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David J. Krauss
Washington University School of Law

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REASONABLE SUSPICION AUTHORIZES DETENTION OF OCCUPANTS OF
VALIDLY SEARCHED PREMISES

Michigan v. Summers, 101 S. Ct. 2587 (1981)

In *Michigan v. Summers*¹ the United States Supreme Court recognized a new exception to the fourth amendment² probable cause requirement by holding that the detention of an occupant on the premises during the execution of a valid search is constitutionally permissible if based on reasonable suspicion of criminal activity.

Respondent, who was charged with the possession of heroin³ found on his person at the time of arrest,⁴ moved to suppress the heroin as the

1. 101 S. Ct. 2587 (1981).

2. The fourth amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

3. Respondent was charged with a violation of the Controlled Substances Act of 1971, MICH. COMP. LAWS § 335.341(4)(a) (1972).

4. After discovering that respondent was the owner of the premises and finding narcotics in the basement, police arrested respondent and subsequently searched him. The Supreme Court held that respondent's arrest was based on probable cause. 101 S. Ct. at 2594. It is well established that a police officer may fully search the accused in the course of a lawful custodial arrest. *See, e.g.*, *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (the right to search flows automatically from a lawful custodial arrest); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (same); *Harris v. United States*, 331 U.S. 145, 150 (1947) (search and seizure incident to lawful arrest referred to as "a practice of ancient origin" and "an integral part" of police procedure); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (the right to "contemporaneously" search a person lawfully arrested "not to be doubted").

In *Chimel v. California*, 395 U.S. 752 (1969), the Court held that it was reasonable for a police officer to search an individual after arresting him "in order to remove any weapons that the latter might seek to use in order to resist or effect his escape," *id.* at 763, and further, to search for and seize any evidence that might easily be secreted or destroyed. The Supreme Court has held, however, that it is immaterial whether the officer has reason to suspect that the subject is armed or whether the subject is arrested for an offense for which no fruits would exist. *See, e.g.*, *Gustafson v. Florida*, 414 U.S. 260 (1973) (respondent arrested for failing to have his driver's license in his possession while driving); *United States v. Robinson*, 414 U.S. 218 (1973) (respondent arrested for operating a motor vehicle after his license was revoked).

Moreover, the search-incident-to-arrest doctrine has been extended beyond the person of the accused to include the area in his immediate possession and control. *See, e.g.*, *Chimel v. California*, 395 U.S. 752 (1969) (search of petitioner's parlor in which arrest was effectuated upheld); *Abel v. United States*, 362 U.S. 217 (1960) (search of petitioner's hotel room upheld); *Harris v. United States*, 331 U.S. 145 (1947) (search of a three-room apartment upheld). *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE § 6.3 (1978).

product of an illegal search and seizure.⁵ He alleged that the law enforcement officers detained him without probable cause while they executed a valid warrant to search his residence for narcotics.⁶ The trial court granted the motion,⁷ and both the Michigan Court of Appeals⁸ and the Michigan Supreme Court⁹ affirmed. On certiorari,¹⁰ the United States Supreme Court reversed and *held*: A warrant to search particular premises for contraband implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.¹¹

The fourth amendment to the United States Constitution protects citizens against “unreasonable searches and seizures”¹² and¹³ prohibits

5. See note 16 *infra* and accompanying text.

6. When police officers arrived at respondent's residence, they confronted respondent on his way out the front door. The officers forced respondent to re-enter his home and remain there for the duration of the search. The Court viewed this fact as having no constitutional significance. 101 S. Ct. at 2595.

7. *People v. Summers*, 68 Mich. App. 571, 243 N.W.2d 689 (1976).

8. *Id.*

9. *People v. Summers*, 407 Mich. 432, 286 N.W.2d 226 (1979). The Michigan Supreme Court held that seizure of defendant, unsupported by probable cause, violated the fourth amendment.

10. *Michigan v. Summers*, 449 U.S. 898 (1980) (mem.).

11. 101 S. Ct. at 2595.

12. The inclusion of this provision in the Bill of Rights was unquestionably a reaction against both the hated “writs of assistance” in colonial America and the use of the “general warrant” for searches and arrest in common-law England. The writs of assistance gave customs officers the right to conduct discretionary searches to seize goods, wares, and merchandise believed to be smuggled, absent any factual showing based on sworn testimony. The general warrant, which did not have to describe the person or thing to be seized or the place to be searched, was declared illegal in *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763). For a comprehensive discussion see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

13. There is argument as to whether the conjunction “and” used in the fourth amendment was intended to separate the clause prohibiting unreasonable searches and seizures from that setting forth the conditions under which warrants may issue. The initial draft of the amendment, submitted by James Madison, read:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched and the persons or things to be seized.

1 ANNALS OF CONG. 452 (Gales & Seaton ed. 1789). The version that was ultimately passed by Congress was similar to Madison's draft, incorporating the unreasonable searches and seizures section and the warrant section into a single, unified clause. However, the chairman of the committee to arrange the passed amendments drafted his own version, containing two seemingly separate and distinct clauses, which was submitted unnoticed to the Senate. The Senate agreed to that version, and it subsequently was immortalized in the Bill of Rights. For a complete account, see J.

the issuance of arrest and search warrants¹⁴ except upon a showing of “probable cause.”¹⁵ Enforced through the use of the exclusionary rule,¹⁶ the fourth amendment applies to all seizures of the person,¹⁷ including those involving only brief detentions¹⁸ that do not amount to

LANDYNSKI, SEARCHES & SEIZURES AND THE SUPREME COURT (1966); N. LASSON, *supra* note 12, at 102-03.

A number of Justices have expressed the opinion, based on the legislative history of the fourth amendment, that the warrant clause is paramount and that therefore all searches or seizures must be based upon probable cause. *See, e.g., Harris v. United States*, 331 U.S. 145, 157-62 (1947) (Frankfurter, J., dissenting); *id.* at 195, 196 (Jackson, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

14. The warrant must be issued by a neutral and detached magistrate who is capable of determining whether probable cause exists for an arrest or search. *See Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

Although the Court has consistently held that the fourth amendment applies to the issuance of both search and arrest warrants, an arrest supported by probable cause has never been held unconstitutional “solely because the officers failed to secure a warrant.” *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). It is generally recognized that a rigid rule requiring review by a magistrate prior to all arrests would be extremely detrimental to effective law enforcement. *See Payton v. New York*, 445 U.S. 573 (1980); *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411 (1976); *Beck v. Ohio*, 379 U.S. 89 (1964).

15. In *Brinegar v. United States*, 338 U.S. 160 (1949), the Supreme Court explained that “[p]robable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Id.* at 175-76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). *See generally* 1 W. LAFAVE, *supra* note 4, §§ 3.1-7.

16. The exclusionary rule was first introduced in *Weeks v. United States*, 232 U.S. 383 (1914). In *Weeks* the Supreme Court held that evidence seized in violation of the fourth amendment’s prohibition against unreasonable searches and seizures could not be used in a federal court against the person whose rights had been violated. The rule was extended to the states through the due process clause of the fourteenth amendment in *Mapp v. Ohio*, 367 U.S. 643 (1963), which held that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.” *Id.* at 655.

For a comprehensive discussion of the exclusionary rule, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Comment, *Admissibility of Illegally Obtained Evidence—the Federal Exclusionary Rule—A Historical Analysis*, 38 U. DET. L.J. 635 (1961). *See generally* 1 W. LAFAVE, *supra* note 4, §§ 1.1-11.

17. Although the fourth amendment never explicitly uses the term “arrest,” it not only enures “the right of *people* to be secure in their *persons* . . .,” but it also stipulates that warrants must particularly describe the “*persons* or things to be seized.” U.S. CONST. amend. IV (emphasis added).

18. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (stops of vehicles at permanent checkpoints for brief questioning of occupants); *United States v. Brignoni-Ponce*, 422 U.S.

full-scale arrests.¹⁹

Historically, the Supreme Court adopted the view that probable cause was a prerequisite to all seizures governed by the fourth amendment, irrespective of the extent of intrusion. In 1968, however, the Court for the first time recognized an exception to this general rule in *Terry v. Ohio*.²⁰ In *Terry*, the Court found that when the circumstances of a particular case led a police officer reasonably to suspect²¹ that “criminal activity was afoot” and that the subject with whom he was dealing was “armed and presently dangerous,”²² the police officer could detain him and subject him to a limited search for weapons²³ even absent probable cause for arrest.²⁴ The Court stated that although

87 (1975) (stops of vehicles by officers on roving patrol for brief questioning of occupants); *Terry v. Ohio*, 392 U.S. 1 (1968) (momentary street detention for brief questioning and limited search).

19. The 1979 edition of Black’s Law Dictionary defines an “arrest” as “depriv[ing] a person of his liberty by legal authority.” BLACK’S LAW DICTIONARY 100 (5th ed. 1979). The Supreme Court traditionally has accepted this definition. For example, in *Henry v. United States*, 361 U.S. 98 (1959), the majority held that federal agents detaining an automobile whose occupants had engaged in suspicious activity lacked probable cause to arrest, and then stated that “[w]hen the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete.” *Id.* at 103.

20. 392 U.S. 1 (1968). The *Terry* decision was preceded by heated debate. Those in support of the decision emphasized the law enforcement officer’s need for immediate action in potentially life threatening situations. *See, e.g.*, Brief of Attorney General of the State of New York as Amicus Curiae in Support of Appellees, *Terry v. Ohio*, 392 U.S. 1 (1968), reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT 552-60 (1975). On the other hand, *Terry* opponents argued that the right to stop and frisk encouraged arbitrary and oppressive police behavior. *See, e.g.*, Brief for American Civil Liberties Union as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968), reprinted in 66 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT 493-94 (1975).

21. The phrase “reasonable suspicion,” referring to that quantum of evidence necessary to carry out a stop and frisk, is commonly associated with *Terry*. The phrase was not first expressly used, however, until Justice Harlan wrote in his concurring opinion in *Sibron v. New York*, 392 U.S. 40 (1968), that “[u]nder the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause” *Id.* at 71 (Harlan, J., concurring).

22. *Terry v. Ohio*, 392 U.S. at 30-31.

23. The Court emphasized the restricted nature of a permissible search, stating that an officer may conduct a “carefully limited search” only of the “outer clothing” of a suspect in an attempt to disclose weapons. *Id.* at 30.

24. *Id.* at 27. The Court concluded that because such a search is reasonable under the fourth amendment, “any weapons seized may properly be introduced in evidence against the person from whom they were taken.” *Id.* at 31.

Prior to *Terry*, state and lower federal courts and some state legislatures had established fairly well the right of a policeman to stop an individual for interrogation upon less than probable cause. The courts placed differing limitations on the constitutionality of such conduct depending on the circumstances of each case. *See, e.g.*, *Keiningham v. United States*, 307 F.2d 632 (D.C. Cir. 1962)

a momentary, on-the-street detention accompanied by a frisk for weapons²⁵ constituted a fourth amendment seizure,²⁶ the detention was substantially less intrusive than a traditional arrest.²⁷ The Court held that the reasonableness²⁸ of a *Terry*-type detention should be determined by balancing the invasion of a citizen's personal security²⁹ against the governmental interest in preventing crime and in protecting police officers³⁰ rather than by the traditional, and more rigid, probable cause

(circumstances warranted officer in making some inquiry about the ownership of a briefcase that was being abandoned in the officer's presence), *cert. denied*, 371 U.S. 948 (1963); *United States v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959) (not every momentary detention of a suspicious individual is a seizure under the fourth amendment), *rev'd on other grounds sub nom. United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960); *People v. Jones*, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (1959) (police officers under certain circumstances have the right to make inquiry of persons on the public streets at night).

The Uniform Arrest Act of 1942 symbolizes the first attempt at formulation of rules dealing with the questioning and detaining of suspects. INTERSTATE COMMISSION ON CRIME, THE HANDBOOK ON INTERSTATE CRIME CONTROL 86-89 (1942). By the late 1950s, three states had enacted stop and frisk legislation based on the Uniform Arrest Act's provisions. See DEL. CODE ANN. tit. 11, §§ 1901-1910 (1979); N.H. REV. STAT. ANN. §§ 594:1-25 (1976); R.I. GEN. LAWS §§ 12-7-1 to -12 (1969 & Supp. 1980).

In 1964, New York enacted § 180-a of the New York Code of Criminal Procedure, patterned largely after the Uniform Arrest Act and employing the reasonable suspicion standard as a means of evaluating both the stop and the frisk stages of police investigation. N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1967).

Finally, in 1966, the American Law Institute incorporated into its Model Code of Pre-Arrestment Procedure a section dealing with the constitutional validity of a stop and frisk without probable cause to arrest. ALI, MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 2.02(5) (Tent. Draft No. 1, 1966). See ALI, MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 110.2 (1975).

25. During the early 1960s, this common police practice came to be referred to euphemistically as "stop and frisk" and was a popular subject of many commentators. See Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practice*, 1962 WASH. U.L.Q. 331; Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433 (1967). The Supreme Court, however, did not confront the issue until *Terry v. Ohio*, 392 U.S. 1 (1968). See note 20 *supra* and accompanying text.

26. The Supreme Court determined that, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. at 16.

27. *Id.* at 26-27.

28. The Court stated that the "central inquiry" under the fourth amendment is "the reasonableness in all the circumstances of the particular governmental invasion." *Id.* at 19.

29. The Court argued that the police officer must be able to defend his conduct with "specific and articulable facts" that would reasonably have warranted the intrusion on the individual's privacy. *Id.* at 21.

30. The Court cited various statistics revealing the high risks of armed violence confronting police officers in the line of duty. *Id.* at 24 n.21. The majority asserted that the governmental interest in investigating crime was secondary to the more immediate concern of the police in taking precautionary measures to insure that the subject under suspicion "is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23.

standard.³¹

Initially, the Supreme Court applied the *Terry* standard solely to cases involving traditional stop and frisk circumstances.³² The Court adopted a piecemeal approach, evaluating the fourth amendment issue according to the particular circumstances of each case.³³ In these early cases, the Court continued to utilize the balancing approach introduced in *Terry*, weighing the necessity to seize and search against the degree of state intrusion into individual privacy.³⁴ Although these cases served to clarify and refine the *Terry* doctrine, the Court consistently maintained the narrowness of the *Terry* holding³⁵ by recognizing the constitutional propriety of seizures based upon less than probable cause only in those cases in which both reasonable suspicion of criminal activity and a serious threat to the officer's safety existed.³⁶

In *Pennsylvania v. Mimms*,³⁷ however, the Supreme Court extended *Terry*'s limited scope³⁸ by holding that a routine policy of ordering out of their vehicles all drivers stopped for traffic violations was constitutionally permissible despite the absence of reasonable suspicion of criminal activity and a belief that the subject was armed and dangerous.³⁹ In *Mimms*, reasonable suspicion arose only after defendant, at

31. *Id.* at 20-27. The concept of determining the reasonableness of an intrusion by balancing the governmental interest against the invasion of the individual's privacy was first used in *Camara v. Municipal Court*, 37 U.S. 523, 534-35 (1967).

32. *See Adams v. Williams*, 407 U.S. 143 (1972). This was also the approach taken by the lower federal courts. *See, e.g., United States v. Unverzagt*, 424 F.2d 396 (8th Cir. 1970); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969).

33. *E.g., Adams v. Williams*, 407 U.S. 143 (1972). In this case the officer's reasonable suspicion of criminal activity was derived from an informant's tip that the subject was carrying narcotics and a gun. The officer approached the automobile in which the subject was seated and immediately seized the weapon. The *Adams* Court held that under the circumstances, including the subject's initial refusal to get out of the car, the officer's conduct constituted "a limited intrusion designed to insure his safety" and was therefore reasonable. *Id.* at 148. It was irrelevant that the officer's reasonable suspicion was based on an informant's tip rather than personal observation, as long as the informant displayed some "indicia of reliability." *Id.* at 147.

34. *See* notes 32-33 *supra* and accompanying text.

35. The *Terry* Court held specifically that a police officer can conduct a limited search for weapons only when he reasonably believes that his safety is threatened. 392 U.S. at 27. Moreover, in a footnote, the Court emphasized that its decision did not attempt to delineate the outer limits of the new reasonable suspicion standard: "[W]e . . . decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Id.* at 19 n.16.

36. *See* text accompanying note 22 *supra*. *See generally* 3 W. LAFAVE, *supra* note 4, § 9.2.

37. 434 U.S. 106 (1977).

38. *See* note 35 *supra*.

39. 434 U.S. at 111-12. Two years later, however, in *Brown v. Texas*, 443 U.S. 47 (1979), the

the request of a police officer, had stepped out of his automobile. The officer then observed a large bulge under defendant's jacket.⁴⁰ The loaded revolver that was subsequently discovered was suppressed by the Pennsylvania Supreme Court,⁴¹ but the United States Supreme Court reversed.⁴² In reaching its decision, the *Mimms* Court balanced the interests in police safety⁴³ against the intrusion into the driver's personal liberty,⁴⁴ concluding that once the vehicle had been lawfully detained, the additional intrusion was "de minimus."⁴⁵

In *United States v. Brignoni-Ponce*⁴⁶ the Supreme Court recognized for the first time an exception to the probable cause requirement in a situation not involving limited weapons search.⁴⁷ The Court concluded that the fourth amendment permitted a roving border patrol to detain briefly a vehicle near the Mexican border on the reasonable suspicion that the automobile was carrying illegal aliens.⁴⁸ The Court again invoked the *Terry* balancing test,⁴⁹ this time weighing the public interest in preventing illegal entry into the United States⁵⁰ against the severity of the interference with individual liberty.⁵¹ Similarly, in *United States*

Court held a Texas law providing that police officers could stop citizens and request identification violative of the fourth amendment because there was no reasonable suspicion requirement.

40. *Pennsylvania v. Mimms*, 434 U.S. 106, 107 (1977). Police officers had initially stopped respondent upon observing that he was driving a vehicle with an expired license plate. *Id.*

41. *Commonwealth v. Mimms*, 471 Pa. 546, 370 A.2d 1157, *rev'd sub nom. Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The Pennsylvania Supreme Court relied on *Terry* in finding that the police officer's conduct constituted an impermissible seizure under the fourth amendment because the order was issued as a matter of policy, rather than on the basis of "specific and articulable facts" supporting a reasonable suspicion that the driver posed a threat to the officer's safety. *Id.* at 552-53, 370 A.2d at 1160-61. See note 30 *supra* and accompanying text.

42. 434 U.S. at 107.

43. *Id.* at 110. The Court noted that according to one study nearly 30% of all police shootings took place "when a police officer approached a suspect seated in an automobile." *Id.*

44. *Id.* at 111.

45. *Id.* The Court reasoned that "[t]he police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." *Id.*

46. 422 U.S. 873 (1975).

47. See notes 32-45 *supra* and accompanying text.

48. 422 U.S. at 880. The Court held, however, that the fourth amendment prohibited roving patrol stops based merely on the apparent Mexican ancestry of a vehicle's occupants, because that alone was not enough to constitute reasonable suspicion of illegal activity. *Id.* at 886.

49. See note 31 *supra* and accompanying text.

50. The Court noted that the number of aliens residing illegally in the United States ranged from approximately one million to ten or twelve million and deemed their presence to be a "significant economic and social problem." 422 U.S. at 878.

51. *Id.* at 880. The Court observed that a border stop "usually consumes no more than a minute" and involves only a few brief questions. *Id.*

v. Martinez-Fuerte,⁵² the Court used the *Terry* reasoning to hold that police could stop vehicles at permanent checkpoints and briefly question the occupants even in the absence of any reasonable suspicion that those vehicles contained illegal aliens.⁵³

In other cases, the Supreme Court has balanced the *Terry* scales in favor of the individual. In *Delaware v. Prouse*,⁵⁴ for example, the Court held that a state policy of arbitrarily detaining automobiles in order to check license and registration information, without any reason to suspect illegal activity, violated the fourth amendment.⁵⁵ The Court declared that this type of intrusion could not be justified by the state's interest in promoting highway safety.⁵⁶ In *Davis v. Mississippi*,⁵⁷ the Court held that in the absence of probable cause for arrest, the fourth amendment would not permit the detention of suspects at police headquarters for fingerprinting and interrogation.⁵⁸

52. 428 U.S. 543 (1976).

53. *Id.* at 559. The Court recognized that the governmental interest in performing routine checkpoint stops is immense, whereas the consequent intrusion on the individual is limited. *Id.* at 557.

The Court, however, has never permitted an intrusion beyond questioning of occupants of vehicles at border stops absent probable cause. See *United States v. Ortiz*, 422 U.S. 891 (1975) (warrantless vehicle searches by border patrol officers at fixed checkpoints absent consent or probable cause held violative of fourth amendment); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (same). See generally 3 W. LAFAVE, *supra* note 4, § 10.5.

54. 440 U.S. 648 (1979).

55. *Id.* at 663. The Court cited *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), in finding that the stop of an automobile and the detention of its occupants constitutes a fourth amendment seizure. 440 U.S. 653. The Court declared that such a detention to check license and registration information would be permissible, however, if based on "articulable grounds" and a "reasonable suspicion" that the driver did not have a license or that the automobile was unregistered. *Id.* at 656.

56. 440 U.S. at 658-59. The Court agreed with the petitioner that the states have a vital interest in highway safety, but concluded that a system of random spot checks would have only an incremental contribution toward this interest. *Id.* at 659.

57. 394 U.S. 721 (1969).

58. *Id.* at 726-27. The Court held that the fingerprints obtained pursuant to this detention were inadmissible as fruits of an unlawful seizure. *Id.* at 723. The Court indicted in dictum, however, that a station house detention for the sole purpose of obtaining fingerprints might, "under narrowly defined circumstances," be considered reasonable under the fourth amendment, even in the absence of probable cause. *Id.* at 727.

Other types of investigative detentions not supported by probable cause have withstood scrutiny under the fourth amendment. See, e.g., *United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury subpoenas summoning 20 persons to the United States Attorney's Office, where they were requested to make voice recordings, upheld on the basis that a grand jury subpoena is not a fourth amendment seizure); *Wise v. Murphy*, 275 A.2d 205 (D.C. 1971) (court-ordered line-up without probable cause for arrest held permissible in a rape investigation). But see *Beightol v. Kunowski*,

In *Dunaway v. New York*⁵⁹ the Supreme Court again refused to extend the *Terry* doctrine to the context of custodial interrogations.⁶⁰ In *Dunaway*, police officers had reasonable suspicion, not amounting to probable cause, to believe that the petitioner was connected with an attempted robbery and homicide.⁶¹ The petitioner was taken into custody⁶² and interrogated, whereupon he made statements and drew sketches that were used against him at his trial.⁶³ The state appellate court upheld the admissibility of the evidence,⁶⁴ but the Supreme Court reversed, arguing that the intrusion involved in *Dunaway* was largely indistinguishable from a traditional arrest⁶⁵ and that any exception created to justify such detentions “would threaten to swallow the general rule that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause.”⁶⁶

486 F.2d 293 (3d Cir. 1973) (seizure of subject free on bail at preliminary hearing to obtain fingerprints and photograph held unconstitutional).

59. 442 U.S. 200 (1979).

60. *Id.* See note 58 *supra* and accompanying text. *Cf.* *Morales v. New York*, 396 U.S. 102 (1969) (per curiam) (Court chose not to rule on propriety of custodial detention without probable cause for arrest and remanded case for further proceedings on the issue). *But see* *United States v. Mendenhall*, 446 U.S. 544 (1980), in which a plurality of the Court held that the detention in an airport investigative office and subsequent search of a woman did not violate the fourth amendment guarantee against unreasonable searches and seizures. Delivering the opinion for the Court, Justice Stewart, joined by Justice Rehnquist, concluded that no fourth amendment seizure had occurred because the record indicated that the respondent had no reason to believe that she was not free to leave. *Id.* at 555. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, dissented from this portion of the Court’s opinion. Justice Powell assumed that the detention did constitute a seizure and proceeded to argue that this seizure could be upheld as reasonable by weighing the great public interest in prevention of drug trafficking against the minimal intrusion on the individual. *Id.* at 565. Justice White, joined by Justices Brennan, Marshall, and Stevens, filed a dissenting opinion, contending that the respondent’s detention was of the same class as that in *Dunaway*, and as such, required probable cause to support it. *Id.* at 574-76. See generally Kirschner, *The Probable Cause Requirement in Custodial Detentions*, 21 N.H.B.J. 370 (1980); Comment, 13 J. MAR. L. REV. 733 (1980). See also *Brown v. Illinois*, 442 U.S. 590 (1975) (Court held inadmissible inculpatory statements made during police station interrogation subsequent to arrest based on less than probable cause).

61. 442 U.S. at 203.

62. *Id.* Although the petitioner was not informed that he was under arrest at the time he was taken into custody, he would have been physically restrained had he attempted to leave. *Id.*

63. *Id.*

64. *Id.* at 206. The appellate court found that despite the absence of probable cause, the detention was permissible because it was based on reasonable suspicion and because the subject was interrogated for only a “brief period of time.” *Id.*

65. *Id.* at 212. The Court argued that the petitioner’s seizure was not even “roughly analogous” to the limited intrusion involved in *Terry*. *Id.* at 213.

66. *Id.*

Often intertwined with the fourth amendment issue in the custodial detention cases is the ques-

In *Michigan v. Summers*⁶⁷ the Court determined that the weight of the competing interests was on the side of the state when it applied the *Terry* balancing test to the special context of detentions incident to the execution of valid search warrants.⁶⁸ Writing for the majority,⁶⁹ Justice

tion of the fifth amendment privilege against self-incrimination. For example, in *Brown v. Illinois*, 422 U.S. 590 (1975), an unlawfully detained suspect who had been advised of his fifth amendment privilege as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), subsequently made several incriminating statements that eventually were used to convict him of murder. The Supreme Court held that use of the *Miranda* warnings, although sufficient to protect an individual's fifth amendment interests, could not extend to safeguard his fourth amendment rights as well. Thus, the suspect's statements, as products of an illegal seizure, were improperly admitted at trial. In *Dunaway*, the Court was confronted with a similar factual situation. 442 U.S. at 203. In this case, however, a full confession was extracted from petitioner, who had been issued his *Miranda* warnings and had waived counsel. *Id.* After resolving the fourth amendment issue, the Court turned to the fifth amendment question and held that to allow the prosecution to use petitioner's confession would permit "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the fifth." *Id.* at 219. See also *Wong Sun v. United States*, 371 U.S. 471 (1963); *Gregory v. United States*, 231 F.2d 258 (D.C. Cir.), cert. denied, 352 U.S. 850 (1956). See generally 3 W. LAFAVE, *supra* note 4, § 11.4. For a comprehensive discussion, see Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements*, 1961 U. ILL. L.F. 78.

67. 101 S. Ct. 2587 (1981).

68. *Id.* at 2591-93. In the similar case of *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Supreme Court evaded the question of whether petitioner and his companions were illegally detained at the residence of one of the companions while two of six officers departed for about 45 minutes to obtain a search warrant. At his trial for trafficking in and possession of narcotics, Rawlings unsuccessfully sought to exclude an inculpatory statement he had made at the time of the search. On certiorari, the Supreme Court upheld the admission of this statement. Assuming for the sake of argument that the detention did violate the fourth amendment, the Court found that the petitioner's statement was not a result of this unlawful detention. The Court reasoned that not only was petitioner's statement voluntary, but he had received his *Miranda* warnings immediately before making it, the atmosphere remained congenial throughout the duration of the detention, and finally, the officer's behavior did not amount to "flagrant misconduct." *Id.* at 106-10.

State and lower federal courts have reached the issue of whether a police officer may detain a person on the premises pending the execution of a valid search warrant based upon reasonable suspicion of criminal activity on numerous occasions. The courts have arrived at differing conclusions according to the practices and procedures followed in the particular jurisdiction. See, e.g., *United States v. Miller*, 546 F.2d 251 (8th Cir. 1976) (police officers entering premises with valid search warrant for narcotics not justified in detaining defendant against his will in view of the fact that detention was unnecessarily long); *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973) (proposition that persons present on premises to be searched pursuant to valid warrant may not be detained is "clearly frivolous"); *United States v. Festa*, 192 F. Supp. 160 (D. Mass. 1960) (court suggested in dictum that officer executing a search warrant could detain persons on premises to insure that the detainees would not depart with evidence); *State v. Wise*, 284 A.2d 292 (Del. Super. Ct. 1971) (police officers with reasonable suspicion justified in detaining defendant for two hours under uniform arrest law while proper search was conducted); *State v. Valdez*, 91 N.M. 567, 577 P.2d 465 (Ct. App. 1978) (plaintiff, who was getting ready to leave premises in car when officers arrived, was lawfully detained while premises were searched pursuant to warrant).

Stevens found that the detention did not violate respondent's fourth amendment right "to be secure against an unreasonable seizure of his person."⁷⁰ Conceding that respondent's detention constituted a fourth amendment "seizure"⁷¹ unsupported by probable cause,⁷² the Court concluded that this seizure was nevertheless reasonable.⁷³ The Court cited *Terry* and its progeny⁷⁴ for the proposition that some detentions, although subject to the fourth amendment, are sufficiently less intrusive than traditional arrests and are supported by such substantial law enforcement interests as to be valid if based upon reasonable suspicion rather than upon probable cause.⁷⁵ The majority distinguished *Dunaway*⁷⁶ as involving a detention of much greater severity.⁷⁷

In justifying detentions based upon reasonable suspicion during proper searches, the Court balanced the government intrusion⁷⁸ against

69. Justice Stevens was joined by Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist. Justice Stewart, joined by Justices Brennan and Marshall, dissented.

70. 101 S. Ct. at 2589-90. The Court found it unnecessary to decide whether a search warrant authorizes police to search the occupants of a premises, because the eventual search of respondent was incident to his arrest. *Id.* at 2590. Therefore, *Ybarra v. Illinois*, 444 U.S. 85 (1979), relied on by the respondent, was not applicable. *Ybarra* dealt solely with the issue of whether police executing a search warrant in a public tavern could search all of the customers present. Without considering the validity of the detention of the petitioner, the Court held that a warrant authorizing search of a premises does not automatically authorize a search of all persons thereon and, further, that the search of petitioner was invalid for lack of probable cause. *Id.* at 90-96.

For additional cases dealing with the issue of whether a search warrant for premises permits a search of persons on those premises, see *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Di Re*, 332 U.S. 581 (1948); *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973); *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973); *United States v. Teller*, 397 F.2d 494 (7th Cir.), *cert. denied*, 393 U.S. 937 (1964); *Clay v. United States*, 246 F.2d 298 (5th Cir.), *cert. denied*, 355 U.S. 863 (1957). See generally 2 W. LAFAVE, *supra* note 4, § 4.9.

71. 101 S. Ct. at 2590 & n.5. In support of this proposition, the Court cited *Terry v. Ohio*, 392 U.S. 1 (1968).

72. 101 S. Ct. at 2590. The Court noted that its decision was based on an assumption of the existence of probable cause to arrest. *Id.* at 2590 & n.3.

73. *Id.* at 2595.

74. *Id.* at 2591-92. The Court relied heavily on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); and *Terry v. Ohio*, 392 U.S. 1 (1968).

75. 101 S. Ct. at 2592. The Court stated that police must have an "articulable basis for suspecting criminal activity." *Id.*

76. *Id.* at 2591-92. The Michigan Supreme Court relied on *Dunaway* in arguing that any seizure consisting of more than a momentary detention must be supported by consent or probable cause. *People v. Summers*, 407 Mich. 432, 444-46, 286 N.W.2d 226, 229 (1979), *rev'd sub nom. Michigan v. Summers*, 101 S. Ct. 2587 (1981).

77. 101 S. Ct. at 2593-94.

78. *Id.* at 2593.

the public interest in effective law enforcement.⁷⁹ The Court reasoned that because a neutral and detached magistrate, in issuing a valid search warrant, had already approved a substantial invasion of the respondent's privacy, the added intrusion resulting from his detainment was inconsequential.⁸⁰ Moreover, the detention of the respondent at his own residence involved neither the indignity associated with an on-the-street detention nor the inconvenience of a trip to the police station.⁸¹ The Court further observed that the public interest in minimizing the risk of harm to officers,⁸² preventing the escape of criminal suspects,⁸³ and facilitating the orderly completion of searches⁸⁴ clearly outweighed the minimal intrusion imposed upon the person detained.⁸⁵

In conclusion, the majority noted that the requisite element of reasonable suspicion⁸⁶ could be implied from the existence of a search warrant, because a judicial officer had previously found probable cause to believe that the law was being violated on the premises to be searched.⁸⁷

Justice Stewart, joined in dissent by Justices Brennan and Marshall,⁸⁸ argued that the Court should not uphold a detention based on less than probable cause unless the government could justify the detention with a purpose beyond the ordinary police interest in effective criminal investigation.⁸⁹ The dissent argued that the petitioner in *Sum-*

79. *Id.* at 2593-94.

80. *Id.* at 2593. *Cf.* *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), in which the Court held that once the vehicle has been stopped, the added intrusion is de minimus. *See* note 45 *supra* and accompanying text.

81. 101 S. Ct. at 2593.

82. *Id.* at 2594. Justice Stevens noted that a search pursuant to a warrant is the type of endeavor that frequently gives rise to "sudden violence" or "frantic efforts to conceal or destroy evidence." *Id.* at 2594. *See, e.g.,* *People v. Nefzger*, 173 Colo. 199, 476 P.2d 995 (1970).

83. 101 S. Ct. at 2594.

84. *Id.* In its brief, petitioner noted that particularly where the nature of the evidence is such that it can readily be hidden or destroyed, there is a strong public policy interest in not permitting occupants on the premises "to roam about at will." Brief for Petitioner at 13, *Michigan v. Summers*, 101 S. Ct. 2587 (1981).

85. 101 S. Ct. at 2594. In balancing the public and private interests involved, the Court did not consider the possibility of the suspect departing from the premises with the sought-after evidence. Emphasis on such an issue would have signified an even greater departure from the rulings in *Terry* and *Sibron*.

86. *See* note 28 *supra* and accompanying text.

87. 101 S. Ct. at 2594.

88. *Id.* at 2595.

89. *Id.* at 2596. The dissent recognized only two classes of cases in which seizures do not have to be supported by probable cause: stop and frisk cases and border patrol cases. *Id.* In both

mers failed to present such an extraordinary interest.⁹⁰ In addition, the dissent distinguished the *Terry* and *Brignoni-Ponce* lines of cases as involving only momentary detentions,⁹¹ whereas the type of seizure upheld in *Summers* potentially could last for several hours.⁹² The dissent concluded that the *Summers* facts provided no occasion for a departure from the traditional standard of probable cause usually applied in fourth amendment cases.⁹³

Although the Court's opinion in *Terry v. Ohio* initially appeared conservative and hesitant,⁹⁴ subsequent decisions invoking the *Terry* precedent have been increasingly broad and decisive.⁹⁵ It has become clear that in sanctioning a single exception to the probable cause requirement, the *Terry* decision precipitated a definite shift from traditional fourth amendment standards.⁹⁶ The holding in *Michigan v. Summers* indicates that the Supreme Court has not yet completed its expansion of *Terry*.

The detention validated in *Summers* constituted a permissible seizure within the meaning of the fourth amendment. The officers had reasonable suspicion that the respondent was engaging in criminal activity.⁹⁷ The detention presumably was of limited duration⁹⁸ and did not entail transporting the respondent to a different location.⁹⁹ In addition, any interrogation was limited to a few brief questions to ascertain general information.¹⁰⁰ Moreover, the detention eliminated the chance that the defendant might secrete or destroy evidence, go into hiding, or

types of cases, the government has demonstrated prevailing concerns beyond the normal interests in law enforcement. *Id.* at 2597.

90. *Id.* The dissent asserted that the law enforcement objectives represented by the majority in the case at bar, in contrast to those justified in *Terry* and *Brignoni-Ponce*, represented "nothing more than the ordinary police interest in discovering evidence of crime and apprehending wrongdoers." *Id.*

91. *Id.* at 2598.

92. *Id.*

93. *Id.* at 2599. See notes 28-31 *supra* and accompanying text.

94. See note 35 *supra* and accompanying text.

95. See notes 37-38, 46-48, 52-53 & 67-68 *supra* and accompanying text.

96. See notes 16-19 *supra* and accompanying text.

97. The officers had secured a warrant founded upon probable cause that criminal activity was taking place at the residence of the respondent. 101 S. Ct. at 2593. Having ascertained that the respondent was the owner, the police officers were reasonable in believing that he might be a participant in the illegal activity. *Id.* at 2589-90.

98. *Id.* at 2593.

99. *Id.*

100. Brief for Petitioner at 2, *Michigan v. Summers*, 101 S. Ct. 2587 (1981).

secure a dangerous weapon while the search was being conducted.¹⁰¹

The Court's continued reliance on the balancing test to determine reasonableness, however, encourages inconsistent results. Law enforcement officers, having no workable set of guidelines, are forced to balance competing public and individual interests on an ad hoc, case-by-case basis. The Court in *Dunaway v. New York*¹⁰² correctly pointed out that officers possess neither the time nor the expertise necessary to perform such a task.¹⁰³ More importantly, there exists enormous potential for abuse or discretion by an overzealous police officer.

The balancing standard also precipitates incongruous decisionmaking by the Supreme Court. An illustration of the incongruity is the contrast of the decisions in *Terry v. Ohio*¹⁰⁴ and *United States v. Brignoni-Ponce*,¹⁰⁵ in which great emphasis was placed on the necessity of an overwhelming and unique governmental concern,¹⁰⁶ with that in *Michigan v. Summers*, in which general public interest in efficient law enforcement was sufficient to sustain the intrusion.¹⁰⁷ In addition, uniform application by state and lower federal courts is entirely impracticable.

The dissent's concern that the *Michigan v. Summers* holding may lead to detentions of unreasonable duration¹⁰⁸ is unwarranted. Case law offers indirect safeguards against this possibility. It is a well-established principle that law enforcement officers may remain on the premises to be searched only for the time reasonably necessary to execute a warrant.¹⁰⁹ The *Summers* Court specifically held that the occupants of the premises could be detained only while a "proper search is conducted."¹¹⁰ Moreover, some states have enacted legislation patterned

101. See note 84 *supra* and accompanying text.

102. 442 U.S. 200 (1979).

103. The *Dunaway* Court expressed the fear that "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Id.* at 213 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

104. 392 U.S. 1 (1968).

105. 422 U.S. 873 (1975).

106. See notes 30 & 50 *supra* and accompanying text.

107. 101 S. Ct. at 2593-94.

108. *Id.* at 2598.

109. See, e.g., *Abel v. United States*, 362 U.S. 217 (1970); *Levin v. Blair*, 17 F.2d 151 (D. Pa. 1927). See also CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, MANUAL ON THE SEARCH AND SEIZURE 11 (1974).

110. 101 S. Ct. at 2595.

after Uniform Arrest Act or ALI Model Code of Pre-Arrestment Procedures provisions. The Uniform Act proposes a limit of two hours for detentions based on reasonable suspicion but for which probable cause is lacking;¹¹¹ the Model Code suggests that such seizures should not extend beyond twenty minutes.¹¹²

The Supreme Court should abandon the balancing test in favor of concise and workable guidelines for determining the constitutional propriety of detentions unsupported by probable cause. Continued application of the balancing test will accelerate the erosion of the personal safeguards established by the fourth amendment.

D.J.K.

111. INTERSTATE COMMISSION ON CRIME, *supra* note 24.

112. ALI MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 110.2(1) (1975).

