1980

Freezing the Status Quo in Criminal Investigations: The Melting of Probable Cause and Warrent Requirements

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FREEZING THE STATUS QUO IN CRIMINAL INVESTIGATIONS: THE MELTING OF PROBABLE CAUSE AND WARRANT REQUIREMENTS

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INTRODUCTION

In *Bailey v. United States*,[1] police officers were notified that a robbery had just been committed by three black men, otherwise described only in general terms, who had fled in a twelve- or thirteen-year-old automobile.[2] The officers forcibly stopped such an automobile, carrying four blacks, at a time and at a distance from the robbery consistent with its being the getaway car.[3] A police officer approached the car, ordered the occupants to sit still and, after opening the front door and asking the driver for his driving permit, spotted a wallet lying on the floor of the car.[4] The wallet was introduced into evidence and the three defendants were convicted.[5] On appeal, the Court of Appeals for the District of Columbia Circuit, in what might seem at first a routine case, held the wallet admissible.[6] The court found that the police officer had had probable cause[7] to arrest as he approached the car and that the wallet had been seized incident to that arrest.[8]

In a concurring opinion,[9] however, the late Judge Leventhal expressed doubts about the court's approach.[10] In his view, the majority, in order to uphold a search and seizure that seemed intuitively reasonable, had felt bound to find that probable cause had existed when the police stopped the car.[11] Otherwise, the stop, clearly a significant restraint on those in the car,

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[1] 389 F.2d 305 (D.C. Cir. 1967).

[2] *Id.* at 307.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 308.

[6] *Id.*

[7] The phrase "probable cause" appears in the United States Constitution:

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

U.S. CONST. amend. IV.

According to the United States Supreme Court, probable cause exists where "the facts and circumstances within their [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. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

[8] 389 F.2d at 308.

[9] *Id.* at 312.

[10] *Id.*

[11] *Id.*

would have been unconstitutional and any evidence obtained as a result would have been inadmissible. Judge Leventhal agreed with the majority that the search and seizure had been eminently reasonable.[12] What troubled him was the court's determination that probable cause to arrest had been present. Noting that none of the occupants of the car had acted suspiciously, that other such cars had also been stopped at about the same time, that old cars were relatively numerous in that part of the city, and that the officers did not intend to arrest when they approached the car, Judge Leventhal stated:

> I am unwilling to say that any group of three or four Negroes who happened to be riding in an old Chevrolet on that day in a fifty square mile area can without more be searched, booked, and stigmatized by an arrest record regardless of whether they could explain the whole thing away if given an immediate chance.[13]

It is not, however, the fact that Judge Leventhal disagreed with th. court's finding of probable cause that makes his comments noteworthy. The crucial point is that, although he did not believe probable cause to be present, Judge Leventhal still proceeded to uphold the police officer's conduct. In support of his position, he first noted that an entire category of situations existed in which some intrusiveness short of a full custodial arrest would seem reasonable without probable cause.[14] Judge Leventhal then argued that in addition to allowing searches based upon probable cause, the fourth amendment permitted the intrusion in *Bailey*.[15] He viewed this intrusion as existing at an intermediate level, short of a full custodial arrest, and as being based upon an intermediate level of evidence, short of probable cause.[16] His view contrasted with the two-level analysis commonly employed in reviewing the constitutionality of police searches and seizures—probable cause, with which a full custodial arrest could occur, and the absence of probable cause, with which no significant intrusion would be constitutional.[17] To Judge Leventhal, insistence on a two-level construct forced the court to stretch probable cause, to "refashion what was done in order to fit it to the frame of traditional analysis of arrests."[18] Courts could circumvent this problem, according to Judge Leventhal, by relying on a three-tiered analysis which included an intermediary level of intrusion.[19]

Judge Leventhal believed that the level of evidence possessed by the police at the time of the stop in *Bailey* fell short of probable cause, and, therefore, that if the constraints put upon the occupants were significant enough to be considered custodial, an illegal arrest had taken place.[20] If, however, the

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 315.
[15] *Id.* at 315-16.
[16] *Id.* at 316.
[17] *Id.*
[18] *Id.* Aware of the potential for abuse in criminal investigations. Judge Leventhal urged that this danger should be guarded against directly "and not dealt with by manipulating the already overused concepts of arrest and probable cause." *Id.* at 313-14.
[19] *Id.* at 312.
[20] *Id.* at 312, 314.

extent of the constraints applied was no more than necessary to ensure the safety of the police and bystanders, no full arrest requiring probable cause had yet occurred.[21] In short, the level of evidence possessed by the police at the time of the stop did not justify custody but did justify the protection of the police and bystanders. As justification for this intermediate level of intrusion, Judge Leventhal's opinion suggested that the police were entitled to explore, without a search or a full arrest, a situation which could not be reconstructed once the car left the jurisdiction and the occupants scattered.[22] When, during this justifiable encounter, the police officer spotted the wallet on the floor, then—and only then—was there probable cause to arrest the occupants and make a full search incident to that arrest.[23]

Judge Leventhal's eloquent and perceptive opinion reflected a harsh truth: that there are situations where limited intrusions on less than probable cause are justified. Nevertheless, due to the strict probable cause requirement at that time considered necessary to justify any and all significant restraints, these situations were either ignored by the police or, if pursued, the evidence secured was held inadmissible or the transaction was being forced into the probable cause mold.[24]

Judge Leventhal's *Bailey* concurrence broke from this pattern. By identifying situations in which an intermediate level of justification warranted intrusion, Judge Leventhal traced the parameters of a rule which would permit law enforcement to seize the moment to exploit opportunities for investigation. Such a rule would "freeze the status quo" in criminal investigations, authorizing the police to make limited intrusions on less than probable cause when the opportunity for fruitful investigation would otherwise be irretrievably lost.

Although there were, on occasion, other judicial suggestions that the generally accepted all-or-nothing approach with respect to searches could be supplanted,[25] it was not until *Terry v. Ohio*,[26] in 1968, that the United States

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[21] *Id.* at 314.

[22] Judge Leventhal stated that:

> What the police did was to act reasonably to bring a situation under control; they had no way of knowing whether the car would leave the jurisdiction, and once the occupants scattered it would be nearly impossible to reassemble them again.

Id.

[23] *Id.* at 316.

[24] "In other cases the matter was dealt with solely in terms of substantive law because the suspect was prosecuted for 'being suspicious' under a vagrancy statute or similar provision." LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 44 (1968) [hereinafter cited as LaFave] (footnote omitted).

[25] *See* Rios v. United States, 364 U.S. 253 (1960); Brinegar v. United States, 338 U.S. 161 (1949).

[26] 392 U.S. 1 (1968). It is clear that *Terry* added a new level of justification: *"Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause." Dunaway v. New York, 442 U.S. 200, 208-09 (1979). *See also* Pennsylvania v. Mimms, 434 U.S. 106, 115 (1977) (dissenting opinion) ("The approval in *Terry* of a lesser standard for certain limited situations represented a major development in Fourth Amendment jurisprudence."); Wainwright v. City of New Orleans, 392 U.S. 598, 610 (1968) (dissenting opinion) "If this case is to be decided by the traditional Fourth Amendment standard applicable prior to *Terry v.*

Supreme Court confirmed the possibility of limited intrusions on less than probable cause, when such intrusions are necessary and reasonable.

This article will trace the development of what can be called the "freezing the status quo" concept in the United States Supreme Court. That concept provides for intermediate level intrusions based on intermediate levels of justification, permitting law enforcement to isolate an event and exploit its opportunities for fruitful investigation. The article will begin with a discussion of two early cases which hinted at the Supreme Court's willingness to adopt the "freezing the status quo" doctrine as a means of justifying certain police activity in the absence of probable cause. Next, the Court's decisions in *Terry v. Ohio* and subsequent cases will be analyzed. These cases, which laid the foundation for the Court's use of the doctrine, will be reviewed, and the justifications for the decisions will be considered. Finally, the article will examine three cases in which the doctrine could have been used to justify concessions with respect to the warrant clause of the fourth amendment. The article will conclude that the doctrine, although useful, has been imperfectly utilized by the Court, and that future cases will be needed to spell out the limits of justifiable police behavior in "freezing the status quo."

I. Early References

Two pre-*Terry* cases in the United States Supreme Court, *Brinegar v. United States*[27] and *Rios v. United States*,[28] anticipated the "freezing the status quo" doctrine, at least by implication.

Ohio, the question is whether a person who is unconstitutionally arrested must submit to a search of his person, or whether he may offer at least token resistance."); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. Rev. 219, 226 (1974) [hereinafter cited as Weisgall]; and Mr. Justice Harlan's reference to "this important new field of law" in Terry v. Ohio, 392 U.S. 1, 31 (1968) (concurring opinion).

Indeed, there was some feeling that "Terry [might] inaugurate a new era in fourth amendment adjudication, under which the question in every case [would] simply be whether the police conduct was reasonable, taking into account all the competing interests." J. Scarboro & J. White, Constitutional Criminal Procedure: Cases, Questions and Notes 229 (1977) [hereinafter cited as Scarboro & White].

Although the doctrine was new, however, the practice may not have been:

> The practice of stop and frisk, of course, is by no means new. It is a time-honored police procedure for officers to stop suspicious persons for questioning and, occasionally, to search these persons for dangerous weapons. This is a distinct law enforcement technique which has characteristics quite different from other police practices such as arrest or search incident to arrest, and has long been viewed by the police in this way. It is curious, but perhaps understandable, that it has taken so long for the law and lawyers to respond to a practice which quite obviously presents "serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances."

LaFave, *supra* note 24, at 42 (citing Terry v. Ohio, 392 U.S. 1, 4 (1968)).

[27] 338 U.S. 160 (1949).

[28] 364 U.S. 253 (1960).

In *Brinegar v. United States*,[29] government agents forcibly stopped a car whose occupants were suspected of involvement in the illegal transportation of alcohol.[30] In the following discussion, the driver of the car admitted that there was alcohol in the car.[31] The alcohol was seized and introduced into evidence at trial.[32] The United States Supreme Court held that there was probable cause for the search prior to the incriminating statement and that the evidence seized was admissible.[33]

In *Brinegar*, the concurring opinion of Mr. Justice Burton[34] anticipated accurately the later course of judicial events. In setting out his theory of the case, a theory which embodies the "freezing the status quo" concept, he observed:

> [I]t is not necessary, for the purposes of this case, to establish probable cause for the search at any point earlier than that of the above colloquy. The earlier events ... disclose at least ample grounds to justify the chase and official interrogation of the petitioner by the government agents in the manner adopted. This interrogation quickly disclosed the indisputable probable cause for the search and for the arrest.... [T]hose events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of the agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences.[35]

Thus, Mr. Justice Burton saw the need for an intermediate level of justification for an intermediate level of intrusion.

While no United States Supreme Court action implemented Mr. Justice Burton's suggestion until 1968, one other pre-*Terry* case is worth mentioning since it comes extremely close to recognizing the "freezing the status quo" concept. In *Rios v. United States*,[36] police officers followed a taxicab carrying a passenger whom the officers apparently suspected of trafficking illegally in drugs.[37] When the cab stopped at a traffic light, the officers approached the cab.[38] At some point in the subsequent encounter the suspect dropped what

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[29] 338 U.S. 160 (1949).
[30] *Id.* at 162-63.
[31] *Id.* at 163.
[32] *Id.*
[33] *Id.* at 165-71.
[34] *Id.* at 178.
[35] *Id.* at 178-79 (concurring opinion).
[36] 364 U.S. 253 (1960).
[37] *Id.* at 256.
[38] *Id.*

turned out to be illegal drugs on the cab floor.[39] The drugs were seized by the officers[40] and used as evidence to convict the suspect.[41] There was conflicting evidence regarding when the drugs were dropped and at what point an arrest might have occurred.[42] Remanding the case to the United States District Court for a determination of when the arrest occurred,[43] Mr. Justice Stewart, speaking for the Court, stated:

> But the Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence.[44]

It is important to note that Mr. Justice Stewart did not suggest that the "routine interrogation" was purely casual, entailing no intrusion. He conceded that at least a limited detention could take place, one not going "beyond the momentary requirements of such a mission."[45] Since the evidence discovered during such an encounter was admissible, according to the Court, clearly the limited detention was a constitutional one.

If the case had not been remanded to the district court, and if the evidence concerning the sequence of events had been clearer, the *Rios* Court might well have decided whether—and to what extent—an intermediate level of evidence might justify an intermediate level of intrusion. Thus, the *Rios* case might have been the occasion for breaking much of the ground not broken until *Terry* was decided in 1968.

II. Freezing the Status Quo—The Quantum of Evidence Focus

It was in *Terry v. Ohio*[46] that the breakthrough occurred. In *Terry*, a police officer noted three individuals acting suspiciously in an area of downtown Cleveland where he had had many years of experience.[47] Suspecting that they were contemplating a robbery of a business establishment, he approached them, identified himself as a police officer, and asked their names.[48] Receiving only a mumble in reply, he grabbed one of the suspects, spun him around so that he was between the officer and the other two suspects, and proceeded to conduct a limited pat-down search of all three.[49] On

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[39] *Id.*
[40] *Id.*
[41] *Id.* at 254.
[42] *Id.* at 256, 262.
[43] *Id.* at 260-62.
[44] *Id.* at 262.
[45] *Id.*
[46] 392 U.S. 1 (1968).
[47] *Id.* at 5-6.
[48] *Id.* at 6-7.
[49] *Id.* at 7.

two of the suspects, including Terry, the officer felt a weapon and retrieved it.[50] These weapons, as well as some bullets, were introduced into evidence against Terry and his co-defendant.[51]

After his conviction for carrying a concealed weapon,[52] Terry contended that the search which yielded the evidence was unconstitutional. Following its grant of certiorari,[53] the United States Supreme Court considered the argument that, without probable cause to believe that a crime had been committed, it was impermissible for an officer to place any sort of restraint upon a suspect's freedom to walk away from the scene.[54] Chief Justice Earl Warren, speaking for the Court, rejected what he called the "traditional jurisprudence of the Fourth Amendment,"[55] that there could not be "a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest."[56] The Court seemed persuaded by the frequently advanced argument that "in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."[57]

Nevertheless, the Court refused to endorse the suggestion that fourth amendment rights came into play only at the probable cause level—the "all-or-nothing model of justification and regulation under the Amendment."[58] Instead of denying the existence of such rights, the Court held that when a police officer with articulable suspicion that there is criminal activity afoot approaches a suspect, when the officer's inquiries fail to dispel that suspicion and when, further, the officer has reason to believe that his life is in danger, he may make a limited pat-down search to discover weapons and reach inside

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[50] *Id.*

[51] *Id.* at 5.

[52] *Id.* at 4. *See also* 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

[53] 387 U.S. 929 (1967).

[54] 392 U.S. at 25. One author has observed:

> [T]he opponents of stop-and-frisk urged the Court to recognize only two categories of police-citizen street encounters. Either a citizen was being restrained in his freedom to walk away from the arresting officer—restrained in any degree, for any length of time, for any purpose—or he was not. If he was being restrained, that was a fourth amendment "seizure" of his person and was lawful only upon probable cause to believe him guilty of a crime. If he was not being restrained, there was no "seizure," and of course the officer was free to talk to the citizen as much as he wished, upon any grounds or none at all—so long as the citizen also wished to stop and listen.

Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974) [hereinafter cited as Amsterdam].

Indicative of the bi-level theory until then prevailing, the prosecutor had urged at the suppression hearing in *Terry* that the police officer had arrested on probable cause and that the search was therefore valid as incident to that arrest. 392 U.S. at 7.

[55] 392 U.S. at 11.

[56] *Id.*

[57] *Id.* at 10.

[58] *Id.* at 17. Professor Amsterdam refers to the "traditional monolithic model of the fourth amendment." Amsterdam, *supra* note 54, at 395.

the person's clothing to retrieve what feels like a weapon.[59] In the Court's view, this strict limitation on the scope of allowable police intrusion enabled it to permit the stop and search, while at the same time protecting the suspect's fourth amendment rights. Any weapon found as a result of such a limited search is admissible.[60] Additionally, such a weapon may constitute probable cause to arrest on a weapons charge, incident to which a full search would be justified.[61]

It is important to recognize that in *Terry* there is a dual intrusion being justified. The limited pat-down is an intrusion that is justified by the officer's need to be safe.[62] If the officer is entitled to protect himself during the encounter, however, he must be entitled to make the confrontation in the first place. In concurrence, Mr. Justice Harlan made this point: "[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the

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[59] 392 U.S. at 30-31.

[60] *Id.* at 31.

[61] United States v. Robinson, 414 U.S. 218 (1973). On the surface, at least, *Terry* is a search case. It was, after all, the search which yielded the gun, and it is clear that the search of the person, however limited, was a "freezing the status quo" search. The Court allowed the "frisk" only to preserve the safety of the officer while making the encounter. If the objective had been merely to find evidence of crime in general, or even to find a gun if the only reason to search was to facilitate a conviction through the securing of evidence, the intrusion would have been unconstitutional under the fourth amendment. A valid arrest or a valid warrant, either of which would have required probable cause, would have been needed.

The *Terry* Court made clear that if the warrant clause had been at issue, probable cause would have been required, 392 U.S. at 30, presumably because the fourth amendment speaks absolutely with regard to this point: "and no Warrants shall issue, but upon probable cause. . . ." U.S. CONST. amend. IV. It should be clear, however, that this situation is not outside the warrant clause merely because it is a less-than-probable cause one; it would be anomalous to require judicial evaluation for the greater level of evidence and not for the lesser. (In this connection, note Justice Douglas statement, in his *Terry* dissent: "We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action." 392 U.S. at 36. With regard to this point, Professor LaFave comments: "I would award this round to Justice Douglas, as it is unmistakably clear that the Court has repeatedly held that police may not act upon less evidence merely by avoiding the magistrate." LaFave, *supra* note 24, at 54.) It is outside the warrant clause because of the lack of time to secure a warrant, a matter irrelevant to the level of evidence. Note that no warrant is required even for a full-blown arrest and search incident, United States v. Watson, 423 U.S. 411 (1976), and this is true even though there might have been time in which to secure one, the Court being unwilling to see the issue of exigency constantly litigated:

> [W]e decline to transform this judicial preference [for a warrant in arrest cases] into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Id. at 423-24. This blanket authorization for arrest without a warrant is bottomed, therefore, on the impracticability of securing one, not on the level of evidence available.

[62] 392 U.S. at 23.

officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous."[63] The two intrusions work in tandem to "freeze the status quo." First, the officer is entitled to confront the subject in order to explore the situation before the subjects scatter. As in *Bailey,* the situation for confronting is irretrievable, although no complete intrusion, such as taking the subjects into custody, is permitted on less than probable cause.[64] Second, since, as Mr. Justice Harlan suggests,[65] such a confrontation is presumably "reasonable" under the fourth amendment, the officer must have the concomitant right to take at least one obvious step to protect himself—a limited pat-down in order to discover obvious weapons.

The decision in *Terry* clearly involves the Court in a delicate balancing test, to which the law is no stranger,[66] between the interests of the police and

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[63] *Id.* at 32 (concurring opinion) (emphasis in original). In emphasizing this point, Justice Harlan reiterated that "the right to frisk in this case depends upon the reasonableness of a *forcible* stop to investigate a suspected crime." *Id.* at 33 (emphasis added). Mr. Justice White agreed: "[T]he person may be briefly detained against his will while pertinent questions are directed to him." *Id.* at 34 (concurring opinion).

[64] Dunaway v. New York, 442 U.S. 200 (1979).

[65] Terry v. Ohio, 392 U.S. at 32 (concurring opinion).

[66] Indeed, the level of evidence required for an intrusion might well be affected by the seriousness of the threat to a victim. *See, e.g.,* Mr. Justice Jackson's suggestion, in 1949, that a roadblock and search of a car on less than probable cause could be sustained in a kidnap case, to preserve the life of the hostage, though not in an illegal transportation of alcohol case. Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissenting opinion). Mr. Justice Jackson's point reflects not only a balancing test but also, still germane to the inquiry here, a "freezing the status quo"—preserving the life of the victim—on less than probable cause.

It is interesting to compare the remarks of Professor LaFave:

> In the criminal law, however, there is one case-by-case variable—the seriousness of the offense—which cannot be ignored by police and courts. Taking into account the seriousness of the offense does not require the use of some fine-spun theory whereby each offense in the criminal code has its own probable-cause standard; rather, it involves only the common-sense notion that murder, rape, armed robbery, and the like call for a somewhat different police response than, say, gambling, prostitution, or possession of narcotics.

LaFave, *supra* note 24, at 57 (footnotes omitted). Professor LaFave believes that the possibility that Sibron (in Sibron v. New York 392 U.S. 40 (1968), discussed in text at notes 72-83 *infra*) was attempting to sell narcotics was as strong as the possibility that Terry was planning a robbery. He attributes the different results to the difference in seriousness of the offenses suspected. *Id.* at 58-59.

The balancing called for in search and seizure cases is a difficult one, to be sure:

> The [Pennsylvania v. Mimms, 434 U.S. 106 (1977)] decision brought to the surface the irreconcilable tension between the safety needs of law enforcement officers and traditional fourth amendment requirements. It is doubtful that the police practices at issue ever can be adequately evaluated in terms of traditional fourth amendment analysis, even as expanded by *Terry v. Ohio.*

Miles, *From Terry to Mimms: the Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police-Citizen Confrontations,* 16 AM. CRIM. L. REV. 127, 153 (1978) [hereinafter cited as Miles].

the fourth amendment interests of the suspect.[67] Since the police officer's safety is not the sole interest at stake, a total search of the subject cannot be justified, even though the subject might have concealed a weapon that would not be disclosed by a limited pat-down search. Nonetheless, the fact that the officer has *some* evidence of wrongdoing justifies *some* intrusion into the subject's privacy.

There is, however, a major problem with the concept introduced in *Terry*—namely, that creating a middle level of evidence may lead to confusion.[68] There is considerable room for undue flexibility in Chief Justice Warren's statement that a "stop and frisk" is justified "where a police officer observes unusual conduct which leads him reasonably to *conclude* in light of his experience that criminal activity *may* be afoot and that the persons with whom he is dealing *may* be armed and presently dangerous. . . ."[69] The use of the word "conclude" in this crucial portion of the *Terry* decision suggests a certainty largely done away with by the double use of the very imprecise term "may" in the remainder of the sentence. The Court does make clear that mere suspicion or intuition will not suffice but that instead specific indications are needed.[70] Although this clarification will go far to dispel vagueness, vagueness nonetheless remains. One argument which favors the all-or-noth-

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[67] "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " 392 U.S. at 21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-35, (1967)). *See also* Delaware v. Prouse, 440 U.S. 648, 654 (1979):

> Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's fourth amendment interests against its promotion of legitimate governmental interests.

Id. See also Brown v. Texas, 443 U.S. 47, 50 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

[68] Professor Amsterdam comments: "Buy why only three categories? Why not six, or a dozen, or even a hundred?" Amsterdam, *supra* note 54, at 376. He suggests that two values pulling different ways require accommodation: the higher the number, the better will the scheme "encompass life"; the lower, the better will we be able to "organize it manageably." *Id.* at 377.

[69] 392 U.S. at 30 (emphasis added). For a discussion of the problem of determining what is suspicious conduct and a list of circumstances that might or might not qualify, see Weisgall, *supra* note 26, at 254-58 (1974). *See also* LaFave, *supra* note 24, at 67-88.

At least two problems exist with respect to suspicious conduct. First, it is possible that the conduct deemed suspicious may be the result of the police scrutiny rather than a manifestation of criminal intent. Comment, *The Gradation of Fourth Amendment Doctrine in the Context of Street Detentions: People v. De Bour,* 38 OHIO ST. L.J. 409, 435 (1977) [hereinafter cited as Comment]. Second, "[E]ven though properly enforced, the [stop and frisk] law will be applied primarily to members of minority groups whose habits, dress or environment will no doubt make them appear more suspicious to the patrolmen." Note, *Stop and Frisk: A Perspective,* 53 CORNELL L. REV. 899, 913 (1968).

[70] 392 U.S. at 27:

> And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id.

ing approach—that is, no intrusion without probable cause—is its relative clarity. As Mr. Justice Douglas perceptively noted, "the term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.' "[71]

Two cases decided on the same day as *Terry, Sibron v. New York*[72] and *Peters v. New York,*[73] provided needed elaboration upon the implications of the *Terry* decision. In *Sibron,* a police officer had under surveillance a drug suspect who, during an extended period of time, conversed with several persons known to be addicts.[74] The officer finally approached the suspect, Sibron, in a restaurant, told him to come outside, and said to him, "You know what I am after."[75] According to the officer, Sibron " 'mumbled something and reached into his pocket.' "[76] Simultaneously, the officer put his hand into the same pocket and discovered several glassine envelopes which contained the heroin ultimately used to secure Sibron's conviction for unlawful possession.[77]

The *Sibron* Court, noting there was no probable cause on these facts to justify an arrest and an incident search, addressed itself to the *Terry* issues.[78] There could be no valid self-protective search for weapons here, according to the Court, since such searches require that the officer "be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."[79] Nor was there any evidence that the police officer reached into the pocket in self-defense since the record made clear that he "thought there were narcotics in Sibron's pocket."[80] Moreover, the Court observed that, even if there had been sufficient grounds to search Sibron for weapons, the search went beyond the *Terry* authorization.[81] Rather than making the "initial limited exploration for arms"[82] permitted by *Terry,* the officer went right into the subject's pocket. Since the search was not limited to a scope consistent with the only permissible goal—self-protection—the evidence was inadmissible.[83]

The Court in *Peters v. New York,*[84] as in *Sibron,* dealt with the ramifications of the *Terry* opinion. In *Peters* an off-duty police officer, hearing a noise at his

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[71] *Id.* at 37 (dissenting opinion). It has been said that while *Terry* "introduced a certain amorphousness," Miles, *supra* note 66, at 133, "the Supreme Court has not [yet] significantly clarified the *Terry* decision." *Id.* at 128.

For a listing of the *Terry*-type issues litigated in state and lower federal courts, see *id.* at 136-37.

[72] 392 U.S. 40 (1968).

[73] *Id.*

[74] *Id.* at 45.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 44-45.

[78] *Id.* at 62-63.

[79] *Id.* at 64.

[80] *Id.* (footnote omitted).

[81] *Id.* at 65.

[82] *Id.*

[83] *Id.* at 65-66.

[84] *Id.* at 47.

apartment door, looked through the peephole into the hall and saw two men tiptoeing from the alcove toward the stairway.[85] Recognizing neither of the two men as tenants and suspecting they were attempting a burglary, the officer went into the hall and slammed his door loudly behind him.[86] As the two suspects began to flee down the stairs, the officer gave chase.[87] Finally catching one of the suspects, Peters,[88] the officer patted him down. Upon feeling a hard object in Peters' pocket which he thought might be a gun, the policeman reached in and removed an opaque plastic envelope which contained burglar's tools.[89] These were admitted at Peters' trial and he was convicted of possessing burglary tools.[90] The Court held that the police officer had probable cause to arrest Peters at the time the seizure occurred and, therefore, the burglary tools were validly seized incident to a lawful arrest.[91]

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[85] *Id.* at 48.
[86] *Id.* at 48-49.
[87] *Id.* at 49.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 48.
[91] *Id.* at 66. In each of the three cases under discussion—*Sibron, Terry* and *Peters*—the Court is concerned with a different level of evidence, quantitatively speaking. In *Sibron,* the officer had no significant evidence to justify any kind of intrusion; in *Terry,* there were suspicious specifics (though not probable cause) justifying an intermediate level of intrusion; and, in *Peters,* there was probable cause, justifying a full search.

> [The United States Supreme Court's] 1968 decisions are commonly read as recognizing three categories of street encounters: mere conversation, which an officer may commence without any particularizing cause; "stops," which require some reliable indicia of criminal activity not amounting to probable cause; and "arrests," which require probable cause.

Amsterdam, *supra* note 54, at 376. With regard to observations that the police may initiate "mere conversation" without any evidential basis for suspicion, consider the following:

> Of course any individual has a right to approach any other individual. . . . 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?

Reich, *Police Questioning of Law Abiding Citizens,* 75 YALE L.J. 1161, 1162 (1966). Another author observed that:

> Although some courts have equated police questionings with the exercise of the ordinary citizens's rights to ask questions of others, police inquiries within the scope of the criminal law enforcement function should not be considered in such a simplistic manner because of the possibility of further intrusion and the citizen's lack of choice in deciding whether to respond.

Comment, *supra* note 69, at 427.

Since the probable cause issue could be called "close" in *Peters,* it is interesting to ask why the Court did not decide it along *Terry* lines. *See* SCARBORO & WHITE, *supra* note 26, at 234. Two reasons suggest themselves. First, the Court may have felt it helpful to decide on the same day as *Terry* a case which could emphasize the fact that the probable cause standard for arrest was still alive and well and that *full* searches could be performed incident thereto—and only thereto, absent a search warrant or exceptional circumstances. Second, the Court may have wished to avoid the issue of whether, under the *Terry* standard, the police officer had justification for believing he

In relation to the "freezing the status quo" concept, Justice Harlan's concurring opinion in *Sibron* and *Peters* is of great interest. Agreeing that neither probable cause nor the *Terry* doctrine could save the *Sibron* search, and doubting the existence of probable cause in *Peters,* Harlan encouraged use of the "freezing the status quo" rationale:

> While no hard-and-fast rule can be chosen, I would suggest that one important factor . . . that should be taken into account in determining whether there are reasonable grounds for a forcible intrusion is whether there is any need for immediate action.[92]

In *Sibron,* Harlan stressed, there was no more reason to confront the suspect at that time than four hours earlier, and no reason to think the situation would change in the near future.[93] Consequently, there was no need for immediate action. The *Peters* search, however, in Justice Harlan's view, did have this "important factor":

> It was clear that the officer had to act quickly if he was going to act at all, and . . . it seems to me that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action.[94]

Harlan's view captures the spirit of "freezing the status quo," the idea that the situation, once dissipated, is irretrievable, and that it is therefore reasonable to allow an intermediate level of intrusion on an intermediate level of evidence.

Terry announced the "freezing the status quo" doctrine. In *Sibron,* the Court emphasized the necessity for specifics establishing the need for the intermediate level of intrusion and for restricting that intrusion to an intermediate level. In *Peters,* the Court recognized the traditional scope of intrusions pursuant to probable cause.

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was in danger, an issue that is irrelevant if there was probable cause to arrest, since a lawful custodial arrest carries with it the right to make a full search regardless of whether there is any reason to believe weapons or evidence will be found as a result of the search. United States v. Robinson, 414 U.S. 218 (1973).

Indeed, in *Robinson,* the Court distinguished *Terry:*

> *Terry v. Ohio* . . . did not involve an arrest for probable cause, and it made quite clear that the "protective frisk" for weapons which it approved might be conducted without probable cause. . . . This Court's opinion explicitly recognized that there is a "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons."

414 U.S. at 227 (citations omitted).

A decision in *Peters* along *Terry* lines would have required the Court to determine whether burglary is, with regard to danger to the officer, more like drug possession (in *Sibron*) or robbery (in *Terry*). It was much easier to decide it on probable cause grounds although the opinion can be viewed as an indication that the days of forcing situations into the probable cause mold to justify searches were not yet over.

[92] 392 U.S. at 73 (concurring opinion).

[93] *Id.*

[94] *Id.* at 78.

III. Analysis of *Terry*: Pros and Cons of Allowing Police Intrusions Without Probable Cause

A. *Justifications for the Confrontation*

Whatever the benefit to law enforcement, serious analytical problems remain with the Court's approach in *Terry* and Justice Harlan's approach in *Peters*. Presumably, the objective in any limited search cannot be the discovery of evidence since, according to the Court in *Terry*, the only permissible search on less than probable cause must be self-protective.[95] As indicated earlier,[96] a search geared to the officer's self-protection is necessarily justified to make the confrontation safe. But the officer's safety in the transaction cannot be the only consideration justifying the totality of the police conduct since it is clear that the officer could have avoided all danger by merely ignoring the incident. The major question, therefore, is whether the initial confrontation should be allowed at all.

To answer this question, it is helpful to imagine three scenarios that can result from a confrontation. First, the subject's answer might persuade an officer that all is well. In such a case, the confrontation is of no utility, except perhaps as a means of removing that subject from further investigation. A second possible result of a confrontation is that the person's answers, or failure to answer, may fail to eliminate an officer's suspicions, in which case the officer is no better off than before the encounter. A third possibility is that the subject may make a significantly damaging admission which, standing alone or in addition to what the officer already knows, establishes probable cause or at least justifies further surveillance.

With respect to this third possibility, it is difficult to believe that the Court expects suspects in any significant numbers to confess to illegal intentions upon a police officer's mere inquiries as to who the person is and what he is doing there.[97] In the typical case, it is safe to assume that any significant

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[95] *Id.* at 26.

[96] See text at note 63 *supra.*

[97] Did the Court really expect Terry to say, in response to the officer's inquiries, "We were just casing this store for a possible hold-up"?

Admissions were forthcoming in Brinegar v. United States, 38 U.S. 160 (1949), see text at note 29 *supra,* but *Brinegar* involved a case in which the subject and the agents had had prior dealings. It is unlikely to represent the typical street confrontation. In connection with *Brinegar,* it is interesting to note the following remarks of Professor LaFave:

> Judging from the appellate cases, the most frequent admissions of guilt concern the suspect's possession of contraband. [Citing L. Tiffany, D. McIntyre & D. Rothenberg, Detection of Crime 65 (1967)]. It is not surprising that this should be so, since the suspect may often believe that the officer is about to search him and find the contraband anyway. . . .

LaFave, *supra* note 24, at 93 n.274. Obviously, the lawfulness of a device should not be based upon the likelihood that the subject will yield evidence under the fear that an *illegal* search is the alternative.

Citing Reiss and Black, *Interrogation and the Criminal Process,* 374 Annals 47 (1967), LaFave points out that

> in 86% of all field interrogations observed in that study no admission was made by the suspect; but it is not made clear whether "admission" is in-

admissions would be obtained, if at all, only after a lengthy interrogation. Such lengthy questioning sessions almost inevitably involve the constraint associated with an arrest and therefore require probable cause.[98] Furthermore, even if such a successful denouement is possible in a case like *Peters,* where the defendant may be suspected of already having committed a crime as to which some admission is possible, such an ending is most unlikely in a case like *Terry,* where the crime suspected was yet to occur.[99]

The improbability of gathering admissions would indicate that the only likely value to be served by the encounter—putting aside, again, the benefits accruing when a frisk yields evidence justifying an arrest—lies in the first of the above-mentioned possibilities, namely the opportunity to disregard certain suspects as subjects of subsequent investigation. The Court's *Terry*-type cases offer little indication, however, that this is the objective, let alone that such an objective would justify the intrusions necessarily involved.

A fourth justification for the encounter may be that of a crime prevention.[100] Like the other three justifications, however, there is difficulty with

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> tended to mean only a direct admission of criminal conduct or is meant to include a damaging admission through an unsuccessful attempt of the suspect to exonerate himself.

LaFave, *supra* note 24, at 93. LaFave also observes that:

> [e]xperience has shown that suspects questioned under these circumstances rarely make a direct admission of guilt, but it is even more unusual for a suspect to offer no response at all. Typically, the suspect either provides an explanation of his actions which satisfies the officer, or else gives an account which adds to the prior suspicion and thus, in many cases, presents the officer with a situation in which he may make a lawful arrest.

Id. (footnotes omitted).

The enforcement of the law in the illegal immigration area is one context in which the "stop and question" device may be effective, at least if the government's authority to require identification is upheld. *See* Brignoni-Ponce v. United States, 422 U.S. 873 (1975), discussed in text at notes 137-43 *infra,* and United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) ("Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways."). Like *Brinegar,* this does not reflect the typical street confrontation anticipated by *Terry.* In *Brignoni-Ponce,* "the Court was dealing with a narrow, highly specialized area of law enforcement." Miles, *supra* note 66, at 145.

For a discussion of the possible responses to law enforcement inquiries, see LaFave, *supra* note 24, at 93-94. With respect to the significance of a failure to answer questions, see *id.* at 106-09.

[98] Dunaway v. New York, 442 U.S. 200, 214-15 (1979).

[99] This would be especially true if Terry had been alone. As the transaction in fact happened, it is possible to say that conspiracy to commit robbery may already have occurred, but obviously the Court's conclusion did not rest on the fact that several people rather than one were involved in the suspicious activity. It will not do to say that the suspected crime was that of carrying a concealed weapon, for the Court makes clear that it was suspicion connected with possible robbery that occasioned the confrontation, and the "frisk" for weapons was a subsidiary transaction to enable the confrontation with regard to the robbery to transpire safely. Further, if the "freezing the status quo" concept is at all applicable to *Terry,* the timing element so crucial to it is involved in the robbery suspicion but not in the concealed weapon suspicion.

[100] See Justice White's statement that a "frisk may nevertheless serve preventive ends. . . ." Terry v. Ohio, 392 U.S. 1, 35 (1968) (concurring opinion).

this point. In *Terry,* for example, one could argue that a good deal of prevention could take place with no fourth amendment intrusion if a uniformed officer were merely to take up a position a few feet away from the suspects and keep an eye on them.[101] Authority to apprehend suspects is unnecessary as long as the very appearance of an officer foils any criminal plans of the suspects.[102] If mere surveillance is insufficient, the officer could remark to the suspects that their suspicious presence in the area concerns him. This device would be as effective as a *Terry*-type confrontation, unless the purpose of the confrontation is an inappropriate one—that is, conviction through the use of evidence anticipated from the "frisk."[103] Indeed, a glance toward *Sibron* and *Peters* indicates that no more significant prevention occurred there, even if the approaches had been valid under *Terry,* than would have occurred merely by a police officer's visible presence. Thus, allegations by police that crime prevention was the reason for confrontations may disguise a policy of invading privacy to search for evidence of past or present criminality, based only upon suspicion of future criminality.[104]

As an indication of the Court's struggle to find justifications for police confrontations of the *Terry* type, it is helpful to consider *Adams v. Williams,*[105] the first occasion the Court had to return to the *Terry* trilogy within the context of a street confrontation. In *Adams,* a police officer on patrol in "a high crime area of Bridgeport"[106] had received a tip from a known informant to the effect that an individual sitting in a car nearby was in possession of narcotics and "had a gun at his waist."[107] The officer tapped on the car window and asked the occupant, Williams, to open the door.[108] Instead, Williams rolled down the window, at which point the officer reached into the car and retrieved a loaded gun from Williams' waistband.[109] Williams was arrested for carrying a concealed weapon and a search incident to that arrest disclosed heroin on the subject's person.[110] Williams subsequently was convicted of carrying a concealed weapon.[111] The Court held that while the information from the informant did not meet probable cause requirements for an arrest,[112] the tip was reliable enough to justify a *Terry*-type confrontation, even

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[101] Indeed, in Brown v. Texas, 443 U.S. 47 (1979), which held a particular stop and request for identification unconstitutional, see text at notes 150-53 *infra,* the United States Supreme Court intimated as much: "The record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees." 443 U.S. at 52.

[102] Comment, *supra* note 69, at 921. In some cases, surveillance may yield a better long-range result, namely, the acquisition of enough evidence to convict the subject of the crime suspected.

[103] The "frisk" is justified only by concern for the officer's safety. See text at notes 62-63 *supra.*

[104] Comment, *supra* note 69, at 921.

[105] 407 U.S. 143 (1972).

[106] *Id.* at 144.

[107] *Id.* at 144-45.

[108] *Id.* at 145.

[109] *Id.*

[110] *Id.* Other contraband was discovered in the car.

[111] *Id.* at 144.

[112] To meet probable cause requirements, it would have been necessary for the officer to have specifics from which he could conclude that the informant was reliable

though none of the bases for suspicion resulted from the officer's own observations.[113] Furthermore, the Court held that the officer did not have to make a limited pat-down search before reaching inside to grab the gun:

> When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable.[114]

In *Terry* terms, the officer's primary purpose in confronting the subject could not have been to make a search since a search is justified only to make a confrontation safe.[115] Was the purpose to prevent the commission of a crime? Only two possible crimes are indicated by the information presented to the police officers—narcotics possession and illegal gun possession. Yet, even if the tip was accurate, these crimes were already occurring and would most likely continue to occur despite the police officer's questions. In any event, whatever inhibition of criminal activity would have been generated by the encounter could have been duplicated, as indicated earlier, by merely making the officer's presence and identity known.[116]

Left with no other justification, the Court indicated that the purpose of the confrontation was to gather admissions:

> *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.[117]

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and from which he could assess the reasonableness of the informant's conclusion, Aguilar v. Texas, 378 U.S. 108, 114 (1964), at least absent some form of independent corroboration by the officer, Spinelli v. United States, 393 U.S. 410, 415-18.

[113] 407 U.S. at 147.

[114] *Id.* at 148. It is possible that Williams rolled down the window not to avoid complying with the officer's request but to *hear* it. This may be an example of a situation in which the "suspicious" conduct is a result of the police scrutiny rather than a manifestation of criminal intent. See note 69 *supra.*

[115] The Court stated:

> The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.

407 U.S. at 147.

[116] Such inhibition could also have been generated by putting the suspect under surveillance. Judge Friendly, in his court of appeals opinion in this case, noted: "[T]he record suggests that the officer had ample means for placing Williams under surveillance." Williams v. Adams, 436 F.2d 30, 37 (2d Cir. 1970) (dissenting opinion).

[117] 407 U.S. at 145-46 (citation omitted) (emphasis added).

As previously suggested, the prospect of gathering an admission from a suspect is remote, and is therefore a tenuous justification for the *Terry*-type "stop and frisk."[118]

In light of this discussion, it is interesting to note that none of the confrontations in the few cases most crucial to the "stop and question" and "stop and frisk" doctrines led to any significant benefit to law enforcement unless and until some evidence was discovered which changed the nature of the transaction from that of a *Terry*-type seizure into that of an arrest. In *Terry* itself, the officer never found out anything about the alleged robbery from questioning the suspects. A gun was found during the subsidiary frisk, however, which yielded probable cause to arrest for carrying a concealed weapon. In *Sibron,* the "stop and question" device yielded nothing; it was the search, ultimately determined to be illegal, which gave probable cause to arrest. In *Peters,* where the stop and search were ultimately upheld on pure probable cause grounds, not *Terry* grounds, the encounter yielded no admissions or other new information; the success of the encounter, as in *Terry* and *Sibron,* depended on the presumably subsidiary frisk which yielded evidence of probable cause. Finally, in *Adams v. Williams,* nothing was learned from the officer's being able safely to confront the subject; it was the presumably subsidiary search which became the focus of the transaction by providing probable cause to arrest for a weapons offense. The arrest, in turn, justified the search which yielded the narcotics.[119] Thus, although the underlying rationale in the *Terry* doctrine is one of "freezing the status quo," it typically is not the "freezing"—the colloquy between the officer and the subject—that benefits law enforcement. Instead it is the purportedly ancillary search that reaps the gains. The intermediate device of neutralizing the defendant by a weapons search becomes the crux of the matter; the means of making the confrontation safe becomes the end of the confrontation itself.

Only one conclusion flows from this analysis—it may well be that the *Terry* doctrine is operating as a pretext. While the "stop and question" or "stop and frisk" is advanced as the justification, what in fact is being authorized is a search for tangible evidence of criminal activity.[120] The following observations of Judge Friendly in the court of appeals panel decision in *Adams*,[121] quoted by Justice Brennan in his *Adams* dissent,[122] reflect the dangers of such a pretext and the concomitant perversion of the original rationale behind the *Terry* doctrine:

> There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be

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[118] See text at notes 97-98 *supra.*

[119] Indeed even in Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967), see text at notes 1-23 *supra,* the officer did not really find out anything about the situation except serendipitously—he spotted the wallet on the floor. Nevertheless, the seizure could not have been the *objective* of the confrontation, since the plain view of the evidence was lawful *only* because of the lawful confrontation, which otherwise yielded nothing.

[120] In this regard it is interesting to note that in both *Terry* and *Sibron* the prosecutor sought to justify the search as one incident to a valid arrest on probable cause.

[121] Williams v. Adams, 436 F.2d 30 (2d Cir. 1970).

[122] 407 U.S. at 151, 153 (dissenting opinion).

> true.... *Terry v. Ohio* was intended to free a police officer from the rigidity of a rule that would prevent his doing anything to a man reasonably suspected of being about to commit or having just committed a crime of violence, no matter how grave the problem or impelling the need for swift action, unless the officer had what a court would later determine to be probable cause for arrest.[123]

Based on this analysis of the *Terry* trilogy and *Adams v. Williams,* it is suggested that the Court decide the real issue more directly. While there are, as Judge Friendly indicates, serious problems with the *Terry*-type intrusion regardless of rationale, such intrusions should be justified forthrightly.[124] If no likely benefit flows from the confrontation itself but rather only from the frisk ancillary to it, the Court should candidly hold that a police officer may make a limited pat-down search of any person when the officer has articulable suspicion that that person possesses a weapon, or perhaps even other contraband, fruits or evidence of crime, that might be discovered through such a pat-down search. Although this would create an exemption from the probable cause requirement, so too did the *Terry* doctrine itself. To the extent that "reasonableness," as opposed to probable cause, is the key,[125] this approach seems as defensible as that in *Terry* and certainly more candid. At least with regard to the weapons aspect, this approach recognizes that the high level of danger presented by the presence of illegally concealed weapons in public places justifies an intermediate level of intrusion based on an intermediate level of evidence. An apt analogy would be an automobile search aimed at discovering a hostage.[126]

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[123] 436 F.2d at 38-39. Both Justice Douglas and Justice Brennan shared with Judge Friendly a concern about the extension of *Terry* to possessory offenses, at least absent evidence more reliable than that in *Adams.* 407 U.S. at 151, 153 (dissenting opinions). *See also* Amsterdam, *supra* note 54: "The power may in fact be exercised by an officer for some other purpose than the one which is asserted to justify it." *Id.* at 434. Professor Amsterdam does not see this as a hypothetical problem: "[T]he stop-and-frisk power ... may be—and, indeed, *very frequently is*—abused by its employment as an investigative tool." *Id.* at 436 (emphasis added). To prevent the self-protective frisk doctrine from being used as a pretext, he would exclude all non-weapon evidence secured as a result of such frisks, even if apparently lawful. *Id.* at 437.

See also Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional,* 27 SYRACUSE L. REV. 627, 640 (1966); Note, *Probable Cause Held Not Requisite for Stop and Frisk,* 39 N.Y.U. L. REV. 1093, 1098 (1964). Some would exclude even weapons. W. SCHAEFER, THE SUSPECT AND SOCIETY 43 (1967); Comment, *Selective Detention and the Exclusionary Rule,* 34 U. CHI. L. REV. 158, 166 (1966).

Professor LaFave has suggested "legislation designed to prevent stop and frisk from becoming 'stop and fish.'" LaFave, *supra* note 24, at 66.

[124] Compare the remarks of Professor LaFave:

> I would only add that if the police are to be given the right to step in before a crime has occurred, it is certainly preferable to recognize that power openly rather than to confer it indirectly by the use of broad vagrancy provisions or by pushing the law of attempt back into the preparation stage.

LaFave, supra note 24, at 67 (footnotes ommitted).

[125] See text at notes 66-67 *supra.*

[126] See Mr. Justice Jackson's hypothetical at note 66 supra.

Such a "danger" doctrine would not be as outrageous as may at first appears. In *Camara v. Municipal Court,*[127] the United States Supreme Court held that, for administrative searches at least, area-wide probable cause would suffice for the issuance of a warrant to search or inspect.[128] In effect, though the Court insisted that probable cause as to a general area is still required, it was authorizing inspections on articulable suspicion as to any *particular* premises when it said that it is enough for the issuing judge to believe that the area or neighborhood has certain infestation, wiring problems, or the like. To be sure, such area-wide inspections require a warrant[129] which, it could be argued, will protect against unreasonableness. This argument, however, should not prevent application of the "reasonableness" test of *Camara* to *Terry*-type warrantless confrontations. If *Camara* dispenses with the probable cause requirement, in effect, in a warrant clause situation, so too can the requirement be waived, in a situation not subject to the warrant clause. Furthermore, the Court in *Camara* required the warrant because in the situation typically presented in administrative searches time is not of the essence.[130] In cases where time *is* crucial, the Court should not insist on advance judicial approval. Obviously, in the street confrontations envisioned by *Terry,* the warrant process is totally impractical. Absent the warrant requirement, *Camara* presents a practical approach to the *Terry*-type of situation.

Indeed, the exigencies reflected in *Terry* situations are every bit as compelling as those in many of the administrative search situations. While the *Camara* Court put some weight on the fact that the inspectors there were not conducting a criminal investigation, one guesses that the Court will not insist that less privacy is due to the non-suspect than to the suspect. After all, the thrust of the fourth amendment is reasonable security from governmental intrusion regardless of its purpose—although, of course, the *importance* of that purpose may determine the *reasonableness* of the intrusion.[131]

The Supreme Court has, in fact, come close to a clear adoption of the *Camara* "reasonableness" test as applied to police searches of criminal suspects. In *Davis v. Mississippi*[132] the Court held that fingerprints secured from the defendant were inadmissible because the arrest incident to which the prints were secured was invalid for lack of probable cause.[133] An astonishing dictum, however, accompanied the holding, a dictum which supplies a forceful analogue to the suggestion that police be entitled *forthrightly* to perform the searches indirectly authorized by the *Terry* line of cases:

> It is arguable, however, that because of the unique nature of the fingerprinting process, such detentions [for the sole purpose of obtaining fingerprints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there

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[127] 387 U.S. 523 (1967).
[128] *Id.* at 538.
[129] *Id.* at 534.
[130] *Id.* at 539.
[131] See note 67 *supra.*
[132] 394 U.S. 721 (1969).
[133] *Id.* at 726-28.

> is no probable cause in the traditional sense. [Citing *Camara v. Municipal Court.*] Detention for fingerprinting may constitute a much less serious intrusion upon security than other types of police searches and detentions. . . .[134]

Among the reasons cited as to why fingerprinting presents a relatively minor intrusion was that "the limited detention need not come unexpectedly or at an inconvenient time" because there is no danger of destruction of fingerprints.[135] The Court concluded: "[f]or this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context."[136] Since the limited pat-down search seems not to involve any greater intrusion than detention for fingerprinting, and since the former is an inappropriate situation for the warrant process, the *Davis* dictum provides significant support for the proposition considered here, namely, that the Court should recognize directly the police power to pat-down for weapons—and perhaps other contraband—upon articulable suspicion of their presence.

B. Terry's *Mixed Blessings: Extending–and Restricting–the Scope of Fourth Amendment Protection*

Despite the justifiable fears that have been voiced concerning *Terry* and its progeny,[137] there have been significant indications that the *Terry* doctrine might yield a net increase in the privacy of the citizenry precisely because it invites closer scrutiny of those police-citizen encounters which clearly fall short of probable cause. For example, in *United States v. Brignoni-Ponce,*[138] the Border Patrol stopped a car merely because the car's occupants appeared to be Mexican.[139] Incriminating statements were obtained from the respondent and his two passengers as a result of the ensuing interrogation, and the respondent was ultimately convicted on two counts of transporting illegal immigrants.[140] The conviction was based in part on the "testimony of and about the two passengers."[141] Reinforcing the *Terry* doctrine, the United States Supreme Court ruled that, "because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest."[142] True to the *Terry* doctrine, how-

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[134] *Id.* at 727.
[135] *Id.*
[136] *Id.* at 728.
[137] *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 114 (1977) (dissenting opinion); *id.* at 116 (dissenting opinion); Adams v. Williams, 407 U.S. 143, 151 (1972) (dissenting opinion); Terry v. Ohio, 392 U.S. 1, 38-39 (1968) (dissenting opinion); Comment, *supra* note 69, at 426; Amsterdam, *supra* note 54, at 434-36.
[138] 422 U.S. 873 (1975).
[139] *Id.* at 875.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 880. With regard to the "limited nature of the intrusion," the Court pointed out:

> According to the government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of

ever, the Court maintained that mere hunch will not do, nor will the mere appearance of Mexican ancestry. Required would be "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[143]

The *Terry* doctrine allowed the Court in *Brignoni-Ponce* to recognize that the fourth amendment regulates even those brief detentions falling short of a traditional arrest.[144] Since there was now a tri-level system for reviewing the constitutionality of police behavior, the Court was in a position to compare the "stop and question" in *Brignoni-Ponce* to the middle level of justifiable intrusions and find it wanting. It is very possible that under the traditional bi-level system, the Court would have been unwilling to tie the Border Patrol's hands in all situations short of probable cause, and therefore might have felt constrained to rule all such "stop and question" situations ad *de minimis* intrusions not requiring any evidential check.[145]

The same might be said for *Delaware v. Prouse*,[146] in which a police officer, having stopped a car merely to check the driver's license and the automobile's registration, seized marijuana in plain view on the car floor.[147] The United States Supreme Court held the evidence flowing from the stop inadmissible:

> [W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[148]

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a document evidencing a right to be in the United States" [Citing Brief for the United States, at 25].

422 U.S. at 880. It should be noted that the United States Supreme Court has yet to determine whether, pursuant to a lawful stop, the person confronted may be *required* to give his name, address or the like. *See* Brown v. Texas, 44 U.S. 47, 53 n.3 (1979). This issue has great importance to law enforcement, at least within the illegal alien context.

[143] 422 U.S. at 884. With regard to the difficulty of determining what circumstances measure up to this requirement, see note 69 *supra*.

[144] "[T]o exclude any particular police activity from coverage [as a 'search' or 'seizure'] is essentially to exclude it from judicial control and from the command of reasonableness." Amsterdam, *supra* note 54, at 393.

[145] *Cf.* Pennsylvania v. Mimms, 434 U.S. 106 (1977), in which the Court held that requiring a subject to step out of the car, once lawfully stopped, was at most inconvenient and needed, therefore, no evidential basis: "[T]his additional intrusion can only be described as *de minimis*." *Id.* at 111.

[146] 440 U.S. 648 (1979).

[147] *Id.* at 650.

[148] *Id.* at 663. The Court did indicate that stops for license and registration checks occurring pursuant to some neutral plan, for example, a roadblock at which all cars are stopped, would pass constitutional muster. Apparently, this is because the intrusion is less or, at the least, the unconstrained discretion of the police officer is done away with. In any event, the police officer in *Prouse* was "not acting pursuant to any standards, guidelines or procedures pertaining to document spot checks, promulgated by

Under the two-level system, the *Prouse* Court might have been unwilling to outlaw all stops short of those occurring pursuant to probable cause, and therefore might have declared all such *relatively* unintrusive detentions lawful. Since there existed an intermediate level of constitutional intrusion requiring, instead of probable cause, some specific justification for suspicion, and since the governmental interest in traffic safety was suitably accommodated by that

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either his department or the State Attorney General." *Id.* at 650. The fixed checkpoint has been approved in the illegal alien investigation area for stops without probable cause or articulable suspicion, again on the notion that these are less intrusive and subject to less discretion with regard to particular stops:

> Routine checkpoint stops do not intrude ... [as extensively as roving-patrol stops] on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of the fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harrassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1979). It remains to be seen how much of this description will be found to apply to document stops in the roadblock context and how much of it will be required for such stops to meet constitutional minima.

Marinez-Fuerte does, however, pose problems for the tri-level theory since it was "agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.* at 556. (Indeed, the Court even approved the directing aside of certain cars, on no more than an appearance of Mexican ancestry, for closer inquiry of the occupants.) The Court, therefore, seems to be suggesting still a fourth level of intrusiveness, one involving a significant detention without any specific evidential requirement. It is possible that the Court views the situation as *sui generis* due to its importance ("We note here only the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, a practice which the Government identifies as the most important of the traffic-checking operation," *id.*) or, at least, as part of a larger emergency class of situation not admitting of an evidential requirement:

> A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would allow it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

Id. at 557. It may not be untoward to remark that an analogous argument could be made justifying a police officer's stopping and questioning all pedestrian traffic in the *Terry* setting.

device, the Court was able to compare the stop in *Prouse* with the *Terry* standard and find that stop wanting.[149]

A final example of the role played by the *Terry* doctrine in protecting fourth amendment values is reflected in *Brown v. Texas,*[150] in which the defendant was convicted of violating a Texas statute requiring any person to reveal his true identity and address upon inquiry by a police officer.[151] Brown had been confronted in an El Paso alley by the police, who acknowledged that they did not at the time suspect Brown of any specific misconduct, although the area involved had "a high incidence of drug traffic."[152] In a situation which might have been termed *de minimis* had the Court been rigidly constrained within the two-level system, the United States Supreme Court, its eye clearly on the *Terry* requirement, held the stop unconstitutional for lack of specific facts justifying suspicion.[153] It seems unlikely that the *Brown* Court would have found all street encounters based on less than probable cause unconstitutional. Without a doctrine like *Terry,* it is conceivable that all such encounters would have been deemed to be outside the protection of the fourth amendment.

One recent case, however, reflects the fact that the *Terry* doctrine need not always play a role which increases citizen security from police intrusion. In *Pennsylvania v. Mimms,*[154] the police stopped the defendant for a routine motor vehicle violation and required him to get out of the car.[155] Noticing a bulge under his sports jacket, they frisked him and found a concealed weapon which led to the defendant's conviction on weapons charges.[156] The United States Supreme Court held that requiring the subject, who had been lawfully stopped, to step out of his car was a reasonable safety precaution due to the danger the officer would face both from the subject and from passing traffic if he spoke with the subject through the left front window of the car.[157] Once the officer had seen the bulge, he could frisk the subject and seize the gun, again as a self-protective measure.[158] The Court persuasively pointed out that any intrusion involved in being required to get out of the car was a *de minimis* addition to that already clearly justified, namely, the stop due to the

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[149] *Id.* at 653-63.

[150] 443 U.S. 47 (1979).

[151] *Id.* at 49. The statute under which the defendant was convicted reads, in pertinent part:

> (a) person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a police officer who has lawfully stopped him and requested the information.

TEXAS PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).

[152] 443 U.S. at 49.

[153] *Id.* at 51. The Court cited *Prouse,* see text at notes 146-49 *supra,* for this proposition and for the suggestion that such seizures might be constitutionally carried out "pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers." 443 U.S. at 17.

[154] 434 U.S. at 106 (1977).

[155] *Id.* at 107.

[156] *Id.*

[157] *Id.* at 110-11.

[158] *Id.* at 112.

motor vehicle violation.[159] Indeed, if the Court was saying merely that the only seizure (until the bulge was seen after the defendant stepped out of the car) was the stop, there is little reason to quarrel with its view. But if the police officer's command to get out of the car was a significant additional intrusion, then the *Terry* spirit may not have been wholly honored. As Justice Marshall observed in dissent,[160] since there was no suggestion that the defendant was armed until he was forced out of the car, the result "cannot be explained by *Terry,* which limited the nature of the intrusion by reference to the reason for the stop."[161] The Court's view seems to be that the traffic stop situation is one inherently dangerous for the police officer involved[162] although, as the dissenting Justice Stevens pointed out,[163] such stops are in fact not "fungible":[164]

> The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night.[165]

The dissenters in *Mimms*—Justices Marshall, Stevens and Brennan—would have insisted on the individualized inquiry required in *Terry.* Indeed, Justice Stevens feared that still a new level of intrusion, one requiring no evidential inquiry, was being created.[166]

C. The Extent of Permissible Police Intrusion in the Absence of Probable Cause

Brignoni-Ponce, Prouse and *Brown* tell us the types of intrusions which are considerable enough to require at least articulable suspicion as well as the kinds of hunches which fail to qualify as articulable suspicion and those requiring probable cause. In *Dunaway v. New York,*[167] the police, without probable cause to arrest, took petitioner into custody, brought him to the police station and detained him there for interrogation.[168] The *Dunaway* Court held that detention for custodial interrogation on less than probable cause violated the fourth amendment.[169] The Court emphasized that *Terry* and its progeny

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[159] *Id.* at 111.
[160] *Id.* at 112 (dissenting opinion).
[161] *Id.* at 113 (dissenting opinion).
[162] *Id.* at 110-11 (dissenting opinion).
[163] *Id.* at 115 (dissenting opinion).
[164] *Id.* at 121 (dissenting opinion).
[165] *Id.* at 120 (dissenting opinion).
[166] *Id.* at 122 (dissenting opinion): "The Court holds today that 'third-class' seizures may be imposed without reason. . . ." See the discussion in connection with *United States v. Martinez-Fuerte* at note 148 *supra.*
[167] 442 U.S. 200 (1979).
[168] *Id.* at 203.
[169] *Id.* at 214.

legitimated limited intrusions, whereas in *Dunaway* "the detention of petitioner was in important respects indistinguishable from a traditional arrest."[170]

In support of the Court's result, it might be appropriate to note that the *Terry* spirit, focusing on a freezing of the status quo, was much less present in the *Dunaway* situation; there was not in *Dunaway* the seizing of the moment at which criminal activity may be "afoot" since the crime had already been committed and the police were following up a lead.[171] The Court correctly recognized that, if the state's argument for a balancing test even in custodial arrest situations were to prevail, the traditional requirement of probable cause for full-fledged arrests might well disappear, with consequent diminution of personal security:

> The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule .... A single, familiar standard is essential to guide police officers....[172]

Therefore, the lines on either side of the *Terry*-type intrusion already have been drawn rather precisely. From *Brignoni-Ponce, Prouse* and *Brown,* it is clear that all forced encounters, even requests for identity—unless to a roadblock or the like[173]—will be considered seizures within the fourth amendment for which at least articulable suspicion is required. *Dunaway* reminds us that as the encounter takes on significant aspects of the traditional arrest—custody, movement from the place at which a person is first confronted, extensive duration of detention, perhaps even placement in a police car—the likelihood increases that the Constitution will be read to require probable cause regardless of whether a formal arrest has occurred.

IV. Freezing the Status Quo—The Warrant Focus

It is a "settled ... rule that warrantless arrests in public places are valid."[174] Searches incident to such arrests are also valid.[175] Therefore, decisions in cases involving confrontations and "frisks" in public places, for example, *Terry, Adams,* and *Sibron,* focused upon the probable cause requirement and not the warrant issue. Searches of premises, however, typically re-

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[170] *Id.* at 212. *Cf.* Oregon v. Mathiason, 429 U.S. 492 (1977), in which the defendant, who confessed to the crime involved while at the police station, was held not to have been in custody since he was responding to an invitation to be present.

[171] 442 U.S. at 202-03.

[172] *Id.* at 213-14. This point had also been made by Justice Douglas, dissenting to the addition of the *Terry* standard to the fourth amendment set-up. See text at note 71 *supra.*

[173] See note 148 *supra.*

[174] Payton v. New York, 100 S. Ct. 1371, 1382 (1980).

[175] Chimel v. California, 395 U.S. 752 (1969).

quire a warrant,[176] as do searches of other private property.[177] Consequently, the "freezing the status quo" concept—the idea of seizing the moment to exploit the opportunity for investigation—also occasioned discussion in the Court with respect to loosening the warrant requirement in such situations. Having so far dealt with the first category of cases, in which the Court did not focus on the warrant requirement, the discussion turns now to the second category, where the warrant requirement was at issue. While one of the Court's modern pronouncements in the area, *Chambers v. Maroney*,[178] crystallizes and elaborates upon a doctrine that was already an established exception to the warrant clause, several others[179] create and expand upon a new spirit of "freezing the status quo" in criminal investigations.

Chambers v. Maroney was perhaps the most prominent pronouncement in this area.[180] In *Chambers*, the police stopped a car shortly after a robbery and arrested the occupants.[181] The car was taken back to the police station and searched without a warrant.[182] The Court held that the search was valid despite the lack of a warrant because there was probable cause for the search and the automobile was a movable vehicle subject to be taken out of the jurisdiction:

> [T]he car is movable, the occupants are alerted and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.[183]

Chambers, therefore, addressed itself to freezing the status quo not through a lessening of the probable cause requirement but through a concession with respect to the warrant requirement. The *Chambers* decision contains analytical problems, however, due to the Court's analysis of the alternatives available to the police in preserving the status quo. In the *Chambers* context, the Court saw two possible approaches—holding the car until a warrant may be obtained, or searching it immediately without a warrant.[184] Rather than choose between the two, it authorized both:[185]

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search

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[176] Payton v. New York, 100 S. Ct. 1371, 1380-81 (1980).

[177] Arkansas v. Sanders, 99 S. Ct. 2586, 2590 (1979).

[178] 399 U.S. 42 (1970). This decision, discussed in the text and notes at notes 180-91, seems to reaffirm the clear suggestion of Carroll v. United States, 267 U.S. 132 (1925), that searches of automobiles in a movable posture pursuant to probable cause do not require a warrant.

[179] *See, e.g.*, Vale v. Louisiana, 399 U.S. 30 (1970), discussed *infra* in the text and notes at notes 206-10 *infra*, and United States v. Van Leeuwen, 397 U.S. 249 (1970), discussed in the text and notes at note 214-18 *infra*.

[180] 399 U.S. 42 (1970).

[181] *Id.* at 44.

[182] *Id.*

[183] *Id.* at 51.

[184] *Id.* at 51-52.

[185] "The Court, unable to decide whether search or temporary seizure is the 'lesser' intrusion, in this case authorizes both." *Id.* at 63 n.8 (concurring and dissenting opinion).

> warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which is the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause, either course is reasonable under the Fourth Amendment.[186]

In terms of fourth amendment values, the price paid for freezing the status quo in such cases is too great. In the quantum of evidence cases discussed previously, it was clear that a major aspect of the "freezing the status quo" doctrine is the requirement that the extent of police intrusion be strictly limited to that necessary to "freeze" the status quo. This same requirement should be honored in making inroads into the warrant clause of the fourth amendment. Thus, when the Court in *Chambers* worried about which is the "greater" or "lesser" intrusion, one is tempted to respond that if anyone is to make the choice, perhaps it should be the person whose fourth amendment rights are at stake, if that person is available. Because of the "variety of circumstances" referred to by the Court, the least defensible course might be to decide, as the Court did, that the alternatives are equally acceptable as a matter of law.

The approach of Mr. Justice Harlan, who concurred in part and dissented in part,[187] would in effect allow the subject to choose. Agreeing fully with the *Chambers* Court that the officers should be "permitted to take the steps necessary to preserve evidence and to make a search possible."[188] Justice Harlan was prepared to say that holding the car for the warrant is usually the lesser intrusion.[189] In any event, the person whose privacy is involved remains free to consent to an immediate search. Clearly seeing the "freeing the status quo" aspect of *Chambers*. Justice Harlan, citing *Terry*, insisted that "[w]here consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure."[190] Justice Harlan therefore faulted the Court's theory for its failure to conform to "our insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented."[191]

Cupp v. Murphy[192] involved the seizure, without a warrant or the suspect's consent, of fingernail scrapings from a suspect who had voluntarily come to

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[186] *Id.* at 51-52.
[187] *Id.* at 55.
[188] *Id.* at 62 (footnote omitted) (concurring and dissenting opinion).
[189] *Id.* at 63.
[190] *Id.* at 64 (concurring and dissenting opinion).
[191] *Id.* at 63.
[192] 412 U.S. 291 (1973).

the police station following his wife's death,[193] the suspect, detained just long enough for the scrapings to be taken, was not arrested formally until about a month later.[194] Noting that probable cause to arrest existed at the time of the detention, the Supreme Court held that evidence flowing from this detention and seizure of scrapings was admissible at the defendant's subsequent homicide trial.[195] The presence of probable cause to arrest in *Cupp* enabled the Court to uphold the search as one incident to an arrest.[196] The Court did, however, suggest that a full search would not have been valid since, without the actual arrest of the subject, the reasons typically advanced for allowing a full search incident to arrest—neutralizing weapons and preventing destruction of evidence—were not present.[197] Even without the arrest, the Court

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[193] *Id.* at 292.

[194] *Id.* at 294.

[195] *Id.* at 295. The Court noted that in Davis v. Mississippi, 394 U.S. 721 (1969), see text and note 132 *supra,* no probable cause existed at the time of the arrest. 412 U.S. at 294-95.

[196] The Court relied on Chimel v. California, 395 U.S. 752 (1969). It should be noted that even a search incident to an arrest is in large part a warrantless freezing of the status quo since its purpose is to prevent the defendant from either destroying evidence or seizing a weapon:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Id. at 762-63. The search incident to arrest, however, is itself founded on a traditionally lawful intrusion, *i.e.,* the arrest on probable cause, and in any event has itself been a traditionally-recognized power. United States v. Robinson, 414 U.S. 218, 294 (1973). Since the focus of this article is upon non-traditional freezing of the status quo, no extended reference to searches incident will be made or, for that matter, to other traditionally-recognized freezing devices such as the power of the police to intrude upon persons or places in the fact of real emergencies.

[197] 412 U.S. at 296.

The problem with relying on *Chimel* is that the right to search incident to a valid arrest by definition presupposes the *fact* of an arrest, although the rationale of searching for weapons is concededly more logically tied to the arrest than that of searching for evidence that might be destroyed. In other words, without the arrest in *Chimel* there seems no reason to attempt to neutralize weapons (the confrontation would not even meet *Terry* requirements for a pat-down search since the crime suspected was non-violent).

To the extent that *Cupp* is merely a search incident to an arrest occurring much later, as suggested by the Court's reliance on *Chimel,* it is interesting to compare the converse situation presented by United States v. Edwards, 415 U.S. 800 (1974). In *Edwards,* the police arrested the defendant and took his clothing for analysis ten hours *after* his arrest, the delay being due to the unavailability of substitute clothing. 415 U.S. at 802, 805. The United States Supreme Court held the resulting evidence admissible.

> This was no more than taking from respondent the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than

indicated that a "very limited intrusion" [198] would be justified to preserve any evidence which the subject, now alerted to the police interest in him, might be in a position to destroy.[199] In *Cupp v. Murphy*, the Court emphasized this alerting:

> At the time Murphy was being detained at the station house, he was obviously aware of the detectives' suspicions. Though he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention.[200]

Thus, since the Court upheld a limited intrusion without an arrest, it seems accurate to say that *Cupp v. Murphy* justified what was clearly a detention and seizure of evidence under the fourth amendment as a freezing of the status quo pursuant to probable cause, or perhaps even articulable suspicion if a relatively minor intrusion is involved.[201] The warrant requirement was waived because it was impractical. Although the concept could have been more clearly emphasized, Mr. Justice Marshall, who saw the case as within the *Terry* spirit, noted the "freezing the status quo" aspects of the case: "At that point, there was no way to preserve the status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so." [202]

> he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more ... than they were entitled to do incident to the usual custodial arrest and incarceration.

Id. at 805.

[198] 412 U.S. at 296.

[199] *Id.*

[200] *Id.*

In an arrest situation, there is no requirement that there be some articulable suspicion that there is in fact evidence to be destroyed since it is the fact of arrest, not whether any evidence is likely to be uncovered, that justifies the search:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

United States v. Robinson 414 U.S. 218, 235 (1973).

In a non-arrest situation, however, such articulable suspicion would be important:

> When a person is detained, but not arrested, the detention must be justified by particularized police interests other than a desire to initiate a criminal proceeding against the person they detain. The police therefore cannot do more than investigate the circumstances that occasion the detention.

Cupp v. Murphy, 412 U.S. at 299 (concurring opinion). Indeed, it was on precisely this point that the *Robinson* Court distinguished *Terry*. 414 U.S. at 227.

[201] Indeed, in cases where there clearly is probable cause, the issue might seem relatively simple and could be decided on pragmatic grounds: since the police concededly could have arrested and searched incident to that arrest, it would seem anomalous to penalize them for a lesser intrusion, or to require them to go through a needless (and more intrusive) formality.

[202] 412 U.S. at 298 (concurring opinion).

Nonetheless, rather than simply permitting the search, it might have been more desirable for the *Cupp* Court to allow the subject the choice of enduring an immediate intrusion or awaiting the warrant process.[203] Alternatively, it might have been preferable to require that the subject be held until a warrant was obtained,[204] unless the subject himself consented to an earlier search. Mr. Justice Marshall disagreed with this point in *Cupp*. In his concurring opinion he stated that "for purposes of Fourth Amendment analysis, detaining him while a warrant was sought would have been as much a seizure as detaining him while his fingernails were scraped."[205] But is it inconceivable that a subject might prefer to await a judicial person's approval or possible disapproval with regard to an intrusion into his privacy rather than have the intrusion occur immediately? Furthermore, why must the courts make the choice? Would not law enforcement's total interest in the situation be served by allowing the subject to choose or by requiring the freezing of the status quo pending a warrant unless the subject consents to an earlier intrusion? The point here is that holding the subject until a warrant is obtained honors more completely the "freezing of the status quo" concept since it holds the transaction back as far as possible without making the law enforcement objective irretrievable or impossible. In a very real sense, that is the true spirit of *Terry v. Ohio*.

Perhaps the most intriguing suggestion relating to the "freezing the status quo" concept was made in *Vale v. Louisiana*.[206] In that case the subject was arrested in front of his home, after which a "cursory inspection" of the house was made to determine whether any other person was present.[207] Subsequently, a second and more thorough search occurred.[208] The United States Supreme Court held that the evidence found during the second search was inadmissible since that search had gone beyond the scope of a valid search incident to arrest.[209] Addressing itself to the state's argument that the search could be justified due to the destructibility of the evidence sought (narcotics), the Court stated: "Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises."[210]

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[203] See text and notes at notes 186-91 *supra*.

[204] This was Mr. Justice Douglas' view on the matter. 412 U.S. at 301 (dissenting in part). If the police had merely held the subject pending either a warrant (or his consent to an earlier seizure of the scrapings), the Court might not have felt the need to find probable cause in what seems a close case. See Mr. Justice Douglas' observations on this point. *Id.* at 301-02 (dissenting in part). His fear that there was not in fact probable cause at the time of the seizure of the scrapings recalls Judge Leventhal's concerns in *Bailey*. See text and note at note 18 *supra*.

[205] 412 U.S. at 298 (concurring opinion). If, as Mr. Justice Marshall suggests in the same opinion, *id.*, it might have been impossible to maintain the status quo until a warrant or consent was secure, the immediate search was justified and nothing need be said about "lesser" or "greater" intrusions.

[206] 399 U.S. 30 (1970).

[207] *Id.* at 32-33.

[208] *Id.* at 33.

[209] *Id.*

[210] *Id.* at 34.

Even though the Court rejected the evidence obtained as a result of the second police search, its clear suggestion was that the initial "cursory inspection" of the house to check for people was valid, as a "freezing the status quo" device. Although this concept was not specifically stated, presumably the Court, in assessing the validity of the second search, would not have pointed to an earlier *unconstitutional* search as precluding the need for the second. Therefore, the *Vale* Court indirectly approved the quick checking-out device employed by the police to "freeze" the status quo until a warrant had been obtained.

Had the validity of the first search, the "cursory inspection," been directly at issue in *Vale,* it is submitted that the "freezing the status quo" spirit of *Terry* would dictate disapproval of this device if the immediate police objective had been to obtain evidence, and approval if the police motive had been to secure the house pending the warrant process.[211] A warrantless inspection based on the latter motivation presumably would require probable cause because without it no valid warrant to search the premises could be anticipated. Since entry into a house even for a "cursory inspection" is by definition a serious intrusion which has traditionally required a warrant based on probable cause,[212] it would be illogical to allow a course of action calculated to maintain the status quo pending a warrant in a situation that would not qualify for a warrant even if one were immediately available.[213]

In sum, the spirit of *Terry* is honored in *Vale,* but not in *Chambers* or in *Cupp v. Murphy.* In *Chambers v. Maroney,* the Court upheld a warrantless search of an automobile based upon probable cause. It failed to find that detaining the car pending the securing of a warrant was the lesser intrusion and therefore the required route. *Cupp v. Murphy* brought the same result with regard to a seizure of fingernail scrapings from the person. In *Vale v. Louisiana,* the Court seemed to approve a warrantless, superficial inspection of a house to ensure that no one was present to destroy any evidence. The Court, disapproving the second, complete search thereafter performed, suggested that the quick inspection, the lesser intrusion—all that was necessary to preserve the situation pending a warrant—was the only appropriate alternative. These cases, it is submitted, suggest that the Court has not been consistent in limiting concessions on the warrant requirement for criminal investigation to those searches reasonably necessary for fulfillment of the law enforcement purpose.

V. Freezing the Status Quo—The Doctrine at Work

The discussion turns now to a case reflecting the "freezing" doctrine at its best, a case containing elements from both the quantum of evidence cases and the warrant cases. In *United States v. Van Leeuwen,*[214] the defendant sought to

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[211] *Id.*

[212] Rarely may a warrantless dwelling search be made even with probable cause. *See* Payton v. New York, 100 S. Ct. 1371, 1380 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.").

[213] Except, perhaps, in the rare case in which there is reason to believe that evidence constituting probable cause might be developed in a very short time.

[214] 397 U.S. 249 (1970).

send two twelve-pound packages via registered air mail at a United States Post Office sixty miles from the Canadian border.[215] Declaring that the packages contained coins, he insured them for $10,000.[216] When a suspicious postal clerk summoned a police officer who happened to be present, the officer observed that the return address on the packages was a vacant housing area of a nearby junior college, and that the defendant's automobile bore British Columbia plates.[217] Based upon this evidence, the post office held the packages pending a further investigation.[218] This investigation turned up evidence that the defendant possibly was involved in some kind of illegality.[219] Subsequently, a warrant to search the packages was obtained based upon probable cause, and the packages were opened.[220] The total time transpiring between the detention of the packages and their opening was twenty-nine hours.[221] The defendant, ultimately convicted of illegally importing gold coins, urged that the packages had been unlawfully detained and therefore that their contents were inadmissible against him.[222] Analogizing to *Terry v. Ohio,* the United States Supreme Court held the detention proper:

> [The evidence] justified detention, without a warrant, while an investigation was made. The "protective search for weapons" of a suspect which the Court approved in *Terry v. Ohio,* even when probable cause for an arrest did not exist, went further than we need go here. The only thing done here on the basis of suspicion was detention of the packages.[223]

While some of the language used by the Court might suggest that detention of the package was not an intrusion severe enough to be within the fourth amendment,[224] the Court makes clear that some type of fourth amendment intrusion did occur, both by its statement that the evidence justified the detention, and by its further observation that not every twenty-nine hour holding of first-class mail would be justified.[225] *Van Leeuwen* was a case where a *relatively minor* intrusion was authorized on less than probable cause,

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[215] *Id.*
[216] *Id.* at 249-50.
[217] *Id.* at 250.
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.* at 253.
[222] *Id.* at 250.
[223] *Id.* at 252 (citations omitted).
[224] The Court stated:
> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Id. at 253. The Court elsewhere states that "[t]heoretically . . . detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment." *Id.* at 252.
[225] *Id.* at 253.

pending further investigation which promise a significant possibility of developing the probable cause needed for a warrant. It was a "freezing the status quo" case because it seized the moment to prevent the dissipation of the situation:

> Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initital suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.[226]

Van Leeuwen was a quantum of evidence case since the Court allowed an intermediate type of intrusion on less than probable cause; the case also spoke to warrant requirements since the Court necessarily decided that no warrant was required to detain the package. Indeed, perhaps no warrant was even practicable when the time period involved was likely to be so brief and where, in any event, no probable cause yet existed.

There is, however, some tension between *Van Leeuwen,* the perfect example of a "freezing the status quo" case, and *Chambers v. Maroney.*[227] In *Chambers,* the Court, apparently unable to decide that an immediate warrantless search of the car was a greater intrusion than merely holding it for a warrant, authorized either device. If that rationale were to prevail in *Van Leeuwen,* the Court presumably would have approved the immediate opening of the package as readily as the holding for further investigation, although there is not even such a suggestion in *Van Leeuwen.*

It is not meant to suggest that the Court honors the "lesser intrusion" spirit on a purely random basis. While not justifying the result, there are four possible explanations for failing to adhere to the *Terry* spirit in *Chambers,* a case decided after *Van Leeuwen.*

First, since *Chambers* was decided after *Van Leeuwen,* the Court had no occasion to discuss in *Van Leeuwen* the "alternative methods" point made in *Chambers.* Had the chronology been reversed, the *Van Leeuwen* Court might have felt compelled to address itself to the issue of which is the lesser intrusion: the immediate search or the detention pending a warrant.

Second, and a related point, the official in *Van Leeuwen* did not in fact search immediately, unlike the officials in *Chambers.* Since the *Van Leeuwen* case involved only what is manifestly not the "greater" intrusion, no dictum on an immediate search was needed. In *Chambers,* in other words, an inevitable question was: why not await a warrant? In *Van Leeuwen,* in the posture in which the case was presented to the Court, neither side was interested in asking: why not an immediate search?

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[226] *Id.*

[227] See text and notes 186-90 *supra. See* J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS IN A NUTSHELL 140 (1975):

> This [the *Chambers v. Maroney* proposition that police could either search immediately or hold the automobile pending issuance of a search warrant] would seem somewhat inconsistent with the rationale of *United States v. Van Leeuwen* ... permitting the lesser intrusion of delaying a mailed package for a day until a search warrant could be obtained.

Id.

Third, one might seek to justify the *Chambers* approach on the grounds that delaying one's use of his car for a given period of time is a more serious intrusion than delaying the delivery of his package, as was done in *Van Leeuwen.* Yet this is speculative at best. The package might contain important medicine, crucial matter for a family wedding or even car keys. In the car situation, the subject may have several cars or, if he is retained in custody, no occasion to use any automobile. Furthermore, the length of delay is clearly relevant to the degree of intrusion. In many situations, the warrant to search will be obtainable within a shorter period of time than that required for follow-up investigation. In *Van Leeuwen,* the delay was less than twenty-nine hours, and the warrant process in many situations need not even take that long. Surely the follow-up investigation in some cases will require more time than that. Moreover, since prospectivity is so important in fourth amendment cases, it is relevant to note that the prospective delay is often more accurately predictable in the warrant situation than in the follow-up investigation case although, concededly, there will be cases in the latter category in which one phone call might clear the suspect or confirm his implication in illegality. Of course, where the follow-up investigation yields probable cause to search, any additional time necessary to secure the warrant must be added to the time required for the investigation. Thus, it is not clear that *Chambers* presents a stronger case for an immediate search than *Van Leeuwen.*

Fourth, the quantum of evidence might be relevant to any balancing test between the government's right to intrude without a warrant and the subject's right to be free of governmental interference. In the *Van Leeuwen* case, there was no probable cause at the time the package was detained whereas there was probable cause in *Chambers.* One could argue for greater police flexibility in a probable cause situation, and, in addition, there is greater certainty that a search based on probable cause will take place since the only significiant bar to such a search is the potential disagreement of the magistrate from whom the warrant is sought. In the *Van Leeuwen* type of investigative situation, there are many possibilities of probable cause or a warrant not eventuating. Consequently, in the probable cause case the difference between holding and searching immediately is likely to involve *the time* at which the search occurs rather than *whether* it occurs, while in the investigation case the immediate search might well occur even though in many cases the follow-up investigation would have dispelled the reasons for the suspicion and therefore for the search. Indeed, it is conceivable that the immediate search of the package might yield inconclusive evidence, neither confirming nor dispelling suspicion. This situation is less likely to occur in a probable cause case. Given probable cause which a magistrate would find sufficient for a warrant, the required specificity as to the objects sought would lend itself to fairly definite confirmation or dispelling upon searching the vehicle.

CONCLUSION

Terry v. Ohio and its progeny ushered in a clean, concise concept of "freezing the status quo." This concept provides for intrusions of intermediate intensity upon an intermediate quantum of evidence—that is, more than a hunch but less than probable cause. The same may allow some loosening of

the warrant requirement, and perhaps even a yielding of probable cause in some situations.

This "freezing the status quo" concept is of significant value to law enforcement. Nonetheless, since it is the necessity of acting "now" that spawns the indicated concessions, vigilance is required to ensure that the concept does not become the vehicle for wholesale dilution of probable cause and warrant requirements. Curiously, the stop-and-frisk type of situation represented in the street encounter in *Terry v. Ohio,* the first clear "freezing the status quo" decision in the United States Supreme Court, needs reconsideration in light of this concern. It is possible that a realistic assessment of likely gains to law enforcement will suggest that the concessions approved in *Terry* are not justified. So too in the *Chambers v. Maroney* type of transaction, one in which there is probable cause to search a motor vehicle, the police should be restricted to a holding of the vehicle—or of the person in the analogous class of cases reflected in the fingernail scrapings seizure of *Cupp v. Murphy*—until a warrant is secured, lest the "immediate search" alternative authorized in *Chambers* undermine the true rationale of the freezing principle. Otherwise, there is a real danger that the "freezing the status quo" concept will become merely a pretext for melting traditional probable cause or warrant requirements.

In future cases, the "freezing the status quo" concept will be most appropriately explored with reference not to cases like *Terry* or *Chambers,* but rather to a case such as *Van Leeuwen,*[228] which authorized the limited intrusion of detention of the postal matter until probable cause developed and a warrant was secured. *Van Leeuwen* is the paradigm because of the careful restriction of the intrusion, absent probable cause and a warrant, to that necessary to law enforcement and justifiable under the fourth amendment. This is the focus called for by the *Terry* spirit and by Judge Leventhal's eloquent and perceptive opinion in *Bailey v. United States.*

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[228] To the extent the Court impliedly approved there the cursory inspection which antedated the full search of the house, courts will also refer to *Vale. Vale* honors the *Terry* spirit by restricting the intrusion to the least necessary to insure the justifiable law enforcement interest.