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Varieties of Detention and the Fourth Amendment

Joseph G. Cook

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Unique among the prohibitions and protected rights of the first eight amendments to the Constitution, the fourth amendment contains no absolutes; its standards are couched in terms of reasonableness.[1] A product of this innate flexibility has been a number of recent Supreme Court decisions which have broadened the permissible scope of law enforcement techniques;[2] while at the same time the unbending language of other amendments has led the Court to seemingly irresistible extensions of their substantive protections which have stringently limited the confines of lawful police activity.[3]

Although fourth amendment cases frequently turn on the question of the legality of an "arrest," that term does not appear in the Constitution. More accurately, the fourth amendment prohibits unreasonable seizures of the person.[4] While no doubt this concept covers all cases of illegal arrest, it may well extend to other circumstances. Thus, some forms of temporary detention technically may not be arrests and

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1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. *See* Ford v. United States, 352 F.2d 927, 932 (D.C. Cir. 1965); United States v. Clark, 289 F. Supp. 610, 618 n.10 (E.D. Pa. 1968).

2. *See* Davis v. Mississippi, 394 U.S. 721 (1969) (dictum); Terry v. Ohio, 392 U.S. 1 (1968).

3. The privilege against self-incrimination contained within the fifth amendment has been extended to cover situations thought clearly outside its limits in prior years. Undoubtedly, the extension of this privilege has been the most notable of the judicial modifications of constitutional safeguards appurtenant to criminal trials. See Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Changes*, 37 U. CIN. L. REV. 671 (1968) for an enlightened discussion by the noted Second Circuit judge. The sixth amendment right to counsel has also been broadened in scope, but the extension has been less broad than that of the self-incrimination privilege. *See* Note, *Criminal Co-defendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969).

4. The amendment protects the right of the people to be "secure in their persons," and this protection is understood to prevent unreasonable arrests or detentions and to prohibit the issuance of arrest warrants without probable cause. See the interpolation of the amendment in Henry v. United States, 361 U.S. 98, 100-02 (1959). *See also* Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality*, 56 J. CRIM. L.C. & P.S. 32, 35 (1965).

traditionally may not have been so labelled; but calling such practices by another name will not resolve the constitutional issue[5]—the detentions may still be unreasonable. Therefore, the term "arrest," despite its simplicity and usefulness in other contexts, has severe limitations for purposes of constitutional analysis. These limitations were explicitly acknowledged by the Supreme Court in *Terry v. Ohio*[6] where the common-law power of police to make inquiry and an incidental frisk of a suspicious individual on a street was challenged.

> 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.[7]

Thus, the focal point of inquiry is not on labels, but rather on the reasonableness of the particular detention involved.

This article will explore the nature of fourth amendment protection in regard to seizures of the person. First, attention will be directed to the particular significance to be given a detention which qualifies as an arrest. Second, consideration will be given to detentions short of arrest, whose constitutional justification must lie in the reasonable suspicion

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5. Implicit in all attempts to broaden the investigatory power of the police has been an avoidance of the term arrest; the avoidance seems premised on the belief that this in and of itself would foreclose the constitutional problem.

> One can certainly understand the wish which has fathered this attempted distinction, for "arrest" is a blunt word, implying stigma and dramatizing the instant at which the liberty of the citizen is totally subjected to the power of the state . . . . It is no wonder, therefore, that the authors have attempted to soften the sharp image of their proposed change with a semantic curtain. They would have us believe that a taking into custody for questioning and search is not an arrest but something else, as if a change in the descriptive label of a concept effects a change in the nature of the concept itself. This is Madison Avenue at its best, but it is hard to see how it advances the cause of legal analysis of this proposal on its merits.

Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C. & P.S. 402, 403 (1960). *See also* Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 36-38 (1957) [hereinafter cited as Foote, *Safeguards*]; LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331; Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386 (1960).

6. 392 U.S. 1 (1968).

7. *Id.* at 16 (footnotes omitted). *See also* Davis v. Mississippi, 394 U.S. 721, 726 (1969).

aroused in the detaining authority by the surrounding circumstances. Finally, the outer limits of fourth amendment permissibility will be explored—situations in which limited detentions may be deemed reasonable notwithstanding an absence of probable cause sufficient to justify an arrest or of even a minimal level of suspicion.

I. WHAT IS AN ARREST?

When the legality of a putative arrest is challenged, normally the issue raised by the accused is whether there was probable cause for an arrest.[8] Regardless of whether the definition of the term is itself a constitutional question, determining when or if an arrest occurred may have constitutional significance in delineating the rights of the accused. On the one hand, the accused may wish to prove that a sequence of events did constitute an arrest; for if he is able to do so, and if there was no probable cause for an arrest at that moment, then his being taken into custody was illegal. Conversely, the prosecution, by proving that no arrest occurred, avoids the burden of demonstrating probable cause; it may justify its actions on the basis of reasonableness. On the other hand, the accused may wish to prove that no arrest was made, thereby preventing the prosecution from arguing that a disputed search was valid as incident to an arrest.[9] In such case, the prosecution may find it desirable to show that the defendant was in fact arrested.[10]

8. The nature of probable cause is not within the scope of the present study. The traditional definition is expressed in Beck v. Ohio, 379 U.S. 89, 91 (1964), as follows: "[W]hether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

9. The scope of such a search has recently been severely limited by Chimel v. California, 395 U.S. 752 (1969). When an arrest is made, the officers may search only the person and the area of immediate access, to ensure against the suspect's having a concealed weapon or his obtaining one.

10. Constitutional issues are frequently interrelated and demand separate appraisal. Here, extremely difficult questions may arise as to when the accused must be apprised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). It is highly probable that from the point of time when an arrest occurs the accused is entitled to the *Miranda* warnings and rights. Quite likely, however, cases will arise in which an arrest has not occurred, yet the circumstances are such that the *Miranda* warnings should be given. Nevertheless, these issues should be considered as separate and distinct problems. For example, see Gray v. United States, 394 F.2d 96 (9th Cir. 1968), in which the suspects were questioned for five and a half hours, but the court held that the arrest did not occur until later. *Cf.* Brown v. United States, 365 F.2d 976 (D.C. Cir. 1966); United States v. Adams, 289 F. Supp. 838 (D.D.C. 1968); People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969). *See also* United States v. Bird, 293 F. Supp. 1265, 1271-72 (D. Mont. 1968); State v. Miranda, 104 Ariz. 174, ____, 450 P.2d 364, 370 (1969); People v. Ellingsen, 258 Cal. App. 2d 535, 65 Cal. Rptr. 744 (1968); State v. Evans, 439 S.W.2d 170 (Mo. 1969); LaFave, *"Street Encounters" and the*

The importance of this determination is illustrated by *Henry v. United States*.[11] There, F.B.I. agents were investigating the theft of an interstate shipment of whisky from a Chicago terminal. They had received information "concerning the implication of the defendant Pierotti with interstate shipments,"[12] but the nature of this implication was not disclosed in the record. The agents followed the car in which defendants Pierotti and Henry were travelling after it left a tavern. The car was eventually parked in an alley. The agents observed Henry leave the car and return a few minutes later carrying some cartons which he placed in the car. When the car departed, the F.B.I. agents were unable to follow it, but eventually found it parked again in front of the tavern. Shortly thereafter, the defendants returned to the car and again drove to the same alley. Henry, just as he had done previously, left the car and returned in a short while with several cartons. Defendants then drove away; the agents followed and motioned them to stop. The car was searched, and the cartons, which bore the name "Admiral" and were addressed to an out-of-state company, were placed in the agents' car. The defendants were taken into custody and held for approximately two hours. During this time, the agents discovered that the cartons contained stolen radios and formally placed the defendants under arrest.

The Seventh Circuit held that no arrest occurred when the car was stopped, that when the officers saw the cartons in the car, they then had probable cause to make an arrest and, consequently, that their detention of the defendants was valid.[13] When the case came before the Supreme Court, both the majority and the two dissenters agreed that at the time the car was stopped there was no probable cause for making an arrest. Furthermore, all the Justices agreed that sighting the cartons with the interstate labels did constitute probable cause for an arrest. However, the issue which divided the Court, and upon which it parted company with the tribunal below, was determining the moment in which the arrrest occurred. Justice Douglas, speaking for the Court, stated:

> The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our

Constitution: Terry, Sibron, Peters and Beyond, 67 MICH. L. REV. 39, 95-114 (1968) [hereinafter cited as LaFave, *Street Encounters*].

11. 361 U.S. 98 (1959).

12. *Id.* at 99.

13. United States v. Henry, 259 F.2d 725 (7th Cir. 1958). One judge dissented, contending that not only was there a lack of probable cause at the time of the stopping, but also that there was a lack of probable cause after the agents discovered the cartons in the car. *Id.* at 730.

> view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.[14]

Justice Clark, joined in dissent by Chief Justice Warren, argued that the stopping of the car did not amount to an arrest, and that the events subsequent to the stopping provided the necessary probable cause.[15]

Henry v. United States is a curious and confusing case. An examination of the respective briefs of the parties indicates that they were arguing entirely different points. The defendant argued the issue on which the Court decided the case—that an arrest occurred at the time the car was stopped. Conceding that there were no Supreme Court decisions pertinent to the question, the only authority the defendant could bring to his support was an Illinois Court of Appeals decision which defined arrest in terms of restricting the individual's freedom of locomotion.[16] Precedent clearly would have favored the prosecution, had they elected to contest the issue.[17] But surprisingly, the prosecution conceded that the arrest had occurred when the automobile was stopped,[18] and chose to argue instead that there was probable cause for an arrest at that time.

The issue properly before the Supreme Court then was whether probable cause for an arrest existed at the time the car was stopped. The two dissenting Justices, however, discounting the fact that the time of the arrest was not in dispute, argued that the arrest had not occurred until a time later than that agreed. The majority similarly acknowledged that the question was moot, yet chose to express its opinion that the arrest had indeed occurred at the time of the stopping. This was no mere

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14. 361 U.S. at 103.

15. [T]he time at which the agents were required to have reasonable grounds to believe that petitioner was committing a felony was when they began the search of the automobile, which was after they had seen the cartons with interstate labels in the car. The earlier events certainly disclosed ample grounds to justify the following of the car, the subsequent stopping thereof, and the questioning of petitioner by the agents. This interrogation, together with the sighting of the cartons and the labels, gave the agents indisputable probable cause for the search and arrest.

361 U.S. at 106. The same approach was used by Justice Burton, concurring, in Brinegar v. United States, 338 U.S. 160, 178-79 (1949).

16. People v. Mirbelle, 276 Ill. App. 533 (1934). The facts in Mirbelle were far more indicative of the occurrence of an arrest: "The State's evidence shows that police officers, armed with revolvers, approached defendant, announced that they were officers, and commanded, in effect, that defendant surrender, whereupon he immediately put up his hands, thereby plainly indicating that he complied with their command, and submitted to arrest." *Id.* at 544. *See also* Legrand v. Bedinger, 20 Ky. 539 (1827), quoted at length in the *Mirbelle* decision.

17. See note 28 *infra* and accompanying text.

18. Brief for the United States at 1, 12, Henry v. United States, 361 U.S. 98 (1959).

dictum since the Court considered the time of arrest to be determinant of outcome in the case. Because it was the first time the Court had addressed itself to that issue, it would seem appropriate to define the term "arrest." Yet, in the final analysis the majority merely states perfunctorily that an arrest occurred at the time of the stopping; the dissent states that it did not and then proceeds to tell when it did occur. Neither opinion explains the reasoning behind its conclusions. Moreover, the majority hedges its decision with the qualification that the arrest was complete "for the purposes of this case."[19] Also, unfortunately, neither opinion indicates whether its conclusion was constitutionally compelled, or was the prevailing common-law view, or was the law in the jurisdiction in which the case arose.[20] In any event, had the majority simply accepted the concession of the prosecution, the case would have been no different from the numerous cases raising the issue of probable cause. But having at least commented on the merits of the question, the impression is left that had the prosecution chosen to argue that the arrest had not occurred at the time the car was stopped, the Court would still have decided the issue adversely.

The following year, the question of when an arrest takes place arose again in *Rios v. United States*.[21] In *Rios*, state officers were cruising in a neighborhood reputed for narcotics activity. They were not investigating a particular crime. They observed the defendant get into a taxicab. Although neither of the officers had seen him previously, they followed the taxicab for approximately two miles. When it stopped for a traffic light, the officers got out of their car and approached the cab from opposite sides.

Examining the chain of events up to this point, it clearly seems that there was no probable cause for an arrest, and the Court so found.[22] However, the government contended that an arrest had not occurred at the time the officers approached the car, that they were only engaged in a "routine investigation" and did not intend to detain the defendant. When one of the officers identified himself as a policeman, the defendant became alarmed, attempted to get out of the taxicab, and in the process dropped a recognizable package of heroin. The defendant then escaped the grasp of the officers and ran into an alley, but ultimately was subdued by gunfire.

19. Henry v. United States, 361 U.S. 98, 103 (1959).

20. The Illinois authority relied upon by the defendant was not referred to in the Court's opinion.

21. 364 U.S. 253 (1960).

22. *Id.* at 261-62.

The initial encounters between the officials and the accused would appear to be substantially similar in *Henry* and *Rios*. In *Rios*, however, the Court did not decide that an arrest occurred at the time the officers approached the car but, rather, remanded the case with instructions to the lower court to determine when the arrest did occur.[23] The cases might be distinguished by reference to the intent of the officers at the time of the encounter. It is reasonable to believe that in *Henry* the officers fully expected to make an arrest for possession of stolen liquor when they approached the car. In *Rios*, however, the officers were quite likely "fishing." Ironically, the officers' inferences in *Henry* proved quite incorrect while the hunch in *Rios* paid off.

Henry might be interpreted to mean that any confrontation between officers and suspect will constitute an arrest. However, if this were the Court's intention, *Rios* would have been reversed merely on the authority of *Henry*. *Rios* clearly indicates that the holding in *Henry* does not establish an absolute prohibition of temporary detentions, even when carried out because of a mere suspicion of crime. A few isolated decisions within the various jurisdictions appear to imply a literal reading of *Henry*.[24] Generally, however, *Henry* and *Rios* have had little influence on lower courts.

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23. On remand, the district court held that an arrest had not occurred when the officers first approached the vehicle. United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961).

24. *See* Jackson v. United States, 408 F.2d 1165 (8th Cir. 1969); Moran v. United States, 404 F.2d 663 (10th Cir. 1968); United States v. Ruffin, 389 F.2d 76 (7th Cir. 1968); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); United States v. Wrieole, 379 F.2d 394 (3d Cir. 1967); United States v. Baxter, 361 F.2d 116 (6th Cir.), *cert. denied*, 385 U.S. 834 (1966); United States v. Nicholas, 319 F.2d 697 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); Dixon v. Shiner, 248 Ind. 66, 163 N.W.2d 481 (Ct. App. 1968); Williams v. State, 248 Ind. 66, 222 N.E.2d 397 (1966), *cert. denied*, 388 U.S. 917 (1967) (court split 2-2, and thus affirmed, on same issue which divided the Supreme Court in *Henry*—whether the arrest occurred before or after incriminating evidence was observed); Edwardsen v. State, 231 Md. 332, 190 A.2d 84 (1963); Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965) (decision appears to extend further than Henry—arrest occurs when officer begins pursuit for the purpose of making it); State v. Contursi, 44 N.J. 422, 209 A.2d 829 (1965); State v. Krogness, 238 Ore. 135, 388 P.2d 120 (1963), *cert. denied*, 377 U.S. 992 (1964); State v. Mercurio, 96 R.I. 464, 194 A.2d 574 (1963). In a far reaching interpretation the Rhode Island court construed *Henry* to hold "that the constitutional standard against an illegal arrest is founded on the common law. Here the legislature has attempted to abrogate the common-law test and substitute therefore that which, at common law, constitutes an unwarranted interference with one's liberty." *Id.* at 468, 194 A.2d at 576; *cf.* State v. McWeeney, 100 R.I. 405, 216 A.2d 357 (1966). *See also* Souris, *Stop and Frisk, or Arrest and Search—The Use and Misuse of Euphemism*, 57 J. CRIM. L.C. & P.S. 251, 257 (1966): "*Henry* means to me that police interruption of a citizen's progress and restriction of his liberty of movement constitutes an arrest within the purview of the fourth amendment's ban against unreasonable seizures of our citizens' persons, the validity of which must be judged by the

It would appear that any too literal interpretation of *Henry* has been foreclosed by *Terry v. Ohio*,[25] in which the Supreme Court distinguished a detention and incidental search from the arrest which proximately followed. Too, in *Peters v. New York*,[26] the Court cited *Rios* with approbation, observing that "it is a question of fact precisely when, in each case, the arrest took place."[27] The greater number of state and lower federal court decisions which have come down since *Henry* and *Rios* likewise do not regard the cases as imposing a blanket prohibition on limited detentions for investigative purposes.[28] At most, *Henry* would seem of continued viability in cases where there is an unequivocal show of force by an officer or officers, precluding the possibility that the suspect will not be taken into custody. *Orozco v. Texas*[29] is illustrative. There, four police officers entered the petitioner's bedroom in a boarding house at four in the morning, awakened him, and began questioning him concerning a homicide. One officer testified, and apparently the Court agreed, that from the moment the petitioner gave

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fourth amendment's requirement of probable cause, not by a standard of mere suspicion." This interpretation, however, would appear to be soundly refuted by Terry v. Ohio, 392 U.S. 1 (1968), discussed at text accompanying notes 37-55 *infra*.

25. 392 U.S. 1 (1968).

26. 392 U.S. 40 (1968).

27. *Id.* at 67.

> And while there was some inconclusive discussion in the trial court concerning when Officer Lasky "arrested" Peters, it is clear that the arrest had for purposes of constitutional justification, already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity.

Id.

28. *See* Wartson v. United States, 400 F.2d 25 (9th Cir. 1968); Dupree v. United States, 380 F.2d 233 (8th Cir. 1967); Moore v. United States, 296 F.2d 519 (5th Cir. 1961); Coleman v. United States, 295 F.2d 555 (D.C. Cir. 1961) (emphasis placed on the fact that in *Henry* the Supreme Court held the arrest complete "for purposes of this case," thus not suggesting any general rule); United States v. Thomas, 250 F. Supp. 771 (S.D.N.Y. 1966) ["If *Henry* can be read as holding that every stopping and consequent restriction of freedom of movement is an arrest, then I must candidly note that the rule of *Henry* is more 'honour'd in the breach than the observance.' (Hamlet, Act 4, Scene 1.)"]; State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (1967); Lowe v. State, 191 So. 2d 303 (Fla. Dist. Ct. 1966); People v. Jackson, 98 Ill. App. 2d 212, 240 N.E.2d 421 (Ill. App. Ct. 1968); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964); State v. Valstad, 282 Minn. 301, 165 N.W.2d 19 (1969); State v. Berry, 450 S.W.2d 212 (Mo. 1970); State v. Hutton, 108 N.H. 279, 235 A.2d 117 (1967); State v. Dilley, 49 N.J. 460, 231 A.2d 353 (1967); People v. Butterfly, 25 N.Y.2d 159, 250 N.E.2d 340, 303 N.Y.S.2d 57 (1969) (on facts virtually identical to *Rios*, court reached the same result and remanded the case for determination of when arrest occurred); Commonwealth v. Hicks, 209 Pa. Super. 1, 223 A.2d 873 (1966); Howard v. Commonwealth, 210 Va. 674, 173 S.E.2d 829 (1970) (distinguishing *Henry*).

29. 394 U.S. 324 (1969). The issue before the Court was whether petitioner was entitled to the *Miranda* warnings prior to interrogation.

his name he "was not free to go where he pleased but was 'under arrest.' "[30]

II. "REASONABLE" DETENTIONS NOT DESIGNATED AS ARREST

The common law recognizes a power to detain individuals for a reasonable period of time without such detentions being deemed arrests.[31] Although such detentions do not require probable cause, there is a minimal requirement of suspicion.[32] Similar limited detentions have also been authorized by statute. The New York stop-and-frisk law[33] is

30. 394 U.S. at 325. *See also* State v. Basford, 1 Wash. App. 1044, 467 P.2d 352 (1970) (*Orozco* distinguished).

31. *See* Foote, *Safeguards, supra* note 5; LaFave, *Street Encounters, supra* note 10, at 42-43; LaFave, *supra* note 5; Remington, *supra* note 5; Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L.C. & P.S. 532 (1967).

32. Although circumstances authorizing the temporary detention of a suspect have not been articulated with precision, the following criteria have been suggested in determining the legality of the detention: (1) There must be some rational suspicion by the police officer that some activity out of the ordinary is taking place; (2) There must be some indication to connect the person under suspicion with the unusual activity; (3) There must be some suggestion that the activity is related to crime.

People v. Villareal, 262 Cal. App. 2d 438, 445, 68 Cal. Rptr. 610, 614 (1968). *See also* People v. Reulman, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964); People v. Lingo, 3 Cal. App. 3d 661, ___, 83 Cal. Rptr. 755, 757 (1970) ("An officer may not, routinely and without any cause whatsoever, detain every citizen he encounters—even if he has violated some traffic rule — in order to interrogate him about narcotics or about any other possible offense, and then use the reply to such questioning as an excuse for a search otherwise unlawful"); People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969); People v. Henze, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967); People v. Anonymous, 48 Misc. 2d 713, 265 N.Y.S.2d 705 (Nassau County Ct. 1965) (officer could not stop defendant simply because he was "carrying books in Hicksville").

On the other hand, an officer may become too suspicious. *See* White v. United States, 271 F.2d 829 (D.C. Cir. 1959), where the officer said: "Anyone walking in that area at that time of morning is involved in some illegal activity . . . practically anyone." *See also* People v. Moore, 60 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).

33. N.Y. CODE CRIM. PROC. § 180-a (McKinney 1967):

Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

For further discussion of "stop and frisk" law see Kuh, *supra* note 4; Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433 (1967); Souris, *supra* note 24.

the most well-known of these. The Uniform Arrest Act[34] is also significant, having been adopted by several states.[35] Most importantly, the constitutionality of these statutes has been uniformly upheld.[36]

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34. THE UNIFORM ARREST ACT § 2 provides:

(1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

See generally Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942).

35. DEL. CODE ANN. tit. 11, § 1902 (1953); N.H. REV. STAT. ANN. § 594:2 (1955) (allows detention for up to four hours); R.I. GEN. LAWS ANN. § 12-7-1 (1956). Similar statutes are found elsewhere, *e.g.*, Hawaii, Massachusetts, and Missouri.

HAWAII REV. LAWS §§ 708-41 (1968):

On Suspicion. Whenever a crime is committed, and the offenders are unknown, and any person is found near the place where the crime was committed, either endeavoring to conceal himself, or endeavoring to escape, or under such other circumstances as to justify a reasonable suspicion of his being the offender, such person may be arrested without warrant.

MASS. ANN. LAWS c. 41, § 98 (1968):

They (police officers) may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going; . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police.

The last sentence quoted was held unconstitutional in Alegate v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967).

MO. ANN. STAT. § 544.170 (1953) (emphasis added):

All persons arrested and confined . . . for any alleged breach of the peace or other criminal offense, *or on suspicion thereof*, shall be discharged from said custody within twenty hours from the time of such arrest.

See also ILL. ANN. STAT. ch. 38, §§ 107-14, 108-1.01 (Smith-Hurd 1970); LA. REV. STAT. ANN. § 215:1 (Supp. 1969).

36. *Del.* De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960). The effect of the *De Salvatore* decision appeared to be the nullification of any ground gained by the statute since the court interpreted the language to require the same standard of probable cause as was required for an arrest. This impression, however, was erased in Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961), where the court reaffirmed the constitutionality of the statute and drew a clear distinction between an arrest and a detention under the statute. *See also* State v. Moore, 55 Del. 356, 187 A.2d 807 (1963); State v. Halko, 55 Del. 1385, 188 A.2d 100 (1962); State v. Scanlon, 84 N.J. Super. 427, 202 A.2d 448 (Super. Ct. 1964).

Mass. Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964). *See also* Commonwealth v. Salerno, ___ Mass. ___, 255 N.E.2d 318 (1970); Commonwealth v. Garreffi, 355 Mass. 428, 245 N.E.2d 442 (1969); Commonwealth v. Matthews, 355 Mass. 378, 244 N.E.2d 908 (1969).

N.H. Nelson v. Hancock, 239 F. Supp. 857 (D.N.H. 1965), *rev'd*, 363 F.2d 249 (1st Cir. 1966), *cert. denied*, 386 U.S. 984 (1967). The district court implicitly assumed the validity of the statute and held for the petitioner on the failure of the state to comply with its provisions. On appeal, the

The constitutionality of the common-law power to detain and carry out an incidental frisk was considered for the first time by the Supreme Court in *Terry v. Ohio*.[37] A plainclothesman was patrolling an area of downtown Cleveland in the early afternoon when his attention was attracted by Terry and another man.[38] He observed them walk back and forth before a store window perhaps a dozen times. At one point he observed them confer briefly with a third party who thereafter left. Finally, the two men walked away together and again met the third party at another location. The officer, suspecting the men were planning a robbery, approached them, identified himself, and asked for their names. When the men "mumbled something," the officer grabbed Terry, placed him between himself and the other two suspects, and patted down the outside of his clothing. During this process, he discovered a pistol in Terry's inside overcoat pocket. Being unable to retrieve the weapon, he removed Terry's overcoat and gained possession of a .38 caliber revolver. Terry was subsequently convicted of carrying a concealed weapon. The conviction was affirmed by the Court of Appeals of Ohio,[39] and the Supreme Court of Ohio dismissed an ensuing appeal. Thereafter, the United States Supreme Court granted certiorari.

The Supreme Court affirmed the conviction in an eight-to-one decision with the majority opinion written by Chief Justice Warren.[40] Prior to reaching the merits of the case, the Court engaged in a philosophical discussion of the application of the fourth amendment to temporary detentions.[41] The Court firmly asserted that detentions on the

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decision was reversed on the grounds that the violation of the statute did not violate a constitutional right, and that there was no seizure of evidence until after a legal arrest.

R.I. Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961). The United States Supreme Court dismissed an appeal "for want of a substantial federal question." 368 U.S. 516 (1962). Justice Douglas felt the case should be heard on its merits before the jurisdictional question was answered. *But see* Barth v. Flad, 99 R.I. 446, 208 A.2d 533 (1965), and Berberian v. Smith, 99 R.I. 198, 206 A.2d 531 (1965). In both of these instances, what police contended was a legal detention pursuant to the statute was interpreted by the court to be an illegal arrest. *See also* State v. Brown, ___ R.I. ___, 260 A.2d 716 (1970).

37. 392 U.S. 1 (1968).

38. The officer, who had thirty-nine years experience in police work, could not explain exactly why they caught his attention. "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.' " *Id.* at 5.

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

40. Terry v. Ohio, 392 U.S. 1 (1968). Justices Harlan and White wrote concurring opinions; Justice Black concurred in the opinion of the majority with two minor qualifications; and Justice Douglas dissented.

41. The Court noted that the Supreme Court of Ohio had dismissed an appeal by the

street are not distinguishable from invasions of the home,[42] because "the Fourth Amendment protects people, not places."[43] The question, then, was not whether temporary detentions raise a constitutional issue, but whether such detentions can satisfy the reasonableness standard of the fourth amendment.

The opinion went on to say that encounters by the police with individuals are known to occur for numerous reasons, many of which are unconnected with the ultimate objective of the prosecution of crime.[44] "Doubtless some police 'field-interrogation' conduct violates the fourth amendment,"[45] but a refusal of the Court to condone such activity would not prevent abusive practices.[46] As Warren saw it the narrow question in this case was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[47]

Referring to an encounter between police and individual as a "stopping" or a "detention" instead of an arrest does not alter the nature of the constitutional issue.[48] Nor, per the majority, is it adequate to say that momentary detentions are too insignificant to raise constitutional questions.[49] "We therefore reject the notion that the

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defendants "on the ground that 'no substantial constitutional question' was involved." 392 U.S. at 8.

42. "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." *Id.* at 8, 9.

43. *Id.* at 9, *quoting* Katz v. United States, 389 U.S. 347, 351 (1967).

44. This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

Terry v. Ohio, 392 U.S. 1, 13, 14 n.9 (1968).

45. *Id.* at 13, 14.

46. [A] stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Id. at 14.

47. *Id.* at 15.

48. *See* note 5 *supra* and accompanying text. *See also* Davis v. Mississippi, 394 U.S. 721, 726 (1969).

49. 392 U.S. at 19; *cf.* Kavanagh v. Stenhouse, 93 R.I. 252, 256, 174 A.2d 560, 563 (1961),

Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.' "[50]

Therefore, since the case is to be approached in traditional fourth amendment conceptualizations, the ultimate question remains whether there is probable cause—not for an arrest—but for a detention.[51] The Court formulated its test as follows: "[W]ould 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?"[52] The language quoted by the Court is that repeatedly employed in decisions applying the test of probable cause to arrests and searches. The quotation is cut short, and the phrase, "that the action taken was appropriate," is added as a means of adopting this extant constitutional standard to the problem of detentions and frisks short of arrests and searches.

Effective law enforcement requires questioning of suspects and informers in situations where probable cause for arrest does not exist. The practical necessity of such endeavors is a persuasive reason for concluding that they are not "unreasonable" within the context of the fourth amendment.[53] This consideration has a bearing on application of

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appeal dismissed, 368 U.S. 516 (1962): "[I]t seems to us that the general assembly exercised its police power on behalf of the individual member of society by protecting him against the ignominy or humiliation of a premature arrest where the detaining officer may have had reason to suspect that the person detained was guilty of wrongdoing."

Arguably, the suspect could honestly say that he had never been arrested, and there would be no record of his detention. *See* People v. Morales, 22 N.Y.2d 55, 63, 238 N.E.2d 307, 313, 290 N.Y.S.2d 898, 906 (1968):

> This prerogative of police officers to detain persons for questioning is not only essential to effective criminal investigation, but it also protects those who are able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered. . . . The fact that the detention is not recorded as an arrest and may not be considered by the individual as an arrest is also important.

See also United States v. Rundle, 282 F. Supp. 926 (E.D. Pa. 1968); United States v. Rundle, 274 F. Supp. 364 (E.D. Pa. 1967); Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961).

50. Terry v. Ohio, 392 U.S. 1, 19 (1968).

51. *See id.* n.16: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Cf.* People v. Excollias, 264 Cal. App. 2d 16, 22, 70 Cal. Rptr. 65, 68-69 (1968) (Kaus, J., concurring). "Having, both as reader and writer, struggled through dozens of cases which involve the fine distinctions between probable cause and 'circumstances short' thereof, I confess that I find the notion of a third concept, sandwiched somewhere between the other two, quite appalling." *See also* LaFave, *Street Encounters, supra* note 10, at 65.

52. 392 U.S. at 21-22.

53. *See* Goldsmith v. United States, 277 F.2d 335, 344 (D.C. Cir. 1960) ("absurd to suggest

the constitutional standard.[54] The Court concluded that the circumstances present in *Terry* justified an investigation.[55]

Although the impact of *Terry* is only beginning to be felt, recent indications are that it has strengthened the hand of lower courts in upholding the validity of brief detentions which might have caused considerable "constitutional jitters"[56] under prior decisions, particularly *Henry*. For example, in *Ballou v. Massachusetts*,[57] officers received a tip from an anonymous informant that the petitioner and others were in a certain cafe and that they were armed. The officers knew that the petitioner previously had been convicted of illegal possession of a gun and that one of his companions was the leader of a faction currently involved in a gang war. The officers found petitioner and his companion in front of the cafe, frisked them, and found a revolver in the petitioner's belt, for the possession of which he was convicted. While acknowledging that this case did not involve the "unusual conduct" found in *Terry*, the First Circuit believed that the detention and frisk were nevertheless justified.[58]

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that police must arrest a person before they can ask him questions"); United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1950) ("cannot be contended . . . every detention . . . a 'seizure' . . . . Under such a theory, a policeman could not stop and question a person standing next to a bloody corpse"); Commonwealth v. Lehan, 347 Mass. 197, 204, 196 N.E.2d 840, 845 (1964) ("[i]ndividual who acts in a suspicious way invites threshold investigations . . . ."—not unreasonable for police to inquire into suspicious behavior during nighttime); People v. Estrialgo, 37 Misc. 2d 264, 282, 233 N.Y.S.2d 558, 576 (Sup. Ct. 1962), *rev'd*, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (1963), *aff'd*, 14 N.Y.2d 733, 199 N.E.2d 384, 250 N.Y.S.2d 293 (1964)("Police . . . not required to have abnormal eyesight . . . . They may approach a suspect, observe him and his possessions at close range and conduct a brief and perfunctory interrogation and investigation"). *But see* Inbar & Thompson, *Stop and Frisk: The Power and the Obligation of the Police*, 59 J. CRIM. L.C. & P.S. 333 (1968) (*Terry* makes it "unmistakably clear that the Court will not tolerate dragnet seizures and frisks" even though for "worthy objectives" if such actions do not meet fourth amendment reasonableness requirement); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966). *See also* LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, chs. 14-16 (1965); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 58; Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393 (1963); Warner, *supra* note 34.

54. "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." Terry v. Ohio, 392 U.S. 1, 22 (1968).

55. "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." *Id.* at 23.

56. Commonwealth v. Howell, 213 Pa. Super. 33, ____, 245 A.2d 680, 681 (1968).

57. 403 F.2d 982 (1st Cir. 1968).

58. "[I]t seems clear to us that the tip in the light of the visual corroboration and the reality

A similar lack of outwardly suspicious circumstances was present in the recent California case of *People v. Cruppi*.[59] Officers observed the defendant cross the street at a traffic light in front of their patrol car at 5:15 in the morning. Except for the hour, there would appear to be nothing particularly suspicious in the defendant's behavior.[60] The officers pulled alongside the defendant, attracted his attention, and asked for identification. The defendant showed them his selective service card.[61] The address on the card indicated he lived three blocks from the point of encounter. The defendant told the officers that he had been at an all night restaurant and said that he wanted to look at the nearby school grounds before returning home. His reason for doing so was never made clear. One of the officers then radioed for a "name check" and learned that there were two warrants outstanding for the defendant's arrest. He was then placed under arrest. An inventory of his possessions revealed a quantity of marijuana which in turn led to his being prosecuted. The court held that the circumstances were suspicious enough to justify the detaining and questioning of the defendant. Moreover, the unsatisfactory nature of his responses to the officers' inquiries was found to be adequate grounds for pursuing the investigation until probable cause for arrest was established.

The fact that an individual is carrying an object in an unnatural manner has also been recognized as a significant factor in determining the reasonableness of a temporary detention. In *Commonwealth v. Howell*,[62] an officer observed the defendant wearing one top coat and carrying another over his arm, apparently in an attempt to conceal something. When stopped, the defendant told the officer he was carrying a tape recorder. The officer then asked for some identification, whereupon the defendant handed him a driver's license describing a white male, forty-seven years of age. The defendant was a Negro and appeared much younger.[63] He was then taken into custody. When the officer and defendant arrived at the police station, the true owner of the

of a gangland feud were at least the equivalent of the parading by the store window observed in Terry." *Id.* at 985.

59. 265 Cal. App. 2d 9, 71 Cal. Rptr. 42 (1968).

60. At one point the court indicated that the officers "saw the defendant step from behind a telephone pole," but his subsequent conduct in crossing the street directly in front of the patrol car would appear to rebut any air of furtiveness. *Id.* at 10, 71 Cal. Rptr. at 43.

61. Apparently the court felt the defendant's lack of a driver's license a sign of suspicion in itself, a somewhat curious presumption to be placed on nondrivers.

62. 213 Pa. Super. 33, 245 A.2d 680 (1968).

63. It was subsequently learned that he was thirty-five years of age.

driver's license, the top coat, and the tape recorder was at the station reporting their theft. The court held that the circumstances were suspicious enough to justify the stopping, and that the patently false identification warranted taking the defendant into custody. Similarly, in *People v. Manis*,[64] an officer observed the defendant during a heavy rainstorm without a raincoat carrying what appeared to be a new portable typewriter case in a part of town which had been rife with typewriter burglaries. Officers followed the defendant who went in the direction of an area where a number of pawnshops were located. At one point they passed him in their patrol car, whereupon he reversed his direction. Thereafter, the defendant was stopped, and when asked what he had in the case, responded that it contained radios which he had stolen. The court held that the detention was reasonable.

These decisions would appear to indicate an increased judicial tolerance for the preliminary investigation of behavior only minimally suspicious but of particular significance to a trained law enforcement officer. The factors which possess the most significance are dress, conduct, and movement.[65] These in turn are considered in light of the setting of time and place.[66] Viewing these factors in combination, preliminary investigation may be warranted if the activity runs contrary to ordinary habits and smacks of potential criminal involvement.

A question of considerable constitutional significance not resolved by *Terry* is whether an officer can forcibly detain a suspect who ignores the officer's request to stop. Justices Harlan and White in concurring opinions in *Terry* unequivocally indicate that the officer possesses such authority.[67] If their contentions are correct, then it would appear that when an officer exercises this power, the individual has been effectively

64. 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969).

65. *Id.* at 660, 74 Cal. Rptr. at 428.

66. *Id.*

67. Justice Harlan, feeling "constrained to fill in a few gaps," 392 U.S. at 31, observed:

> [I]f 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 . . . . That right must be more than the liberty (. . . possessed by every citizen) to address questions to other persons, for ordinarily the persons 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.

392 U.S. at 32-33. Justice White noted: "[I]t seems to me the person may be briefly detained against his will while pertinent questions are directed to him." 295 U.S. at 34. *Cf.* Raphael, *"Stop and Frisk" in a Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History*, 20 ALA. L. REV. 294, 301 (1968).

arrested. Arguably, the evasiveness of the suspect added to the officer's original suspicion establishes probable cause for arrest.[68] The practical result of this reasoning is that where suspicious circumstances exist, the individual must either voluntarily stop or place himself in jeopardy of being arrested.[69] An even greater constitutional dilemma may be presented when the suspect does stop on request, but refuses to respond to the officer's inquiries. Again, such conduct could tend to confirm the officer's suspicions. But here, the authority to detain confronts the absolute "right to remain silent" guarantee of the fifth amendment.[70] If the exercise of this fifth amendment right may be considered in determining the existence of probable cause, it may be contended that the suspect has been improperly penalized for invoking a constitutional protection.[71]

On the same day *Terry* was decided, the Court also handed down decisions in the companion cases of *Sibron v. New York* and *Peters v. New York,*[72] both involving the application of the New York stop-and-frisk law.[73] In each instance the central issue before the Court was the admissibility of evidence obtained in an alleged frisk. The Court was not called upon to consider the constitutionality of the statutory authority to "stop"—thus it was able to refrain from intimating an opinion upon this basic issue.[74] Restricting its attention to the application of the

68. The cases are not in agreement as to the inferences to be drawn from the reaction of the suspect to the approach of the police. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Nicholas, 319 F.2d 697, 698 (1st Cir. 1963), *cert. denied,* 375 U.S. 933 (1963); People v. Privett, 55 Cal. 2d 698, 361 P.2d 602, 12 Cal. Rptr. 874 (1961); People v. Gaines, 265 Cal. App. 2d 730, 71 Cal. Rptr. 468 (1968); Gallegos v. People, 157 Colo. 173, 401 P.2d 613 (1965); Wright v. United States, 242 A.2d 833 (D.C. Ct. App. 1968); People v. Jackson, 98 Ill. App. 2d 238, 240 N.E.2d 421 (1968); Thompson v. State, 4 Md. App. 31, 35, 240 A.2d 780, 784 (Ct. Spec. App. 1968); People v. Bomboy, 32 Misc. 2d 1002, 229 N.Y.S.2d 323 (Ct. Spec. Sess. 1962); People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (Magis. Ct. 1967).

69. Such potential results add some persuasiveness to Justice Douglas' argument in his dissent in *Terry* that the decision has significantly diminished the protection of the fourth amendment. 392 U.S. at 35-39.

70. Miranda v. Arizona, 384 U.S. 436, 468 (1966). In this regard, Justice White contended in *Terry,* "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34. *See* Raphael, *supra* note 67, at 302-03. *See also* Commonwealth v. Berrios, 437 Pa. 338, 263 A.2d 342, 343 n.2 (1970).

71. *See, e.g.,* Griffin v. California, 380 U.S. 609 (1965).

72. 392 U.S. 40 (1968)(both cases are treated in the same opinion).

73. *See* note 33 *supra.*

74. "[A] pronouncement by this Court upon the abstract validity of § 180-a's 'stop' category would be most inappropriate in these cases, since we have concluded that neither of them presents the question of the validity of a seizure of the person for purposes of interrogation upon less

statute in these cases, the Court concluded that in *Sibron* the purported frisk was actually an illegal search and reversed, but that in *Peters* there was probable cause to make an arrest, and thus the potential scope of the statute-conferred authority to detain and frisk was inconsequential. Consequently, Peters' conviction was affirmed.[75] So long as the stop-and-frisk law is used to confer no greater power upon the police than that approved in *Terry,* the statute certainly will not be deemed constitutionally offensive.[76]

The relevance of the common-law power to stop-and-frisk was illustrated in *People v. Rivera,*[77] decided by the Court of Appeals of New York. *Rivera* was decided after the passage of the stop-and-frisk law but concerned facts which occurred prior to the enactment. Therefore, the new statute was not applied. The court, in sustaining the summary power of the police to stop-and-frisk on suspicion,[78] stated:

> [T]he evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police

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than probable cause." 392 U.S. at 60 n.20. The Court suggested that the constitutional validity of the statute might well turn on the manner in which it is interpreted by the New York state courts. "We cannot tell, for example, whether the officer's power to 'demand' of a person an 'explanation of his actions' contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the 'stop' is 'custodial.' " *Id.*

75. Eight of the justices agreed with the decisions in both cases. Justice Black preferred to affirm both convictions. Concurring opinions were authored by Justices White, Fortas, Harlan, and Douglas.

76. Justice Harlan noted in a concurring opinion:

> I would accept, as an adequate general formula, the New York requirement that the officer must "reasonably suspect" that the person he stops "is committing, has committed or is about to commit a felony. . . ." "On its face," this requirement is, if anything, more stringent than the requirement stated by the Court in *Terry*: "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. . . ."

392 U.S. at 72 (citations omitted).

77. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied,* 379 U.S. 978 (1965).

78. The suspicious circumstances were described by the court as follows:

> [T]he facts developed in the record, e.g., the incidence of crime in the neighborhood, the peculiar approaches of defendant and his companion to the grill, the rapid leaving when police were seen (even in plain clothes three men in a car watching could reasonably give alarm to a person alert to detection), all justified the police stopping defendant and questioning him.

14 N.Y.2d at 445, 201 N.E.2d at 34-35, 252 N.Y.S.2d at 462. *Rivera* was followed in People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied,* 380 U.S. 936 (1965), *cert. denied,* 382 U.S. 20 (1965), *appeal dismissed,* 383 U.S. 575 (1966).

> may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed.[79]

Not until two years later did the New York court hear its first case calling for application of the statute. The case was *People v. Peters,*[80] and, not surprisingly, the court upheld the validity of the statute under the rationale of *Rivera.*[81] As constitutional authority the court cited *Ker v. California,*[82] where the nation's highest Court had said:

> The States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.[83]

This passage from the *Ker* decision has been particularly popular in the state courts for the purpose of upholding state laws and procedures. The statement, however, is no more than a tautology: it says only that the states may employ any law enforcement devices so long as they are not unconstitutional.[84] We are no closer to precisely determining the

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79. 14 N.Y.2d at 445, 201 N.E.2d at 34, 252 N.Y.S.2d at 461. This case is illustrative of the potential snowballing effect of the power: The police observed the men acting suspiciously and thus were justified in stopping them. Having stopped the suspects, the frisk was "a reasonable and constitutionally permissible precaution." The frisk revealed "a hard object" which turned out to be a .22 caliber gun. The defendant was then arrested for illegal possession of the pistol. The seizure of the pistol thus became legal as incident to the arrest.

Judge Fuld dissented, conceding the right of the police to stop and question, but contending that the frisk was an illegal search and seizure prohibited by the fourth amendment. *See also* Judge Van Voorhis' dissent in People v. Sibron, 18 N.Y.2d 603, 219 N.E.2d 196, 273 N.Y.S.2d 374 (1966), *rev'd,* 392 U.S. 40 (1968).

80. 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966), *aff'd,* 392 U.S. 40 (1968).

81. "[I]t is apparent that there is not a great deal of difference between the statute and the standards used in *Rivera.*" 18 N.Y.2d at 244, 219 N.E.2d at 598, 273 N.Y.S.2d at 222. *See also* United States v. Thomas, 250 F. Supp. 771 (S.D.N.Y. 1966).

82. 374 U.S. 23 (1963).

83. *Id.* at 34.

84. The language preceding the quotation from *Ker* is generally ignored:

> Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above, and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here . . . . While the Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for

constitutional standard after *Ker* than before, because the ultimate question remains: What is "reasonable" within the framework of the fourth amendment?[85]

While both the common-law and the stop-and-frisk statute permit only a brief detention at the point of encounter, the Uniform Arrest Act allows a two hour detention in the event the detained party fails to identify himself or explain his actions to the satisfaction of the detaining officer. It is only at the end of this period that the individual must be released unless there is probable cause for his arrest.[86] Granting the likelihood of the constitutionality of statutory authorization for reasonable field interrogation in light of the *Terry* and *Sibron* decisions, it would seem probable that a two hour detention, quite likely at the police station, would be such a restriction on the liberty of movement of

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itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.

Id. at 33-34. *See also* City of Portland v. James, 251 Ore. 8, 11, 444 P.2d 554, 557 (1968) in which the court declared:

> The requirement of probable cause is imposed in order to limit police interference with the citizen's constitutional rights. Neither the legislative assembly nor the city council has the power to circumvent this safeguard by casting legislation in a form which makes conduct which creates only suspicion a crime. To say that an officer may arrest if he has probable cause to believe that the suspect's conduct is suspicious is to speak in anomalies.

See generally Nelson v. Hancock, 239 F. Supp. 857, 868 (D.N.H. 1965).

85. "The adjective 'unreasonable,' chameleon-like, adopts coloration from its surroundings." Kuh, *supra* note 4. For a discussion of various possibilities in determining the reasonableness of a detention see Leagre, *supra* note 53.

86. *See* State v. De Koenigswarter, 54 Del. 388, 177 A.2d 344 (1962). In one curious Delaware decision, the defendant contended that he had been held in excess of two hours, and consequently that a statement obtained during the illegal detention was inadmissible. The court held that § 1902 was irrelevant because the defendant was not "abroad" when taken into custody. Thus he had been arrested, not detained. The court ignored the fact that if there had been an arrest, it had been made without probable cause, a point which apparently the defendant did not argue. Jarvis v. State, ____ Del. ____, 224 A.2d 596 (1966).

An alternative method commonly used by police is to arrest an individual on a charge of vagrancy, a crime of extremely nebulous standards, where the individual is suspected of a more serious offense. This practice has come under increasing criticism in recent years. *See* Worthy v. United States, 409 F.2d 1105 (D.C. Cir. 1968); McNeilly v. State, 119 N.J.L. 237, 195 A. 725 (Sup. Ct. 1937) (involving a thief looking for a suitable store window to break); State v. Hall, 25 N.J. 381, 52 A.2d 845 (Ct. Spec. Sess. 1947) (prostitute with a man on the way to her room); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 202 N.Y.S.2d 739 (1967) (holding New York vagrancy statute unconstitutional); Fonte v. State, 213 Tenn. 204, 373 S.W.2d 445 (1963)(arrest for vagrancy upheld where defendant possessed large sum of money gained in gambling activities); State v. Grenz, 26 Wash. 2d 764, 175 P.2d 633 (1946), *appeal dismissed*, 332 U.S. 748 (1947)(chicken thief arrested for vagrancy as he was about to enter a chicken yard); Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956).

the individual as to be unreasonable under the fourth amendment.[87] In fact the Court, via *Davis v. Mississippi*[88] decided in the next term, suggests that a statute authorizing a two hour detention absent probable cause may well be unconstitutional. In *Davis,* petitioner and twenty-four other Negro youths were held for questioning and fingerprinting in connection with a rape. The only leads available to the police were a set of fingerprints and a general description of the assailant. Suspects had been "chosen" in random fashion by means of dragnet procedures. The Court held that petitioner's fingerprints should have been excluded in his trial as fruits of an illegal seizure in violation of his fourth amendment rights. Consequently, if the *Davis* principles are applicable to justifications for detention besides fingerprinting, a two-hour detention for questioning and investigation ordered at a police officer's discretion seems highly unlikely to be within the range of circumscribed procedures permitted by the Court.

In *Morales v. New York,*[89] however, which was decided after *Davis,* the Court skirted the issue. The state court had sanctioned the police in detaining an individual "for custodial questioning on less than probable cause." The Supreme Court observed that the holding below went beyond *Terry* and *Sibron,* but avoided consideration on the merits by remanding the case for further factual elucidation.[90]

III. Brief Detentions Without Showing of Suspicion

Roadblocks are a common phenomenon in the United States. Courts have upheld their use to control the passage of people and goods across international borders,[91] to apprehend fleeing felons,[92] to check

87. If it is decided that a two hour detention on suspicion is not "unreasonable," where is the line to be drawn? Is the New Hampshire variation of four hours also reasonable? If so, would six hours be reasonable? In any event, it would seem clear that whenever the detention is prolonged, and the police engage in the interrogation of the suspect, the *Miranda* warnings are essential. *See* Raphael, *supra* note 67, at 343. The dangers of station house detention for interrogation are also discussed by Justice Frankfurter in Colombe v. Connecticut, 367 U.S. 568 (1961).

88. 394 U.S. 721 (1969).

89. 396 U.S. 102 (1969).

90. Given an opportunity to develop in an evidentiary hearing the circumstances leading to the detention of Morales and his confessions, the State may be able to show that there was probable cause for an arrest or that Morales' confrontation with the police was voluntarily undertaken by him or that the confessions were not the product of illegal detention.

Id. at 105. *See also* Doran v. United States, 421 F.2d 865 (9th Cir. 1970); People v. Hatcher, 2 Cal. App. 3d 71, 82 Cal. Rptr. 323 (1969).

91. Boyd v. United States, 116 U.S. 616 (1886); Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969); Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); Fernandez v. United

driver's licenses and vehicle registration papers,[93] to inspect vehicles,[94] and, less frequently, to uncover unknown violations of the law.[95] Certain characteristics common to all roadblocks may be observed. First, they involve some degree of detention of the occupants of a vehicle. Second, the persons detained do not realistically have any choice in stopping or not stopping.[96] Third, these detentions and the frequent searches incident thereto are conducted without the authority of a warrant. Finally, with the exception of an infinitesimally small number of cases, there is no probable cause, as commonly understood, to stop any particular vehicle. In sum, the aggregate of the conditions inherent in roadblocks suggests a serious constitutional challenge to their legality.

Indeed, the roadblock detention goes further than the stop-and-frisk or field interrogation situation, for there is not even the presence of suspicion upon which the law enforcement officer's action can be founded. Rather, the roadblock, aside from its use to apprehend fleeing felons, operates on the principle of the law of averages: out of any number of vehicles which are detained, a certain percentage of violations of some law should be discovered.[97] The constitutionality of such

States, 321 F.2d 283 (9th Cir. 1963); Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959); King v. United States, 258 F.2d 754 (5th Cir. 1958); Landau v. United States Atty., 82 F.2d 285 (2d Cir. 1936); United States v. Berard, 281 F. Supp. 329 (D. Mass. 1963); United States v. Yee Negee How, 105 F. Supp. 517 (N.D. Cal. 1952); People v. Mitchell, 209 Cal. App. 2d 312, 26 Cal. Rptr. 89 (1962); Ramirez v. State, 123 Tex. Crim. 89, 58 S.W.2d 829 (1933).

92. People v. King, 175 Cal. App. 2d 386, 346 P.2d 235 (1959); Commonwealth v. Bollinger, 198 Ky. 646, 249 S.W. 786 (1923); Williams v. State, 226 Md. 614, 174 A.2d 719 (1961), *cert. denied*, 369 U.S. 855 (1962); State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932); Kagel v. Brugger, 19 Wis. 2d 1, 119 N.W.2d 394 (1963).

93. Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (1967); Mincy v. District of Columbia, 218 A.2d 507 (D.C. Ct. App. 1966); City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959); Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962); Morgan v. Town of Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968); State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (Super. Ct. 1967); Edwards v. State, 319 P.2d 1021 (Okla. 1957)(dictum); State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960); Pruitt v. State, 389 S.W.2d 475 (Tex. 1965).

94. Myricks v. United States, 370 F.2d 901 (5th Cir. 1967), *cert. denied*, 386 U.S. 1015 (1967); People v. De La Torre, 257 Cal. App. 2d 182, 64 Cal. Rptr. 804 (1967); State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (1967); Commonwealth v. Abell, 275 Ky. 802, 122 S.W.2d 757 (1939); People v. Fidler, 280 App. Div. 698, 117 N.Y.S.2d 313 (1952).

95. Wirin v. Horrall, 85 Cal. App. 2d 470, 193 P.2d 470 (1948); People v. Gale, 45 Cal. 2d 253, 294 P.2d 13 (1956); State *ex rel.* L.B., 99 N.J. Super. 589, 240 A.2d 709 (Juv. & Dom. Rel. Ct. 1968).

96. Presuming the roadblock is a legitimate activity, the failure to stop would amount to a refusal to obey the lawful command of an officer, a crime in itself.

97. Foote, *supra* note 5, at 406; Note, *Roadblocks and the Law of Arrest in Montana*, 24 MONT. L. REV. 137, 138 (1963).

procedures, as previously noted, is clearly open to question.[98] In 1925, in *Carroll v. United States*,[99] the Supreme Court made the following statement which has been generally ignored:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[100]

This reasoning was reaffirmed in *Brinegar v. United States*[101] in 1949: "This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion."[102]

The *Carroll* decision, although not involving a roadblock itself, indicates that the reasonableness of a roadblock will depend upon the purpose for which it is used. One situation in which this method of detention is acknowledged as constitutional is in the identification of

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98. *See generally* Reich, *supra* note 53.

99. 267 U.S. 132 (1925).

100. *Id.* at 153-54.

101. 338 U.S. 160 (1949).

102. *Id.* at 177. *But see* id. at 182-83, 188 (Jackson, J., dissenting):

> Undoubtedly the automobile presents peculiar problems for enforcement agencies, is frequently a facility for the perpetration of crime and an aid in the escape of criminals. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.
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> I do not, of course, contend that officials may never stop a car on the highway without the halting being considered an arrest or a search. Regulations of traffic, identifications where proper, traffic census, quarantine regulations, and many other causes give occasion to stop cars in circumstances which do not imply arrest or charge of crime.

persons and goods crossing an international border.[103] This practice is justified as necessary for "national self-protection"[104] and thus is clearly distinguishable from other instances of arrest, search, and seizure.[105] Border detentions have even been upheld where they occurred some distance from the international line.[106] Moreover, searches are also known to occur on state boundaries for the purpose of detecting the illegal or untaxed importation of liquor, tobacco products, diseased plants and animals, and other items. The validity of such procedures appears not to have been judicially tested.[107]

There are no Supreme Court decisions concerning the constitutionality of a roadblock used to apprehend a fleeing felon.[108] But the practice has been uniformly upheld by those state courts which have considered the issue.[109] If the roadblock is legal, then any violations of the law incidentally detected through its use may be the subject of prosecution.[110]

Language employed by the Court in both *Carroll* and *Brinegar* suggests that roadblocks used to check driver's licenses or vehicle

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103. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925); cases cited note 91 *supra.*

104. Carroll v. United States, 267 U.S. 132, 154 (1925); *see* note 100 *supra* and accompanying text. *See also* King v. United States, 258 F.2d 754, 756 (5th Cir. 1958).

105. The search for and seizure of . . . goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not.

Boyd v. United States, 116 U.S. 616, 623 (1886). *See also* Landau v. United States Atty., 82 F.2d 285, 286 (2d Cir. 1936); United States v. Yee Negee How, 105 F. Supp. 517 (N.D. Cal. 1952).

106. Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

The right of border search is indeed broad, and the border itself is elastic. Judged by Texas standards, sixty-three miles is a small distance, and if the Customs agents had any reason, even though not ordinarily measuring up to "probable cause," it might, under all the circumstances suffice to meet the constitutional test of reasonableness and amount to "probable cause."

Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965). *But see* Contreras v. United States, 291 F.2d 63 (9th Cir. 1961); Moring v. United States, 40 F.2d 267 (5th Cir. 1930).

107. *See* Note, *Random Road Blocks and the Law of Search and Seizure,* 46 IOWA L. REV. 802, 810-11 (1961) [hereinafter cited as *Random Road Blocks*].

108. *But see* Brinegar v. United States, 338 U.S. 160, 182-83, 188 (1949) (Jackson J., dissenting). See note 102 *supra.*

109. *See* cases cited note 92 *supra.* "This is a necessary and reasonable restraint for protection of our personal liberty." State v. Hatfield, 112 W. Va. 424, 426-27, 164 S.E. 518, 519 (1932). "Such authority is inherent in the power and the duties of law-enforcement officers if those duties are to be effectively discharged." Kagel v. Brugger, 19 Wis. 2d 1, 4, 119 N.W.2d 394, 396 (1963).

110. People v. King, 175 Cal. App. 2d 370, 346 P.2d 235 (1959).

registrations are impermissible.[111] However, neither of these cases has ever been relied upon by a court to prohibit such practices by law enforcement officers. Courts have said that such momentary detentions do not constitute arrests,[112] that such procedures are necessary to enforce the licensing and registration laws,[113] that the interests of the individual must be balanced against those of the public,[114] that no unreasonable infringement of the right of privacy is involved,[115] and further, that the practice protects automobile owners against the unauthorized use of their vehicles.[116] Many of the same reasons expressed to uphold the use of roadblocks have been advanced to secure the right to conduct safety inspections of vehicles.[117] Only where the roadblock is being used as a subterfuge to conduct searches for other purposes do the courts find the practice offensive.[118]

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111. "[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." Carroll v. United States, 267 U.S. 132, 154 (1949); *cf.* Brinegar v. United States, 338 U.S. 160, 182-83 (1949) (Jackson, J., dissenting). *See also* Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959), *quoting* Justice Jackson with approval.

112. Mincy v. District of Columbia, 218 A.2d 507 (D.C. Ct. App. 1966); Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962); Morgan v. Town of Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963); Pruitt v. State, 389 S.W.2d 475 (Tex. Crim. App. 1965).

113. Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962); State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (Super. Ct. 1967); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968).

114. City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959). This case directly confronted the court with the issue. Plaintiff had been stopped for a license check at a roadblock, had shown the officer a valid license, and had continued on his way without being cited for any violation. He thereafter sought to enjoin the city from using roadblocks for this purpose, claiming they were an unconstitutional invasion of his right to use the public ways. The court upheld the power of the city, citing *Carroll*, but not discussing the constitutional issue to any extent. Policy reasons concerning growing highway deaths, among other things, were raised. *See also* Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962); State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (Super. Ct. 1967); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968).

115. State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (Super. Ct. 1967).

116. State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932).

117. *See* cases cited note 94 *supra.*

> The State can practice preventive therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. The purpose of the check is to determine the present, not the past: *is* the car, *is* the driver now fit for further driving? In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in hopes of uncovering the evidence of non-traffic crimes . . . the stopping for road checks is reasonable and therefore acceptable.

Myricks v. United States, 370 F.2d 901, 904 (5th Cir.), *cert. denied*, 386 U.S. 1015 (1967).

118. Bowling v. United States, 350 F.2d 1002 (D.C. Cir. 1965); State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (1967); Mincy v. District of Columbia, 218 A.2d 507 (D.C. Ct. App. 1966); State

The use of roadblocks as a method of generally uncovering crime would appear to be the least likely to survive constitutional challenge. In effect, this practice bypasses the constitutional requirement of probable cause in the accomplishment of arrests and searches. For example, roadblocks have been used on occasion to blockade certain areas of a city, so that all persons entering or leaving the area could be detained and searched for weapons or contraband.[119] This practice has also been used purely for harrassment.[120] It would seem clear that these practices fall within the prohibition of the fourth amendment and should no longer be permitted.[121]

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v. Severance, 108 N.H. 404, 237 A.2d 683 (1968); Murphy v. State, 194 Tenn. 698, 254 S.W.2d 979 (1953); Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947); Cox v. State, 181 Tenn. 344, 181 S.W.2d 338 (1944) (court expressed skepticism about the true purpose of the license check, as the roadblock was set up on New Year's Eve night).

119. Wirin v. Horrall, 85 Cal. App. 2d 497, 193 P.2d 470 (1948); State *ex rel* L.B., 99 N.J. Super. 589, 240 A.2d 709 (Juv. & Dom. Rel. Ct. 1968). It is reported that the Philadelphia police established random roadblocks during Burglary Prevention Week at which automobiles were stopped and searched to determine whether they carried burglary tools or other contraband in hopes of apprehending some burglars. The state attorney general expressed the opinion that the procedure was unconstitutional. *See Random Road Blocks, supra* note 107, at 811. "Connecticut also uses roadblocks on holidays to check all drivers for signs of drinking." Reich, *supra* note 53, at 1166.

> Recently . . . the Baltimore Sun gave its "Policeman of the Year" award to the inventor of the "Battaglia plan." This hardly novel invention was to stop and "check" cars driven by teenagers at night. The Sun reported that during its first year of operation 157,000 cars were stopped in this operation, netting "more than 1,000 arrests" for non-traffic offenses.

Foote, *supra* note 5, at 406. State police in Massachusetts stopped 400 motorists in an effort to catch residents who were buying their holiday cheer at cut rate New Hampshire prices and bagged one violator, described as "an elderly, bewildered man." A five hour roadblock on Chicago's south side is reported to have involved stopping 1,190 cars, with a net catch of seven persons arrested for narcotics investigation, five suspected drunken drivers and six drivers who did not have licenses in their possession.

Id.

120. In People v. Gale, 46 Cal. 2d 253, 294 P.2d 13, 15 (1956), deputy sheriffs "were conducting a routine search of vehicles . . . . 'to curb the juvenile problem and also check for, well, anything that we [the deputy sheriffs] might find, anything that looked suspicious.' "

> Connecticut police have regularly placed roadblocks to stop teenage drivers to see if they have been drinking in New York State, where the minimum age is lower.
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> The tendency to institutionalize is part of the normal urge to push any principle to its logical conclusion. In New Jersey, it was reported that police had used their power to stop and question in order to aid an effort to lobby for new legislation. According to the New York Times northern New Jersey police stopped at least 2,400 cars in roadblocks at night for the purpose of "seeking information to present to the New York Legislature in an effort to persuade it to raise the drinking age limit from 18 to 21."

Reich, *supra* note 53, at 1166, 1167. *See also* Terry v. Ohio, 392 U.S. 1, 14 (1968).

121. *See* Wirin v. Horral, 85 Cal. App. 2d 497, 193 P.2d 470, 472 (1948). *See also* Smith v. United States, 264 F.2d 469 (8th Cir. 1959); People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956).

IV. A SHORTCUT TO CONSTITUTIONALITY

Notwithstanding that some of the investigative procedures considered above, among them roadblocks and suspicion-based detentions, raise serious constitutional questions, it is conceivable that such methods may be legitimized in light of the rulings of the Supreme Court in the companion cases of *Camara v. Municipal Court*[122] and *See v. City of Seattle.*[123] These cases respectively dealt with the power of housing inspectors and fire inspectors to carry out area inspections without search warrants for the purpose of enforcing municipal codes. The Government contended that to require a showing of probable cause to permit the inspections would render enforcement of the laws and the achievement of the desirable goals of protecting the health, safety, and welfare of the public impossible.[124] The Court responded that such practical considerations could not be used to create an exception to the protection of the Constitution: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[125] Thus, the Court concluded that administrative searches could not be conducted without a warrant based on probable cause.[126]

At first blush the Court seems to be restricting the right of municipal authorities to inspect dwellings while at the same time expanding the individual's right to be free from such intrusions: there is now a requirement for a warrant where before there was none. However, the Court took a shortcut to constitutionality—and may have shortchanged the citizen in the process—in that it unequivocally

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"[T]he essential freedom of the individual demands that police not be permitted to stop every car that passes with no other justification than mere inclination or the desire to harass with no legitimate end in view." United States v. Bonanno, 180 F. Supp. 71, 80 (S.D.N.Y. 1960). *But cf.* State *ex rel.* L.B., 99 N.J. Super, 589, ____, 240 A.2d 709, 719 (Juv. & Dom. Rel. Ct. 1968):

> Under the facts here presented there should be no need for this Court to go into a lengthy discussion as to what is and what is not reasonable under varying facts and situations. Here the juvenile was leaving a restricted area of Plainfield troubled by a then existing civil disturbance at an hour in the early morning when no juvenile should be on the streets. In view of the looting, reported shootings and in consideration of the marked ability of an automobile for carrying away contraband, it would seem to be unquestionably reasonable for the officer to stop the vehicle, order the juvenile out of the car and take him into custody without process.

122. 387 U.S. 523 (1967).
123. 387 U.S. 541 (1967).
124. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).
125. *Id.* at 530.
126. *Id.* at 540; *accord,* See v. City of Seattle, 387 U.S. 541, 545-46 (1967).

concluded that the standard of probable cause to issue a warrant for inspection of a dwelling is not so demanding as that required in the case of a warrant issued for arrest or seizure pursuant to a criminal investigation.[127] In response to the contention that varying the standard of probable cause from that used in criminal cases will lessen the overall protection of the individual available through the fourth amendment, the Court asserted:

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. . . . Such an approach [does not endanger] time honored doctrines applicable to criminal investigations . . . [but] merely gives full recognition to the competing public and private interests . . . .[128]

Therefore, the reasonableness of the public interest is a justifying principle for lowering the standards of probable cause in order to meet the fourth amendment mandate.

The policy arguments favoring the inspections in *Camara* and *See* are analogous to those heard in defense of roadblocks to check driver's licenses, automobile registration documents, and safety inspections.[129] Many roadblocks, perhaps otherwise illegal, could be transmuted into acceptable law enforcement methods if conducted pursuant to a warrant based on reasonable legislative and administrative standards. By superimposing the reasonableness of the public interest upon the need for roadblocks, the standard for probable cause in detaining cars could be likewise lowered. This possibility has received added support in *Davis v. Mississippi,* discussed previously.[130] Having invalidated petitioner's conviction, which rested on his being fingerprinted after a broad dragnet sweep, the Court cited *Camara* for the proposition that detentions for

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127. 387 U.S. at 534.

128. *Id.* at 539 (citations omitted).

129. Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety . . . . There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.

Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967).

130. 394 U.S. 721 (1969). See text accompanying note 88 *supra.*

fingerprinting "might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the . . . sense [necessary to justify arrest]."[131] An analogous approach could be taken to validate many of the detentions previously discussed which are presently of dubious constitutionality. Extensions of *Camara* to either of these possibilities per the *Davis* dictum would certainly be the most expansive use of governmental power ever permitted under the fourth amendment and would lend credence to Justice Clark's argument in his dissent in *See*[132] that the court is rapidly moving in the direction of judicial sanction for what is little more than a "paper warrant."

V. Conclusion

The innate flexibility of the fourth amendment has resulted in a judicial proclivity to mold constitutional standards to satisfy the practical exigencies of varying problems of law enforcement. If literal reading of *Henry* were ever justified, subsequent decisions soon made clear that the determination of the occurrence of an arrest requires a more probing factual analysis than merely finding a confrontation between officer and suspect. While *Terry* can hardly be said to have established new doctrine, the psychological impact of its underscoring the constitutional legitimacy of field detentions with less than probable cause has been manifested clearly in the attitude of lower courts. Courts need spend less time cautiously approving the general authority of police to stop suspected persons and may now take *Terry* as a point of departure, applying its rationale to disparate situations.

Such malleability only becomes disturbing when viewed in the combined light of *Davis* along with *Camara* and *See*. The practical necessity for certain types of public welfare inspections may easily be accepted as outweighing the minor infringement of individual freedom involved. The same may normally be said of the occasional roadblock to apprehend a fleeing felon. But to the extent the *Davis* dictum presages constitutionally valid dragnet-type investigative detentions for the purpose of comparing identifying characteristics, a serious inroad on fourth amendment protection is threatened.

131. *Id.* at 727.
132. 387 U.S. 541, 547-48 (1967).

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