applied a balancing test, weighing the governmental interest in administrative searches against individual privacy concerns for the sanctity of one's home. In *Terry v. Ohio*,[8] the cornerstone of the stop-and-frisk doctrine, the Court dispensed with the necessity of probable cause by applying the *Camara* balancing test to the police detention and pat-down of a suspicious individual.

Justice William Brennan's frequent concurrences[9] and dissents[10] in stop-and-frisk cases have recorded the Court's gradual erosion of *Terry's* investigative stop rule. Justice Brennan strongly advocated a narrow construction of the *Terry* holding and admonished that:

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.[11]

This note discusses how Supreme Court decisions after *Camara* and *Terry*, while purporting to follow these watershed cases, instead have corrupted the narrow stop-and-frisk doctrine. Section II reviews the history and language of the fourth amendment. Section III shows that the Supreme Court cases following *Terry* have expanded and consequently eviscerated *Terry's* important guidelines. Essentially, these decisions strip the fourth amendment of all privacy guarantees. Section IV of this note demonstrates the difficulty of constitutional interpretation in the area of investigative stops, and lists proposals by academics.

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concerning search and seizure which would allow the exclusionary rule to work more effectively with less criticism.

7. 387 U.S. 523 (1967); *see also* Bacigal, *supra* note 2, at 777.

8. 392 U.S. 1 (1968).

9. *See, e.g.*, Hayes v. Florida, 470 U.S. 811, 818 (1985) (Brennan, J., concurring); United States v. Hensley, 469 U.S. 221, 236 (1985) (Brennan, J., concurring); United States v. Place, 462 U.S. 696, 710 (1983) (Brennan, J., concurring); Kolender v. Lawson, 461 U.S. 352, 362 (1983) (Brennan, J., concurring); Florida v. Royer, 460 U.S. 491, 509 (Brennan, J., concurring).

10. *See, e.g.*, Michigan Dep't. of State Police v. Sitz, 110 S. Ct. 2481, 2488 (1990) (Brennan, J., dissenting); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 655 (1990) (Marshall, J., dissenting with whom Brennan, J., joins); United States v. Montoya de Hernandez, 473 U.S. 531, 545 (1985) (Brennan, J., dissenting); United States v. Sharpe, 470 U.S. 675, 702 (1985) (Brennan, J., dissenting); Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 225 (1984) (Brennan, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1054 (1983) (Brennan, J., dissenting); United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976)(Brennan, J., dissenting); Adams v. Williams, 407 U.S. 143, 151 (1972) (Brennan, J., dissenting).

11. United States v. Montoya de Hernandez, 473 U.S. 531, 567 (Brennan, J., dissenting) (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)).

The Supreme Court's break with the framers' intent, scholarly interpretation of the fourth amendment's semantic construction, and the utilization of the fourth amendment to favor current law enforcement practices results in a precarious and unpredictable balancing approach. This note suggests a return to the principled and functional approach to stop-and-frisk enunciated in *Terry v. Ohio*.[12]

II. A History and Grammar Lesson

The extensive powers of search and seizure authorized by King George II formed a principal cause for discontent among the American colonists.[13] The King's Writs of Assistance empowered customs officers to "break open and enter houses, without the authority of a civil magistrate, founded on legal information."[14] This type of power cut against the grain of historical limits on searches and seizures.[15] William Pitt's proclamation in the House of Commons in 1763 evidences that the English valued the sanctity of the home:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[16]

However, officially-sanctioned violations of colonists' rights of privacy in their homes and places of work continued. Perhaps the most vivid example of these transgressions involved the search of the home of legal scholar, Sir Edward Coke: "As Coke lay dying in the great curtained bed, they ransacked study and library, took away the manuscripts for all four parts of the *Institutes*, [and] the manuscript notes for additional books of *Reports*."[17] Not surprisingly, the colonists made the search and seizure grievance a focal point in their conflict with England.[18]

These abuses of privacy rights led to the adoption, in 1791, of the fourth amendment to the Constitution.[19] Proper construction of the

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12. 392 U.S. 1 (1968).

13. Grayson, *The Warrant Clause in Historical Context*, 14 Am. J. Crim. L. 107, 108 (1987). For a more comprehensive work, see N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51-78 (1970).

14. N. Lasson, *supra* note 13, at 75.

15. *See id.* at 13-19 (tracing search and seizure through the Bible, Roman history and law, as well as through the Anglo-Saxon and Norman eras).

16. Grayson, *supra* note 13 at 112 (quoting 1 T. Cooley, A Treatise on the Constitutional Limitations 611 n.1 (1927)).

17. J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 23 (1966) (quoting C. Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke 1552-1634, 533 (1957)).

18. *Id.* at 37-38.

19. U.S. Const. amend. IV. The amendment proclaims

amendment has been the subject of academic inquiry, with the focus on the interpretation of the conjunction "and" that separates the unreasonable search clause from the warrant clause. One scholar, Professor Landynski,[20] noted three possible interpretations:

> (1) that the "reasonable" search is one which meets the warrant requirements specified in the second clause;
>
> (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under a warrant; or
>
> (3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* warrant.[21]

After examining the history of search and seizure, Professor Landynski concluded that only the first two theories could be consistent with the intent of the constitutional framers.[22] Through its decisions, however, the Court has embraced the third theory, the only theory contrary to the framer's notions of permissible behavior.

These differing interpretations of the fourth amendment cloud its meaning. Debatably, this semantic conflict precludes lucid interpretation of the fourth amendment. The Court will remain unable to articulate a clear stop-and-frisk standard because courts and legal scholars will continue to disagree on the fourth amendment's limitations. In short, the judiciary and the academics disagree on the proper reference point for interpretation. Without a common point of origin, courts will remain unable to fashion an acceptable and feasible stop-and-frisk doctrine. Juxtaposing the concerns for privacy with the ambiguity that surrounds the fourth amendment produces the muddled backdrop and starting point for modern decisions and analysis.

III. A Predictable Evolution

A. *The First Step: The Exclusionary Rule and the Balancing Test*

When the Court decided *Mapp v. Ohio*[23] it mandated the exclusionary

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

20. J. Landynski, *supra* note 17, at 42-43; *see also* Grayson, *supra* note 13, at 115-20.

21. J. Landynski, *supra* note 17, at 42-43 (emphasis in original).

22. *Id.* at 43.

23. 367 U.S. 643 (1961). *Mapp* approved the exclusionary rule, which precludes the use of illegally obtained evidence or any other evidence that flows from the illegal search and seizure. *Id.* Before *Mapp* the option to implement the exclusionary rule was left to the

rule, precluding the use of illegally obtained evidence or any other evidence that flows from the illegal search or seizure, the proverbial "fruit of the poisonous tree."[24] *Mapp* ended an era of judicial silence on the constitutionality of investigative stops.[25] The Court was soon pressured to set guidelines for investigative detentions for magistrates, law enforcement officers, and administrators to follow.

In *Camara v. Municipal Court*,[26] Mr. Camara refused to allow a municipal housing inspector access to his home for a routine inspection because the inspector did not have a search warrant. Police officers arrested Camara for his refusal pursuant to the Housing Code.[27] The Court fashioned a balancing test to evaluate Camara's objection to the warrantless routine inspection of his home in light of the government's desire to effectuate housing inspections. When evaluating these competing interests, courts must weigh the government's need to search against the level of intrusion traditionally protected by the fourth amendment.[28] After implementing the balancing approach in *Camara*, the Court quickly expanded this new test, with massive repercussions.

B. Terry, *The First Leap*

In *Terry v. Ohio*,[29] police officer Martin McFadden observed three men acting suspiciously as if they were "casing" a store. Officer McFadden approached the men and asked them perfunctory investigative questions which they answered with mumbles. Fearing for his own safety and the safety of others nearby, Officer McFadden conducted a pat-down search of the suspects' outer garments for weapons and found a revolver. Subsequently Terry was charged with carrying a concealed weapon.[30] At a sup-

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states. By constitutionalizing the exclusionary rule, *Mapp* made its use mandatory by all the states.

24. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 3.1, 9.3-.5 (1984)[hereinafter LAFAVE & ISRAEL].

25. LAFAVE, *supra* note 2, at § 9.1(a) at 335.

26. 387 U.S. 523 (1967).

27. *Id.* at 525-27.

28. *Id.* at 536-37. The Court stated:

> In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.

Id. (quoting Frank v. Maryland, 359 U.S. 360 (1959)).

According to Professor Bacigal, the *Camara* decision was the first step in the fall of the towering probable cause requirement. Bacigal, *supra* note 2, at 777.

29. 392 U.S. 1 (1968).

30. *Id.* at 4-7.

pression hearing, Terry argued that this pat-down violated the fourth amendment's prohibition against unreasonable searches, because the officer lacked probable cause to search and arrest Terry.[31] The Court applied the *Camara* balancing test, weighing the state's interest in protecting the safety of its police officers and citizens against the intrusion on the citizen's rights of privacy.[32] The Court concluded that the state's interest was stronger.[33]

The *Terry* decision allows investigatory detentions of individuals so that police can search for weapons to protect themselves and the public. The Court concluded that these detentions can only take place when the officer has a reasonable, articulable suspicion that the individual is armed; a mere "hunch" is inadequate to support a stop.[34] In reaching its decision, the Court indicated that the scope of the search must not exceed the actions necessary to determine whether the suspicious individual is armed.[35]

Justice Douglas astutely warned of the implications of the monumental leap taken in *Terry*. He cautioned, "[t]here have been powerful hydraulic pressures throughout history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today."[36]

The Court foresaw the potentially broad construction that could be placed on the newly legitimized stop-and-frisk power. Consequently, in one of *Terry*'s companion cases, *Sibron v. New York*,[37] the Court invalidated a search conducted by an officer who did not fear for his safety. In

31. *Id.* at 7-8.

32. *Id.* at 21. The Court stated that balancing was the only ready test for determining reasonableness. *Id.* (citing Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967)).

33. *Id.* at 24. "[W]e 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." *Id.*

34. *Id.* at 27. The Court summarized:

> 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.

Id. at 30-31.

35. *Id.* at 29.

36. *Id.* at 39 (Douglas, J., dissenting).

37. 392 U.S. 40 (1968).

Sibron, the Court emphasized the need for a dangerous threat before engaging in a *Terry* stop. In *Peters v. New York*,[38] also decided the same day as *Terry*, the Court held that the police had probable cause for an investigative detention, thereby foregoing utilization of the balancing analysis. The existence of probable cause mandates extensive searches without engaging in the balancing analysis, separating probable cause cases from stop-and-frisk/balancing cases. Depending upon one's perspective, *Terry* and its companion cases either opened Pandora's box or opened the doorway to more effective law enforcement.

C. *Descending into the Abyss: The Cases that Disturbed the* Terry *Standard*

In the following investigative stop cases[39] the Court tried to fashion boundaries for its new doctrine, but the clarification process resulted in the loss of the "particularized suspicion" requirement. The decision in *Adams v. Williams*[40] constitutes the first monster that emerged from Pandora's box or, alternatively, the first tin-star-wearing lawman to step through the doorway of vigilante crime fighting. *Adams* validated the constitutionality of a detention and search which revealed a weapon. The search was solely predicated on an informant's tip. When the informant's tip would not pass muster under the two-pronged test of *Aguilar v. Texas*[41] to determine "substantial reliability,"[42] the Court circumvented its ruling by allowing the detention and search under the *Terry* decision, declaring "[o]ne simple rule will not cover every situation,"[43] and that the informant's tip carried enough "indicia of reliability"[44] to justify the detention.

As the majority proceeded to push fourth amendment jurisprudence onto the summit of a "slippery slope," Justice Brennan attempted most vehemently to dig in his heels and stop the fall. Justice Brennan noted the damages of a broad application of the stop-and-frisk rule in *Adams*.

38. 392 U.S. 40 (1968).

39. Pennsylvania v. Mimms, 434 U.S. 106 (1974); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972).

40. 407 U.S. 143 (1972).

41. 378 U.S. 108 (1964). The two-pronged test of *Aguilar* required (1) underlying circumstances from which the informant could know what he or she professes to know; and (2) underlying circumstances from which the officer could conclude that the informant was credible. LAFAVE & ISRAEL, *supra* note 24, at § 3.3(c) at 192-203; *see* Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 393 U.S. 410 (1969) (following *Aguilar*). The *Gates* decision changed the *Aguilar* and *Spinelli* warrant test to one of reasonableness under the circumstances, further diluting concrete criteria in search and seizure cases.

42. Bacigal, *supra* note 2, at 775.

43. *Id.* at 783 (quoting Adams v. Williams, 407 U.S. at 147).

44. Adams v. Williams, 407 U.S. at 147.

His dissent, quoting Judge Friendly of the Second Circuit Court of Appeals, bears repeating: "There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."[45] Acknowledging the widening of latitude in law enforcement discretion, Justice Brennan revealed his fear of the disintegration of previously safeguarded rights. The Justice explained that *Terry* "was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property. . . . I greatly fear that if the [contrary view] should be followed, *Terry* will have opened the sluicegates for serious and unintended erosion of the protection of the Fourth Amendment."[46] Therefore, *Adams v. Williams*[47] is tremendously significant because the Court advocated further expansion of the *Terry* holding.

In *United States v. Brignoni-Ponce*,[48] the Court declared that the border patrol's practice of stopping cars and questioning occupants as to their citizenship violated the fourth amendment. In finding the national origin of the vehicle's occupants, alone, did not rise to the level of reasonable articulable suspicion, the Court balanced the governmental interest in immigration regulation against the intrusion on the individual's privacy interest.[49] Although the Court found the intrusion to be "modest,"[50] the degree of interference was still too high. This ruling was no victory for proponents of strict *Terry* interpretation, however, because the Court applied the balancing test to a situation in which the physical safety of neither the police nor the public was at stake.[51] *Brignoni-Ponce* expanded the *Terry* doctrine to allow law enforcement officers to make investigative stops regarding possible past, non-violent crimes.[52] By stepping away from present or impending crimes to past crimes, the Court expanded *Terry* to include a large class of previously unsanctioned searches. The move from fear of imminent danger to suspicion of any criminal activity is no less massive. The race to embrace the balancing test buried the rationale of the *Terry* decision.

In cases involving suspected violations of immigration laws the Court dilutes and even eradicates protective standards. In *United States v. Martinez-Fuerte*,[53] the Court stated curtly that border encounters are

45. *Id.* at 151 (Brennan, J., dissenting)(quoting Williams v. Adams, 436 F.2d 30, 38-39 (2d Cir. 1970) (Friendly, J., dissenting)).

46. *Id.* at 153 (Brennan, J., dissenting) (quoting Williams v. Adams, 436 F.2d at 39 (Friendly, J., dissenting)).

47. 407 U.S. 143 (1972).

48. 422 U.S. 873 (1975).

49. *Id.* at 876.

50. *Id.* at 879-80.

51. Harper, *supra* note 2, at 28.

52. *Id.*

53. 428 U.S. 543 (1976).

"subject to less stringent constitutional safeguards."[54] The border patrol stopped the appellants away from the Mexican border at a permanent checkpoint even though the patrol had no reason to suspect that the appellants were aliens or were transporting aliens.[55] The Court stated that use of the "reasonable suspicion" doctrine would have been "impractical."[56] Justice Brennan, in a blistering dissent,[57] wrote, "the Court's argument fails for [a] basic reason[]. There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied."[58] *Martinez-Fuerte* eliminated the requirement of individualized suspicion, at least in border search cases, and flung open the door to the demise of individualized suspicion in all cases.[59]

The next major blow to the stop-and-frisk doctrine came in *Pennsylvania v. Mimms*.[60] In *Mimms*, a police officer stopped Mimms' car after noticing an expired registration sticker on his vehicle. The officer ordered

54. *Id.* at 555.

55. *Id.* at 547.

56. *Id.* at 557. The Court found:

> A requirement that stops on major routes inland always be based on reasonable suspicion would be *impractical* because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.

Id. (emphasis added).

57. Justice Brennan begins the dissent: "Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." *Id.* at 567 (Brennan, J., dissenting). He then listed the other eight cases: Texas v. White, 423 U.S. 67 (1975) (permitting the warrantless search of an automobile in police custody despite unreasonableness of the custody and opportunity to obtain a warrant); United States v. Watson, 423 U.S. 411 (1976) (public arrests never need warrants even if there exists an opportunity to get one); United States v. Santana, 427 U.S. 38 (1976)(approved warrantless arrest of individual standing in doorway of home); United States v. Miller, 425 U.S. 435 (1976) (denying the existence of a protectible privacy interest in personal banking materials); Stone v. Powell, 428 U.S. 465 (1976)(disallowing federal collateral relief for fourth amendment claims); United States v. Janis, 428 U.S. 433 (1976) (evidence unconstitutionally seized by state officer admissible by United States in civil proceeding); South Dakota v. Opperman, 428 U.S. 364 (1976)(allowing indiscriminate inventory searches of impounded automobiles); Andresen v. Maryland, 427 U.S. 463 (1976)(weakening fourth amendment proscription against general warrants).

58. *Martinez-Fuerte*, 428 U.S. at 575 (Brennan, J., dissenting). Justice Brennan concluded by asserting:

> The cornerstone of this society, indeed of any free society, is orderly procedure. . . . [T]o permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure."

Id. at 578 (quoting Malinski v. New York, 324 U.S. 401, 414 (1945)).

59. *See infra* notes 109-112 and accompanying text.

60. 434 U.S. 106 (1977).

the driver out of the car according to his usual procedure. He then noticed a bulge in the driver's jacket pocket, frisked the motorist and found a gun.[61] The Court approved this practice because the officer acted out of concern for his safety when he searched for the weapon. The Court determined the governmental interest in police safety to be "legitimate and weighty"[62] and the intrusion on Mimms "*de minimis*."[63] Justice Stevens noted in his dissent, "this kind of seizure . . . leaves police discretion utterly without limits."[64] Where the traffic-stop-safety rationale would apply to any passengers in the car as well, *Mimms*, like *Martinez-Fuerte*[65] alleviated the need for particularized suspicion.[66]

Professor Rosenberg bluntly criticized the *Mimms* decision:

> Acting cavalierly and without acknowledging that it was even doing so, the *Mimms* Court effected a major doctrinal shift in fourth amendment jurisprudence by creating a new class of "tertiary" seizures governed by neither probable cause nor reasonable suspicion—indeed, a seizure governed by no articulable standard other than the police officer's fancy.[67]

The new class of searches referred to by Professor Rosenberg and Justice Stevens are a product of "generalized suspicion." This standard allows law enforcement officers the latitude to search if they reasonably suspect that something is awry.[68]

In the decisions in *Adams v. Williams*,[69] *Brignoni-Ponce*,[70] *Martinez-Fuerte*,[71] and *Mimms*,[72] the narrow stop-and-frisk test in *Terry* steadily degenerated into a blanket power for law enforcement personnel to effect a seizure for past, non-violent crimes. As a result of broadening *Terry*, officers may frisk any person involved in the most trivial legal infraction,

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61. *Id.* at 107.
62. *Id.* at 110.
63. *Id.* at 111.
64. *Id.* at 122 (Stevens, J., dissenting).
65. 428 U.S. 543 (1976); *see supra* notes 53-59 and accompanying text.
66. *Mimms*, 434 U.S. at 122-23 (Stevens, J., dissenting).
67. Rosenberg, *Notes From the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part II*, 19 Hous. L. Rev. 831, 890-91 (1982) (footnotes omitted). Professor Rosenberg views summary adjudication as an evil that haunts the growth of constitutional doctrines including the fourth amendment. *Id.* at 894-95.
68. Moreover, the Supreme Court ruled that searches pertaining to automobiles are less likely to be violative of the fourth amendment because, "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281 (1983). This automobile exception, when coupled with the aforementioned border searches exception, excludes a significant number of cases from scrutiny, even by the stop-and-frisk doctrine's diluted test.
69. 407 U.S. 143 (1972).
70. 422 U.S. 873 (1975).
71. 428 U.S. 543 (1976).
72. 434 U.S. 106 (1978).

if they can vocalize the slightest possibility of either greater lawlessness or danger.

D. *Floundering in the Quicksand: The Cases after "Generalized Suspicion"*

Once the Court eradicated the "particularized suspicion" doctrine, the Court's attempts to clearly define fourth amendment restrictions resulted in a confused ambiguity. In *Delaware v. Prouse*,[73] the Court condemned purely arbitrary traffic stops. In *Prouse*, the officer plainly stated, "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off."[74] The Court deemed the search improper because a proper search requires "some quantum of individualized suspicion;"[75] the officer's overabundant discretion invalidated this search.[76] The Court determined that stops of vehicles violating traffic laws were equally likely to uncover unlicensed drivers as random stops.[77] Clearly preferring an objective standard over a subjective one, the *Prouse* Court found a less onerous alternative and invalidated the random traffic stop procedure.[78] Had the Court continued to apply this requirement, a clearly objective standard would remain to limit police discretion. The loss of the least onerous alternative test results in the reasonability standard being more susceptible to subjective and therefore, non-uniform analysis.

Still concerned about the possibility that *Mimms* could allow wholly capricious behavior, the Court decided *Ybarra v. Illinois*.[79] In *Ybarra*, officers procured a warrant from a magistrate to search a bar for drugs. The officers searched all the patrons of the establishment. The Court condemned this practice and recognized that fourth amendment constitutional protection is individualized and does not provide for a "cursory search for weapons" or anything else.[80]

Ybarra and *Mimms* may be reconciled. In *Mimms*, the driver aroused individual suspicion by driving a car with expired tags, an illegal act. In *Ybarra* the bar patrons committed no crime. However, no distinct line distinguishes a legitimate weapons search from an impermissible one.

Shortly after *Ybarra*, the Court asserted in *Michigan v. Summers*[81] that the detention of persons at a place being searched pursuant to a warrant was constitutionally permissible. With this decision the Court de-

73. 440 U.S. 648 (1979).
74. *Id.* at 650-51.
75. *Id.* at 654-55 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).
76. *Id.* at 655.
77. *Id.* at 659-60.
78. Bacigal, *supra* note 2, at 799-803.
79. 444 U.S. 85 (1979), *reh'g denied*, 444 U.S. 1049 (1980).
80. *Id.* at 93-94.
81. 452 U.S. 692 (1981).

cided that pursuant to a search warrant, seizures are permissible but searches of persons are not. If a workable doctrine is to emerge, this distinction will require the Court to address the permissible scope of each under marginally different circumstances. The Court resorted to making just such petty factual distinctions in *Florida v. Royer*[82] and acknowledged the difficulty in delineating a clear rule:

> There will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.[83]

The question that leaps to mind is if no sentence or paragraph will suffice to explain a rule, will the adjudication of twenty cases make the doctrine clear? Fifty? One hundred? As the Court decides each case, instead of becoming more lucid, the reasonable suspicion doctrine becomes more of an enigma.

In *Kolender v. Lawson*,[84] the Court found a California vagrancy statute to be unconstitutionally vague. The statute provided that a police officer could demand that any individual account for his presence by providing credible and reliable identification coupled with a reasonable assurance of trustworthiness.[85] In striking down this statute, the Court established criteria for drafting statutes which will not fail for vagueness by including the requirement of individualized suspicion. By providing guidelines to the legislatures, the Court attempted to redefine the doctrine it fashioned. Arguably, the clarification process still does not work. As the Court continues to add variables to consider in the balancing test, it approves expanded discretion which results in more confusion.

The stop in *United States v. Place*[86] involved officers at the Miami International Airport. Suspicious of Place, the officers approached him and asked for his ticket and identification. Place complied with the officers' request. The officers further questioned Place's behavior after noticing a difference in his purported and actual destination and other suspicious conduct. The officers then contacted their counterparts at Place's destination, La Guardia Airport, who questioned him upon his arrival. The New York officers confiscated Place's luggage and submitted it to a sniff test by a trained canine. The dog reacted positively to one of the bags. Since it was late Friday afternoon, the officers held the luggage until

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82. 460 U.S. 491 (1983)(plurality opinion).
83. *Id.* at 506-07.
84. 461 U.S. 352 (1983).
85. *Id.* at 355-57.
86. 462 U.S. 696 (1983).

a warrant was obtained on the following Monday. Upon opening the bag, the officers found cocaine.[87]

In deciding *Place*, the Court announced that the length of the stop was an important factor in determining intrusiveness, although the Court declined to endorse any definite guidelines.[88] The Court struck down the seizure due to the long, yet preventable delay, and the police failure to inform appellant of the whereabouts of his belongings or when retrieval would be possible. This seizure exceeded the officer's authority and therefore violated the fourth amendment.[89]

In the *Place* decision, the Court failed to take advantage of an opportunity to implement an objective standard, leaving the fourth amendment protections in a subjective oblivion without ascertainable boundaries. Justice Brennan again wrote his own opinion, a concurrence in the result only, warning of the dangers of balancing at the expense of the fading probable cause requirement.[90]

The decision in *Michigan v. Long*[91] freed another privacy-encroaching monster from the Pandora's box opened in *Terry*. This decision authorized searching not only the driver in a traffic stop, but the area within his or her control. Justice Brennan's predictable dissent rang with a familiar warning, "[i]n sum, today's decision reflects once again the threat to Fourth Amendment values posed by 'balancing.' "[92]

Soon thereafter, Justice Brennan vocalized his apprehensions in another dissent in *Immigration and Naturalization Service v. Delgado*.[93] He argued, "the Court has become so mesmerized by the magnitude of the problem that it has too easily allowed Fourth Amendment freedoms to be sacrificed."[94] In *Delgado*, armed, uniformed agents from the Immigration and Naturalization Service ("INS") questioned factory workers.

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87. *Id.* at 698-700.

88. *Id.* at 709; *cf.*, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1) (1975) (proscribing twenty minutes as the maximum detention time for a *Terry* stop).

89. *Place*, 462 U.S. at 710.

90. *Id.* at 717-20 (Brennan, J., concurring). Joined by Justice Marshall, Justice Brennan wrote:

> The Court acknowledges that seizures of personal property must be based on probable cause. . . . Despite this recognition, the Court employs a balancing test drawn from *Terry* to conclude that personal effects may be seized based on reasonable suspicion. . . .
>
> . . . Today, the Court uses *Terry* as a justification for submitting to these pressures [upon the Court to water down constitutional guarantees]. Their strength is apparent, for even when the Court finds that an individual's Fourth Amendment rights have been violated it cannot resist the temptation to weaken the protection the Amendment affords.

Id. at 717, 720.

91. 463 U.S. 1032 (1983).

92. *Id.* at 1063 (Brennan, J., dissenting).

93. 466 U.S. 210 (1984).

94. *Id.* at 239-40 (Brennan, J., dissenting).

The INS equipped these agents with walkie-talkies and posted armed agents at the exits. The Supreme Court denied that these actions constituted a search at all.[95] Not surprisingly, commentators criticized the *Delgado* decision for its inconsistency with prior holdings,[96] and dangerous nebulousness: "[T]he shocking aspect of this trend [to expand the ability of police to react more effectively] is that the fourth amendment protections are being slowly chiseled away."[97]

The Court again weakened the "reasonable suspicion" doctrine in *United States v. Hensley*,[98] a broad holding allowing police officers to effectuate a *Terry* stop if he or she has a reasonable suspicion that the person encountered was either wanted for, or involved with, a completed felony.[99] In *Hensley*, the suspicion arose from a wanted flyer distributed by a neighboring police department. The Court found this practice to be "reasonable."[100] Professor Harper calls *Hensley* "a good example of the type of citizen/police confrontation that should be avoided."[101] He maintains that the *Hensley* expansion will not necessarily improve police effectiveness; rather, this expansion will permit police to engage in unprofessional conduct and lessen judicial supervision and control by allowing courts to judge officers' conduct with a subjective rather than an objective standard.[102]

E. *The Rubble that Remains: The Cases to Contrast with* Terry

Each case after *Terry* constituted a small step, but when compounded, allowed for decisions like *United States v. Montoya de Hernandez*,[103] *Skinner v. Railway Labor Executives' Association*[104] and *Michigan Department of Police v. Sitz*,[105] that with the *post hoc* rationales, bear no resemblance to their antecedent, *Terry*. Justice Brennan's fears concerning the decay of the probable cause requirement became reality in *United*

95. *Id.* at 219. The Court based this assumption on the fact that any meaningful restriction of workers was out of voluntary cooperation with their employer. Being consensual in nature, the activity merited no further constitutional analysis. *Id.* at 218.

96. Caldwell, *Seizures of the Fourth Kind: Changing the Rules*, 33 CLEV. ST. L. REV. 323, 332 (1984). Professor Caldwell questions whether *Delgado* was a search and seizure case at all. He maintains that *Delgado* may actually have been an immigration case and not a search and seizure case. If this is true, ramifications of the decision upon the already muddled probable cause doctrine would be far less significant. *Id.* at 334-35.

97. *Id.* at 338.

98. 469 U.S. 221 (1985).

99. Harper, *supra* note 2, at 32.

100. *Hensley*, 469 U.S. at 229, 232.

101. Harper, *supra* note 2, at 38.

102. *Id.* at 35-42.

103. 473 U.S. 531 (1985).

104. 489 U.S. 602 (1990).

105. 110 S. Ct. 2481 (1990).

States v. Montoya de Hernandez.[106] In *Montoya de Hernandez*, officers suspected an airline passenger of smuggling drugs within her alimentary canal and detained her for twenty-four hours in a small room. Two elderly matrons watched Montoya de Hernandez and the officers told her that she would remain there until she either defecated in a wastebasket or consented to an x-ray; she was prohibited from using a telephone.[107] Applying the balancing test, the Court found this detention to be reasonable using a *post hoc* rationale. The Court reasoned that although the "[r]espondent's detention was long, uncomfortable, indeed, humiliating . . . both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country."[108]

Justice Brennan, in his scathing dissent, reprimanded the majority for the use of hindsight to determine reasonableness, noting that most individuals searched do not carry contraband.[109] He also declared that the decision in *Terry* in no way sanctioned this stop.[110] The Court added yet another factor to consider in search and seizure guidelines, reason for the delay.[111] This consideration supports the government's side of the balancing scale by giving the government a judicially acceptable excuse. However, reason for the delay fails to illuminate aspects of governmental interest or individual intrusiveness, expanding the balancing analysis even further. Justice Brennan labelled *Montoya de Hernandez* a "disgusting and saddening episode."[112] *Montoya de Hernandez* rendered the "reasonable suspicion" doctrine so completely amorphous that any attempt to

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106. 473 U.S. 531 (1985). For more cases concerning bodily intrusions, see generally Winston v. Lee, 470 U.S. 753 (1985) (surgery to remove bullet found to be unconstitutional because it was highly intrusive and an affront to human dignity); Schmerber v. California, 384 U.S. 757 (1966) (blood sample taken from conscious person is commonplace and permissible if properly performed); Breithaupt v. Abram, 352 U.S. 432 (1957) (blood sample taken from an unconscious person so routine so as not to be violative); Rochin v. California, 342 U.S. 165 (1952) (stomach pumping as shocking and too intrusive to be constitutional).

107. *Montoya de Hernandez*, 473 U.S. at 532-36.

108. *Id.* at 544.

109. *Id.* at 557-559 (Brennan, J., dissenting).

110. *Id.* Justice Brennan commented:

> Allowing such warrantless detentions under *Terry* suggests that the authorities might hold a person on suspicion for 'however long it takes' to get him to cooperate, or to transport him to the station where the 'legitimate' state interests more fully can be pursued, or simply to lock away while deciding what the State's 'legitimate' interests require. But the Fourth Amendment flatly prohibits such 'wholesale intrusions upon the personal security of individuals, and any application of *Terry* even by analogy to permit such indefinite detentions 'would threaten to swallow' the basic probable-cause and warrant safeguards. . . . It is simply staggering that the Court suggests that *Terry* would even begin to sanction a *27-hour criminal investigative detention*, even one occurring at the border.

Id. at 559 (Brennan, J., dissenting) (citations omitted) (emphasis in original).

111. *See* Anderson, *supra* note 2, at 33.

112. *Montoya de Hernandez*, 473 U.S. at 545 (Brennan, J., dissenting) (quoting United States v. Holtz, 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting)).

predict its limits necessitates guesswork. By continuing to add relevant factors, the Court sanctioned the practice of authorizing searches and seizures for whatever reason law enforcement finds compelling, even if never previously allowed by the Court.

In *Skinner v. Railway Labor Executives' Association*,[113] the Court expanded the *Martinez-Fuerte*[114] deletion of the individualized suspicion doctrine to include legislation mandating blood and urine testing for railroad workers.[115] "We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."[116] Justice Marshall penned his discontent in a bitter dissent joined by Justice Brennan. They examined the disintegration of the protections of the fourth amendment and concluded:

> I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. . . . [T]oday's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily.[117]

This expansion reduces the probable cause requirement to a mere fiction. The Court no longer requires individualized suspicion, and balancing often favors the government because the courts accord great weight to the prevention of rail accidents, crime-fighting, and immigration control.

Finally, in *Michigan Department of State Police v. Sitz*,[118] the Court further dismantled the protections of the fourth amendment concerning investigative stops and the narrow scope of *Terry*.[119] *Sitz* upheld the use of fixed sobriety checkpoints that detained all passing motorists, even though the police lacked any indicia of individualized suspicion. The Court labelled the intrusion slight.[120] Predictably, Justice Brennan found fault with this decision, expressing in his dissent his fear of the possibility

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113. 489 U.S. 602 (1990). For a more detailed study of *Skinner*, see Note, *The Battle of the Balancing Tests in the Fourth Amendment Drug Testing Cases:* Skinner Railway Labor Executives' Ass'n—*The Proper Balance is Struck*, 15 OKLA. CITY U.L. REV. 333 (1990); Note, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After* Skinner v. Railway Labor Executives' Ass'n?, 12 U. HAW. L. REV. 343 (1990).

114. 428 U.S. 543 (1976); *see supra* notes 53-59 and accompanying text.

115. *Skinner*, 489 U.S. at 606-12.

116. *Id.* at 624 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

117. *Id.* at 655 (Marshall, J., dissenting).

118. 110 S. Ct. 2481 (1990).

119. *See supra* notes 29-36 and accompanying text.

120. *Sitz*, 110 S. Ct. at 2486. *But see* Brown v. Texas, 443 U.S. 47, 51-52 (1978) in which the Court stated, "[t]he flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct." The Court further stated that presence in a crime-ridden area is not enough cause for suspicion, *id.*, however *Sitz* implies that mere driving is enough cause for suspicion.

of arbitrary government action. In discussing the scope of the governmental interest, he noted "consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis."[121] This case expanded the holding in *Skinner*[122] by dismantling the "individualized suspicion" requirement not only for railway workers, a small segment of the overall population, but for motorists, a huge portion of the population. *Skinner* also dealt with the public sector, while *Sitz* razed the individualized suspicion doctrine in the private arena. Plainly, the holding in *Sitz*, which allowed detention without any reasonable, articulable suspicion, signals the demise of the intended narrow construction of the *Terry* decision.

The Court indulged in post-hoc rationalization to justify the intrusions in *Montoya de Hernandez*,[123] *Skinner*,[124] and *Sitz*.[125] This kind of analysis inevitably results in the tipping of the scales in the government's favor. The Courts often balance in favor of the government's compelling interests, while the precious right to be free of unreasonable searches and seizures, when invoked by criminal defendants, gets lost in the judiciary's good intentions.

The Supreme Court's perplexing decisions have either befuddled the lower courts or given them the leeway to do whatever they want. In *United States v. Ogberaha*,[126] the Circuit Court of Appeals for the Second Circuit proclaimed, "[w]e further note our deference to the expertise and 'common sense conclusion[s]' of trained customs inspectors . . . who are well versed in the 'smugglers' repertoire of deceptive practices."[127] In short, the court's deference allows customs officials to make determinations concerning the privacy rights guaranteed under the fourth amendment. Conversely, a number of courts look to individualized suspicion, even though the Supreme Court has rendered the doctrine inapplicable.[128] The Circuit Court for the District of Columbia lamented,

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121. *Sitz*, 110 S. Ct. at 2490 (Brennan, J., dissenting).
122. 489 U.S. 602 (1990); *see supra* notes 113-117 and accompanying text.
123. 473 U.S. 531 (1985); *see supra* notes 103-112 and accompanying text.
124. 489 U.S. 602 (1990); *see supra* notes 113-117 and accompanying text.
125. 110 S. Ct. 2481 (1990); *see supra* notes 118-122 and accompanying text.
126. 771 F.2d 655 (2d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).
127. *Id.* at 658 (citations omitted).
128. *See, e.g.*, United States v. Drinkard, 900 F.2d 140, 143 (8th Cir. 1990)("[a] limited investigative detention of a citizen by a government agent is illegal unless that agent has reasonable suspicion that the citizen has committed or is about to commit a crime" (citing Terry v. Ohio, 392 U.S. 1 (1968)); United States v. Ninety One Thousand Nine Hundred Sixty Dollars, 897 F.2d 1457, 1461 (8th Cir. 1990) ("the investigatory stop must be supported by reasonable, articulable suspicion of criminal activity" (citing *Terry*, 392 U.S. at 21)); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989) ("[a]n officer may make an investigatory stop if he is aware of specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that the particular person detained is engaged in criminal activity" (citing United States v. Cortez, 449 U.S.

"[u]nfortunately, but not surprisingly, there is no brightline test for distinguishing between a lawful *Terry* stop and an illegal arrest."[129] This lack of uniformity adds an unnecessarily capricious element to American criminal procedure. Whether or not a seizure will be struck down depends wholly upon the jurisdiction of the offense. Although federal crimes should be prosecuted uniformly, varying district practices preclude this desired and equitable result.

These search and seizure cases illustrate that stepping on the slippery slope with *Terry* has led to the results in *Montoya de Hernandez* and *Sitz*. Should the Court attempt to remedy the resulting confusion as an undesirable end or wait for the "reasonable suspicion" doctrine to pass through this "phase" of the maturation process? Unfortunately, the length of time that the Court has spent trying to clarify the issue largely discredits the "phase" theory.

IV. The Resulting Quagmire

A. *Need for Workable Guidelines*

Commentators have rushed to criticize the Supreme Court for leaving the fourth amendment in such a fluid state. The Court must solidify the doctrine of probable cause due to its frequent application. However, the Court faces a monumental task as "[balancing] would require an almost complete remapping of fourth amendment doctrine."[130] Remapping constitutional doctrines is undoubtedly complex and difficult work. Furthermore, the high stakes involve rights considered absolutely vital. Justice Gray eloquently stated, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[131]

Professor Bacigal, while noting the sensibility of balancing, asserts that without a clearer method, the resulting decisions "will continue to appear unprincipled."[132] Professor Amsterdam observes the difficulty of instituting a doctrine with such real-world implications, for "the welter of life is constantly churning up situations in which the application of clear and

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411, 416-18 (1981)); United States v. Crittendon, 883 F.2d 326, 328 (4th Cir. 1989) ("the stop and frisk at issue here was lawful only if it was conducted on the basis of reasonable suspicion"); United States v. Levetan, 729 F. Supp. 891, 897 (D.D.C. 1990) ("[s]uch a [reasonable, articulable] suspicion is necessary to justify a limited seizure or investigatory." (citing *Terry*, 392 U.S. at 1)).

129. United States v. Glenna, 878 F.2d 967, 971 (7th Cir. 1989).

130. Amsterdam, *supra* note 2, at 398.

131. Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891).

132. Bacigal, *supra* note 2, at 803.

consistent theories would produce unacceptable results."[133] He writes, "the Supreme Court is strongly cautioned to keep its contours fluid, so as to maintain extensibility over the unexpected."[134] Professor Harper perceives a "public outcry for greater protection from criminals."[135]

Defining the fourth amendment presents an arduous task, especially with the ambiguities contained in the language of the amendment itself. "The work of giving concrete and contemporary meaning to that brief, vague, general, unilluminating text written nearly two centuries ago is unescapably judgmental. In the pans of judgment sit imponderable weights."[136] Professor Landynski declares, "[t]he search and seizure provision . . . ha[s] both the virtue of brevity and the vice of ambiguity."[137] Clearly, the Supreme Court Justices disagree on the basic meaning of the words of the fourth amendment.[138] Additionally, interpretation of the framer's intent yields few clues in the search for a practical yet protective result.[139]

Not only do lawyers and judges utilize the probable cause standard in courtrooms, but law enforcement personnel and magistrates must apply the standard daily, making the ambiguity of the doctrine particularly troublesome. "[T]he 'unreasonableness' standard is obviously much too amorphous either to guide or to regulate the police. Lurking beneath the difficulty, in turn, is the monstrous abyss of a graduated fourth amendment . . . splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforceability and general ooziness."[140] Professor Schwartz notes the dangerousness of this unintelligible standard because the power to stop necessarily includes the power to use force to effectuate that stop.[141] The lack of concrete guidelines results in the use of more force, both legitimate and illegitimate.[142] He lists situations in which possible suspicious activity may be taking place to illustrate the subjectiveness of the decision police officers would be forced to make without clear criteria.[143]

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133. Amsterdam, *supra* note 2, at 351.

134. *Id.* at 386.

135. Harper, *supra* note 2, at 43.

136. Amsterdam, *supra* note 2, at 353-54.

137. LANDYNSKI, *supra* note 17, at 42.

138. *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1984); *Id.* at 370 (Brennan, J., dissenting).

139. *See* Amsterdam, *supra* note 2, at 398.

140. *Id.* at 414-15.

141. Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM L. & CRIMINOLOGY & POLICE SCI., 433, 448 (1967).

142. *Id.*

143. *Id.* at 455. Professor Schwartz postulates:

> (1) Without a coercive stop, how can officers secure the cooperation of someone travelling at 60 miles per hour?
>
> (2) Can the police be prevented from shouting "stop" at a running man and from

In 1969, Professor Sokol published a small book of guidelines for police officers entitled *The Law-Abiding Policeman.*[144] He poses the question, "[i]f a person is suspicious, can you frisk him?"[145] In his answer he proposes the need to question first before conducting a limited search of only outer clothing and weapons.[146] He closes stating, "[i]f you don't have probable cause to arrest a person, your right to frisk him is severely limited."[147] If Professor Sokol attempted to answer the same question today, the work would need to be significantly longer to include different standards for border searches, use of informant tips, non-dangerous situations and a myriad of other possible circumstances that police officers face, assuming, of course, that discernable standards could be enunciated at all. As stated by Howard R. Leary, police commissioner of New York City, "[w]e do have a right to expect every policeman to know the essence of the Bill of Rights and to carry it in his head and heart."[148] However, the Supreme Court makes this goal in regards to the fourth amendment very difficult if not utterly impossible.

The Court needs to draw a brighter line to clarify the appropriate standard for a stop and frisk search. The difficulty arises in determining how to draw a workable line without losing the flexibility now afforded by the balancing approach. "Growth is what statesmen expect of a Constitution,"[149] but the danger of growing too much is clear. "This [balancing] approach has the danger of becoming a sort of universal solvent, operating as a technique for resolving all constitutional questions without much regard for the choices authoritatively expressed in the language of the document itself."[150]

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enforcing that command?

(3) Are the police to be denied the right to freeze the situation at the scene of a shooting by ordering that "nobody leave" to prevent a suspect or witness from permanently disappearing?

. . . .

(4) A person running at 2:00 A.M. with a heavy package in a business neighborhood.

(5) A person travelling in an automobile who seems to correspond to the description of a suspect.

(6) A person walking slowly down a street at night, looking into parked cars.

Id. (citation omitted).

144. R. Sokol, The Law-Abiding Policeman (1969).

145. *Id.* at 31.

146. *Id.* at 31-33.

147. *Id* at 33.

148. *Id.* at 5.

149. Amsterdam, *supra* note 2, at 399.

150. LaFave, *"Case by Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 Sup. Ct. Rev. 127, 171 (discussing United States v. Robinson, 414 U.S. 218 (1973)).

B. *Solutions Espoused by the Commentators*

Professor LaFave advocates standardized fourth amendment procedures in the interest of fairness and judicial economy.[151] Professor Amsterdam prefers that legislation or police-made regulations limit police action and suggests making the exclusionary rule more elastic.[152] To the contrary, Professor Harper advocates a return to strict *Terry* interpretation, limiting the use of the "reasonableness" exception to dangerous situations requiring immediate police action.[153] Professor Bacigal favors a "wait and see" approach to see if further adjudication will clarify the situation.[154]

V. Conclusion—To Emerge from the Chaos

Professor Bacigal made his wait and see suggestion sixteen years ago. Patience has resulted in the further degeneration of probable cause. Currently the fourth amendment rests in dire straits. Both Justice Brennan and Professor Amsterdam liken the graduated model to a Rohrschach blot,[155] a spatter of ink that looks different to all who view it. Justice Brennan's resignation from the Supreme Court ends a most vehement struggle within the Court against the dilution of fourth amendment rights. The loss of Justice Brennan's voice on the bench signals an even more urgent need for clear, usable guidelines.

Professor Harper's plea to return to strict *Terry* interpretation merits attention. He reasons that constitutional interpretation should not turn upon public opinion or framer's notions of what was protected centuries ago. He views the Court's role as one of watchdog, vigilantly protecting the privacy rights of individuals in today's world.[156] As Professor Amsterdam points out, "[t]he problem . . . is where and how to draw an administrable line."[157] Since the Court has tried to draw this line for over twenty years and has met with only minimal success, perhaps the wisest choice for the court is a return to the first line, the *Terry* line. The familiarity and, most importantly, *clarity* of this standard constitutes a workable proposition. Anyone can use the *Terry* doctrine with relative ease, whether it be in courtrooms, classrooms, or on the streets where police

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151. *Id.* at 209-216.
152. Amsterdam, *supra* note 2, at 409.
153. Harper, *supra* note 2, at 44.
154. Bacigal, *supra* note 2, at 806. Professor Bacigal acknowledges that the present state may be "fuzzy and open-ended," but points out that these may also be beneficial characteristics.
155. New Jersey v. T.L.O., 469 U.S. 325, 358 (1984) (Brennan, J., dissenting); Amsterdam, *supra* note 2, at 393.
156. Harper, *supra* note 2, at 44.
157. Amsterdam, *supra* note 2, at 408.

perform under considerable duress and without much time for the careful balancing the Court indulges in. While some of the sophistication of the multi-factored balancing approach may be lost, the individual security guaranteed by the fourth amendment would be retained, sealing the lid to the Pandora's box of privacy-encroaching monsters.

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