Decline of the Right of Locomotion: The Fourth Amendment on the Streets

Tracey Maclin

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THE DECLINE OF THE RIGHT OF LOCOMOTION: THE FOURTH AMENDMENT ON THE STREETS

Tracey Maclin†

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INTRODUCTION

America's freedom of locomotion is in danger. We have long enjoyed the liberty to walk the streets and move about the country free from arbitrary government intrusion. Freedom to travel, whether locally or between states, without having to either account for our presence or carry official papers, is one of the "cherished liberties that distinguish this nation from so many others." Like many other freedoms, the right of locomotion is misunderstood and taken for granted. The Supreme Court has placed this right at risk by undermining its central constitutional underpinnings through restrictive interpretation of the fourth amendment.

It is ironic that the decline of the right of locomotion has corresponded with the ascent of another cherished value—the right to privacy, which is protected by the fourth amendment and other constitutional provisions. Perhaps because the right of locomotion is taken for granted, courts rarely give it due consideration in fourth amendment adjudication. Yet the fourth amendment was meant to, does, and should protect us in our public as well as in our private

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1 Gomez v. Turner, 672 F.2d 134, 143 n.18 (D.C. Cir. 1982); accord State ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 6, 663 P.2d 992, 997 (1983) (Feldman, J., concurring) ("The thought that an American can be compelled to 'show his papers' before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals."); Florida v. Avery, 531 So. 2d 182, 198-99 (Fla. 4th Dist. Ct. App. 1988) (en banc) (Anstead, J., dissenting) ("It is in cases like this that we must confront the question of whether our system of government is really that different from systems prevailing in other countries where the routine boarding of public transportation and confrontation of passengers by police officers is accepted without question.").
lives. The growing emphasis on privacy values in the Constitution may obscure the public travel values it should also protect.

Put simply, today's Supreme Court slights the right of locomotion. The substantial discretion given to police officers in their confrontations with citizens has severely restricted that right. Part I of this Article briefly discusses the right of locomotion. Parts II and III trace the history of the Court's attack on the right of locomotion and then critique the Court's reasoning. Adopting the perspective of the citizen on the street, this Article examines the Court's proffered justifications for limiting the right of locomotion, and explores whether these justifications are consistent with the Court's own promise to protect the citizenry from "arbitrary and oppressive" police behavior.

Part IV highlights the Court's overemphasis of privacy concerns at the expense of the right of locomotion. It also questions the continued viability of the *Terry* balancing rule and advocates that street encounters no longer be judged by the reasonable suspicion test. Part IV then argues that this extremely deferential standard of review for police actions is unjustified. The Article concludes by asking whether the "war on drugs" has exacted too heavy a cost in terms of constitutional freedom.

I

THE RIGHT OF LOCOMOTION

The idea of a right of locomotion is neither novel nor radical. Americans have enjoyed the freedom to walk the streets and move about the country free from unreasonable government intrusion for many years. Indeed, an apt description of the right of locomotion was set forth almost sixty years ago by the Ninth Circuit when it stated that:

“Personal liberty, which is guarantied [sic] to every citizen under our constitution and laws, consists of the right of locomotion—to go where one pleases, and when, and to do that which may lead to one’s business or pleasure, only so far restrained as the rights of

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4 Of course, not all Americans have been able to move freely about the country. In many parts of colonial America, both North and South, Negros were required to carry "passes." See A. Leon Higginbotham, Jr., *In the Matter of Color, Race & The American Legal Process: The Colonial Period* 171 (1978).

Both before and after the Civil War, blacks—free and enslaved—were restricted in their freedom of movement in parts of the North and South. Prior to the war, both antislavery and white supremacist feelings led Iowa, Illinois, Indiana and Oregon to bar blacks from entering the state. See Eric Foner, *Reconstruction: America's Unfinished Revolution* 1863-1877 at 26 (1988).
others may make it necessary for the welfare of all other citizens.\(^5\)
The right of locomotion is grounded in two fundamental commitments contained in the fourth amendment's prohibition against unreasonable seizures. First, the fourth amendment includes "the right to be let alone" from government interference.\(^6\) In the context of police-citizen encounters on the street, this right can be enjoyed only if the discretion of police officers is adequately checked, thus preventing officers from having "dictatorial power over the streets."\(^7\)

The second constitutional column that supports a right of locomotion is the fourth amendment's protection of personal security.\(^8\) This commitment to personal security and the shared general vision that all citizens are free to travel\(^9\) seemingly combine to afford the citizen on the street substantive, as well as procedural, protection against unreasonable police interference.\(^10\) Individuals could

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\(^{5}\) Hawaii v. Anduha, 48 F.2d 171, 172 (9th Cir. 1931) (quoting Pinkerton v. Verberg, 78 Mich. 573, 584, 44 N.W. 579, 582 (1889)). In Anduha, the court invalidated a vagrancy law because it was unconstitutionally vague. Although Anduha spoke of the personal rights of all citizens in general, and a broad constitutionally protected right of locomotion in particular, the court "did not indicate from which amendment [of the Constitution] these rights were derived." Note, Locomotion, Liberty and Legislation, 32 Mont. L. Rev. 279, 282 (1971) (authored by P. Bruce Harper).

\(^{6}\) Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

\(^{7}\) Amsterdam, supra note 5, at 222.

\(^{8}\) U.S. CONST. amend. IV. The first clause of the fourth amendment states: "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." Id.

\(^{9}\) In this sense, the fourth amendment's protection of the personal liberty and security of those who move about the streets is collateral to the right to travel recognized by other provisions of the Constitution. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 629 (1969). The Shapiro court noted:

>This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

Id.

The constitutional source of the right to travel has been a frequently debated topic. See Zobel v. Williams, 457 U.S. 55, 66-67 (1982) (Brennan, J., concurring); id. at 78-81 (O'Connor, J., concurring).

\(^{10}\) The first clause of the fourth amendment recognizes an independent right of personal sovereignty and liberty. See supra note 8; see also Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 103 (1937) (the initial clause of the fourth amendment grants an independent right of security from unreasonable search and seizure; the prohibition contained therein was designed to "cover something other than the form of [a] warrant."); Clark Cunningham, A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense, 73 Iowa L. Rev. 541, 552 (1988) (The drafters of the fourth amendment created "two constitutional mandates." "Not only would the fourth amendment bar certain
therefore anticipate the same degree of constitutional protection for their freedom of movement as they enjoy within their homes.\textsuperscript{11}

Until recently, the Court did not hesitate to draw on these fourth amendment promises in recognizing a right of locomotion. In 1925, the Court declared that “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.”\textsuperscript{12} The Court made clear in a later series of cases that a mere suspicion of criminal activity was insufficient to justify seizing a person on the street.\textsuperscript{13} These cases reflected the view that “[u]nder our system suspicion is not enough for an officer to lay hands on a citizen.”\textsuperscript{14} Even in contexts in which it was unnecessary to invoke the fourth amendment, the Court struck down laws that made the right to stand or walk on a public sidewalk dependent on “the whim of any types of warrants, but it also would generally prohibit unreasonable searches and seizures that violated the right of the people to be secure.”). \textit{But see} Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989) (holding that the fourth amendment only affords procedural protection). I have argued elsewhere that the reasoning of Waters is misplaced. Tracey Maclin, \textit{Seeing the Constitution From the Backseat of a Police Squad Car: An Essay on Tempered Zeal} by H. Richard Uviller (Book Review), 70 B.U.L. Rev. 543 (1990). For a general discussion on the relationship between the fourth amendment’s two clauses, see Silas Wasserstrom, \textit{The Fourth Amendment’s Two Clauses}, 26 Am. Crim. L. Rev. 1589 (1989).

\textsuperscript{11} \textit{But cf.} United States v. Watson, 423 U.S. 411 (1976) (where there is probable cause for arrest, the warrantless arrest of a felony suspect found in public does not violate the fourth amendment even in circumstances where the police could have obtained a warrant prior to the arrest).

When the privacy of a citizen’s home is at stake, the Court has been more generous in its reading of the fourth amendment. See, e.g., Welsh v. Wisconsin, 466 U.S. 740 (1984) (fourth amendment bars warrantless night entry of the home in order to arrest for nonjailable traffic offense); Steagald v. United States, 451 U.S. 204 (1981) (fourth amendment prohibits search for the subject of an arrest warrant in the home of a third party without valid search warrant); Payton v. New York, 445 U.S. 573, 589-90 (1980) (where there are no exigent circumstances, an officer must have a warrant before crossing the threshold of a house); United States v. United States District Court, 407 U.S. 297 (1972) (President may not authorize electronic surveillance in domestic security matters without prior judicial authorization). \textit{But cf.} New York v. Harris, 110 S. Ct. 1640 (1990) (exclusionary rule does not bar use of an incriminating statement taken from the defendant outside his home despite his being arrested in violation of \textit{Payton}, if there is probable cause for arrest); Maryland v. Buie, 110 S. Ct. 1093 (1990) (pursuant to an arrest warrant, officers may conduct warrantless “protective sweep” of entire house if they have reasonable suspicion that dangerous individuals are on premises).

\textsuperscript{12} Carroll v. United States, 267 U.S. 132, 154 (1925); \textit{accord} Brinegar v. United States, 338 U.S. 160 (1949) (The citizen traveling on the highway “who has given no good cause for believing he is engaged in [illegal] activity is entitled to proceed on his way without interference.” \textit{Id.} at 177.).


\textsuperscript{14} \textit{Henry}, 361 U.S. at 104.
police officer."\(^{15}\)

More recently, the Court refused to sanction seizures based solely on a person's suspicious appearance or on the need to assert a "police presence" into an ambiguous situation. In *Brown v. Texas*,\(^ {16}\) the Court held that where there is no reason to suspect misconduct, "the balance between the public interest and [one's] right to personal security and privacy tilts in favor of freedom from police interference."\(^ {17}\) Moreover, the fourth amendment analysis does not change because of advances in technology. In *Delaware v. Prouse*,\(^ {18}\) the Court held that citizens were not shorn of their fourth amendment right of liberty merely because they "stepp[ed] from the sidewalks into their automobiles."\(^ {19}\) The Court also denied police officials the right to conduct random or arbitrary seizures for the purpose of checking a motorist's identification.\(^ {20}\) To allow this ac-

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\(^{15}\) Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965). Laws that authorize arrest based on vague standards trigger the concern that the police will exercise their authority in an arbitrary or discriminatory manner. Where this occurs in the context of street encounters, it "implicates consideration of the constitutional right to freedom of movement." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted); see Papachristou v. City of Jacksonville, 405 U.S. 156, 169-71 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971).

The right to stand or loiter, although not traditionally considered a part of fourth amendment freedoms, might be considered a corollary right to the freedom of locomotion. *See Note, Orders to Move On and the Prevention of Crime, 87 Yale L.J. 603, 622 (1978)* (A person given an order to move on by a police officer is "deprived of his freedom to go where he wishes, and he may have to abandon some legitimate activity he has planned. Although this restraint is less severe than arrest, it is a 'seizure' of the person within the meaning of the Fourth Amendment."). *Cf. Comment, Is There Something Suspicious About the Constitutionality of Loitering Laws?, 50 Ohio St. L.J. 717, 729-30 (1989) (authored by Jordan Berns)* (loitering and prowling laws have been criticized because they "permit arrest on suspicion of criminal activity rather than on probable cause as mandated under the fourth and fourteenth amendments.").

\(^{16}\) 443 U.S. 47 (1979).

\(^{17}\) *Id.* at 52.


\(^{19}\) *Id.* at 663.

\(^{20}\) *Prouse* held that unless there is a specific reason to believe that a motorist has violated the law, "stopping an automobile and detaining the driver in order to check his driver license and the registration of the automobile are unreasonable under the Fourth Amendment." *Id.* The suggestion in *Prouse*, as well as *Brown*, 443 U.S. at 51, that a seizure is permissible—even where individualized suspicion of wrongdoing is absent—was formally endorsed in *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990). *Sitz* upheld the use of temporary highway sobriety checkpoints. The roadblock at issue in *Sitz* involved stopping all vehicles passing through the checkpoint in order to examine drivers for signs of intoxication. *Id.* at 2484. According to Chief Justice Rehnquist, the state's interest in preventing drunk driving, the extent that sobriety checkpoints advance that interest, and the degree of intrusion upon individual motorists, "weighs in favor" of upholding sobriety checkpoints. *Id.* at 2488.

Because *Sitz* was decided after this Article was completed, a detailed critique is not possible here. For purposes of this Article, it is sufficient to note that the Court's result allows seizures that grant police substantial leeway to interfere with the right of locomotion. *See Sitz*, 110 S. Ct. at 2493, 2497 (Stevens, J., dissenting) ("A Michigan officer who
tion would create a "'grave danger' of abuse of discretion."21 Taken together, Brown and Prouse reflect a feeling that on the streets of this country, in contrast to other nations, the individual is sovereign. The Constitution mandates that the citizenry is beyond the reach of state intrusion unless the government has good reason to believe that a crime has been or is being committed.22

II
THE DOCTRINAL WEAPONS USED TO LIMIT THE RIGHT OF LOCOMOTION

In assessing street-level encounters between police officers and citizens, the Court purports to balance the constitutional interests of the individual against the societal need for effective law enforcement. But the Court's claim that it is engaged in balancing is deceptive. Rather than using a balancing test, the Court uses a set of three tacit rules that provide the doctrinal foundation for its decisions involving police-citizen encounters.

The first is the "right-to-inquire" rule. Under it, police officials may accost,23 stop, and question any citizen found in a public place. The second is the "common sense" rule, under which the Court shuns what it calls "rigid" or "technical" directives in limiting the authority of officers conducting intrusive investigations. The third rule involves "waiver of privacy." Under this rule, the Court deems that pedestrians have "waived" their constitutional protections against certain types of police intrusions that would not be tolerated if they occurred in a person's home.24 Citizens therefore have no

questions a motorist [seized] at a sobriety checkpoint has virtually unlimited discretion to [prolong the detention of] the driver on the basis of the slightest suspicion.... [T]he Court's decision... appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures."); see also James B. Jacobs & Nadine Strossen, Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks, 18 U.C. DAVIS L. REV. 595, 664 n.286 (1985) (The flaw in Prouse, Brown, and now Sitz is that they ignore "the additional, at least equally important, purpose of the individualized suspicion requirement—to prevent unjustified invasions of individual freedom, security, or privacy. This purpose is not served by the 'neutral plan' requirement.").

21 Prouse, 440 U.S. at 662 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).

22 See Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) ("Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime.").

23 This article uses the term "accost" as it is understood by those following the teachings of Noah Webster. According to Webster, "accost" means "to approach and speak to," or "speak to without having first been spoken to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12 (Unabridged ed. 1981).

24 Cf. Hayes v. Florida, 470 U.S. 811, 817 (1985) (signalling approval of a seizure for in-the-field fingerprinting on less than probable cause for someone found on the
fourth amendment privacy expectations regarding their public movements. Together, these rules have had a substantial impact on the right of locomotion. Indeed, the Court’s recent cases involving street encounters raise serious questions regarding the survival of all citizens’ freedom of movement.

Two separate consequences of these rules are worth distinguishing. Generous interpretations of police regulations can either render the fourth amendment inapplicable, or render its requirements satisfied. In the context of street encounters, constitutional scrutiny is triggered only when police officers cross the mystical line beyond which police conduct is deemed sufficiently “intimidating” to cause a person to believe that she is not free to leave.25 Before this line is crossed, citizens—both the innocent and the guilty—have no right to expect or demand freedom from a police presence that restricts their movements.

The first category of cases discussed in Part II concerns police activity considered to be outside the protection of the fourth amendment. Police officers who exercise the government’s right-to-inquire do so without triggering fourth amendment scrutiny. Within this line of cases, the Court expanded the concerns that originally gave birth to the right-to-inquire rule. Initially, police could stop people on the streets only when there was probable cause to believe a crime had been committed.26 Now police can stop and question citizens even when there is no reason to suspect them of criminality.27 The right of the people to come and go as they please—their right of locomotion—is no longer as broad as the people might assume.

The second category of cases concerns street encounters which the courts have held do implicate fourth amendment protections. As discussed below, these investigatory seizures are not controlled by objective rules designed to constrain police discretion. Instead, the Court looks to see if an officer has exercised common sense, and whether the officer’s actions promote effective law enforcement. If both these requirements are satisfied, the Court will deem the officer’s conduct constitutional.

A. Much Police Activity Lies Beyond Fourth Amendment Scrutiny

The history of the Court’s decisions concerning the constitut-

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26 See infra text accompanying notes 33-50.
27 See infra text accompanying notes 51-93.
tionality of street encounters between police and citizens is check-ered. In *Terry v. Ohio*[^28] the Court allowed a police officer, who lacked probable cause, to question and search a citizen who the officer suspected might be armed and dangerous. Prior to *Terry*, the Court had adamantly held that seizing a person with less than probable cause violated the fourth amendment[^29] *Terry* and its immediate progeny blurred this clear rule. These cases expressly approved limited investigatory stops but only on rather narrow facts. Recently, however, the Court has made plain that a broad range of investigatory activities falls outside the purview of the fourth amendment.

1. The Origins of the Right-to-Inquire Rule

Under the right-to-inquire rule, law enforcement officers are free to inquire about the public comings and goings of individuals. This authority has been referred to by a state court as the "common-law right of inquiry."[^30] The Supreme Court has not expressly recognized this power. Its rulings demonstrate, however, that there is no constitutional prohibition against this form of police conduct.[^31]

Justice Burton’s concurring opinion in *Brinegar v. United States*[^32] was the first modern articulation of the right-to-inquire rule. At issue in *Brinegar* was whether government agents had probable cause to stop an automobile that they suspected contained illegal liquor.[^33] While agreeing with the majority of the Court that the agents had probable cause to search the car after Brinegar’s incriminating admissions, Justice Burton found it unnecessary to decide whether probable cause existed to stop the car prior to the inculpatory admissions. In his view, even before they heard Brinegar’s incriminating statements, the agents had “a positive duty to investigate”[^34] despite their lack of probable cause.

Justice Burton maintained that “[i]t is only by alertness to

[^29]: See *supra* notes 12-15 and accompanying text.
[^31]: The Court has acknowledged that:
  law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

[^34]: *Brinegar*, 338 U.S. at 178-79 (Burton, J., concurring).
proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible.”

For Justice Burton law enforcement officers were required to make a stop when they had a mere “reasonable ground for an investigation.”

Justice Fortas was the next member of the Court to endorse the right-to-inquire rule. The seldom noted case of *Wainwright v. City of New Orleans* considered the legitimacy of a police officer accosting a pedestrian who fit the description of a murder suspect. The case also involved the right of the pedestrian to refuse to cooperate with the police. Although the writ of certiorari in *Wainwright* was dismissed as improvidently granted, Justice Fortas elaborated his opinion that there was no error in arresting Wainwright for resisting

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35 Id. at 179.
36 Id. That Justice Burton is not referring to the traditional quantum of evidence associated with the probable cause standard is reflected in the use of the phrase “reasonable ground for investigation.” Id. (emphasis added). In describing the probable cause standard, the *Brinegar* majority explained that “[t]he substance of all the definitions of probable cause ‘is a reasonable ground for belief of guilt.’” Id. at 175 (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)).

The *Brinegar* majority also stated that “[p]robable cause exists where ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably 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)). Thus, Justice Burton’s reference to a “reasonable ground for investigation” is not the same as the majority’s test that justifies police seizures of citizens travelling on the open road. Probable cause “give[s] fair leeway for enforcing the law in the community’s protection,” id. at 176, but requires “more than [a] bare suspicion.” Id. at 175. Justice Burton’s desired standard would have fallen below this constitutional threshold.

37 392 U.S. 598 (1968). *Wainwright* was a companion case to *Terry*. As Professor LaFave noted: “the concurring and dissenting opinions [in *Wainwright*] contain some interesting discussion” on the constitutionality of stopping citizens for investigatory purposes. Wayne R. LaFave, “Street Encounters” and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 Mich. L. Rev. 39, 46 n.27 (1968).

38 *Wainwright* involved the following facts. Wainwright, a law student at Tulane University, left his apartment around midnight to get something to eat. A short time later, two New Orleans police officers stopped him because he allegedly fit the description of a murder suspect. *Wainwright*, 392 U.S. at 600 (Warren, C.J., dissenting). The so-called “description” of the wanted suspect was actually quite vague; the only solid information the officers had was that the suspect had a tattoo on his left forearm that said “born to raise hell.” Id.

In any event, after the officers accosted Wainwright, he informed the officers that he was a law student, gave them his address and told them he was going to get something to eat. The officers, apparently not satisfied with Wainwright’s explanation, asked him to remove his jacket so they could see his forearm. Wainwright refused, responding that he “would not allow himself ‘to be molested by a bunch of cops here on the street,’ and he ‘didn’t want to be humiliated by the police.’” Id. During the encounter, Wainwright tried three times to walk peacefully away from the police, though he stopped each time the police ordered that he do so. Eventually, Wainwright was arrested for vagrancy. Id. at 600-01.

39 Id. at 598.
police inquiries. Justice Fortas maintained that where there is "constitutionally adequate cause"\(^{40}\) for an officer's belief that a citizen may be a suspect, the fourth amendment does not restrain aggressive inquiries. Justice Fortas suggested that the police, in this situation, may arrest a citizen if he refuses to cooperate with a request for identification.\(^{41}\)

The central point in each opinion is that police officers are entitled to accost and question citizens when they have some reason for investigation. Both Justice Burton and Justice Fortas assumed that the duties of police officials require investigations into the comings and goings of citizens. Despite the Burton and Fortas sketches of the government's right-to-inquire, a majority of the Court nevertheless remained committed to the view that citizens' fundamental right of free movement cannot be interrupted unless there is probable cause to believe a crime has been committed.

This fourth amendment principle was altered by the landmark case of \textit{Terry v. Ohio}.\(^{42}\) The \textit{Terry} Court faced the issue of whether an officer lacking probable cause could nevertheless seize and search a citizen on the street. A strict reading of precedent by the \textit{Terry} Court would have led to a conclusion unfavorable to the traditional law enforcement community. Prior to \textit{Terry}, the Court had clearly established that a citizen "was entitled to the protection of the Fourth Amendment as he walked down the street."\(^{43}\) And, at least since 1925, probable cause had been the benchmark for assessing the legitimacy of seizures of the person.\(^{44}\)

The \textit{Terry} Court, however, was not completely isolated from the developing, complicating, and conflicting concerns of the larger society. The \textit{Terry} Court, no less than today's Court, was well aware of the national concern with street violence.\(^{45}\) The facts of \textit{Terry}, for

\(^{40}\) Id. at 599 (Fortas, J., concurring).

\(^{41}\) Id. In Justice Fortas's words:

\textit{I am not prepared to say that, regardless of the presence or absence of adequate cause for police action, the arrest or the attempt by the officers to search is unlawful \ldots where the accosted person produces no identification, attempts three times to walk away, and refuses to dispel any doubt by showing that his forearm is not tattooed. I should want to know whether, in fact, there was constitutionally adequate cause for the police to suspect that the pedestrian was the man sought for murder.}

\(^{42}\) 392 U.S. I (1968).

\(^{43}\) Id. at 9.

\(^{44}\) See \textit{supra} note 12 and accompanying text. Official conduct responsible for restraining a person's liberty would be considered a seizure, and could be justified only by probable cause that criminality was existent. \textit{See Florida v. Royer}, 460 U.S. 491, 498 (1983) (plurality opinion); \textit{Dunaway v. New York}, 442 U.S. 200, 207-08 (1979).

\(^{45}\) See, e.g., Brief for Respondents at 6, \textit{Sibron v. New York}, 392 U.S. 40 (1968) (No. 63) \textit{"The current experiences of our own contemporary society show that the struggle between the community and criminals] is increasing in intensity and magnitude to the}
many, seem to typify the problems of urban crime: an officer stopped and searched three persons who appeared to be preparing an armed robbery of a downtown Cleveland store.46

Thus, a conflict emerged between judicial authority establishing that any seizure of the person required probable cause, and the public's demand that something be done to promote "law and order." The Court attempted to satisfy everybody with its ends-oriented decision. However, in the process of reaching this decision, the Court was forced to ignore settled constitutional precedent. On the search question, the Court ruled that a protective frisk was permissible where an officer had objective reasons to believe the person he confronted was engaged in criminality and was armed and presently dangerous.47

On the seizure issue, the Court confused matters by purposefully leaving open the question of whether an officer could accost and stop a person on less than probable cause, while simultaneously acknowledging that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."48 The problem, of course, was that before the Court could logically decide whether an officer's frisk for weapons was valid, it should have first determined whether the officer had the authority to accost the suspect.49 Nonetheless, the Court purported to remain noncommittal about whether an officer's approaching and addressing questions to someone on the street fell under the protective um-

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46 The Terry Court also knew that certain forms of "aggressive" police patrols were used to harass the poor and minorities in urban areas. The Court knew not only that many of these practices violated the fourth amendment, but also that in "many communities field interrogations [were] a major source of friction between the police and minority groups." Terry, 392 U.S. at 30 n.11 (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967)).

47 Terry, 392 U.S. at 30.

48 Id. at 16.

49 Id. at 32 (Harlan, J., concurring) ("In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.") (emphasis in original).
brella of the fourth amendment.\textsuperscript{50}

2. The Post-Terry Cases: The Fourth Amendment Becomes Inapplicable to the Right-to-Inquire

In two cases following \textit{Terry}, the Court marched closer to a right-to-inquire rule. First, in \textit{Davis v. Mississippi},\textsuperscript{51} Justice Brennan acknowledged for the Court that there could be occasions where the fourth amendment would not prevent the seizure of a citizen in order to obtain his fingerprints, even where probable cause was lacking.\textsuperscript{52}

If \textit{Davis} represented a cautious first step toward the right-to-

\textsuperscript{50} On the one hand, the Court stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." \textit{Id.} at 16. This definition of a seizure was quite protective of fourth amendment rights, and seemed consistent with the dynamics of most police-citizen encounters.

On the other hand, the Court later seemed to retreat from this definition when it stated that "[c]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." \textit{Id.} at 19 n.16. Relying on this definition, the Court explained that it could not determine whether a seizure had occurred prior to Detective McFadden's initiation of physical contact with \textit{Terry}, and thus assumed that "up to that point no intrusion upon constitutionally protected rights had occurred." \textit{Id.}

In a telephone conversation with the author, Professor Yale Kamisar pointed out that the \textit{Terry} Court's reluctance to address whether a seizure had occurred is explained by the Court's eagerness to place the interest of "police safety" on the balancing scale it employed to judge the frisk issue. According to Professor Kamisar, the Court was uncomfortable with the notion of police officers seizing and detaining individuals on less than probable cause where the only governmental interest at stake was some vague suspicion of possible wrongdoing. Such a holding would be difficult to square with precedent, and might even cause a stir among the public.

The issue of a frisk for weapons, however, seemed easier to resolve because few would argue against allowing police officers to take steps to protect themselves. And, of course, where a balancing test is employed, the government's interest in "police safety" is unlikely to be subordinated to the fourth amendment interests of an individual. \textit{Cf.} \textit{BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY} 686 (1983) (Chief Justice Warren's draft opinion in \textit{Terry} "focused primarily on the 'frisk' issue, saying little about the question of a police officer's authority to approach and stop someone on the street. Warren asserted that frisking was essential to protect the lives of policemen as they engaged in routine investigations of suspicious persons.").


\textsuperscript{52} \textit{Id.} at 727. Justice Brennan proffered several reasons why investigatory fingerprinting was unique, and thus could be employed in a manner consistent with the fourth amendment: fingerprinting does not involve probing a suspect's mind; when employed in a good faith manner, fingerprinting cannot be utilized to harass a person because only one set of prints need be taken; fingerprinting is a reliable and effective law enforcement tool; and, because there is little danger of a suspect destroying his fingerprints, police officials could easily seek judicial authorization for the process. \textit{Id.} at 727. The Court's discussion of fingerprinting and the fourth amendment was dictum. The Court ultimately held that the police conduct involving the seizure and transporting of \textit{Davis} to police headquarters for fingerprinting violated the fourth amendment because it was not authorized by a judicial warrant, unnecessarily required two fingerprinting sessions, and included custodial interrogation. \textit{Id.} at 728.
inquire rule, the second case, Adams v. Williams\(^{53}\) can be characterized as a hop, skip, and a jump. In Williams, the Court considered whether a police officer had violated the fourth amendment when, on the basis of an informant’s tip,\(^{54}\) he approached a vehicle occupied by Williams and reached into Williams’s waistband to grab a revolver that was not visible to the officer from outside the car.

Speaking for the Court, Justice Rehnquist quickly disposed of Williams’s fourth amendment claims. In the process, he transformed the narrow Terry ruling into a broad permit for investigatory searches and seizures on less than probable cause. Justice Rehnquist declared:

*Terry* recognizes that it may be the essence of good police work to adopt an *intermediate response*. A brief stop of a suspicious individual, in order to determine *his identity* or to maintain the status quo momentarily *while obtaining more information*, may be most reasonable in light of the facts known to the officer at the time.\(^{55}\)

Applying this standard to the facts, it did not matter that the justification for seizing and searching Williams was not based on the officer’s personal observations, as had been the case in *Terry*.\(^{56}\) Nor

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\(^{53}\) 407 U.S. 143 (1972).

\(^{54}\) The reliability of the informant and the basis of knowledge for his allegations against Williams were subject to considerable dispute. Speaking for the majority, Justice Rehnquist stated that the officer knew the informant, and that the informant had “provided [the officer] with information in the past.” Id. at 146. Thus, according to Justice Rehnquist, this was a “stronger case” for police action then the situation where an officer had received an anonymous tip. Id. “The informant here came forward personally to give information that was immediately verifiable at the scene.” Id. Justice Marshall’s dissent, however, noted that the only information the informant had previously provided to the officer concerned “homosexual conduct in the local railroad station.” Id. at 156-57.

On the issue of the informant’s credibility, Professor LaFave notes that Justice Rehnquist appears to suggest that the giving of information on some prior occasion, even absent any indication as to its worth, tells something about the informer’s credibility. It is by no means apparent that this is so, and—indeed—elementary logic would suggest that such is not the case.

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(e), at 477 (2d ed. 1987).

Regarding the basis of the informant’s knowledge, Professor LaFave observes that Justice Rehnquist “says *nothing* about the matter of underlying circumstances showing the basis of the conclusion reached by the informant. The informant apparently did not say that he had personally seen the narcotics and gun, nor did he give any other source of his purported knowledge.” Id. at 478. Thus, according to Professor LaFave, Williams “seems not simply to permit a somewhat lesser showing [than the then-prevailing two-prong test of *Aguilar v. Texas*, 378 U.S. 108 (1964)] regarding the basis of the informant’s conclusions; rather, it appears to allow the officer to make a seizure without any such showing at all.” Id.

55 Williams, 407 U.S. at 145-46 (emphasis added).

56 Justice Rehnquist rejected the claim that reasonable cause for an investigatory intrusion could only be based on an officer's personal observations. He explained that informants' tips, like other forms of evidence, "vary greatly in their value and reliability. One simple rule will not cover every situation." Id. at 147. The technicalities of the
did it matter that Williams did not appear to pose a threat to either the officer or anyone else in the neighborhood at the time of the police intrusion.

Williams transformed Terry. After Williams, police officers were free to seize and search suspicious persons to secure identification or to "maintain the status quo" while other information was obtained.\textsuperscript{57} How far the police were free to go in exercising this power was left unknown. What was certain, however, was that probable cause was no longer the touchstone for assessing seizures of individuals.

3. The Right-to-Inquire Moves Beyond the Reach of the Fourth Amendment

Despite the Davis-Williams extension of the right-to-inquire rule, police officers could invoke the rule only when confronting potentially dangerous or suspicious individuals. More importantly, the Court limited the breadth of the rule by recognizing, at least implicitly, that the right-to-inquire impacted upon a citizen's right of locomotion. Police officers were not free to interfere with that right willy-nilly; an officer was required to have objective, articulable reasons to accost someone in a public place. In 1980, however, this requirement changed.

United States v. Mendenhall\textsuperscript{58} moved the right-to-inquire rule entirely out of fourth amendment scrutiny. At the time Mendenhall was decided, Justice Stewart—its author—spoke for only two members of the Court. Subsequently, however, the standards articulated by Justice Stewart would command a majority.\textsuperscript{59} The government initially argued in Mendenhall that its drug courier profile established

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hearsay rule therefore do "not thwart" an officer's right-to-inquire into allegedly suspicious circumstances. \textit{Id.} \\
\textsuperscript{57} \textit{Id.} at 146. \\
\textsuperscript{58} 446 U.S. 544 (1980). \\
\textsuperscript{59} In Florida v. Royer, 460 U.S. 491 (1983), Justice White's plurality opinion held that a seizure occurs when the circumstances of an encounter "amount to a show of official authority such that a reasonable person would have believed he was not free to leave." \textit{Id.} at 502 (plurality opinion) (quoting Mendenhall, 446 U.S. at 554). Justice Blackmun joined the plurality regarding this standard for determining when a seizure occurs. \textit{Id.} at 514 (Blackmun, J., dissenting).

The plurality found that no seizure occurred when two Florida narcotics officers approached and asked to see the defendant's ticket and identification at the Miami International Airport. Royer was approached because he fit a drug courier profile. Justice White explained that "[a]sking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves." \textit{Id.} at 501. In other words, this conduct did not trigger constitutional scrutiny.

Justice White did, however, conclude that when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's li-
reasonable suspicion of criminal conduct. When this argument appeared weak, a new tactic was initiated. The government argued that a police inquiry—asking a person for his identification—was not a seizure under the fourth amendment. Speaking for only himself and Justice Rehnquist, Justice Stewart maintained that this conduct did not constitute a seizure, and thus did not merit fourth amendment scrutiny.

Justice Stewart asserted that precedent supported his conclusion, citing Terry and Brown v. Texas. He explained that Terry had obviously been seized when Officer McFadden "took hold of him, spun him around, and patted down the outer surfaces of [Terry's] clothing." However, Terry did not decide whether any seizure had occurred prior to the pat down; Terry only "'assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred.'" In Justice Stewart's view, this assumption was entirely correct because the Constitution does not "'prevent[] a policeman from addressing questions to anyone on the streets.'" Officer McFadden had a right-to-inquire even if he had no good reason to believe criminality was afoot.

Justice Stewart's reading of Brown v. Texas presaged how far beyond the reach of the fourth amendment the right-to-inquire rule would be placed. In Brown, police officers observed Brown and a companion walking away from each other in an alley located in a high crime area of El Paso, Texas. One officer stopped Brown and asked him to "identify himself and explain what he was doing there." When Brown refused, the officer arrested him. According to Justice Stewart, the officer's accosting of Brown, request for identification, and demand that Brown account for his presence in the alley did not trigger the fourth amendment. In Justice Stewart's words: "Up to this point there was no seizure."
With this view of the Court's precedents, it was easy to see why Justice Stewart believed that the agent's conduct at issue in Mendenhall was not covered by the fourth amendment. Justice Stewart concluded that Mendenhall had not been seized when she was stopped and asked to produce identification by the federal agents. According to Justice Stewart, a reasonable person in Mendenhall's position would have believed that she was free to end the encounter.\textsuperscript{70} The incident occurred in a public place. The agents were not in uniform and did not display weapons. They merely approached Mendenhall, identified themselves as federal narcotics agents, and requested, but did not demand to see Mendenhall's identification.\textsuperscript{71} This conduct, in Justice Stewart's view, did not constitute "an intrusion upon any constitutionally protected interest."\textsuperscript{72}

Justice Stewart's opinion in Mendenhall substantially extended the right-to-inquire rule. First, it made plain that the rule need not be confined to situations involving "suspicious" individuals. Previously, the Terry and Williams Courts agreed that the officers' inquiries had implicated the defendants' fourth amendment rights. The Court had sanctioned these intrusions only because the police had reasonable suspicions to believe that the suspects were armed and engaged in criminal conduct. In contrast, the Mendenhall plurality found that the actions of the police in accosting and addressing questions to a person in a public place did not implicate a citizen's fourth amendment rights. Neither a search nor a seizure had occurred. The agents, therefore, were free to approach, stop, and address questions to Mendenhall (or anyone else) anytime they wished.

Mendenhall also indicated the importance the Court attached to police questioning. Justice Stewart explained that the fourth amendment was not intended to eliminate all contact between police officers and citizens, but only "to prevent arbitrary and oppressive interference" with constitutionally protected interests.\textsuperscript{73} He saw no useful purpose in categorizing every police-citizen encounter as a seizure, and emphasized the harm such an approach would have upon "a wide variety of legitimate law enforcement practices."\textsuperscript{74}

\textsuperscript{70} Id. at 554.
\textsuperscript{71} Id. at 555.
\textsuperscript{72} Id. Justice Stewart did note that seizures may occur even in some situations where the person accosted does not attempt to leave the presence of police officials. For example, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled," might justify a finding that a seizure has occurred. Id. at 554.
\textsuperscript{73} Id. at 553-54 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).
\textsuperscript{74} Id. at 554.
For Stewart, the necessity of policy questioning was undoubted.

Two recent cases, *INS v. Delgado* and *Michigan v. Chesternut,* show how the right of locomotion has been curtailed by the expanded right-to-inquire rule. These cases indicate that citizens no longer have the right to come and go as they please; they only have the right to be free from an unduly intimidating police presence.

*Delgado* upheld the Immigration and Naturalization Service’s (“INS”) use of factory surveys to detect the presence of illegal aliens in American companies. In these surveys, some agents positioned themselves at the exits of a factory, while other agents moved throughout the building randomly questioning employees. The agents approached each employee, identified themselves, and asked several questions about the employee’s citizenship. If credible answers were given, the questioning ceased. If the employee gave an unsatisfactory reply or admitted that he or she was an alien, then the agent requested the employee to show immigration papers.77

Speaking for the majority, Justice Rehnquist began by noting that it was unimportant that the surveys occurred in an area that was inaccessible to the general public.78 Because the agents were lawfully on the premises and other persons were present during the raids, the Court held that the agents’ activities would be judged by the same criteria used to measure street confrontations.

Relying in part on earlier cases, Justice Rehnquist then asserted that the police could question an individual without triggering constitutional scrutiny. The Court held that interrogation “by itself, [does not] constitute a Fourth Amendment seizure.”79 Because many people comply with police requests does not mean these encounters are coercive. A seizure occurs only when the circumstances become “so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.”80 Under this test, police questioning alone does not result in a seizure, and therefore, the police are not required to show objective justification for their actions.81

Justice Rehnquist also rejected the claim that a surprise INS raid constituted a seizure of the entire workforce of a factory. But

77 *Delgado,* 466 U.S. at 212-13.
78 Id. at 217 n.5.
79 Id. at 216.
80 Id.
81 Justice Rehnquist did note that “if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.” *Id.* at 216-17.
recognizing that the unannounced surveys involved "systematic questioning," the stationing of agents at exits, and the "disruption" of the workplace environment. Justice Rehnquist acknowledged—at least indirectly—that the workers' freedom of movement had been restricted. This restriction, however, was constitutionally insignificant because "ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." 83

_Michigan v. Chesternut_ 84 showed how far the police can go to satisfy their curiosity in a street encounter before their actions trigger fourth amendment scrutiny. On a December afternoon in metropolitan Detroit, an officer in a marked patrol car observed a man get out of another car and approach Michael Chesternut. The officer had seen neither of the two men before. Nor did he have reason to suspect them of criminal activity.

When Chesternut saw the patrol car "he turned and began to run." 85 The police chased Chesternut "'to see where he was going.'" 86 The police then caught up with Chesternut and drove alongside him. Eventually, Chesternut pulled packets from his pocket, discarded them, and then stopped running. The officer arrested Chesternut after he examined the packets and found that they contained contraband.

The Court held that the police chase did not constitute a seizure, and thus did not implicate the fourth amendment. Speaking for a unanimous Court, Justice Blackmun explained that bright-line rules were not helpful in deciding when police investigatory pursuits implicate fourth amendment interests. 87 Bright-line rules

82 Id. at 217-18.

83 Id. at 218. Justice Rehnquist was also not bothered by the placing of agents at the exits. The respondents had insufficient proof that the agents' intent was to "prevent people from leaving." Id. Nothing proved that "this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." Id. The INS agents merely questioned workers and arrested those who were illegal aliens. "[C]itizens or aliens lawfully present" had no reason to worry that they would be seized, either inside the factory or at the exits, if they provided "truthful answers," or even if they refused to answer the agents' questions. Id. at 218-19.


85 Id. at 569.

86 Id.

87 The parties had provided the Court with contrasting views on the constitutional validity of investigatory pursuits. According to the Court, the prosecution argued that a lack of objective suspicion would not taint a police chase, "no matter how coercive, as long as the police did not succeed in actually apprehending the individual." Id. at 572. Chesternut maintained that the police "may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity." Id.
were inapposite because "any assessment as to whether police con-
duct amounts to a seizure . . . must take into account 'all the circum-
stances surrounding the incident' in each individual case."\textsuperscript{88} Although he recognized the imprecision of the \textit{Mendenhall} test, Justice Blackmun explained that it was more appropriate than a bright-
line rule because it focused on the entire incident rather than on isolated details.\textsuperscript{89}

Moreover, according to Justice Blackmun, an open-ended test provides flexibility because it lends itself to "consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."\textsuperscript{90} In contrast to a bright-line rule, the open-ended test "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."\textsuperscript{91}

Applying the "reasonable person" test to the facts, the Court ruled that the police chase did not amount to a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [their] freedom of movement."\textsuperscript{92} Justice Blackmun explained that the officers did not turn on their sirens or flashers. They did not order Chesternut to halt. Nor did they display their weapons or aggressively drive their vehicle so as to block Chesternut's path or control his speed. Although the Court conceded that the police conduct could be "somewhat intimidating," it "was not 'so intimidating' that [Chesternut] could reasonably have believed that he was not free to disregard the police presence and go about his business."\textsuperscript{93}

\textbf{B. Common Sense and Law Enforcement Needs Satisfy Fourth Amendment Requirements}

The Court has fashioned standards to govern police conduct that is clearly covered by the fourth amendment, but that falls short of a full-scale arrest or search. These standards also threaten the right of locomotion. Although investigatory seizures directly implicate the fourth amendment, the Court does not evaluate them with traditional fourth amendment rules. Instead, it asks whether the seizing officer exercised common sense and whether her actions promote effective law enforcement.

The Court will not judge police confrontations by what it con-

\textsuperscript{88} \textit{Id.} (quoting INS v. Delgado, 466 U.S. at 215).
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.} at 574.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 574-75.
\textsuperscript{93} \textit{Id.} at 575-76 (quoting INS v. Delgado, 466 U.S. at 216).
siders to be rigid or nuanced rules that constrain officers in the field. "Common sense," rather than technical rules, is the controlling precept. In the Court's view, the fourth amendment does not prohibit intrusive actions that an individual officer reasonably believes necessary to enforce the law. Put another way, the Court will not second-guess police action that advances law enforcement interests so long as the conduct is not shocking. Thus, intrusive actions that can be termed "good police work," or that which appear to be based on good police judgment, will be permitted even though the actions do not fit within traditional categories of permissible police procedures. Typically, these police acts greatly impact the right of locomotion.

The Court intimates that the common sense standard is a product of balancing. Under its traditional balancing test, the Court weighs "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." Although one might expect a rule based upon balancing to contain subtle nuances and gray areas, the common sense standard does not. Instead, it bluntly asks whether challenged police actions promote effective law enforcement. Three cases illustrate the Court's deferential application of this standard.


*United States v. Sharpe* vividly illustrates that police intrusions are no longer controlled by concrete rules. The issue in *Sharpe* was how long an officer, who lacked probable cause to arrest, could detain a person suspected of criminal activity. The defendants urged the Court to put a clear time limit of twenty minutes on a *Terry* seizure. They argued a strict rule is necessary to ensure investigative seizures do not turn into *de facto* arrests.

The *Sharpe* majority saw no need to rigidly limit the length of...
investigatory seizures. The Court conceded that its earlier rulings had caused "difficult line-drawing problems in distinguishing an investigatory stop from a de facto arrest." It also recognized that a "bright line" rule would provide guidance to officers in the field. These concerns, however, did not justify a strict time limitation. Instead of objective rules, "common sense" governs when an investigatory seizure becomes an arrest and violates the fourth amendment.

The Court explained, in the absence of probable cause, its focus would concentrate on "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." Instead of applying tangible criteria, the Court asked whether the police acted diligently. Applying its new test, the Court upheld a twenty-minute detention despite substantial evidence of police carelessness in carrying out the investigation. Moreover, the failure of the police to use less intrusive

98 Sharpe, 470 U.S. at 685.
99 Id.
100 Id.
101 The Court explained that its evaluation of whether a detention was too long would consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id. at 686. For a critical review of Sharpe on this point, see Tracey Maclin, New York v. Class: A Little-Noticed Case with Disturbing Implications, 78 J. CRIM. L. & CRIMINOLOGY 1, 73-83 (1987).
102 See Sharpe, 470 U.S. at 720 (Brennan, J., dissenting). The facts in Sharpe would he almost amusing if one did not fear that similar events occur more often than realized. Drug Enforcement Agent Cooke, patrolling in an unmarked vehicle, observed a pickup truck traveling with a Pontiac on a South Carolina highway. Cooke's suspicions were aroused because the truck appeared heavily loaded. To obtain assistance, he had to radio a South Carolina state trooper because other DEA agents were apparently "sleeping or eating breakfast rather than monitoring their radios for calls." Id. at 716 (Brennan, J., dissenting).

After the officers decided to stop the vehicles, State Patrol Officer Thrasher signaled the Pontiac, the lead vehicle, to pull over. When this occurred, the pickup truck drove between Thrasher's vehicle and the Pontiac, and continued down the highway. Officer Thrasher then followed the truck, while Agent Cooke pulled over the Pontiac.

Cooke secured identification from Sharpe, the driver of the Pontiac. Unable to reach Officer Thrasher, Cooke then radioed local police and requested that two officers "maintain the situation," while Cooke left to find Thrasher. Id. at 678.

In the meantime, Thrasher had stopped the truck driven by defendant Savage. Savage was "ordered out of his pickup truck at gunpoint, spread-eagled and frisked, and questioned" by Thrasher about suspected marijuana in the truck. Id. at 702-03 (Brennan, J., dissenting). Despite the questioning, Thrasher found no grounds to arrest Savage. When Savage asked to be released, however, Thrasher prohibited him from leaving until Agent Cooke arrived.

Approximately fifteen minutes later, Cooke arrived. Cooke put his nose next to the back of the truck and smelled marijuana. He then opened the truck and found several bags of burlap-wrapped bales resembling bales of marijuana. Savage was arrested, and Cooke then returned to the Pontiac and arrested Sharpe. Id. at 679.
investigatory methods was not constitutionally fatal. The Court acknowledged that the length of the seizure remained a consideration in the fourth amendment analysis. The Court made plain, however, that it would not endorse a rule that would jeopardize the "'important need to allow authorities to graduate their responses to the demands of any particular situation.'"

2. An Investigatory Seizure: When Is It Proper for the Police to Seize a Person?

*United States v. Hensley* provides another example of the Court's "'common sense'" approach to analyzing the validity of investigatory seizures. Police officers in Covington, Kentucky conducted a *Terry* stop on the basis of a "wanted flyer" issued by another local police department. The flyer described Hensley and explained that he was sought for investigation of a robbery in St. Bernard, Ohio. Although the flyer warned that Hensley should be considered armed and dangerous, the flyer did not explain why Hensley was suspected of being involved with the armed robbery.

Almost two weeks after the wanted flyer had been issued, Covington police saw Hensley driving a car. Radio communications were initiated to determine whether a warrant had been issued for Hensley's arrest. Meanwhile, Hensley was pulled over. Before leaving his patrol car, the officer was informed by the dispatcher that she had not yet confirmed whether a warrant had issued for Hensley's arrest. The officer approached Hensley with his weapon drawn, and ordered Hensley and a passenger out of the vehicle. The police discovered a gun in the car, and arrested Hensley and his companion on gun possession charges.

As framed by the Court, the question presented was whether "a stop of a person by officers of one police department in reliance on a flyer issued by another department indicating that the person is wanted for investigation of a felony" was permitted under the fourth amendment. Relying on dicta from an earlier case, the Court

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103 *Id.* at 687. According to the Court, "'[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.'" The Court found that the officers acted reasonably because their actions did not involve any "'delay unnecessary to the legitimate investigation of the law enforcement officers.'" *Id.*

104 *Id.* at 686 (quoting *United States v. Place*, 462 U.S. at 709 n.10).


106 Hensley was not arrested or convicted for the armed robbery charge that had provided justification for seizing him in the first place. *See Harper*, *supra* note 95, at 58.

107 *Hensley*, 469 U.S. at 229.

108 The case Justice O'Connor relied upon was *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971). The *Whiteley* Court stated in dicta that when police officers are called to assist another department in executing an arrest warrant, the re-
held that the fourth amendment does not prohibit officers from stopping an individual based upon another department's flyer or bulletin, even when neither an independent magistrate, nor the officer actually making the stop is apprised of the specific facts justifying the seizure.\textsuperscript{109} To the Court, such a rule was a "matter of common sense."\textsuperscript{110} This rule permits reduction of the amount of information transmitted between police departments, and allows police officers to act quickly based on information received from other jurisdictions.

Traditional fourth amendment doctrine usually distinguishes police intrusions based on a magistrate's authorization from warrantless intrusions.\textsuperscript{111} Justice O'Connorexplained that this principle had no constitutional significance in the context of street confrontations. She rejected the argument that while it may be proper for officers to justify an arrest on a report that a warrant has issued, officers should not be permitted to justify an investigatory seizure merely on a report that another department has a reasonable suspicion of criminal activity. For O'Connor, the latter procedure was just as reasonable as the former because it promoted law enforcement interests while only minimally interfering with personal security.\textsuperscript{112}

Thus, officers could—relying on a flyer or bulletin—seize a suspect to check his identification, question him, or inform him that another department sought to question him.\textsuperscript{113} Moreover, because an experienced officer might "assume" that a warrant would have been obtained subsequent to a flyer's issuance, a flyer could "justify a brief detention at the scene of the stop while officers checked whether a warrant had in fact been issued."\textsuperscript{114} Additionally, when Hensley was stopped he exhibited no signs of dangerousness or other criminal behavior. Nevertheless, the Court found nothing

sponding officers "are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." \textit{Id.} at 568. The Court held that the officer who had obtained the arrest warrant had not provided the magistrate with sufficient information to support a finding of probable cause. Therefore, the arresting officer who had relied upon the radio bulletin also did not have sufficient information to effectuate an arrest of Whiteley either. \textit{Id.} 119 \textit{Hensley}, 469 U.S. at 231. 110 \textit{Id.} 111 See \textit{Johnson v. United States}, 333 U.S. 10, 13-14 (1948). 112 \textit{Hensley}, 469 U.S. at 232. 113 Id. Justice O'Connor did not suggest that officers could legitimately stop individuals when the requesting department lacked a sufficient basis for suspecting that the wanted individual committed a crime. \textit{Id.} This concession, however, is not likely to advance fourth amendment interests; in most cases, officers effectuating the seizure will be unable to assess whether the requesting department had sufficient evidence to support their request. 114 \textit{Id.} at 234.
wrong with the officer approaching Hensley's vehicle with his weapon drawn and ordering Hensley and his passenger out of the car. This conduct "was well within the permissible range in the context of suspects who are reported to be armed and dangerous."115


United States v. Sokolow116 is the most recent example of the Court's use of the common sense standard. Although the majority opinion downplayed the fact, the government's so-called "drug courier profile"117 was at stake in this case. Sokolow reaffirmed that law enforcement officials are not required to satisfy concrete standards regarding suspicious behavior prior to investigatory seizure of an individual. Instead, if an officer's common sense suggests that criminality is afoot, the officer is free to effect a seizure.

The government argued in Sokolow that an officer's common sense should determine whether there is a reasonable suspicion that a person is engaged in drug trafficking. The government further claimed that seizures need not be conditioned upon even circumstantial evidence of criminal behavior.118 The drug courier profile at issue was based on "probabilistic evidence," defined by the Ninth Circuit Court of Appeals as "personal characteristics shared by drug couriers and the public at large, but which, when present in sufficient number, arguably serve to identify drug couriers."119 The Ninth Circuit ruled that "probabilistic evidence" alone was not sufficient to create a reasonable suspicion of criminality. Predictably, the government disagreed.120 Finally, the government contended that the judiciary should defer to the common sense of trained law

115 Id. at 235.
117 Id. at 1587. The drug courier profile is "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs." United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980). For a thorough discussion of the profile and its application, see Morgan Cloud, Search and Seizures by the Numbers: The Drug Courier Profile And Judicial Review Of Investigative Formulas, 65 B.U.L. Rev. 843 (1985). Professor Cloud discusses how the Court's previous rulings involving the drug courier profile—Mendenhall, and Florida v. Royer, 460 U.S. 491 (1983)—failed to define the profile's characteristics and did not require proof of the profile's accuracy. Id. at 861-69; see also Kamisar, supra note 60, at 132-39 (arguing that the elements of the profile are insufficient to amount to reasonable suspicion of criminal behavior).
119 831 F.2d at 1413, 1420 (9th Cir 1987), rev'd, 109 S. Ct. 1581 (1989). The Ninth Circuit did rule, however, that probabilistic evidence, when sufficiently documented, can provide the basis for a reasonable suspicion when that evidence is coupled with evidence of ongoing criminal activity, such as evasive conduct or use of an alias. Id.
120 Cf. Lincoln Caplan, The Tenth Justice 69 (1987) (describing the success of
enforcement officers in deciding who should be seized as a suspected narcotics trafficker. The Court found this argument convincing.

Sokolow indicated that the reasonable suspicion standard should be applied ungrudgingly in evaluation of the type of evidence that law enforcement officials must possess before conducting a seizure. On the quality of evidence, the Court explained that an officer is free to use seemingly innocent behavior as a part of his calculus in deciding to make a seizure. The Court also made clear that there need not be a direct correlation between an officer’s observations and the suspected crime. Officers are free to rely on their common sense to evaluate a suspect’s personal appearance or habits. The Court was unwilling to require that the factors relied upon actually verify criminal conduct.

III
A Critique of the Street Encounter Cases

Having traced the developments restricting the right of locomotion, this Article next asks whether the justifications offered by the Court for restricting that right are consistent with the Court’s commitment to prevent arbitrary and oppressive police behavior. This section critiques the Court’s police-citizen encounter cases from the perspective of the individual subject to a police confrontation and from a traditional legal perspective.

Solicitor General Rex Lee in persuading the Supreme Court to overturn Ninth Circuit rulings. As Caplan recounts:

In the 1983 Term, the Supreme Court reversed the Ninth Circuit in twenty-seven out of twenty-nine cases. The Justices reviewed fourteen of those cases in part because Lee asked them to—he had filed twice as many petitions from rulings of that circuit as he had from the next highest circuit on the list.

Id. (footnote omitted).

121 See Brief for Appellant at 37, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295).
122 Sokolow, 109 S. Ct. at 1587.
123 Id.
124 The Chief Justice concluded there were adequate grounds to suspect that Sokolow was a drug courier. It was “out of the ordinary” to pay $2,100 in cash for two airplane tickets, and even “more out of the ordinary” to pay that sum from a roll of $20 bills containing nearly twice that amount of cash. Id. The Chief Justice also felt that the facts—although “by no means conclusive”—were sufficient “to warrant consideration” that Sokolow was traveling under an alias. Id. Finally, the Chief Justice explained that Sokolow’s destination—Miami—while not ordinarily suspicious in itself, was cause for concern due to the brevity of Sokolow’s trip. Id. When considered together, these factors provided sufficient suspicion for a seizure, even though each factor by itself was not indicative of criminality, and particular factors match the characteristics of many innocent travellers.
A. The Right-to-Inquire Rule and Fourth Amendment Principles

Neither the basic premises of the right-to-inquire nor its impact on the right of locomotion has been analyzed. This subsection will analyze several neglected objections to the right-to-inquire rule. First, there is no constitutional or precedential authority for the original rule or its later manifestations. In the Court's rush to sanction the rule, it ignored established precedents and standards securing the freedom of movement that the fourth amendment guarantees all citizens. Second, the right-to-inquire rule does not check police discretion. Proponents of the rule, both on and off the Court, have yet to demonstrate how the rule can be employed without leaving citizens at the mercy of the police. Third, pressure to retain and expand the rule has forced the Court to adopt unrealistic and deceptive standards to resolve the question of when a person has been seized within the meaning of the fourth amendment. Finally, the right-to-inquire rule has always been more concerned with police interests than with the rights of citizens. This perspective undermines the fourth amendment, which emphasizes the rights of the individual, not police efficiency.

1. The Right-to-Inquire Rule and Precedent

The first objection to the right-to-inquire rule concerns its doctrinal foundation. Because the Court never explained the basis for the original rule, it has never had to justify the rule's subsequent expansion. As a result, subsequent and drastic manifestations of the rule appear to flow naturally from a standard that was never reconciled with the fourth amendment. Moreover, this inattention to history and precedent—begun in Terry—established a trend that has been carried too far.

Justice Burton's call for a right of inquiry in Brinegar had no support in Court precedent when it was made. As the Brinegar majority recognized, the Court's prior cases had emphatically stated that all persons were free to travel the Nation's streets without interruption or search, unless there was probable cause to believe that

125 Although the Court had not endorsed seizures on less than probable cause, the authors of the Uniform Arrest Act proposed that police officers be permitted to stop any person who they reasonably suspected had committed, or was about to commit a crime. An officer would be permitted to detain the suspect and "demand of him his name, address, business abroad and whither he is going." See Sam B. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 321 (1942) (quoting § 2(1) of the Uniform Arrest Act). Professor Foote has described why this section of the Uniform Arrest Act is inconsistent with fourth amendment principles. See Caleb Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest, 51 J. CRIM. L. & CRIMINOLOGY & POL. SCI. 402, 404-05 (1960).
the detained person had committed a crime.\(^{126}\) Twenty years after Brinegar, Justice Fortas raised the issue again in Wainwright.\(^{127}\) By this time, the Court was well on its way to granting the police broad new powers in Terry. The Court, however, still had not established either an historical or a precedential basis for police interruptions and seizures of a person without probable cause.

Indeed, when the Court squarely confronted the issue in Terry, its prior cases pointed toward rejecting government claims that an officer could stop and question a citizen based upon behavior shy of probable cause. A decade before Terry, in Henry v. United States,\(^{128}\) the Court stated that probable cause had always been an essential linchpin of fourth amendment jurisprudence. The Court explained that cases decided both before and after adoption of the fourth amendment established that "common rumor or report, suspicion, or even 'strong reason to suspect'" was not a sufficient basis to justify the seizure of an individual.\(^{129}\) In the years between Henry and

\(^{126}\) Brinegar v. United States, 338 U.S. 160, 177 (1949); see also Carroll v. United States, 267 U.S. 132, 153-54 (1925). For an interesting historical discussion of the power of the police to detain for investigation on less than probable cause, see Brief for the NAACP Legal Defense And Education Fund, Inc., as Amicus Curiae at 12-20, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67) [hereinafter Brief for the NAACP].

\(^{127}\) See supra notes 37-41 and accompanying text. In the interim between Justice Burton's and Justice Fortas's opinions on a right of inquiry, Justice Clark, in a brief dissent joined by Chief Justice Warren, took the position that the fourth amendment did not preclude stopping the occupants of an automobile whose "suspicious activities" were observed during a prolonged surveillance by government agents. See Henry v. United States, 361 U.S. 98, 104-06 (1959) (Clark, J., dissenting).

Professor Tiffany has shown that the government's brief in Rios v. United States, 364 U.S. 253 (1960), "took the position that the Court should give express recognition to the right of police officers to stop persons for interrogation when adequate grounds for an arrest do not exist." Tiffany, supra note 33, at 402.

For an argument that Rios represented a clear "repudiation" of the underlying premises of the stop and frisk and right to inquire rules, see Brief for the NAACP, supra note 126, at 20 n.36.


For a more general criticism of Henry that takes issue with the "all or nothing approach" that required the police to have probable cause before investigating suspicious activities, see Edward L. Barrett, Jr., Personal Rights, Property Rights, and the Fourth Amendment, 1960 Sup. Cr. Rev. 46, 59-67. Professor Barrett criticized the pre-Terry state of fourth amendment jurisprudence involving street detentions. He argued that cases like Henry and Rios v. United States, 364 U.S. 253 (1960), put pressure on the police "to make arrests too early in the investigative process," id. at 66, and at the same time, did not allow the police sufficient leeway to investigate suspicious activities unless they had probable cause for arrest. Professor Barrett argued the police should be free to conduct what he considered to be "relatively minor interference[s]" with personal liberty where they had sufficient grounds for suspecting criminality. Id. at 64. It should be noted, however, that Professor Barrett's "balancing" approach also generated scholarly criticism. See Herman Schwartz, Stop and Frisk (A Case Study in Judicial Control of the Police), 58 J. CRIM. L. & CRIMINOLOGY & POL. SCI. 433, 448-49 (1967).
Terry, the Court twice reaffirmed the principle that probable cause was required to validate a seizure of the person. Thus, Justice Douglas had the weight of authority on his side when, dissenting in Terry, he insisted that the police were constitutionally required to possess probable cause before effectuating a seizure.

Davis v. Mississippi and Adams v. Williams, the immediate offspring of Terry, also played “fast and loose” with precedent; in the process, both cases solidified and expanded the right-to-inquire rule. In Davis, Justice Brennan should have seen that the government’s interest in obtaining the fingerprints of those only vaguely suspected of a crime was far less compelling than the government interest at stake in Terry. In Terry, immediate and compelling interests in crime prevention and officer safety arguably justified an exception to the fourth amendment’s traditional safeguards. Davis, of course, involved no comparable circumstances.

131 Terry, 392 U.S. at 37 (Douglas, J., dissenting). Justice Douglas complained that the upshot of Terry is “that the police have greater authority to make a ‘seizure’ and conduct a ‘search’ than a judge has to authorize such action.” Id. at 36.
132 394 U.S. 721 (1969); see supra notes 51-52 and accompanying text.
133 407 U.S. 143 (1972); see supra notes 53-56 and accompanying text.
134 As commentators have noted, Terry involved a special “rubric of police conduct,” 392 U.S. at 20, that went beyond a general interest in law enforcement. See, e.g., LaFave, supra note 37, at 66 (Terry expressly deals only with the prevention of crime, and not with the detection of crime; Officer McFadden “feared that a crime was about to be committed.”).
135 A concern for police safety undoubtedly motivated Justice Harlan’s comment that “[t]here is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.” Terry, 392 U.S. at 33 (Harlan, J., concurring). See also B. Schwartz, supra note 50, at 685-93 (describing various draft opinions in Terry that focused on the authority of police officers to frisk persons even in the absence of probable cause).

Justice Harlan and the Court were quite right to be concerned with officer safety. However, Justice Harlan’s comments do not show full appreciation of the other side of police confrontations. Professor Schwartz demonstrated—at least in the New York cases decided prior to Terry—that the police frisk was “generally used for much more than self-protection.” Schwartz, supra note 129, at 443-44 (police use frisks to gather evidence, confiscate weapons, and to maintain image of authority on the streets). This “invisible” side of police frisks has been, and continues to be, abused by police officers. See Peter S. Canellos, Police Searches Questioned, Boston Sunday Globe, Jan. 14, 1990, at 1, col. 1.
136 Indeed, 16 years after Davis was decided, Justice Brennan noted that the law enforcement interests that supported the holding in Terry were inapposite to support the intrusion associated with in-the-field fingerprinting. Hayes v. Florida, 470 U.S. 811, 819 (1985) (Brennan, J., concurring).

Moreover, the balancing formula that is typically asserted to justify investigatory seizures is especially dangerous to fourth amendment values. Cf. Barrett, supra note 129. According to Terry, 392 U.S. at 21, the precedent for this balancing model was Camara v. Municipal Court, 387 U.S. 523 (1967). Camara sanctioned the use of adminis-
In *Williams*, Justice Rehnquist asserted:

*Terry* recognizes that it may be the essence of good police work to adopt an "intermediate response". . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily *while* obtaining more information, may be most reasonable in light of the facts known to the officer at the time.137

*Terry*, however, provided no support for the notion that the fourth amendment permits the police to adopt an "intermediate response" whenever they are investigating supposedly suspicious persons. The only intermediate response approved in *Terry* was the use of a frisk for weapons when an officer believed he was confronting an armed person.138 *Terry* never authorized a general power to investigate suspicious persons.139

Although *Williams*'s distortion of *Terry* is regrettable, its approval of a police right to seize suspicious persons in order to check administrative search warrants not supported by the traditional quantum of probable cause required for criminal searches. *Id.* at 538-39. A balancing process may be legitimate in the administrative search context. See Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Sup. Ct. Rev. 1, 20. However, in street encounter cases, using a balancing process "stacks the cards" against the fourth amendment.

In the last decade, prosecutors have had little trouble persuading the Court that the public's interest in law enforcement and police safety justifies relaxing fourth amendment protections. The one notable exception to this phenomenon was *Brown v. Texas*, 443 U.S. 47 (1979), discussed *infra* notes 327-32 and accompanying text.

The government's success before the Court should have come as no surprise. Whenever the Court balances the competing interests involved in investigatory intrusions, the government's interests will always be substantial and will likely seem more compelling than those of the defendant, at least to the Court. Indeed, one would hardly expect the Court to sympathize with the fourth amendment interests of those typically subjected to police confrontations. *Cf. Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 100 (1988) (judges are unlikely to reflect popular opinions since "judicial decisions simply reflect the judgments of judges—judgments based on their own values and their own assessments about whether people like themselves will suffer privacy losses.").

Unfortunately, when the Court's balancing formula is so predictably slanted in favor of the government, and the potential for abuse by police officials is obvious, the balancing process itself can no longer be relied upon to produce legitimate results. *Cf. Amsterdam*, *infra* note 154, at 437 (When police officials extend their power under the stop and frisk doctrine in excess of legitimate needs for safety, "the power makes the intrusion without justification and destroys the balance.").

137 *Williams*, 407 U.S. at 145-46 (emphasis added) (citations omitted).
139 *See* John M. Burkoff, *Non-Investigatory Police Encounters*, 13 Harv. C.R.-C.L. L. Rev. 681, 684 (1978) (*Terry* approved only the narrowest class of investigative seizures; it did not sanction strategic or preventive encounters). Indeed, the Court itself recognized the narrowness of *Terry*’s actual holding in *Morales v. New York*, 396 U.S. 102 (1969) (per curiam). In *Morales*, the Court noted that the New York Court of Appeals’ ruling that the police “may detain [persons] for custodial questioning on less than probable cause for a traditional arrest . . . *goes beyond* our . . . decisions in *Terry v. Ohio* and *Sibron v. New York* and is claimed by petitioner to be at odds with *Davis v. Mississippi.*” *Id.* at 104-05 (citations omitted) (emphasis added).
identification or gather information debilitates the view of the fourth amendment established in *Brinegar v. United States.*

A comparison of *Williams* and *Brinegar* reveals how far the right-to-inquire rule undermines the fourth amendment’s protection against arbitrary police tactics. Justice Rutledge explained in *Brinegar* that the probable cause rule was intended to “safeguard citizens from rash and unreasonable *interferences* with privacy and from unfounded charges of crime.”

He acknowledged that police are often confronted with dubious conduct while on patrol, and constitutional standards must therefore make room for mistakes. “But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”

A lesser requirement would “leave law-abiding citizens at the mercy of the officers’ whim or caprice.”

In a key passage, Justice Rutledge stated that the “troublesome line” often posed is deciding “between *mere suspicion* and probable cause.” According to Justice Rutledge, “[t]hat line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.” In the end, however, where a citizen manifests “no good cause” for the police to believe he is engaged in criminality, although he acts suspiciously, he “is entitled to proceed on his way without interference.”

The essence of Justice Rutledge’s discussion was that the fourth amendment safeguards the liberty and personal security of individuals from all unreasonable police intrusions. When a person leaves the privacy of his home, he does not leave behind his fourth amendment rights. Instead, the amendment assures the citizenry a right of locomotion, which means the right to come and go free from unfounded police intrusions. According to *Brinegar,* although the line separating mere suspicion and probable cause may be blurred at times, especially in street encounters, the judiciary must provide a demarcation point. Only those intrusions premised upon sufficient facts pointing to probable guilt fall on the constitutional side of the line.

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141 *Id.* at 176 (emphasis added).
142 *Id.* For a recent application of the Court’s willingness to tolerate “reasonable” mistakes in the fourth amendment context, see Maryland v. Garrison, 480 U.S. 79 (1987).
143 *Brinegar,* 338 U.S. at 176.
144 *Id.*
145 *Id.* (emphasis added).
146 *Id.*
147 *Id.* at 177 (emphasis added) (footnote omitted).
148 See Brief for the NAACP, *supra* note 126, at 27. The NAACP asserted:
Furthermore, Justice Rutledge's distinction between probable cause and mere suspicion cannot be dismissed just because *Williams* involved a brief stop, while *Brinegar* involved a full-scale search and arrest. The issue in *Brinegar* was whether government agents had sufficient grounds even to stop Brinegar's car. Under the Court's reasoning, if probable cause did not exist, Brinegar would have been "entitled to proceed on his way without interference."  

Nor did Justice Rehnquist explain in *Williams* why *Brinegar*’s reasoning is no longer pertinent. In either the initial stages of an arrest or the first steps in securing the identification of a citizen, if an officer's actions are premised on only a suspicion of wrongdoing, in the end, the citizen is left at "the mercy of the officers' whim or caprice."  

Probable cause is addressed bluntly to the issue of particularized justification that is the Fourth Amendment's first principle. As it has developed judicially, the phrase connotes exactly that quantum of evidence pointing to likely or probable guilt that serves to single out an individual reasonably persuasively from the mass of men. It is the standard designed to distinguish him from Everyman with sufficient sureness that, if the individual's arrest or search be authorized, Everyman's arrest or search will not be authorized by parity of reasoning.

*Brinegar*, 338 U.S. at 177 (emphasis added) (footnote omitted).

*Id.* at 176. One noteworthy example of how the expansive language in *Adams v. Williams* has been used to authorize police searches broader than that contemplated by *Terry* is State v. Flynn, 92 Wis. 2d 427, 285 N.W.2d 710 (1979), cert. denied, 449 U.S. 846 (1980). *Flynn* held that the fourth amendment did not preclude a police officer, who had reasonable suspicion for detaining two suspects, from forcibly seizing and searching the wallet of one of the suspects in order to check his identification. *Id.* at 448-49, 285 N.W.2d at 718-20. Reasonable suspicion was based on the fact that Flynn's companion, Daniel Liesch, fit the description of the suspect in a nearby burglary. *Id.* at 431, N.W.2d at 711. Liesch complied with the officer's request for identification, but Flynn refused. The officer then explained his reasoning for requesting Flynn's identification, but Flynn still refused to comply with the request "becoming verbally abusive as he did so." *Id.* at 431, 285 N.W.2d at 712. The officer then frisked Flynn and removed a wallet and a pair of long-nosed pliers from Flynn's pocket. *Id.* at 431-32, 285 N.W.2d at 712. A search of the wallet revealed Flynn's identity. A radio check established that Flynn was wanted for an earlier crime, and the officer arrested him. *Id.*

After determining that the officer had reasonable grounds for frisking the suspects for weapons, the Wisconsin Supreme Court then addressed whether a search for identification was permissible where the police lacked probable cause of criminal conduct. *Id.* at 436-37, 285 N.W.2d at 714. Relying on both the assertion in *Williams*, 407 U.S. at 145-46, that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information" might be reasonable under certain conditions, and Wisconsin's stop and identify law, Wis. Stat. Ann. § 968.24 (West 1989), which authorizes an officer who reasonably suspects that a person has committed a crime to "demand the name and address of that person and an explanation of his conduct," the court concluded that a search for identification did not violate the fourth amendment. *Flynn*, 92 Wis. 2d at 441, 285 N.W.2d at 716. The court reasoned:

Unless [an] officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all... Ignorant of even the person's name, the officer must either attempt to follow the
Court sought to establish that seizing a suspicious person in order to determine his identity or to maintain the status quo was reasonable, it chose the wrong case to illustrate the rule. As Justice Marshall's dissent noted, it was "clear that the officer intended to make the search as soon as he approached [Williams]. [The officer] asked

suspect in the hope that he will discover some clue as to his identity, or surrender the potential lead and continue his investigation along other lines. Particularly where the officer is confronted with a number of potential suspects, limiting his options in this manner could have a perplexing effect on law enforcement efforts.

Id. at 442, 285 N.W.2d at 716 (footnote omitted).

The court went on to note that acceptance of Flynn's claim that "the officer can stop [a] suspect and request identification, but that the suspect can turn right around and refuse to provide it" would reduce the authority granted to police officers by Williams and Wisconsin's stop and identify law to a "mere fiction." Id. at 444, 285 N.W.2d at 717-18.

The court also thought it "significant" that Flynn could have "substantially avoided the intrusion simply by producing the identification himself as his companion did... . It was his unreasonable refusal to do so that led to the police conduct of which he now complains." Id. at 448, 285 N.W.2d at 719. This sort of reasoning is inevitable when the Supreme Court plays "fast and loose" with fourth amendment principle; the message sent to state and lower federal courts is that they can do the same. First, the result sanctioned in Flynn flies directly in the face of Court precedent. Although the Wisconsin Supreme Court thought otherwise, id. at 449, 285 N.W.2d at 720, its decision in Flynn contradicts the United States Supreme Court's ruling in Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979), reh'g denied, 444 U.S. 1049 (1980), which stated unambiguously that "[n]othing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons." (emphasis added).

Ybarra cannot be distinguished by claiming that it did not address the narrower issue presented in Flynn. Ybarra made it absolutely plain that where probable cause of criminal behavior is absent, a search of person is permissible only where the police believe a suspect is armed and presently dangerous. Ybarra, 444 U.S. at 92-93. If a search for weapons is prohibited absent a reasonable belief that the suspect is armed and dangerous, a search for identification is equally impermissible (if not more so) because the government's interest in protecting the officer's safety—the only interest which justifies the search—is not implicated in a search for identification.

Second, the result in Flynn cannot be defended because of the so-called "need" for the particular intrusion involved, or the "perplexing effect" a contrary rule would have for law enforcement. Cf. 3 W. LaFave, supra note 54, § 9.4(g), at 544. Professor LaFave argued:

But even though some detentions for investigation must be terminated as inconclusive, termination without even ascertaining the identity of the suspect is another matter. Without even that bit of information, subsequent apprehension of the released suspect, if he is later shown to have perpetrated the suspected crime or some other offense, will usually be impossible.

Id. (footnote omitted).

The "necessity" argument is always attractive because fourth amendment cases generally involve unattractive characters. However, "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power." Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). It is a truism that fourth amendment safeguards undermine certain law enforcement activities. That is the point of the provision. Blaming the victim of an unconstitutional police intrusion is hardly a convincing analysis.
no questions; he made no investigation; he simply searched."\textsuperscript{151}

In its rush to secure a rule permitting the police the right-to-seize, \textit{Williams}, like \textit{Davis} and \textit{Terry} before it, refused to follow the Court’s precedents dealing with seizures of citizens. Unfortunately, the Court did not bother to examine either the rule’s origin or its impact on the right of locomotion. Perhaps the Court’s oversight was intentional. Recognizing a broad right-to-inquire rule inevitably would conflict with fundamental constitutional precepts. Nevertheless, the Court may have believed the benefit of the rule was worth the cost in constitutional freedom. Sanctioning a right-to-inquire rule ushered in a “new regime”\textsuperscript{152} the individual on the street could no longer look to the fourth amendment as guaranteeing a right of locomotion.

2. The Right-to-Inquire Rule Does Not Check Police Discretion

A second objection to the right-to-inquire rule is its failure to sufficiently check police discretion. Although commentators have disagreed on the relevance of the fourth amendment’s historical background to today’s law enforcement problems,\textsuperscript{153} most agree the provision was intended to protect the citizenry from unjustified and arbitrary intrusion by the government.\textsuperscript{154} The Court’s development


\textsuperscript{152} Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

\textsuperscript{153} Some scholars have argued that the original intent of the framers of the fourth amendment provides scant help in resolving current constitutional dilemmas. See, e.g., Wasserstrom & Seidman, supra note 136, at 85 (“[T]here is no way to know how the framers would make [the] assessment [of what makes a search or seizure reasonable] in our crime-riddled society, in which, for many, the greatest threat to privacy is criminals, not the police.”).

\textsuperscript{154} Professor Amsterdam has explained that the framers of the fourth amendment sought to prohibit “indiscriminate” government intrusions for two reasons: The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against \textit{unjustified} searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the
and application of a right-to-inquire rule allows unjustified police intrusions, thus jeopardizing the historic values underlying the fourth amendment.

From its inception, the right-to-inquire rule was flawed because the Court provided little guidance on how the rule would work within the dynamics of a police-citizen encounter. In Brinegar, Justice Burton stated that the public interest in law enforcement requires the police to investigate whenever there are reasonable grounds for an investigation.\textsuperscript{155} While Justice Burton’s words may be stirring, his judicial reasoning is unconvincing. The facts justifying a stop of Brinegar were, at best, slim.\textsuperscript{156} In essence, Brinegar was seized because he had a reputation for running liquor.\textsuperscript{157} Justice Burton, however, contended that the agents’ aggressive conduct was appropriate because it interrupted a criminal act, and that nothing had occurred to lessen the original suspicion of the agents.\textsuperscript{158}

This reasoning begs the question. Justice Burton simply assumed that it is constitutionally reasonable to seize citizens with unsavory reputations. Justice Burton concluded that once the agents decided that Brinegar’s reputation as a bootlegger justified the stop, they were free to use almost any means to accomplish their mission. This included forcing Brinegar’s car off the road and interrogating him to the point of eliciting a supposedly “voluntary response”\textsuperscript{159} that his car contained some liquor.\textsuperscript{160} Apart from the fifth amendment concerns raised by this conduct,\textsuperscript{161} fourth amendment inter-

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  \item[156] Federal agents had spotted Brinegar’s car traveling west a few miles from the Missouri-Oklahoma line. \textit{Id}. at 162. One of the agents had arrested Brinegar five months earlier for illegally transporting liquor, although that arrest had not yet resulted in a conviction on any charges, and its validity had not been resolved. \textit{Id}. at 186 (Jackson, J., dissenting). This same agent, on two occasions, had seen Brinegar loading liquor into a car in Joplin, Missouri, a perfectly legal act since Missouri was not a “dry” state. \textit{Id}. at 168. The only objective fact offered by the agents was that Brinegar’s car appeared “heavily loaded” and “weighted with something,” \textit{id}. at 163, a claim that is essentially unreviewable.
  \item[158] Brinegar, 338 U.S. at 179.
  \item[159] \textit{Id}.
  \item[160] \textit{Id}. at 178.
  \item[161] Professor Edwin J. Butterfoss, in his Article \textit{Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins}, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988), provides an excellent analysis of the fifth amendment concerns presented in police-citizen encounters. He describes how courts have “greatly expanded the category of nonseizures by ignoring the fifth amendment implications of encounters involving an
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\end{footnotesize}
ests suffer when the police are licensed to utilize coercive tactics whenever their suspicions are aroused. As Justice Jackson observed in dissent, when the agents “ditched” Brinegar’s car, “they were either taking the initial steps in arrest, search and seizure, or they were committing a completely lawless and unjustifiable act.”

Justice Fortas’s version of the right-to-inquire provides no better check on police discretion. In *Wainwright*, he argued that where there is “adequate cause” for believing a citizen fits the description of a suspect, the fourth amendment does not prevent aggressive police inquiries. Justice Fortas, however, never explained the meaning of “adequate cause.” He suggested that the officers who accosted Wainwright had sufficient information to question him. This suggestion seems implausible; the police department conceded that the arresting officers could not have identified the wanted murder suspect even if they saw him. Wainwright was accosted, and eventually arrested, because he vaguely resembled a suspect whom the officers themselves could not have identified.

Under traditional standards, Wainwright’s arrest was a blatant violation of the fourth amendment. Justice Fortas, however, used a right-to-inquire rule to analyze the police actions. He found nothing improper with the arrest of Wainwright after he failed to produce sufficient identification, and refused to let the police individual suspected of criminal activity.” *Id* at 441. Professor Butterfoss explains that an officer’s aim in the typical encounter is “to have the suspect incriminate herself ‘voluntarily’ by confessing, providing an explanation that heightens the level of suspicion, or consenting to a search.” *Id.* at 468.


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164 See Record at 24-25, *Wainwright* (No. 13) (testimony of Lieutenant Francis Martello) (“Q. Were there any members of the New Orleans Police Department who, to your knowledge, could have identified this murder suspect had they seen him? A. No. Not by sight but by investigation. In the line of investigation.”).
165 See Record at 36-37 (testimony of Officer John Ottesen) (“Q. Why did you notify the Detective Bureau? A. They had specifically asked us to check the vicinity of the French Quarter for a suspect wanted in a murder case. Q. Why did you call them? A. Suspect fitted [sic] the description of the wanted subject. Q. Did you call them to send someone? A. They had a better knowledge of the person than we had.”).
166 The police stopped Wainwright on the street. He “told the officers that he had identification at home but not on his person. He gave them his name and address, and informed them he was a law student and was on his way to get something to eat.” *Wainwright*, 392 U.S. at 600 (Warren, C.J., dissenting). Thus, Justice Fortas was not entirely correct when he stated that Wainwright “produce[d] no identification.” *Id.* at 599 (For-
examine his body in order to dispel their suspicions.\textsuperscript{167} Justice Fortas flirted with the view that anyone accosted by the police on the street had better be prepared to fully submit to police orders, or risk the "serious personal intrusion" associated with an arrest and trip to the stationhouse.\textsuperscript{168} Under this view, acquiescence to police orders is required "regardless of the presence or absence of adequate cause for police action."\textsuperscript{169}

A quick response to this disturbing reasoning is that one should not and "cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."\textsuperscript{170}

Justice Fortas's position reveals the potential for abuse inherent in the right-to-inquire rule. If the police know that they are free to groundlessly accost citizens, and that any resistance to these arbitrary stops permits arrest, the temptation to use this authority will be considerable.\textsuperscript{171} The likely reward for those few citizens courageous enough to resist the police\textsuperscript{172} will be the indignity of arrest. The rest of society, innocent and guilty, will be required to submit to arbitrary insults to individual sovereignty.\textsuperscript{173} This cannot be the

\textsuperscript{167} Had the police examined Wainwright's body, they would have found that his left forearm did not have a tattoo.


\textsuperscript{169} \textit{Wainwright}, 392 U.S. at 599 (Fortas, J., concurring).

\textsuperscript{170} \textit{Id.} at 614 (Douglas, J., dissenting) (quoting Wright v Georgia, 373 US. 284, 291-92 (1963)); cf. Michigan v. DeFillippo, 443 U.S. 31, 45 (1979) (Brennan, J., dissenting). In \textit{DeFillippo}, a Detroit ordinance criminalized a person's refusal to identify himself to a police officer where the officer had reasonable cause to believe the person's conduct warranted further investigation. Justice Brennan argued that the ordinance "commands that which the Constitution denies the State power to command and makes 'a crime out of what under the Constitution cannot be a crime.' " \textit{Id.} at 45 (quoting Coates v. Cincinnati, 402 U.S. 611, 616 (1971)).

\textsuperscript{171} \textit{Cf.} Schwartz, \textit{supra} note 129, at 453 n.146 (describing how police officers do not necessarily mind resistance during investigatory detentions, and, at times, may even encourage it).

\textsuperscript{172} That few persons are willing to disregard a police officer was vividly recounted in Professor H. Richard Uviller's recent book, \textit{Tempered Zeal} (1988). Professor Uviller's observations reveal that the "\{m\}anifest confidence [exuded by the police] begets submission, and the cops learn the firm tone and hand that informs even the normally aggressive customer of the futility of resistance. It's effective. In virtually every encounter I have witnessed, the response of the person approached was docile, compliant, and respectful." \textit{Id.} at 16.

\textsuperscript{173} Justice Jackson's comments on the fragility of citizens' personal security cogently illustrate the point. He noted that under our constitutional system, "freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection." \textit{Brinegar v. United States}, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). He explained that an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervi-
scenario envisioned by the framers of the fourth amendment.\textsuperscript{174}

Of course, some contend that ensuring the safety of police officers warrants granting individual officers substantial discretion to decide how a particular investigation should proceed.\textsuperscript{175} Society unarguably has a strong interest in protecting police officers when they are investigating criminal activity. What is debatable, however, is whether society's need for effective law enforcement requires presumably innocent citizens to obey all police officers' commands. No one has shown that the police need this amount of authority to safely fulfill their duties. What the Court has overlooked, and continues to ignore, is that the power given to officers in cases like Williams is subject to considerable abuse.\textsuperscript{176}

When an officer has legitimate grounds for taking custody of a person, she should be provided sufficient leeway to respond to the exigencies of the situation.\textsuperscript{177} But when the officer lacks any individualized suspicion of wrongdoing, surely a citizen's refusal to
comply with the officer's command is no justification for escalating
the intrusiveness of the encounter.

Advocates of a right-to-inquire rule have never reconciled the
contradiction between police officers' authority to pursue investiga-
tory seizures and the fourth amendment's mission of adequately
checking official discretion. Justice White, a strong proponent of
the rule, has always believed that the fourth amendment does not
limit a police officer's right to accost and question a person in pub-
lic. Furthermore, Justice White believes an officer's authority ex-

dands considerably where "proper circumstances" exist. Indeed,

for Justice White these circumstances permit a frisk even if no ques-
tions are asked.

The difficulty with this approach is defining "proper circum-
stances." Do proper circumstances exist where an unknown black
male walks late at night in an all-white suburb? Do they exist
where officers observe a person resembling a murder suspect, and
the person refuses to cooperate when the officers demand that he
account for his presence? Are protective frisks appropriate where

two officers encounter a group of youths loitering on the street in a
neighborhood known for drug and gang violence among teenagers?
In this last case, Justice White's opinions suggest that a frisk will be
constitutional even if the officers ask no questions before the frisk,
and find no weapons.

In each of these situations, the police lack any specific justifica-
tion to make a stop—other than their own bias or subjective views.
Yet, today, when many law-abiding persons feel afraid to

plain that reasonableness depends on not only when a seizure is made, but also how it is

See Florida v. Royer, 460 U.S. 491, 497-98 (1983) (plurality opinion); Terry v.

Terry, 392 U.S. at 34-35.

Id.

Cf. Dan Stormer & Paul Berstein, The Impact of Kolender v. Lawson on Law En-
forcement and Minority Groups, 12 Hastings Const. L.Q. 105 n.4 (1984) (detailing the

testimony of one police officer who described how he saw Lawson "dancing" on the
street). In Lawson, the officer then detained and questioned Lawson. Later the officer
testified: "I thought if a pedestrian was to walk by, possibly just by [Lawson's] actions
or what I observed, that [Lawson] could have assaulted a pedestrian."


Terry, 392 U.S. at 34-35 (A frisk may "serve preventive ends because of its unmis-
takable message that suspicion has been aroused." Justice White's comments on the
beneficial aspects of certain types of "aggressive patrol" practices by the police may have
been intended to separate himself from the Terry majority's cautious criticism of such
police practices. See id. at 12-15.).

Professor Davis has documented how the subjectivity of individual officers can
influence law enforcement practices. See KENNETH DAVIS, POLICE DISCRETION (1975).
Professor Davis described how many Chicago police officers divided society into two
classes of people: "the 'kinky' (criminal) class and the law-abiding class. The officers
walk the streets of their own neighborhoods, too many will feel that “proper circumstances” almost always exist.\footnote{185}

3. The Right-to-Inquire Rule’s Distortion of the Meaning of Seizure

The right-to-inquire rule has forced the Court to adopt unrealistic and deceptive standards for deciding when a person has been seized for fourth amendment purposes. Analysis in this area has produced holdings that undermine the principle of reasoned decisionmaking.

The roots of the problem can be traced to \textit{Terry}. In \textit{Terry}, the government argued that police conduct that detains a person, but falls short of a traditional arrest, is not a “seizure” within the meaning of the fourth amendment. The \textit{Terry} Court “emphatically reject[ed] this notion.”\footnote{186} It explained that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”\footnote{187} Although the Court stressed this definition of “seizure,” it did not clearly apply its definition to the facts at hand. The Court claimed that it could not determine whether any seizure occurred before Officer McFadden physically contacted Terry. Consequently, it assumed that before McFadden frisked Terry, “no intrusion upon constitutionally protected rights had occurred.”\footnote{188}

The Court’s uncertainty seems strained. If, as the Court stated, a seizure occurs whenever an officer accosts a citizen and restrains his or her freedom, then Terry and his companions were seized prior to the frisk. After watching Terry and his friends for ten to twelve minutes, Officer McFadden decided “the situation was ripe for direct action.”\footnote{189} He “approached the three men, identified can tell which are which by physical characteristics and appearance—mostly hair and dress, but also the look in the eyes. The working principle is that searches of ‘kinky’ people for drugs and handguns are necessary and proper, whether or not the searches would be constitutional if evidence so obtained were presented in court.” \textit{Id.} at 18. \textit{See also} Schwartz, \textit{supra} note 129, at 447.

\footnote{185} Cf. Wasserstrom & Seidman, \textit{supra} note 136, at 88 (The constitutional dilemma confronting judges who must resolve troubling cases is that “neither the fourth amendment, nor anything else in the Constitution, tells judges how secure the people are to be, or at what cost to law enforcement that level of security is to be obtained.”) (footnote omitted).

\footnote{186} \textit{Terry}, 392 U.S. at 16.

\footnote{187} \textit{Id.}

\footnote{188} \textit{Id.} at 19 n.16.

\footnote{189} \textit{Id.} at 6. A point not often addressed in discussion of \textit{Terry} is the fact that Terry and his companions had started to leave the scene prior to Officer McFadden’s stopping them. \textit{See} William J. Mertens, \textit{The Fourth Amendment and the Control of Police Discretion}, 17 \textit{U. Mich. J.L. Ref.} 551, 588 n.158 (1984) (Terry and Chilton had stopped strolling in front of the store window and had begun to move “away from the store they were supposedly casing. Thus it seems unlikely that McFadden jumped in to prevent an immi-
himself as a police officer and asked for their names."\(^{190}\) When the men "mumbled something,"\(^{191}\) the officer spun Terry around and frisked him for weapons.

Under either of the Court's definitions of "seizure," it seems clear that Terry was seized before Officer McFadden grabbed him. Justice Harlan thought so. He explained that the officer's observations justified accosting Terry and "restraining his liberty of movement."\(^{192}\) Indeed, only the most defiant citizen would feel free to leave a police officer under such conditions.\(^ {193}\) Nevertheless, the Terry majority assumed that no intrusion had occurred that implied the fourth amendment.\(^ {194}\) Had the Court directly confronted the facts, it would have been forced to acknowledge that accosting a person on the street restrains liberty and demands fourth amendment scrutiny.\(^ {195}\)

Although the Terry Court avoided confronting the consequence hold up. It seems more likely that he acted to prevent them from getting away, after they had given up on (or at least postponed) their plan."\(^ {\text{emphasis in original}}\).\(^ {190}\) Terry, 392 U.S. at 6-7.
\(^ {191}\) Id. at 7 (internal quotations omitted).
\(^ {192}\) Id. at 33 (Harlan, J., concurring).
\(^ {193}\) See H. Uviller, supra note 172, at 15-16.
\(^ {194}\) See supra notes 48-50 and accompanying text.
\(^ {195}\) As in other areas of constitutional adjudication, the perspective of the decision-maker often plays a central role in the formulation of fourth amendment principles. See Martha Minow, Foreward: Justice Engendered, 101 Harv. L. Rev. 10 (1987). The manner in which the Terry Court dealt with the question of whether Officer McFadden's accosting of Terry constituted a seizure illustrates the importance of perspective. The Court, particularly Chief Justice Warren, was primarily concerned with giving police officers the power to frisk citizens where they believed the individual might be armed and dangerous. B. Schwartz, supra note 50, at 685-87.

As noted at supra note 50, this concern is legitimate. Yet there was substantial evidence that police officers were using stop and frisk tactics against minorities and the poor for reasons that had nothing to do with police safety. This fact, of which the Court was well aware, Terry, 392 U.S. at 14, occupied a subordinate place in the Court's analysis.

Being accosted and questioned by police officers, however, is something that disfavored members of society experience on a daily basis. Professor Amsterdam has noted that "[u]nless one takes a very middle-class white view of life, [police accosting citizens] is a practice that cries out for some sort of fourth amendment regulation." Amsterdam, supra note 154, at 405.

Rather than factor this point into its judicial calculus, Terry was careful to emphasize "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." Terry, 392 U.S. at 12. While recognizing that many forms of field interrogation violated the fourth amendment, the Court believed it was "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." Id. at 13-14; see also Barrett, supra note 129, at 55 (illegal arrests and detentions designed to harass, physical abuse of persons in custody, and police destruction of property are not "affected by the [exclusionary] rule or by the cognate rule excluding coerced or illegally obtained confessions") (footnote omitted); 3 W. LaFave, supra note 54, § 9.1(e), at 345-48 (essential point of Chief Justice Warren's remarks was that illegal street encounters will not be
quences of the right-to-inquire rule, it was inevitable that the Court would eventually have to address the validity of official accosting and questioning of citizens in public. In the drug courier profile cases, the Court accorded police officials broad discretionary powers that do not implicate the fourth amendment. *Mendenhall* and *Royer* demonstrated that questioning citizens does not trigger fourth amendment scrutiny. A seizure occurs only where, in light of the totality of the circumstances surrounding the police-citizen encounter, a reasonable person would feel that he or she was not free to leave.

On its face, this standard is unobjectionable. The same, however, cannot be said for the Court’s application of the standard. The Court held in *Mendenhall* and *Royer* that no seizure occurs when armed police officers accost a citizen, request identification, and deterred by the exclusionary rule because such confrontations are often motivated by objectives other than prosecution and conviction).

Although the exclusionary rule may not be perfect, its alleged flaws provide no excuse for the Court’s reluctance to condemn police practices that undoubtedly violate the Constitution. Furthermore, the fact that some legitimate police practices are “closely similar,” *Terry*, 392 U.S. at 13, to illegal police encounters does not excuse the Court from drawing a line, and then enforcing it, so that the police are not the ones who decide when fourth amendment rights are taken seriously.

As Professor Butterfoss has explained, Justice Stewart’s plurality opinion in *Mendenhall* actually offers two definitions of when a fourth amendment seizure occurs. See Butterfoss, supra note 161, at 445. *Compare Mendenhall*, 446 U.S. at 552 (a seizure occurs “‘only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.’”) (quoting *Terry*, 392 U.S. at 19 n.16); and *id.* at 553, with *id.* at 554 (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”). In analyzing the facts, Justice Stewart used the latter definition to decide that Mendenhall had not been seized. Professor Butterfoss has detailed why this second definition is inadequate for determining whether a person’s freedom of movement has been restrained during a typical street encounter. Butterfoss, *supra* note 161, at 450 (the latter *Mendenhall* standard is underinclusive because it ignores the fact that “most citizens do not feel free to walk away from a police officer who approaches to ask them questions,” and it downplays the fact that in many cases a person’s liberty is restrained because an “officer does not intend to let the citizen continue on their way if they assert their right to do so”).

In *Mendenhall*, Justice Stewart made a point of the fact that the officers “requested, but did not demand to see [Mendenhall’s] identification and ticket.” 446 U.S. at 555. Apparently, some of the Justices believe that there is a meaningful distinction, for fourth amendment purposes, between an officer’s “requesting” or “asking” for a person’s identification, and an officer’s “demand” to see it. Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, Ariz. St. L.J. 207, 217 n.86 (1986).

The so-called difference between a police “request” and “demand” is another example of the “wordsmanship” police departments have become so adept at in describing their investigatory activities. See Yale Kamisar, *Book Review*, 76 Harv. L. Rev. 1502, 1503 (1963) [hereinafter Kamisar, *Book Review*]. Citizens and police officers who have been involved in or witnessed street encounters would probably find a distinction be-
demand an explanation for his or her presence in a public area. How can the Court say that a reasonable person would feel free to leave an armed police officer in these circumstances?

The right-to-inquire rule inevitably led the Court to scorn the reality of police-citizen encounters. In *Mendenhall*, Justice Stewart first reaffirmed that government officers have the authority to seek information from all citizens. The right-to-inquire supersedes whatever protection the fourth amendment provides. Justice Stewart then defined the boundaries of a fourth amendment seizure to ensure that the government’s right-to-inquire would remain unhampered. Indeed, he asserted that a diminished right-to-inquire rule “would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.” This, of course, was the crux of the matter. Justice Stewart was unwilling to forgo “the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws” in order to protect fourth amendment principles. In effect, he carved out an exception to the fourth amendment for a coercive form of police activity and declared that this activity may be used at the discretion of the police.

In the unrealistic world of *Mendenhall*, the average citizen feels free to ignore a police officer who has approached her. In this abstract world, it is irrelevant whether the citizen is aware of her right between “requests” and “demands” for identification fanciful. See, e.g., H. Uviller, supra note 172, at 15 (“Almost all the [police officers] I watched on the street displayed an attitude of toughness and consideration toward the people they approached. . . . Police officers relish respect and, in many small ways, insist on a show of deference from the ordinary folk among whom they work.”); Reich, supra note 161, at 1162 (“But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone.”).

As one commentator has noted, the analysis adopted by Justice Stewart in *Mendenhall*, and later reaffirmed in *Royer* and *Delgado*, “is essentially the approach suggested by [Professor] LaFave” in his treatise on the fourth amendment. Yale Kamisar, *Introduction: Trends and Developments with Respect to that Amendment “Central to Enjoyment of Other Guarantees of the Bill of Rights,”* 17 U. Mich. J.L. Ref. 409, 410 (1984) [hereinafter Kamisar, Trends and Developments] (citing 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(g) at 53-55 (1978)). Indeed, this same commentator has referred to this standard as the “LaFave-Stewart approach.” See Kamisar, supra note 60, at 141.

Although Professor LaFave has not criticized the *Mendenhall-Royer* analysis in his updated treatise, see 3 W. LaFave, supra note 54, § 9.2(h), at 401-22, I will refrain from labeling the Court’s standard the “LaFave-Stewart approach” because I am not sure that Professor LaFave would want his name associated with the Court’s more recent decisions in this area. For convenience, I will refer to Justice Stewart’s analysis as the “*Mendenhall*” standard or test.

Interestingly, Justice Stewart did not rely upon the majority opinion in *Terry*, but instead quoted the concurring opinions of Justices Harlan and White in support of the proposition that the police are free to approach and question citizens on the street. *Mendenhall*, 446 U.S. at 553.

Id. at 554.

Id.
to ignore the officer.\textsuperscript{203} In the real world, however, few people are aware of their fourth amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear.\textsuperscript{204} If \textit{Mendenhall} had dealt with the issue candidly, it would have acknowledged that the average person does not feel free to leave a police encounter.\textsuperscript{205} If a person is unlikely to ignore an officer’s approach, and is equally unlikely to know of her right to depart, is the Court really serious in believing that the average person will exercise her right to do so?

Realistically, the Justices probably do not believe that the typical police-citizen encounter is the equivalent of two old friends greeting each other on the street corner. Professor Kamisar has given a more plausible explanation for the \textit{Mendenhall} standard. He observed that the standard is actually a "policy decision that the police should be allowed to rely on the moral and instinctive pressure to cooperate inherent in [police-citizen] encounters by not treating them as ‘seizures’ for Fourth Amendment purposes."\textsuperscript{206}

Professor LaFave—the person most responsible for formulating the standard\textsuperscript{207}—also recognizes that the standard is partly a legal fiction.\textsuperscript{208} However, he defends the test. Professor LaFave argues that the \textit{Mendenhall} test is appropriate because the police "should be

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\item \textsuperscript{203} \textit{Id.} Justice Stewart’s description of police confrontations as consensual encounters was made possible by his prior legal analysis in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The \textit{Bustamonte} Court held that "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." \textit{Id.} at 248-49 (footnote omitted).
\item \textsuperscript{204} See H. Uviller, supra note 172, at 16.
\item \textsuperscript{205} Commentators are generally in agreement that the average person will not feel free to leave a police official who has approached and addressed questions to him. See, e.g., 3 W. LaFave, supra note 54, § 9.2(h), at 410; Robert L. Bogomolny, \textit{Street Patrol: The Decision to Stop a Citizen}, 12 Crim. L. Bull. 544, 562 (1976); Butterfoss, supra note 161, at 439; Foote, supra note 125, at 407; Richard A. Williamson, \textit{The Dimensions of Seizure: The Concepts of “Stop” and “Arrest”}, 43 Ohio St. L.J. 771, 801 (1982); Note, supra note 161, at 611 n.167; Yale Kamisar, Arrest, Search and Seizure (The Prepared Remarks (Part I) of Yale Kamisar at the U.S. Law Week’s Tenth Annual Constitutional Law Conference) (Sept. 10, 1988) (“Very few people approached or encountered by federal drug agents, or even local detectives, \textit{really} ‘feel free’ to disregard their questions and simply walk away.”) (emphasis in original) (on file with the author).
\item \textsuperscript{206} Kamisar, supra note 205, at 16 (emphasis in original).
\item \textsuperscript{207} See Kamisar, \textit{Trends and Developments}, supra note 199, at 410.
\item \textsuperscript{208} See W. LaFave, supra note 54, at 410-11 (“[I]f the ultimate issue is perceived as being whether the suspect ‘would feel free to walk away,' then virtually all police-citizen
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allowed to 'seek cooperation, even where [their actions] may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should.'

A police-citizen encounter constitutes a seizure only if the officer increases the inherent pressure "by engaging in conduct significantly beyond that accepted in social intercourse." The crucial question is whether the officer has "conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens."

Both the Court and Professor LaFave imply that it is sound "social policy" to allow law enforcement officials to stop and question persons even where there is no suggestion of criminality. Currently, this policy is probably thought to help the government's efforts in the "war on drugs." Therefore, the Court will turn a blind eye to street encounters "by not treating them as 'seizures' for Fourth Amendment purposes" even when these confrontations are perceived as seizures by the citizenry at large.

The fourth amendment deserves better treatment. If it is inappropriate for the Court to impose its views of sound "social policy" on other provisions of the Constitution, it is equally inapposite for the Court to use policy argument to shape the fourth amendment. It is a truism to say that police questioning is an effective tool for law enforcement. Many indiscriminate techniques—such as, dragnet seizures—could also promote certain forms of law enforcement. That fact alone cannot mean that arbitrary techniques are constitutional.

Nor does it suffice to assert that an innocent person will only suffer minor inconvenience or embarrassment during a police encounter. The fourth amendment protects individual liberty from arbitrary government prerogative. When the police have no basis for accosting a person, the citizen should be allowed to decide whether encounters must in fact be deemed to involve a Fourth Amendment seizure.

209 Id. at 411.
210 Id. at 412.
211 Id.
212 Kamisar, supra note 205, at 16.
213 See, e.g., Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.").
214 New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Brennan, J., concurring in part and dissenting in part) ("[T]he presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good.") (emphasis in original).
he or she wishes to deal with police officials, and not vice versa. Why should citizens be subjected to intimidating, inconvenient, or embarrassing encounters when the police have no good reason to suspect criminality?  

As Justice Douglas predicted, the inevitable result of a fourth amendment jurisprudence keyed to balancing or sound social policy is to “give the police the upper hand.” The Court should place the burden on the police by limiting their authority to accost and question citizens to occasions where there is some particularized and objective reason for doing so. Instead, the Court puts the burden on the citizen by suggesting that if he is bothered by the encounter, he can “disregard the [officer’s] questions and walk away.” This approach is unrealistic and unfair. It is unrealistic because few, if any, citizens will resist an officer’s demands. It is unfair because it adopts the police officer’s perspective, rather than the citizen’s, in judging the constitutional validity of police invasions. After all, the fourth amendment speaks of the rights of the people, not of the police.

Mendenhall significantly expanded the right-to-inquire rule by making clear that the government’s right to accost individuals in public is not confined to persons reasonably suspected of criminal conduct. It is not reassuring to be told that the Court believes that the fourth amendment prohibits “‘arbitrary and oppressive’” government intrusions when one is also told that certain invasions of liberty are not really intrusions after all, and can therefore be arbitrary and oppressive.

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215 Professor LaFave misses the mark when he suggests that the central question is whether the officer has “conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens.” W. LaFave, supra note 54, at 412 (footnote omitted). This test is inapt because few, if any, citizens perceive a uniformed and armed police official as just another “ordinary” citizen. Indeed, the officer is most likely seen for what he or she actually is—an agent of the government. See Foote, supra note 125, at 403 (“Were a civilian to ask such a question there would certainly be no restraint, but what on their face are merely words of request take on color from the officer’s uniform, badge, gun and demeanor.”); Reich, supra note 161, at 1162 (“But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?”).

Furthermore, it is hard to imagine an ordinary citizen approaching another citizen on the street and requesting to see some identification, or asking the citizen to account for her presence in the area. Such exchanges seldom occur between civilians. Thus, when a police officer initiates such conversation, the average citizen is likely to be taken aback. And because the officer manifests the authority and power of the state, it is no surprise that the citizen readily complies with the requests of the officer.


INS v. Delgado dispelled any doubt that the Court would continue to analyze police confrontations disingenuously. In its treatment of both individual police-citizen encounters and massive workplace investigations, Delgado further limited the concept of seizure.

Delgado goes beyond Mendenhall by withholding constitutional scrutiny of police confrontations until the encounter becomes menacing. Now a police encounter does not constitute a seizure until the situation becomes "so intimidating"219 that a person might fear police reprisal. For the ordinary citizen, almost any encounter with an armed police official is inherently intimidating. Once that encounter reaches the point where an officer requests identification, or asks the person to account for his presence in an area, informality has evaporated.220 Fourth amendment protections should not be suspended until an encounter reaches the point of becoming "so intimidating" that a person fears there would be police reprisal if he terminated the encounter. A polite, soft-spoken federal agent who interferes with a person's liberty should have good cause to do so—no less than a gruff, gravel-voiced police officer.

Delgado's response to the respondents' claim that the entire workforce was seized during the INS raids is also questionable. The Court gave two reasons why no workforce seizure occurred. First, "when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."221 Second, the workers had no reason to fear that the agents positioned at the exits would prevent them from leaving.222

The Court's first point is not helpful. Admittedly, workers can-

219 Id. at 216. Delgado did not explain how intimidating a police confrontation is permitted to be before it becomes "so intimidating" that constitutional scrutiny is triggered. Apparently, a slight or minimum level of intimidation is permissible. See Michigan v. Chesternut, 486 U.S. 567, 575-76 (1988) (explaining that the "very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, ... [but] not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.") (emphasis added).

The Court must believe there is some magical zone between ordinary police intimidation and police behavior that is "so intimidating" that the average person will not feel free to leave. This view also apparently assumes that officers who are questioning citizens in airports or on buses, or chasing pedestrians down the street are able to perceive when their actions have crossed into that magical zone.


221 Delgado, 466 U.S. at 218.

222 Any such fear was unfounded because "there [was] nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." Id.
not do as they please while on the job, but this begs the question. The Court earlier held that an employer does not waive her fourth amendment right to be free from the "unbridled discretion" of inspection officials merely by giving her employees access to the workplace. Similarly, employees should not be deemed to have waived their fourth amendment rights merely by choosing to work.

Under Delgado's "blame the victim" approach, there would presumably be no seizure if police officers questioned subway passengers on a train that was momentarily stopped at a station while other officers positioned themselves in front of the train's doors. Using Justice Rehnquist's analysis, it can be argued that the riders in a subway car are inherently restricted in their movements, not by the actions of the police officers, but by their choice of travel. If the subway riders had wanted true freedom from restraint, they should have walked or driven automobiles.

Similarly, relying upon what the agents in Delgado "actually did" seems misplaced if the Court is truly concerned with whether government officers are conveying a "show of authority" to persons subjected to their activities. Under Delgado's second premise, placing officers at the doors of the train would not escalate the encounter into a mass seizure of the subway car as long as the officers did not physically prevent anyone from leaving. Again, as in Delgado, the purpose of their presence would simply be to assure that all the riders were questioned, a perfectly legitimate police practice.

Regardless of whether officers actually prevented persons from

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A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded.


225 See Delgado, 466 U.S. at 238 (Brennan, J., concurring in part and dissenting in part) (The workplace environment for the average employee includes "a small, recognizable community that is a locus of friendships, gossip, common effort, and shared experience. . . . This experience . . . forms the basis for a legitimate, albeit modest, expectation of privacy that cannot be indiscriminately invaded by government agents."). But see Ortega, 480 U.S. at 717-18. For criticism of Ortega, see Tracey Maclin, Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?, 25 AM. CRIM. L. REV. 669, 701-05, 733-35 (1988).

226 Interestingly, like Justice Stewart in Mendenhall, see supra note 197, Justice Rehnquist ignored Terry's protection-oriented definition of seizure. He only quoted Terry's more restrictive test for determining when a seizure occurs. "'Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" Delgado, 466 U.S. at 215 (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
leaving the factories in Delgado, or from exiting the train in the above hypothetical, the message conveyed to both the workers and riders is plain—they are not free to leave without first answering the questions of police officials. 227 Whether this encounter takes place when an agent decides to approach the worker, or occurs when the worker chooses to leave the premises, the atmosphere and message conveyed by the government presence reflect authority and control. 228

Some might think this criticism excessive. I think not. Rather than placing the burden on the government to show justification for its intrusion, 229 Delgado puts the onus on the citizen to challenge government authority. The point is not that very few persons will have the moxie to assert their fourth amendment rights in the face of police authority, although we know that most will not. It is whether citizens in a free society should be forced to challenge the police in order to enjoy the right of locomotion. 230

Michigan v. Chesternut 231 is the most recent example of distortion of the seizure concept by the right-to-inquire rule. The Court unanimously held that Chesternut was not seized when he was chased down an alley by a police car. Therefore, the fourth amendment did not apply to the police actions. The Court conceded that the "presence of a police car driving parallel to a running pedestrian could be

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228 A glimpse of the environment created by the INS raids was provided in Justice Brennan's opinion in Delgado. See 466 U.S. at 230-31 (Brennan, J., concurring in part and dissenting in part). The workers said the surveys were "carried out by surprise by relatively large numbers of agents, generally from 15 to 25, who moved systematically through the rows of workers who were seated at their work stations." Id. at 230. Once the agents discovered suspected illegal aliens, the individuals were handcuffed and taken off to "waiting vans outside the factory." Id. Finally, some agents were stationed at the door, while others "would show their badges and direct pointed questions at the workers." Id.

229 This is the approach taken by Justice Powell in his concurring opinion in Delgado. Id. at 221-24. He maintained that the government's interest in conducting the surprise raids outweighed the workers' fourth amendment interests. However, Justice Powell was troubled by the notion that no seizure had occurred during the INS raids. Id. at 221.

Justice Powell believed the better analysis was the approach utilized in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In Martinez-Fuerte, the Court assumed that stopping automobiles at permanent checkpoints away from the Mexican border was a seizure under the fourth amendment. Id. at 556. The suspicionless seizures, however, were upheld because of the strong government interest in stemming the flow of illegal aliens into the country. Id. at 556-64.

230 To paraphrase what Professor Amsterdam has stated in another context, the fourth amendment does not ask what we expect of government officials, it tells us "what we should demand of government." Amsterdam, supra note 154, at 384.

somewhat intimidating.”232 Yet, this conduct was “not ‘so intimidating’ that [Chesternut] could reasonably have believed that he was not free to disregard the police presence and go about his business.”233

How can this result be explained? Police curiosity alone should not justify chasing a person down the street. A unanimous Court had already established that an intimidating police intrusion cannot be justified by the desire to ascertain a citizen’s identity, or on the “understandable desire to assert a police presence”234 into ambiguous surroundings. Where no evidence of criminality exists, the Court has said, “the balance between the public interest and [a citizen’s] right to personal security and privacy tilts in favor of freedom from police interference.”235

Chesternut reflects the current Court’s unwillingness or inability to empathize with those citizens who are subjected to police scrutiny.236 Is the Court credible when it says that “people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks,”237 but then holds that the police are free to chase individuals up and down the streets, provided their actions are not “so intimidating”? Perhaps the result in Chesternut is due to the fact that none of the Justices has been recently chased down public streets by a police car. After Chesternut, if people want to feel secure on the streets, they had better be track stars. The use of the right-to-inquire rule has undermined the Court’s ability to credibly define when a person has been seized. The Court has expanded the rule to a point where the government’s desire to chase, stop, and question persons has become more important than the citizen’s right to come and go as he pleases. As the next section of this critique demonstrates, the Court’s right-to-inquire rule has fundamentally altered how fourth amendment cases are resolved.

232 Id. at 575.
233 Id. at 576 (quoting Delgado, 466 U.S. at 216).
235 Id. (emphasis added).
236 There are other recent examples of the Justices’ inability to empathize with those subjected to police intrusion. See, e.g., O’Connor v. Ortega, 480 U.S. 709, 725 (1987) (plurality opinion) (insisting that public employees already have the power to protect their privacy interests from government scrutiny: “The employee may avoid exposing personal belongings at work by simply leaving them at home.”); Tennessee v. Garner, 471 U.S. 1, 29 (1985) (O’Connor, J., dissenting) (maintaining that the fourth amendment interests of an unarmed suspect are sufficiently protected against the police use of deadly force in a nondangerous context: “to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.”).
4. The Right-to-Inquire Rule and the Police Perspective

The final objection to the right-to-inquire rule focuses on the Court's perspective in deciding fourth amendment cases. The rule is more concerned with police interests than with the rights of citizens. When it does concern itself with citizens, the Court looks to a narrow class. In doing so, the Court disregards Justice Harlan's warning that the level of fourth amendment protection should not depend on the "expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear." By focusing on what an innocent citizen would have thought had he been in the defendant's shoes, the Court diminishes every citizen's freedom. The Court's police-oriented, innocent-citizen perspective undermines the right of locomotion embodied in the fourth amendment.

From its inception, the right-to-inquire rule has emphasized the needs of the government. In Brinegar, Justice Burton stated that the facts imposed on the government agents "a positive duty to investigate further, in some such manner as they adopted." Justice Burton explained that police officials must remain alert to circumstances that call for "prompt inquiries and investigations" to promote crime prevention and enforcement of the law. The trouble is that the term "investigate" is soft. There are many ways to investigate someone without interfering with liberty or personal security. But Justice Burton clearly used the term as a euphemism for the seizure of Brinegar.

Justice Fortas echoed this theme in Wainwright. Society's interest in apprehending criminals was apparently so great that Wainwright's refusal to cooperate with the police justified his arrest, even though the police had no other grounds to believe that Wainwright was the wanted suspect.

Not only has the Court adopted a police perspective, it apparently believes that police confrontations should not trouble the average law-abiding citizen. If citizens give truthful answers, they

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240 Id.
241 See supra note 37 and accompanying text.
242 See supra note 37 and accompanying text.
243 See Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481, 2486 (1990) (when
have no reason to fear a police confrontation. Inquiry about one's presence in an area, or a request to see identification, pose no threat because innocent people know that cooperation with the police is not likely to result in prolonged detention. This perspective of the Court affords the police considerable leeway to detect criminal activity. Many law-abiding persons do not fear the consequences of granting the police power to accost citizens only because they cannot imagine themselves in such a situation.

Where the boundaries of our liberty of movement are drawn with lines that reflect the views of so-called "innocent" persons, however, the fourth amendment suffers. Many persons who have never been guilty of any criminal behavior have ambivalent or negative attitudes about the police. Similarly, some individuals may feel their autonomy impinged when the police groundlessly initiate a street encounter. And still others may simply be annoyed by the fact that they have been interrupted. There is nothing unreasonable in any of these views. It is irrelevant whether some innocent person would not feel overly embarrassed or offended by a police confrontation. The question is whether such a confrontation infringes upon a citizen's right of locomotion.

The fourth amendment prohibits all arbitrary government intrusions—even intrusions that later reveal that a person is guilty of a

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244 See Delgado, 466 U.S. at 218-19. Although phrased in different language, this view is analogous to the position which Professor Barrett urged in the early 1960s. See Barrett, supra note 129, at 58 (arguing that at the investigative stage, the police should be given "reasonably wide powers of investigation" so that innocent persons are not subject to unnecessary arrest) (footnote omitted).

245 See Sitz, 110 S. Ct. at 2493 (Stevens, J., dissenting) (Citizens "who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any [police confrontation] designed to elicit signs of suspicious behavior."”) See Amsterdam, supra note 154, at 469 n.488 (The resentment felt by many minorities toward certain types of police practice was well put by a black male: "'When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question.' ") (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 184 (1967)).

The fourth amendment was meant to limit government authority, even when that authority appears to serve benevolent purposes. Where the Court's fourth amendment principles are limited by those who feel that expansive governmental power is necessary in light of some social crisis—like the war on illegal drugs—the provision no longer stands as a bulwark against police power and discretion. As Professor Amsterdam has told us, the formulation of fourth amendment principles is ultimately a value judgment about the type of society in which we wish to live.

Some might bristle at this critique. They could surely point to several declarations of the Court claiming commitment to fourth amendment principles. The Court's rhetoric is fine; the problem is that the Court does not take its own rhetoric seriously.

For instance, some Justices have stated that citizens on the street have a constitutional right to walk away from an approaching officer when the officer has no objective justification for detaining the citizen. The Court has also disapproved of police actions that escalate the intensity of police-citizen encounters where the police lack objective justification for detaining the citizen.

If these declarations were serious, the citizenry should also enjoy the right to signal their intentions that they would rather not


Like most of the Bill of Rights [the fourth amendment] was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not."

\text{Id. (citations omitted). But cf. Loewy, supra note 153 (arguing that the fourth amendment should be read to protect the innocent, and that the guilty are merely incidental beneficiaries of the provision). For a criticism of Loewy, see Maclin, supra note 225, at 705-18.}

\[\text{See Amsterdam, supra note 154, at 353 ("The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents.").}

\[\text{Id. at 403.}

\[\text{See Florida v. Royer, 460 U.S. 491, 497-98 (1983) (plurality opinion); United States v. Mendenhall, 446 U.S. 544, 553 (1980) (plurality opinion); Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring); id. at 34 (White J., concurring).}

\[\text{See Royer, 460 U.S. at 498 (plurality opinion) (citizen may not be detained, even momentarily, if he refuses to listen to police questions if police lack objective reason for suspecting criminal activity may be afoot); Brown v. Texas, 443 U.S. 47 (1979) (police approach and questioning of citizen in alley presumably allowed, but subsequent frisk impermissible); cf. Mertens, supra note 189, at 608 (the Court seems to be saying that Terry does not permit an intensification of the intrusion when the intensification's obvious purpose is creating enough pressure to convince the individual to consent to be searched).}
endure a police encounter at all. As one commentator has aptly described the Court's logic: "Implicit in [the right to avoid answering police questions] is the right to avoid being questioned in the first place. To require a person to wait for a police officer to approach before turning away would suspend the individual's right to go on his way from the time he became aware of the officer's approach until some magic moment when the right reappeared."  

As Mr. Chesternut learned, however, the Court does not follow its own logic. The Chesternut Court declared that a police chase "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [Chesternut's] freedom of movement." In chasing Chesternut down the street, the Court explained, the police did not use their siren or flash their lights, did not display any weapons, did not command Chesternut to halt, and did not aggressively operate their vehicle to block or control Chesternut's direction or speed of his movements.

The Court's statements about what did not happen hardly sustain the constitutionality of what did happen. If the fourth amendment grants a right to stand or travel on the streets, or the right to avoid the police, then that right should not turn on the fact that the police were not as intrusive or frightening as they might have been.

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251 See LaFave, supra note 54, at 408 (often a person will "indicate his lack of consent [to the police confrontation] by ignoring the officer's summoning or by leaving his presence, which will likely prompt a holding that there was no consent and that police efforts to renew the encounter constitute a seizure").


254 Id.

255 Some may believe that Chesternut is explainable on the grounds that flight from the police is inherently suspicious. Indeed, the police are trained to be suspicious of those who seek to avoid them. 3 W. LAFAVE, supra note 54, § 9.3(c), at 448. The courts, however, have split on whether flight can provide suspicion for investigatory seizures. See id. § 9.3(c) (citing cases).

In cases like Chesternut, where flight from the police is the only evidence the police have, such conduct should be considered insufficient to justify forcible intrusions. Those who disagree should consider the tactics of the Sheriff of Volusia County, Florida. According to the New York Times, Sheriff Robert Vogel has posted highway signs warning oncoming motorists of drug search roadblocks. If a motorist slows down or makes a U-turn to avoid the search, the car will be stopped. See Seth Mydans, Powerful Arms of Drug War Arousing Concern for Rights, N.Y. Times, Oct. 16, 1989, at A1.

Is it fair to assume automatically that a motorist who desires to avoid what may be an intrusive, embarrassing, or inconvenient police confrontation is engaged in criminal conduct? Consider the following:

A motorist with advance notice of the location of a permanent checkpoint has the opportunity to avoid the search entirely, or at least to prepare for, and limit, the intrusion on her privacy. ... A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply "busi-
Despite these objections, the Court's commitment to the right-to-inquire rule appears strong. Indeed, the Court's two newest members seem to have an exceedingly narrow view of the fourth amendment. Speaking for himself and Justice Scalia, Justice Kennedy has asserted that a seizure occurs "when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go." Justice Kennedy believes that, regardless of whether particular police conduct conveys to a person an intention to seize, no fourth amendment interests are at stake "until [the police conduct] achieves a restraining effect."

Justice Kennedy's "no restraint, no seizure" approach was reiterated, albeit in dicta, in *Brower v. Inyo County.* The issue in *Brower* was whether the police had seized a motorist by placing an unilluminated 18-wheel tractor-trailer across both lanes of a two-lane highway on which the defendant was traveling. The Court unanimously decided that the use of this roadblock to stop Brower's car was a seizure.

Justice Scalia, however, took the opportunity to outline his
views on the nature and meaning of a seizure. Justice Scalia maintained that no seizure occurs unless officials undertake intentional conduct designed to effectuate a seizure, and that conduct physically restrains the person or effect that is the target of the police activity. There is no doubt that the framers of the fourth amendment designed it to protect the citizenry against the willful misuse of governmental power. However, it is a bold leap from this fact to Justice Scalia's assertion that the fourth amendment only prohibits seizures that result in an intentional acquisition of physical control over a person.

The Scalia-Kennedy view raises troublesome questions about the permissible scope of police behavior. Do these Justices suggest that even if the police turn on their sirens, draw their weapons, or fire a warning shot over a person's head, there is no seizure if a person continues to flee? Do we really want to give the police this much discretion? In the real world of high speed police chases, guns that fire live ammunition, and innocent citizens who are mistakenly identified as criminals, this approach to the fourth amendment is better left unexplored. Fourth amendment protection should not depend on such slippery and deceptive conclusions about the presence of official intent, or whether official conduct resulted in acquiring physical control over a person.

There are advantages for the police and the Court in the Kennedy-Scalia "no restraint, no seizure" model. This definition of "seizure" gives even greater scope to the right-to-inquire rule. Under this approach, police confrontations will not receive constitutional scrutiny until a person is physically seized. The "no restraint, no seizure" model provides a clear, easy-to-apply test regarding the permissible scope of street encounters. The only casualty in this

260 See Brower, 109 S. Ct. at 1381.
261 Justice Scalia noted that the governmental activity associated with both the writs of assistance and the general warrants which motivated the colonists to adopt the fourth amendment involved intentional action. Id.
262 The Court favors the reasonable person standard because of its alleged objectivity. Chesternut, 486 U.S. at 574. Professor LaFave shares this view. It is important that the relevant standard be understood and administrable by the officer in the field. "Asking [the officer] to determine whether the suspect feels free to leave, ... 'would require a prescience neither the police nor anyone else possesses.' A given set of circumstances, for example, might operate quite differently upon a person with 'a guilty mind' as compared to an 'innocent person.'" LaFave, supra note 54, at 407-08 (citations and footnotes omitted); see also Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142.

An objective, rather than subjective, test is preferable because it frees officers from having to make impossible judgments about the suspect's state of mind. However, the desire and need for objective, easily understood, and administrable rules should not blind the Court into formulating constitutional standards that are out of touch with real world experiences, especially when those standards will be applied to "a sensitive area of police activity." Terry v. Ohio, 392 U.S. 1, 9 (1968).
overhaul of constitutional doctrine is the fourth amendment. The Mendenhall standard was bad enough. The gloss provided by Delgado made the Mendenhall rule even worse. The Kennedy-Scalia “no restraint, no seizure” rule would fasten the final nail in the coffin for the right of locomotion.

B. The Common Sense Rule, the Warrant Requirement, and Unchecked Police Discretion

Like the right-to-inquire rule, the common sense rule leaves police discretion completely unchecked. Traditionally, the Court preferred to use the procedural safeguards of the warrant clause—including the probable cause requirement—to review police behavior. The warrant process was encouraged because “[t]he judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches [and seizures] than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’”263 The common sense rule retreats from these safeguards of the warrant clause.

1. The Threat to the Warrant Requirement

Under the common sense rule, the Court denounces what it calls rigid or technical rules that restrict officers during investigatory seizures. The threat to the warrant requirement is evident. In United States v. Hensley,264 the Court applied the common sense rule and equated a police seizure authorized by a warrant with a police seizure supported only by another department’s suspicions. Justice O’Connor claimed that there was no “reason why a police department should be able to act on the basis of a flyer indicating that another department has a warrant, but should not be able to act on the basis of a flyer indicating that another department has a reasonable suspicion of involvement with a crime.”265

Justice O’Connor’s assertion is partially correct. Obviously, police departments must be able to respond to requests from another department. The real issues, however, involve the basis for the original police request, and the authority wielded by the responding officer.

When the Court in Whiteley v. Warden266 stated that police officers are entitled to act on the basis of a radio bulletin received

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265 Id. at 231.
266 401 U.S. 560 (1971).
from another jurisdiction, it was speaking of police assistance in executing an arrest warrant. In Hensley, however, the officers did not rely upon the fact that a detached magistrate had scrutinized the information justifying the seizure. In fact, when the Covington police seized Hensley no one knew whether there was even a "substantial chance" that Hensley had committed the alleged robbery. The officers knew only that Hensley was wanted by another police department for questioning.

Anticipating this criticism, Justice O'Connor contended that there was no significant difference between reliance on a report that a warrant had issued, and reliance on a report that another department has reasonable suspicion justifying an investigatory seizure. Relying on Terry's balancing formula, she found no meaningful distinction between these two situations because the police interests advanced "by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal."

Justice O'Connor's failure to distinguish a seizure authorized by a warrant from a seizure supported only by another police department's suspicions ignores a fundamental precept of fourth amendment law. The framers envisioned checking zealous police officials by interposing judicial review between the government and its citizens. When government officials are permitted to seize persons in the absence of exigent circumstances without first convincing a judge of the need for their actions, the collective security of society stands at risk.

267 Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983). In Gates, the Court explained that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." Id. at 235 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

268 Hensley, 469 U.S. at 223-24. The suspicions of the police department that requested that Hensley be held for questioning apparently never ripened into concrete evidence of criminality. Hensley was not arrested for the crime of aggravated robbery, the charge contained in the flyer that justified seizing Hensley. Thus, as Professor Harper has noted, "police officers may glean from Hensley the fact that they can stop citizens to investigate past crimes and find evidence of other crimes." Harper, supra note 95, at 38 (footnote omitted).

269 The wanted flyer read as follows:

"Wanted for Investigation Only for Aggravated Robbery"

Wanted for Investigation of Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:19 a.m., is one Thomas James Hensley, M/W—1/18/44, CTL No. 21528, PICA—329, SS#295366974, SFF, 190 lbs. Subject LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.


270 Hensley, 469 U.S. at 232.

271 See Kamisar, supra note 153, at 571-78.

272 Long ago, in words that seem to have lost their meaning for today's Court, Jus-
Justice O'Connor unsatisfactorily stresses law enforcement needs. The fourth amendment, however, was designed to restrain law enforcement practices, especially those predicated on bare suspicion. Nor will it do to suggest that the personal interests involved are minimal. While the intrusions that most concerned the framers were unauthorized searches of the home, there is no logical reason to distinguish between warrantless searches and warrantless seizures. The text of the fourth amendment makes no distinction between warrantless searches and seizures. Indeed, "hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment." The Court long ago established that permitting government officials to stop persons on mere suspicion leaves citizens "at the mercy of the officers' whim or caprice." Even in the street encounter context, equating a police seizure based only on another department's suspicion with a seizure authorized by a warrant, represents a fundamental shift in fourth amendment analysis that further weakens the right of locomotion.

2. The Loss of Objective, Reviewable Criteria for Assessing Police Behavior

The common sense rule permits the police to act not on evidence that a judge could evaluate, but on their own "professional" observations and intuition. The Court defers not to policy judg-

tice Jackson captured the essence of the fourth amendment's requirement that searches and seizures be authorized by a magistrate's disinterested scrutiny:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.


For a counter-argument that all warrantless seizures, even those not necessitated by any exigency, should be permissible, see Joseph D. Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 AM. CRIM. L. REV. 603, 647-48 (1982) (arguing that there is no evidence to suggest that the framers of the fourth amendment considered seizures, apart from the searches that preceded them, to be inherently suspect absent a warrant; the specificity requirement of the warrant clause is not relevant where only a seizure occurs; seizures interfere only with possessory interests).

See supra note 8.


ments promulgated by law enforcement supervisors, but to the actions and reactions of individual officers in the field. This approach provides little guidance to police officers, slight protection to citizens, and no objective criteria by which to review police behavior.

The Court's message is obvious: The lower courts need not formulate concrete standards for investigatory searches and seizures. The Court has little interest in constitutional checks on police discretion. The Justices prefer to rely on the common sense of the officer in the street. For instance, in Sharpe the Court rejected a bright-line test for judging the permissible length of investigating seizures, preferring instead to rely on "common sense and ordinary human experience" as its guiding principle. As a constitutional standard, this is hardly satisfactory.

Sharpe's suggestion that constitutional interests will be served by asking "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly," provides no safeguard. Most actions taken by police officers during an investigatory seizure are designed to confirm or dispel suspicions; presumably, law enforcement officials do not engage in superfluous activities. Furthermore, Sharpe ignores the reality that law enforcement officers are trained to be suspicious. An officer engrossed in a street confrontation is concerned with discovering criminality; fourth amendment values, if considered, are seen only as obstacles to the officer's primary concern.

278 Id. at 686.
279 Some might say that this criticism of Sharpe is unfounded. What is wrong, one might ask, with a standard that hinges on whether the means of investigation are likely to resolve matters soon? Indeed, some might say that Sharpe is simply a logical extension of the principle initiated in Terry.

Of course, in a technical sense, Sharpe and Terry involved very different issues. Yet, when viewed from a broader perspective, both illustrate how the Court views street encounters. While Terry certainly had its problems, see supra notes 186-95 and accompanying text, it at least recognized that a police intrusion must "be strictly circumscribed by the exigencies which justify its initiation." Terry, 392 U.S. at 26. Sharpe, in contrast, offers only a malleable test. If the focus is on whether the police have diligently pursued investigatory methods that will confirm or dispel their suspicions, the seizure can be as long as the police find necessary.

Moreover, when assessing police behavior, Sharpe merely asks whether the officer's conduct fits within a vague concept of "common sense and ordinary human experience." 470 U.S. at 685. Sharpe made plain that the Court would not second-guess police incompetence and bungling, even when obvious investigative alternatives were available and even if the individual seized by the police seizure was entirely "innocent" of wrongdoing. See id. at 688 n.6. In contrast, Terry required meaningful judicial review. 392 U.S. at 21-22.

Thus, Sharpe seems far afield from Terry. Once the Court sanctioned seizures on less than probable cause, it was inevitable that it would have to confront the question of the permissible lengths of such seizures. The methodology used in Sharpe to resolve this issue was far different from the methodology of Terry.
Justice O'Connor's reasoning in *Hensley* is another example of the Court's deferring to police reaction and intuition. She stated that when a flyer or bulletin has been issued on a reasonable suspicion, stopping the individual for questioning is permissible even though an officer is totally ignorant of the facts justifying the seizure. Even if it is sometimes appropriate to check the identity of a person wanted in another locality, stopping Hensley served no purpose because the Covington officers already knew who he was. One has to wonder what questions the Covington police would ask Hensley since they knew only that he was wanted for questioning. The flyer itself gave no hint as to the type of questions that might be posed.

Rather than outline the limits of an investigatory seizure, Justice O'Connor endorsed a "brief detention" of Hensley because experienced officers might well assume that an arrest warrant had been obtained after the issuance of the wanted flyer. It was, therefore, permissible for the officers to detain Hensley to see if their common sense was correct. This logic puts the cart before the horse: officers are permitted to act first, and find out later if there were good reasons to justify their intrusive actions.

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281 See id. at 223-24 (Covington police officers "were acquainted with Hensley" and periodically looked for him in places he was known to frequent).

282 For the full text of the bulletin, see supra note 269. Curiously, Justice O'Connor suggested that a seizure would be proper to "inform [Hensley] that the St. Bernard police wished to question him." *Hensley*, 469 U.S. at 234. Perhaps Justice O'Connor believed that the seizure was intended for Hensley's benefit. Skepticism, however, suggests that Hensley probably would have preferred that the Covington police had refrained from this "public service" action. *Cf. Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Holmes, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.").

283 Justice O'Connor never precisely defines how long an investigatory stop could take. See Harper, supra note 95, at 33.

284 See *Hensley*, 469 U.S. at 234.

285 Justice O'Connor's deferential approach certainly conflicts with the jurisprudential model urged by Professor Black when constitutional rights are implicated by police intrusions. See generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). Professor Black argued that the actions of individual police officers are entitled to "no presumption of constitutionality whatever." *Id.* at 78. As Professor Black put it:

If [a police official] did not in good faith consider the federal constitutional problem, his judgment on it is nonexistent. If he did consider it, his judgment, I think it not too unkind to say, is worthless. When the accused person appeals to the Court on the federal constitutional ground, he is appealing to the very first official authorized or competent—or, for that matter, likely—to consider his claims.

*Id.* at 89.
Court demanded no proof that an arrest warrant normally follows the issuance of a wanted flyer.\textsuperscript{286} Nor was there any evidence of written police guidelines regarding the procedure for detaining persons named in "wanted flyers." Instead, the Court relied on the assumptions and reactions of officers in the field.\textsuperscript{287}

\textit{Hensley}'s reasoning cannot be saved by claims that the challenged police techniques are minimally intrusive. As noted previously, emphasizing the manner in which officers perform permits manipulation of fourth amendment interests.\textsuperscript{288} For the average officer, "common sense and ordinary human experience\textsuperscript{289} might dictate requiring someone like Hensley to wait in his car for approximately an hour while the officer checks to see if an arrest warrant has been issued. Such a seizure would therefore not be considered unduly intrusive in light of the law enforcement interests advanced. For the individual detained, however, such a seizure is likely quite offensive.\textsuperscript{290}

\textsuperscript{286} The government proffered no objective, empirical evidence showing that arrest warrants usually follow the issuance of flyers. At the trial, the arresting officers simply stated that in their experience warrants usually follow flyers. Record, Joint Appendix at 22, 33, United States v. Hensley, 469 U.S. 221 (1985) (No. 83-1330). This was the only evidence proffered to prove that warrants usually follow flyers. Brief for the Petitioner at 3, United States v. Hensley, 469 U.S. 221 (1985) (No. 83-1330).

\textsuperscript{287} Later in her opinion, Justice O'Connor concedes that the flyer did more than ask other departments to "briefly detain" Hensley. It requested other departments to "pick up and hold" Hensley. Recognizing that such an action would amount to a \textit{de facto} arrest without probable cause, she tries to sidestep the logic of her earlier rhetoric by disclaiming any notion that the Court approves of "actions that could foreseeably violate the fourth amendment." \textit{Hensley}, 469 U.S. at 235.

This type of waffling will not do. The Court should always be careful about the scope of authority its holdings grant to police officials because, as Justice Jackson warned, "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." \textit{Brinegar v. United States}, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

\textsuperscript{288} See supra notes 198-237 and accompanying text; Maclin, supra note 225, at 687-92.


\textsuperscript{290} \textit{Cf. United States v. Place}, 462 U.S. 696, 722 n.2 (1983) (Blackmun, J., concurring) ("It makes little difference to a traveller [who] . . . is seized whether the police conscientiously followed a lead or bungled the investigation. The duration and intrusiveness of the seizure is not altered by the diligence the police exercise.").

The extreme deference given to police reaction by \textit{Hensley} is shown in the Court's approval of a menacing police tactic in the absence of any sign of danger to police officers or others nearby. Justice O'Connor saw nothing improper when a Covington police officer approached Hensley's vehicle with his gun drawn and pointed in the air. \textit{Hensley}, 469 U.S. at 235.

Only a few persons would forbid an officer to search a citizen where the officer is "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others" nearby. \textit{Terry}, 392 U.S. at 24. This rule, however, requires that the officer have an immediate, specific, and articulable basis for the search. The same principle should apply to protective seizures.

\textit{Hensley} ignored this rule. When Hensley was seized, there was no evidence that he
The lack of objective criteria dramatically affects police dealings with society’s disfavored classes. In the 1960s, some claimed that allowing detention and questioning of “suspicious” individuals would encourage arbitrary and discriminatory law enforcement practices. The Court maintained in Terry and its progeny that investigative detentions would not be allowed to turn on the subjective views of police officers; instead, officers were required to articulate specific facts that justified their belief that criminality was afoot.

Although the Terry Court promised not to rely on subjective judgments of law enforcement officers, United States v. Sokolow shows that this promise has not been kept. Sokolow permits government agents to seize individuals based on an unproven belief that certain innocent behavior is indicative of guilt.

Earlier in the case’s history, the Ninth Circuit had held that exhibition of characteristics allegedly shared by drug couriers did not give rise to a reasonable suspicion of criminality. The Supreme Court was armed and presently dangerous to the approaching officer. Hensley had been driving his Cadillac convertible down the streets of Covington, Kentucky in a lawful manner; he posed a threat to no one. Nor was it evident why, if the officer sought to “maintain the status quo during the course of the stop,” Hensley, 469 U.S. at 239, it was necessary to approach with a drawn weapon. Under ordinary conditions, menacing police tactics do not maintain the status quo; they intensify and exacerbate the tensions inherent in police-citizen encounters. Moreover, Justice O’Connor’s lax analysis performs “a disservice to society at large.” See Harper, supra note 95, at 38 (“Aggressive police action of pulling citizens over in vehicles ordering them out of their cars, and holding them at gunpoint, will no doubt have a negative impact in minority communities.”). The Court should require more than police intuition before it sanctions such dangerous police tactics.

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292 See, e.g., Schwartz, supra note 129, at 445.

293 See Burkoff, supra note 139, at 690; see also 3 W. LaFave, supra note 54, § 9.3(a), at 422-28.


295 United States v. Sokolow, 831 F.2d 1413, 1418-1419 (9th Cir. 1987), rev’d, 109 S. Ct. 1581 (1989). The Ninth Circuit’s fear that drug agents were questioning and seizing persons “based upon stereotypes of drug courier appearance and behavior,” has been supported by Professor Cloud’s extensive empirical study of the drug courier profile. Professor Cloud’s study reveals that “most of the drug courier profile characteristics appearing in the caselaw do not accurately describe the behaviors of actual drug couriers and generally are not relied upon by the police.” Cloud, supra note 117, at 884.

An example of the type of police conduct that motivated the concursus of the Ninth Circuit recently surfaced in Georgia. See Edwin W. Lempinen, The Guilty Look, Student Lawyer, Dec. 1988, at 5 (court documents reveal that a highway drug courier profile was developed that instructed Georgia state troopers to look for the following: “[M]inorities who wear ‘lots of gold,’ cars carrying a box of tissues, which signals cocaine use, and cars
Court disagreed.296

In finding a reasonable suspicion of criminality, Chief Justice Rehnquist characterized Sokolow's activities as "out of the ordinary," "more out of the ordinary," and "sufficient to warrant consideration."297 Such terms cannot provide a guide for lower courts that must assess claims of arbitrary police behavior. These criteria give officers freedom to effect seizures based on personal appearances or habits that lack any connection to ongoing criminal conduct, and most importantly, are neither crime- nor suspect-specific.298

The Chief Justice implied that relying on the common sense of drug agents was consistent with the Constitution. Quoting from Illinois v. Gates,299 he explained that "'innocent behavior will frequently provide the basis for a showing of probable cause,' and that '[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'"300

One can question whether Gates's totality of the circumstances approach provides any more of a principled way to review police conduct than does the common sense standard.301 As Professor Kamisar has noted, Gates's totality of the circumstances test certainly does not "limit what [types of innocent] circumstances are to be considered relevant"302 for deciding the existence of probable cause. The totality of the circumstances test will not help judges review police intrusions because "[a]lmost everything [will be] rele-

carrying empty McDonald's cartons or pillows and blankets in the back seat, which may signal drug runners in a hurry.").

296 The Court's criticism of the Ninth Circuit's opinion was not substantive. The Court basically criticized the lower court for attempting to place a framework on the reasonable suspicion requirements. Many, however, have complained that the reasonable suspicion analysis sorely needs a framework to guide the police and courts. See, e.g., Charles L. Becton, The Drug Courier Profile, 65 N.C.L. REV. 417, 438-44, 474-80 (1987); Cloud, supra note 117, at 870; Grano, supra note 129, at 455; Kamisar, supra note 60, at 132-43.

297 Sokolow, 109 S. Ct. at 1582.

298 See Cloud, supra note 117, at 853 (law enforcement officers relying on the drug courier profile generally do not have "advance information suggesting that a specific crime has been committed nor even that any passenger on a particular flight is carrying drugs. Instead, they operate on the assumption that illegal drugs are carried by some members of the general population of air travellers.").


300 Sokolow, 109 S. Ct. at 1586 (quoting Gates, 462 U.S. at 243-44 n.13).

301 As I argue at infra notes 341-50 and accompanying text, Gates's totality of the circumstances test and the common sense rule the Court uses in its Terry cases are one and the same.

vant, but almost nothing [will be] decisive." 303 Ultimately, both Gates and the common sense standard accommodate the interests of the police to a much greater extent than they accommodate fourth amendment interests. 304

Moreover, although Sokolow correctly recalled that Gates permits arrest based on innocent facts, this assertion tells only half of the Gates story. The Chief Justice neglected to add that the facts supporting probable cause in Gates were not ordinary, everyday innocent facts. The "innocent" facts involved in Gates were suspect-specific, 305 specified the particular crime, described where, when, and how the alleged crime would occur, 306 were corroborated by extensive police surveillance before the police acted to secure a warrant, 307 and suggested a definite "nexus between the corroborated details and the alleged crime." 308 Although the facts corroborated in Gates were innocent in a technical sense, viewed together they could be called "innocent-plus." The facts in Sokolow were a world apart from the facts of Gates. Apart from his personal appearance and habits, nothing suggested that Sokolow and his companion were engaged in criminal conduct.

Sokolow marked a shift in constitutional law. Allowing seizures based solely on personal appearances and habits raises concerns similar to those that influenced the Court a generation ago when it

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303 Id.
304 Id. at 570-71.
305 An anonymous letter informed the Bloomingdale, Illinois Police Department that "a couple in your town . . . strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums." Gates, 462 U.S. at 225.
306 The tip stated: "Most of their [drug] buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back." Id.
307 After receiving the anonymous tip, the Bloomingdale police corroborated that Lance Gates did reside in Bloomingdale. They also discovered that an "L. Gates" had made a reservation to fly to Florida on May 5. The police also learned that Gates did indeed fly to Florida on May 5, that after arriving in Florida Gates immediately went to a room in a Holiday Inn registered to Sue Gates, that Gates and an unidentified women left the motel the next morning in a car bearing Illinois license plates registered in Gates's name, and that the couple drove northbound on a highway often used by Chicago-bound travelers. After corroborating all of these facts, the Bloomingdale police then sought and obtained a warrant to search the Gates's home and car. Id. at 266. Thus, the anonymous tip certainly satisfied Justice White's requirement that the informant's information not only appear credible, but also that it appear to be based on "reliable, inside information." Id. at 270 (White, J., concurring).
308 Kamisar, supra note 302, at 568; cf. Ker v. California, 374 U.S. 23, 36 (1963) (while the corroborative actions of the defendant were innocent facts, when considered with both the informant's tip and the police surveillance that connected Ker with specific illegal activities involving the same individual, a known drug dealer, there was sufficient reason to believe Ker was in possession of drugs).
struck down overly broad vagrancy laws. In both situations, "there are no standards governing the exercise of discretion"\textsuperscript{309} of law enforcement officials. Traditionally, investigative seizures had to be supported by objective and reviewable criteria, not by hunches or conclusory factors. Citizens should not be subjected to police seizures on the basis of their personal characteristics, habits, or appearance. Appearing "out of the ordinary" or "out of place" with respect to the general population of a particular neighborhood or region is not enough to justify being seized.

It would not be radical to require the government to show an objective or empirical basis for its judgment that apparently innocent conduct justifies a suspicion of criminality.\textsuperscript{310} The Court in \textit{United States v. Brignoni-Ponce}\textsuperscript{311} declared that roving border patrol stops were permissible if there was reasonable suspicion that a vehicle was transporting illegal aliens. The Court noted that agents were free to consider a variety of factors in deciding whether they had sufficient grounds to justify a stop.\textsuperscript{312} Agents could rely upon the presence of seemingly innocent factors that were nevertheless relevant because the government's empirical data exposed the true nature of the "innocent" conduct. Officers were permitted to rely upon the area's general characteristics, including its proximity to the border, the usual pattern of traffic, and collected data regarding "recent illegal border crossings."\textsuperscript{313} Significantly, however, the Court did not endorse the government's claim that its "officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."\textsuperscript{314}

\begin{footnotes}
\textsuperscript{310} United States v. Cortez, 449 U.S. 411 (1981), hinted that empirical data could be an element in demonstrating why facially innocent behavior could support an inference of criminality. It explained that an assessment of reasonable suspicion under the "totality of the circumstances" could include judicial consideration of not only "objective observations" of officers in the field, but also "information from police reports," if available, and evaluation of the "modes or patterns of operation of certain kinds of lawbreakers." \textit{Id.} at 418.
\textsuperscript{311} 422 U.S. 873 (1975).
\textsuperscript{312} A border agent's relevant personal observations included noting that a vehicle was heavily loaded, contained many passengers, held persons trying to hide, or engaged in obvious efforts to evade officers. \textit{Id.} at 885.
\textsuperscript{313} \textit{Id.} at 884-85; \textit{see also} Almeida-Sanchez v. United States, 413 U.S. 266, 279, 283 (1973) (Powell, J., concurring).
\textsuperscript{314} \textit{Brignoni-Ponce}, 422 U.S. at 885-86. Mexican appearance could not justify seizing a person because "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small portion of them are aliens." \textit{Id.} at 886; \textit{see also} \textit{Developments—Race and the Criminal Process}, 101 Harv. L. Rev. 1472, 1504 (1988) [hereinafter \textit{Developments}] (courts generally have rejected the use of ethnicity as a blanket criterion to justify investigative seizures) (footnote omitted). But cf. United States v. Martinez-Fuerte, 428 U.S. 543, 562-63 (1976) (Border agents may stop vehicles at fixed checkpoints for brief questioning even in the absence of individualized suspicion that vehicle contains illegal aliens.}
\end{footnotes}
The fundamental point is that police officials should not be free to effect seizures based upon factors allegedly possessed by those engaged in criminal conduct, but also shared by a significant percentage of innocent persons particularly when those factors concern characteristics like race and age. Seizures based upon stereotypes of appearance and personal habits are not seizures against known or suspected criminals. Instead, they are employed because of a "statistical chance of uncovering a certain percentage of violators in large groups of persons." Moreover, despite the allure of government statistics, judges are often unable to appraise the basis for a particular seizure. When officials know that their decisions are essentially unreviewable, the risk of arbitrary and capricious actions can become intolerable.

Moreover, it is permissible "to refer motorists selectively to the secondary inspection area at the . . . checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." (footnote omitted).

See Johnson, supra note 291, at 225-41. See generally Stormer & Berstein, supra note 181; Developments, supra note 314, at 1500-04 (discussing cases where the courts have allowed law enforcement officers to use race as a factor in justifying investigatory seizures).

Jacobs & Strossen, supra note 20, at 662. This point was originally made by Professors Jacobs and Strossen regarding the unconstitutionality of suspicionless roadblocks for drunk drivers. They perceptively noted that judicial acceptance of police seizures based on the statistical likelihood of catching offenders "could be extended to other pressing law enforcement problems, such as possession of narcotics or firearms, mugging, shoplifting, or bank robberies." Id. (emphasis added).

United States v. Mendenhall, 446 U.S. 544 (1980), exemplifies how government statistics can influence the Court. Justice Powell's concurring opinion, joined by the Chief Justice and Justice Blackmun, argued that Mendenhall's actions gave the agents a reasonable suspicion that she was a drug courier. Justice Powell emphasized the specialized training and expertise of federal drug agents in detecting narcotics trafficking. To bolster this point, Justice Powell noted that "[d]uring the first 18 months of [a drug courier intercept] program, agents watching the Detroit Airport searched 141 persons in 96 encounters. They found controlled substances in 77 of the encounters and arrested 122 persons." Mendenhall, 446 U.S. at 562.

Although the statistics Justice Powell cites seem convincing at first glance, Professor Kamisar has noted that the government's high "batting average" may not be so impressive upon closer scrutiny. See Kamisar, supra note 60, at 139. According to Professor Kamisar:

The government's brief [in Mendenhall] defined "encounters" for purposes of these statistics as encounters where a search ensues. But there may be many encounters which never progress to the "search" stage, because the suspect provides satisfactory identification or otherwise dispels suspicion when initially approached or stopped. For all we know there may be ten or fifteen "encounters" which never escalate to the "search phase" for every one that does. The DEA agents may have a remarkable record when they finally order (or "request") the suspect to remove his or her clothing. But they may have a much less impressive record when all encounters are taken into account.

See id. (footnote omitted) (emphasis in original).

Cf. Amsterdam, supra note 154, at 435 ("The dangers of abuse of a particular
It is not enough to assert without proof—as the government did in Sokolow—that innocent persons seldom exhibit the combination of characteristics that make up a criminal profile. Nor is it persuasive to claim that it is impractical to require agents to support their seizures with statistical proof. The judiciary should not blindly accept the government’s claims, which come at the expense of constitutional values.

Merely claiming that an agent has exercised his common sense in seizing a traveler is not much different from saying that an agent was acting in “good faith” when he seized a person. History, power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance.”).

See, e.g., Sokolow, 831 F.2d at 1423 (“The government assures us that ‘[t]he combination of facts in this case will rarely, if ever, describe an innocent traveler.’ The obvious lack of substantiation for this claim betrays its lack of merit.”).

See Brief for the United States at 33–34, United States v. Sokolow, 109 S. Ct. 1581 (1989) (No. 87-1295). The United States argued:

[T]he kinds of factors that are important to experienced agents in deciding whether to stop a person traveling through an airport are not readily susceptible to empirical or statistical proof. . . . By ordering experienced narcotics agents to justify their investigative decisions with statistical proof, the court of appeals has essentially rejected the use of inferences based on common sense and the shared experience of agents in the field.

Professor Cloud’s empirical study indicates that “most of the drug courier profile characteristics appearing in the caselaw do not accurately describe the behaviors of actual drug couriers and generally are not relied upon by the police.” Cloud, supra note 117, at 884; cf. Jacobs & Strossen, supra note 20, at 673 (arguing police officials should maintain records of the facts and circumstances that allegedly justified the necessity of specific drunk driving roadblocks; such a requirement would “facilitate agency and judicial enforcement of the reasonable suspicion and probable cause standards”) (footnote omitted).

Cf. Johnson, supra note 291, at 240. Johnson asserted: Agents who look for Hispanic drug couriers find them, and agents who lie in wait for black females do not arrest white males. Of course, these are not insuperable barriers. If the data are as compelling as the DEA would like the courts to believe, the ethnic element in drug courier profiles may satisfy probabilistic constraints. But unless and until the government provides such data, courts should ignore race when assessing the justification for the detention of a suspected drug courier.

A recent example of Professor Johnson’s concerns about the use of race and ethnicity by police officials surfaced in New York City. See People v. Evans, 556 N.Y.S.2d 794 (Apr. 20, 1990). Justice Carol Berkman of the State Supreme Court suppressed evidence found by police officers who had seized and searched a woman because she exhibited “unusual” behavior for someone in the Port Authority bus station, a large bus terminal in midtown Manhattan. Justice Berkman noted, as an anecdotal matter that all of the persons arraigned in her court by the Port Authority police were members of minority groups. Justice Berkman explained that she handled the arraignment of “approximately one-third of the felony cases in New York County and h[ad] no recollection of any defendant in a [Port Authority Police Department] drug interdiction case who was not either Black or Hispanic.” Id. at 796 n.2.

It is no reassurance to be told, as a spokesperson for the Drug Enforcement Administration was quoted as saying, that government agents “can spot a drug dealer
however, teaches that where an officer's subjective good faith is the test, the fourth amendment means very little, and citizens are "'secure in their persons, houses, papers, and effects,' only in the discretion of the police."\textsuperscript{323} Simply deciding that the police acted

the way a woman can spot a deal at the supermarket." Lisa Belkin, \textit{Airport Anti-Drug Nets Snare Many People Fitting Profiles}, N.Y. Times, Mar. 20, 1990, at B6. If the federal government were as successful as it claims, one might expect it to provide data to support its assertions. It comes as no surprise, however, that the government does not keep statistics on how many people are seized because they fit drug profiles. And, of course, the government keeps no statistics on how many (or how few) of these seizures result in the discovery of drugs. \textit{Id. See generally Kamisar, supra note 60, at 139; supra note 317 and accompanying text.}

Moreover, government officials do not ease concerns about discriminatory seizures when they claim that race has nothing to do with who is seized, but operate in a manner that demonstrates that race has much to do with who is seized. \textit{See, e.g., Belkin, supra (reported in Houston that 86\% of those subjected to X-ray searches are Nigerian; of the 60 persons subjected to X-ray searches, only 4 were discovered to be carrying drugs); Roland Sullivan, Police Say Drug-Program Profiles Are Not Biased, N.Y. Times, Apr. 26, 1990, at B3 (Port Authority reports that "[a]ll but 2 of the 210 people arrested" under its drug-interdiction program in 1989 were either black or Hispanic).}

\textsuperscript{323} Beck v. Ohio, 379 U.S. 89, 97 (1964). The Court's ruling in \textit{Alabama v. White}, 110 S. Ct. 2412 (1990), will expand the discretion afforded police to make \textit{Terry} seizures. \textit{White} held that an anonymous tip could justify an investigatory seizure, provided the police corroborate some aspects of the tip.

In \textit{White}, police received an anonymous phone call that Vanessa White would be leaving a specified apartment at a particular time in a brown Plymouth station wagon, with a broken right taillight lens, going to Dobey's Motel and that she would have cocaine inside a brown attache case.

Officers immediately proceeded to the apartment building. The officers observed the brown Plymouth with a broken right taillight in front of the specified building. Shortly, a woman, carrying nothing in her hands, left the building and got in the Plymouth. The vehicle took the most direct route to Dobey's Motel. Before reaching the Motel, police stopped the car. After receiving White's consent, the police searched an attache bag discovered in the car. Narcotics were found.

Speaking for a majority of the Court, Justice White disagreed with the finding below that the police had insufficiently corroborated the anonymous tip to furnish reasonable suspicion that White was engaged in criminal conduct. While conceding that an informant's veracity, reliability, and basis of knowledge are relevant in deciding whether reasonable suspicion exists, Justice White explained that reasonable suspicion "can arise from information that is less reliable than that required to show probable cause." \textit{Id. at 2416 (emphasis added).}

It was sufficient that the police corroborated that a woman left the specified building, got into a brown Plymouth, and drove in the direction to the specified destination. The fact that the police did not know Vanessa White or even know it was Vanessa White who left the building was immaterial. Nor did it matter that the police failed to corroborate the particular time White was supposed to leave the building. Under a totality of the circumstances test, once the police verify "significant aspects" of a tip, there is "reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." \textit{Id. at 2417.}

It is not troublesome that \textit{White} sanctioned the use of anonymous tips to justify investigatory seizures. If such tips are permitted to establish probable cause, \textit{see Illinois v. Gates, 462 U.S. 213, reh'g denied, 463 U.S. 1237 (1989), there is no apparent reason why they cannot be used to show reasonable suspicion. What is disturbing about \textit{White} is the reaffirmation that under the Court's "balancing" test, criteria that enhance police
reasonably cannot be enough.324

IV SOURCES OF THE DECLINE OF THE RIGHT OF LOCOMOTION

The preceding analysis describes the current state of the right of locomotion and demonstrates the doctrinal weaknesses in the Court's elimination of it. The cost to individual freedom is obvious. It is perhaps less obvious that the Court has overlooked two important matters. First, the Court mischaracterizes the constitutional interests at stake in the public travel cases. Rather than focusing on whether any privacy interest has been deprived by police officials, the Court should recognize that nonprivacy interests are also implicated in a street encounter. Persons on the street and in other pub-

sions are emphasized, while factors that promote fourth amendment values are ignored.

For example, in deciding whether police are free to seize persons based upon partially corroborated anonymous tips, should not the urgency surrounding the investigation be a relevant factor in judging the reasonableness of the police intrusion? Cf. Jernigan v. Louisiana, 446 U.S. 958, 959 (1980) (White, J., dissenting from denial of certiorari) (Prior precedents have "emphasized the specificity of the information provided, the independent corroboration by the police officer, and the danger to the public."). In a case involving an alleged emergency, more deference can be given to intrusive police reactions. Where there is no apparent emergency, it is ironic to let the police rely upon "information . . . less reliable" than required in other fourth amendment contexts. White, 110 S. Ct. at 2416.

Also, where the police act on information that is, by definition, unknown and presumably unreliable, what is unreasonable about asking police officers to consider alternative means of investigation before effectuating a forcible seizure? Would it have been unreasonable for the police to ascertain that the woman who drove the Plymouth was Vanessa White? A radio check of the vehicle's license plate might have revealed her physical description. If this were unavailable, officers could have approached her on the street after she exited her vehicle and requested to see some identification. Still simpler, the officer receiving the tip could have asked the anonymous informant to provide a description of White. Under the Court's holding, however, the police were not required to even consider the feasibility of these investigative methods.

Finally, and perhaps most distressing, was the Court's failure to even acknowledge the potential for abuse associated with anonymous tips. As Justice Stevens noted in his dissent in White, "every citizen is [now] subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed." White, 110 S. Ct. at 2418. For an example of the type of abuse that can occur when police officers feel free to fabricate "anonymous informants," see Commonwealth v. Lewin, 405 Mass. 566, 542 N.E.2d 275 (1989).

324 When the Court formulates a fourth amendment theory that makes the common sense of the officer the constitutional yardstick, the consequences of this approach in the real world are predictable:

What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Amsterdam, supra note 154, at 394.
lic places have rights of locomotion and personal integrity, independent of any privacy right.

Second, the reasonable suspicion standard also gravely limits the right of locomotion. Rather than operating as a guard against arbitrary and capricious police intrusions, the reasonable suspicion standard permits the Court to defer to police intuition and subjectivity. This, of course, was not the Court's intent when it first adopted an intermediate standard for reviewing police intrusions. *Terry* sanctioned police invasions on less than probable cause only when an officer possessed "specific and articulable facts" which justified the intrusion.\(^3\)\(^2\)\(^5\) *Terry* also envisioned vigorous judicial review.\(^3\)\(^2\)\(^6\) The development of the probable cause standard since *Terry*, however, leaves little legitimate reason for continued use of the reasonable suspicion standard.

A. The Mistaken Emphasis on Privacy Interests

Ironically, it was not long ago that a unanimous Court recognized the constitutional vice in the rule it now promotes. *Brown v. Texas*\(^3\)\(^2\)\(^7\) marked a zenith in the fourth amendment's protection of the person on the street. There, police officers observed Brown and a companion walking away from each other in an alley located in a neighborhood frequented by drug users. The officers accosted Brown and demanded to see identification; Brown refused to comply, and was subsequently arrested for refusing to identify himself.

A unanimous Court held that this action violated the fourth amendment.\(^3\)\(^2\)\(^8\) The fact that the situation "looked suspicious,"\(^3\)\(^2\)\(^9\) and the area was frequented by drug users, was not enough to justify stopping Brown. Moreover, while it may have been "under-

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\(^{3\!2\!5}\) *Terry* v. Ohio, 392 U.S. 1, 21 (1968).
\(^{3\!2\!6}\) *Id.* at 22-23.
\(^{3\!2\!7}\) 443 U.S. 47 (1979).
\(^{3\!2\!8}\) *Id.* at 51-53. Some commentators have questioned the Court's description of when the seizure actually occurred in *Brown*. The Court expressly stated that "[w]hen the officers detained [Brown] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment." *Id.* at 50. Shortly after this statement, the Court repeated *Terry's* broad definition of "seizure" by noting that "'whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.'" *Id.* (quoting *Terry*, 392 U.S. at 16).

A sensible reading of *Brown* supports the view that the seizure occurred as soon as the officers approached Brown, asked him for identification and an explanation of his presence, and Brown angrily asserted that the officers had no right to stop him. Would the average person believe that Brown was free to leave at this point?

Professors LaFave and Williamson, however, have cautioned against broad readings of *Brown*. See 3 W. LAFAVE, *supra* note 54, § 9.2(h), at 403 n.203; Williamson, *supra* note 205, at 785.

\(^{3\!2\!9}\) *Brown*, 443 U.S. at 49.
standable” from an officer’s perspective to inject a “police presence” into the situation, that desire was constitutionally inadequate to justify a fourth amendment deprivation. Separately or in combination, these government concerns were insufficient to justify accosting or detaining Brown.

Brown v. Texas was reminiscent of an earlier judicial era. It recognized that rights of personal security and locomotion are not waived because one appears suspicious. Brown made clear that “the balance between the public interest [in law enforcement] and [one’s] right to personal security and privacy tilts in favor of freedom from police interference.”

The Court is no longer faithful to the view envisioned in Brown. Chesternut epitomizes the Court’s new outlook. Chesternut not only affirmed that pedestrians have no expectation of privacy against police inquiries, it ruled that pedestrians have no right of privacy against a “police presence” that includes being chased by a police cruiser. Justice Blackmun relied upon United States v. Knotts and Florida v. Royer to support this conclusion. Both of these cases also made clear that persons in public places have little, if any, privacy interests protected by the fourth amendment.

Knotts held that governmental monitoring of a vehicle traveling on the open road with a beeper-laden container does not violate any protected expectation of privacy. In fact, Knotts resolutely stated that a “person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one

330 Id. at 52. The Chief Justice’s statement about the “understandable” desire to assert a police presence should not go unquestioned. A desire to assert a police presence in a situation similar to Brown is understandable—and constitutionally unobjectionable—so long as one carefully defines “police presence.”

If a “police presence” means sending a police cruiser down a street to observe a suspicious looking character, fourth amendment values suffer no harm. On the other hand, if a police presence means the type of police harassment described by Professor Reich, see Reich, supra note 198, at 1161-62 (person walking at night stopped on the street by an officer demanding that the person reveal his identification, age, occupation, and reason for being out on the street), or the police conduct involved in Kolender v. Lawson, 461 U.S. 352 (1983) (black male who liked to walk late at night in the white neighborhoods of suburban San Diego was stopped or arrested 15 times), then one can question the desirability—and constitutional validity—of injecting a police presence into so-called suspicious situations.

331 As Justice Brennan has noted, the decision in Brown also made clear “that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion.” Kolender v. Lawson, 461 U.S. 352, 368 (1983) (Brennan, J., concurring).

332 Brown, 443 U.S. at 52 (emphasis added).


place to another." If a motorist has no expectation of privacy regarding the movement of his car on the street, it follows a fortiori that a pedestrian has no expectation of privacy with respect to his movements on the street.\footnote{336}{Knotts, 460 U.S. at 281.}

\textit{Royer} explained that no fourth amendment interests are jeopardized when a police officer accosts and questions an individual in a public place. A police officer, like anyone else, has a right to address questions to other persons,\footnote{337}{In \textit{Mendenhall}, two Justices made clear their view that a person enjoys more protection from police intrusion while traveling in his automobile than when walking on the street. United States v. Mendenhall, 446 U.S. 544, 556-57 (Stewart, J., joined by Rehnquist, J.); cf. Murphy, \textit{supra} note 198, at 215 n.59 (noting the apparent inconsistency between the Court's analysis of police-pedestrian encounters and police-motorist encounters).} and there are diminished expectations of privacy in public places.\footnote{338}{See Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring).} Consequently, persons who "voluntarily" choose to travel on the streets, as in \textit{Knotts}, or move about in a public place, as in \textit{Royer}, cannot expect to be free from a police presence that is not too intimidating. Therefore, Chesternut was in no more of a position to assert a fourth amendment interest than were the defendants in \textit{Knotts} and \textit{Royer}.

It is not clear why the Court refuses to distinguish between a pedestrian's lack of privacy while in a public place, and a person's rights of personal security and locomotion. Perhaps the modern constitutional fascination with the right of privacy obscures other fourth amendment values. Perhaps this distinction is rejected because recognition of a meaningful right of locomotion would cripple the right-to-inquire rule, or reveal the shallowness of the common sense standard. Whatever the motivation, the principle expressed in \textit{Brown v. Texas} has been discarded. Despite the fourth amendment's express command to secure citizens against unreasonable searches and seizures in their "persons" as well as in their "houses,"\footnote{339}{\textit{Cf.} Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam) (the defendant "'was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude.'" (quoting Florida v. Royer, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting))).} the Court has left no doubt that the average citizen is not free to come and go as he pleases.

\textbf{B. The Reasonable Suspicion Test as the Probable Cause Standard}

Given the development of the probable cause standard, the reasonable suspicion test is no longer needed. At the time \textit{Terry} was decided, there was a theoretical need for an intermediate stan-

\footnote{336}{Knotts, 460 U.S. at 281.}
\footnote{337}{In \textit{Mendenhall}, two Justices made clear their view that a person enjoys more protection from police intrusion while traveling in his automobile than when walking on the street. United States v. Mendenhall, 446 U.S. 544, 556-57 (Stewart, J., joined by Rehnquist, J.); cf. Murphy, \textit{supra} note 198, at 215 n.59 (noting the apparent inconsistency between the Court's analysis of police-pedestrian encounters and police-motorist encounters).}
\footnote{338}{See Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring).}
\footnote{339}{\textit{Cf.} Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam) (the defendant "'was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude.'" (quoting Florida v. Royer, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting))).}
\footnote{340}{See \textit{supra} note 8.}
The probable cause standard then had some real "teeth" to it.\textsuperscript{341} Since Gates,\textsuperscript{342} however, the meaning of probable cause has changed. Gates explicitly stated that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."\textsuperscript{344} According to Gates, probable cause only requires a

\textsuperscript{341} There is nothing endemically wrong with the idea of stop and frisk. Indeed, the mission of stop and frisk theory to establish some third state of police powers, midway between those that can be exercised wholly arbitrarily (such as the power of non-coercive, non-detentive street questioning) and those available only upon probable cause (such as arrest and search), has the allure of sweet reasonableness and compromise.

Brief for the NAACP, supra note 126, at 56.

\textsuperscript{342} See e.g., Sibron v. New York, 392 U.S. 40, 62 (1968) (no reason to believe that a person was in the company of narcotics addicts for over an eight-hour period was engaged in criminal behavior; such an inference "is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."); Beck v. Ohio, 379 U.S. 89 (1964) (officer testified that he had been informed that the defendant, who had a previous criminal record, would be engaged in numbers running at a certain place and time; no probable cause for arrest where the officer observed the defendant in the predicted place); Henry v. United States, 361 U.S. 98, 103-04 (1959) (no probable cause for arrest despite federal agents' knowledge that a crime of interstate theft had been recently committed in the vicinity; a companion of the defendant had been implicated in some interstate shipments; and the defendant and companion were observed in the same vicinity picking up and loading cartons in a car and then driving away).

Professor Sundby might disagree with the notion that probable cause was a rigorous standard when Terry was decided. He traces the demise of the traditional probable cause standard to Camara v. Municipal Court, 387 U.S. 523 (1967). He then argues that Camara's redefinition of "probable cause to include government justification independent of suspicious activity not only conceptually diminished the role of traditional probable cause . . . but also diluted its meaning in a way that created a new receptiveness to government intrusions."

Camara permitted the government to demonstrate probable cause on the basis of innocent conduct. Because of this shift, "the fourth amendment no longer revolved around a concept that unambiguously emphasized both nonintrusion by the government and an individual's right to privacy." Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 400-01 (1988).

\textsuperscript{343} 462 U.S. 213 (1983).

\textsuperscript{344} Gates, 462 U.S. at 232. Of course, this aspect of Gates did not go unnoticed. Professor Wasserstrom has criticized the notion that probable cause had been traditionally considered a "flexible standard" or "fluid concept." See Wasserstrom, supra note 45, at 327, 337.

As a formal matter, the Gates Court discarded the "two-pronged" test for determining whether an affidavit alleged sufficient probable cause to justify a magistrate's issuance of a search warrant. Under the two-prong test, an affidavit first had to show the "basis of knowledge" of the affiant's allegation that criminal activity was occurring. Second, it had to provide sufficient facts to indicate the "veracity" of the information contained in the affidavit, or alternatively, the "reliability" of an informant's allegations. The two-prong test derived most of its substance from the Court's earlier holdings in Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964).

Gates decided that it was "wiser to abandon" the two-prong test. Gates, 462 U.S. at 238. Gates replaced it with a standard that asked whether on a "common sense" basis, the "totality-of-the-circumstances" established probable cause to believe criminality had occurred. Id.
"probability or substantial chance" of criminality; it is sufficient if circumstances "'warrant suspicion'" of criminal behavior. No prima facie indication of criminality is needed. In fact, scholars of diverse viewpoints agree that the probable cause test is now the functional equivalent of a reason to suspect, or substantial possibility standard.

This raises a fundamental question. If evidence sufficient to warrant a suspicion of criminal behavior satisfies the probable cause standard, what, if anything, is left of the reasonable suspicion standard? If probable cause only means a "fair probability" or "substantial chance" of criminal behavior, is it possible to have a less demanding standard without giving the police the right to search and seize on a whim?

In an era of diluted probable cause, the Court should discard

\[\text{footnotes omitted}\]
the reasonable suspicion test. First, after Gates there is no need for, and no way to meaningfully articulate and apply, an intermediate standard between probable cause and arbitrariness. Second, while the reasonable suspicion rule is a powerful investigatory device, the types of intrusions it permits have severe consequences for constitutional freedoms. Consider also that while the investigatory powers of law enforcement officials have been expanding, society has nonetheless witnessed an increase in the use and availability of illegal drugs. One has to wonder whether the alleged gain in law enforcement capabilities has been worth the price of the constitutional freedom lost.350

**CONCLUSION**

Stemming the flow of illegal narcotics is the driving force behind many cases involving police-citizen encounters, and behind

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*supra* note 342, at 403, I disagree that the reasonable suspicion standard should be retained, even for stop and frisk cases.

Under Professor Sundby's modification, fourth amendment intrusions would be permitted on reasonable suspicion when the safety of the police or public is endangered. Apart from the problems of defining a third level of suspicion between probable cause and police whim after Gates, see notes 341-48 and accompanying text, I wonder whether Professor Sundby's reasonable suspicion-exigent circumstances exception would preclude the current Court from finding exigency in circumstances that present no immediate danger to the public. *Cf.* United States v. Hensley, 469 U.S. 221, 227-29 (1985) (rejecting rule that precludes police from stopping persons they suspect of past criminal conduct). The *Hensley* Court noted:

[R]estraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible.

*Id.*

Is there any doubt that the Court would find a sufficient threat to the public safety in the aftermath of a tragic and highly publicized shooting? If one needs a recent example of how the combination of homicide, racism, and public hysteria can work together—at the expense of fourth amendment freedoms—the shooting of Charles and Carol Stuart in Boston provides an excellent illustration. *See Racial Manipulation in Boston,* N.Y. Times, Jan. 6, 1990, at A24, col. 1. For a discussion of the fourth amendment questions raised by the Stuart shooting, see Maclin, *supra* note 10.

350 *See* Wayne R. LaFave, Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 J. CRIM. L. & CRIMINOLOGY 1171, 1223-24 (1983). Indeed, a special committee chaired by Professor Dash has found "evidence that certain disregard for the Fourth Amendment, specifically in drug cases, may be an unavoidable by-product of a drug problem so pervasive that the police feel they sometimes must violate constitutional restraints in order to regain control of the streets." Professor Dash's committee emphasized that "the problem is drug use[,] and not the constitutional restrictions on the police. The legal and illegal searches and arrests for drugs have generally proven ineffective in controlling or reducing the drug problem." *Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section, Criminal Justice In Crisis* 46 (1988).
much of the Court's fourth amendment jurisprudence in general.\textsuperscript{351}

However, the \textit{Terry} doctrine has not been a panacea for law enforcement officials. Despite two decades of rulings enlarging the government's investigatory powers, there has been no reduction in the use of illegal narcotics. Of course, law enforcement officials cannot be blamed for society's increasing drug habit. This criticism is not meant to approve the use of illegal drugs, nor is it intended to discourage police efforts in the fight against drug trafficking. Police officials, however, are being asked to resolve a social problem that is beyond their resources and expertise to address alone.\textsuperscript{352} Nevertheless, the Court remains fixated on expanding the government's investigatory powers to help control the drug crisis\textsuperscript{353} despite growing evidence that traditional law enforcement efforts are futile. There is no current evidence to support the proposition that a further expansion of police power will deter future drug use.\textsuperscript{354}

\textsuperscript{351} Professor LaFave has made the point more bluntly: "[I]t is almost as if a majority of the Court was hell-bent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials." LaFave, supra note 350, at 1222. \textit{Cf.} Stephen A. Saltzburg, \textit{Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)}, 48 U. Pitt. L. Rev. 1, 3 (1986) ("It is understandable that the judicial branch of government would want to join with the other two in fighting against the use of illegal drugs.").

\textsuperscript{352} \textit{See, e.g.}, Mathea Falco, \textit{The Bush Drug Plan: Nothing New}, N.Y. Times, Sept. 5, 1989, at A19 (criticizing the Bush Administration's new drug plan because the "new strategy would continue to concentrate primarily on law enforcement, despite overwhelming evidence accumulated during the past eight years of the minimal impact of law enforcement on drug abuse and drug trafficking.").

The social decay associated with narcotics is too well-known and pervasive to categorize here. Suffice it to say that all segments of society have a substantial interest in stemming the flow of narcotics into the country and our neighborhoods. But when law enforcement officials concede that conventional police methods will not deter drug abuse, society is naive to believe that greater investigatory powers for the police will solve the drug crisis. \textit{See} Robert Reinhold, \textit{Police, Hard Pressed in Drug War, Are Turning to Preventive Efforts}, N.Y. Times, Dec. 28, 1989, at A1.

\textsuperscript{353} \textit{See, e.g.}, Florida v. Riley, 109 S. Ct. 693, 703 (Brennan, J., dissenting), \textit{reh'g denied}, 109 S. Ct. 1659 (1989). Justice Brennan stated:

\begin{quote}
It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activities disclosed by a search is illegal or innocuous.
\end{quote}

\textit{Id.} at 703.

\textsuperscript{354} \textit{See} President's "\textit{Victory Over Drugs}': Is Decades Away, Officials Say, N.Y. Times, Sept. 24, 1989, \textit{§} 1, at 1; \textit{After Studying for War on Drugs, Bennett Wants More Troops}, N.Y. Times, Aug. 6, 1989, \textit{§} 4, at 5. This article noted that:

\begin{quote}
[S]ome law-enforcement professionals grouse that [Director of National Drug Control Policy] Bennett is too reliant on law-and-order prescriptions for a problem with deep social and economic roots. "I know it would be heresy for a cop to say this, but we need to quadruple our effort on the demand side," said Sheriff Clarence W. Dupnik of Pima County, Ariz., . . . But such programs will get short shrift, he added, because
While the Court has continued to expand police authority, our right of locomotion has been sharply curtailed. Law-abiding persons can be accosted and questioned by police officers at any time. An individual, in effect, can be required to "show his papers" to a curious officer, even though the officer has no reason to suspect the person of wrongdoing. Citizens may be chased down the streets at the whim of patrolling police officers.

Government agents may conduct surprise raids without constitutional restraint. If such raids may occur at a factory where agents stop and question all of those present, what is to prevent similar raids from occurring in a public park or on a downtown boulevard? If the police may chase a person down a Detroit alley without any objective reason to believe the person has committed a crime, what prevents a judge from allowing the police to chase a minority youth walking in a white upper-class suburb, or to shine their search lights into a parked car?\[355\]

A right of locomotion—the right to be left alone in public—is meaningless if police officials are free to board buses or trains and ask to see the identification of, or search the luggage of, every passenger. Is not such a state of affairs "repugnant to American institutions and ideals"?\[356\] Is the war on drugs worth such a high cost in constitutional freedom? Rather than sacrificing constitutional liberties, our resources would be more efficiently spent on educating, rehabilitating, and creating economic opportunities for those currently engaged in narcotics use and trafficking.

Moreover, society should be equally concerned when law enforcement agents use untested and unreliable drug courier profiles to forcibly seize persons whose dress, appearance, or mode of travel differ from the norm. We often forget that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted."\[357\]

Concern over crime and drugs generate little sympathy for the unsavory characters who are accosted and chased by the police in public places.\[358\] But we should recall Justice Douglas's warning at

"people are in a 'lock 'em up and throw the key away' mood, and it is that emotion that is fueling our national policy."

357 McDonald v. United States, 335 U.S. 451, 456 (1948).
358 Police conduct that violates the rights of the Chesternuts and Sokolows of society should concern everyone because "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).
the time Terry was decided: If the Constitution allows the police to accost citizens on a whim, then the "sleepless professor who walks in the night to find the relaxation for sleep is easy prey to the police, as are thousands of other innocent Americans raised in the sturdy environment where no policeman can lay a hand on the citizen without 'probable cause.'"359 When the police are permitted to detain and search citizens because their actions appear to be "out of the ordinary," or because an officer's common sense suggests further investigation is necessary, then the list of casualties will be a lot longer than Chesternut and Sokolow. Everyone is a potential target.360

Alexander Bickel once wrote "that many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."361 This statement, written over twenty-five years ago, aptly describes the dilemma that faces society in our latest crisis concerning illegal narcotics. Government officials advocate strong measures for getting "tough" on drug users and traffickers, and sacrifices are urged to accomplish the task, including compromising the rights protected by the fourth amendment.362

359 Wainwright v. New Orleans, 392 U.S. 598, 614 (1968) (Douglas, J., dissenting). For a telling illustration of what could occur to a professor who walks the streets at night, see Professor Reich's descriptions of his encounters with the police. Reich, supra note 161.

360 "So a search against Brinegar's car must be regarded as a search of the car of Everyman." Brinegar v. United States, 398 U.S. 160, 181 (1949) (Jackson, J., dissenting); see also Nadine Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1189-90 (1988) ("The scrupulous protection of fourth amendment liberties in any case redounds to the benefit not only of the individual who is directly involved, but also of everyone else, since we are all subject to the standards for police conduct which emerge from individual cases.") (footnote omitted); Saltzburg, supra note 351, at 25. Professor Saltzburg argued:

Before our courts decide to abandon the fourth amendment law that has protected the right of people to find private places and to be left alone, the need for these new law enforcement measures ought to be more clearly demonstrated. Otherwise, the most important victim of illegal drugs may be the liberty of a nation.

Id. (footnote omitted).


362 See, e.g., Bostick v. Florida, 554 So. 2d 1153, 1159 (Fla. 1989) (McDonald, J., dissenting) ("The entire war on drugs is distasteful, and society should accept some minimal inconvenience and minimal incursion on their rights of privacy in that fight.") cert. granted, 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990) (No. 89-1717); R. Morin, Many in Poll Say Bush Plan Is Not Stringent Enough; Mandatory Drug Tests, Searches Backed, Washington Post, Sept. 8, 1989, at A1 (poll showed following attitudes among public: "62 percent of those questioned said they would be willing to give up 'a few of the freedoms we have in this country' to significantly reduce illegal drug use"; "52 percent said they would agree to let police search homes of suspected drug dealers without a court order, even if the
The desire to conduct a "war on drugs" reflects the first aspect of government conduct to which Professor Bickel spoke: the ability to serve our "immediate material needs."

But there is another side to this "war": its unappreciated impact on fourth amendment values. The Court's current methodology and crabbed view of the fourth amendment's protection for those on the street is the inevitable result of replacing traditional fourth amendment principles without ad hoc balancing. The unstructured balancing formula wrung from Terry should be discarded so the fourth amendment can return to its rightful place "in the catalog of indispensable freedoms" that sets our nation apart from much of the world.

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363 A. BICKEL, supra note 361, at 24.
365 One cannot . . . imagine a free society without some protection against unreasonable searches and seizures. By definition, a society that permits its police to search or arrest whenever or whomever they please is not a free society . . . . The fourth amendment, therefore, should be viewed along with a few other safeguards, such as the first amendment's protection of political speech, as a bulwark of civil liberty and of freedom itself.

Grano, supra note 129, at 519-20 (footnote omitted).