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FOREWORD

In the three years since its inception, the University of Puget Sound Law School has achieved unparalleled success in legal education. Dean Sinclitico and the law faculty have demonstrated a dedication to scholarship that presages a future of academic excellence. Striving to attain a quality of legal writing and analysis commensurate with the nascent tradition at this law school, the Editorial Board publishes this intramural edition. Hopefully this volume, published for the benefit of our students and faculty, represents a first and significant step toward a national law review that will serve the legal community and enhance the reputation of the law school.

The Board wishes to express its gratitude to the faculty, particularly Professor Thomas Holdych, who has contributed much time and energy to the arduous task of founding the University of Puget Sound Law Review.

Michael C. Hayden
Editor in Chief
1975-76

COMMENTS

FOUNDED SUSPICION: THE NINTH CIRCUIT'S RESPONSE TO *ALMEIDA SANCHEZ**

Two immigration patrol officers were monitoring traffic approximately ten to fifteen miles north of the Mexican border, when they observed a car riding low in the rear and apparently driven by a Mexican. Suspecting that the automobile might be transporting illegal aliens, the officers stopped it to conduct a routine inquiry. One agent approached the driver while the other walked to the rear of the car, looked in the window and noticed blue cellophane-wrapped packages wedged between two floor panels. Since he had seen kilo packages of marijuana hundreds of times before, the officer immediately concluded the driver was importing contraband. The agents then searched the car, discovered several kilograms of marijuana and arrested the driver, Bugarin-Casas, who was later convicted in federal district court for possessing a controlled substance with intent to distribute.

The agents' actions in *United States v. Bugarin-Casas*[1] typify the conduct of federal officers who routinely stop and search suspicious vehicles near the Mexican border.[2] Ninth

*Following the completion of this article, the United States Supreme Court, in United States v. Brignoni-Ponce, ___ U.S. ___, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), upheld the doctrine of founded suspicion. The Court relied heavily on Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the case in which the Court earlier sustained the doctrine of "stop and frisk."

[1]484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136, 94 S. Ct. 881, 38 L. Ed. 2d 762 (1974).

[2]*See* Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970) (agent discovered marijuana when looking inside a trunk for illegal aliens); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970) (agent discovered marijuana when looking under the hood of the automobile for aliens); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969) (agent found heroin

Circuit courts generally uphold such detentive stops of vehicles by applying the doctrine of "founded suspicion," which merely requires the border officer to justify his actions by reciting one or more objective facts reasonably creating suspicion. For example, the Ninth Circuit has accepted the following assertions as constituting founded suspicion: that the car was riding low,[3] that it was the type of vehicle used in smuggling,[4] that the car was following another car too closely,[5] or that the car was dusty.[6] Moreover, the circuit continues to approve automobile searches based on information discovered by the officer following the stop.[7] Thus the industrious border officer can make a full search of an automobile and obtain admissible evidence despite his initial lack of probable cause to indicate that the vehicle contained aliens or contraband.

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inside jacket in the trunk); Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967) (agent smelled marijuana when searching trunk for aliens and then searched behind back seat); Renteria-Medina v. United States, 346 F.2d 853 (9th Cir. 1965) (agent discovered heroin in alien's notebook); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963) (agent searched under hood of car after smelling marijuana).

[3]*See* United States v. Olivares, 496 F.2d 657 (5th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Portillo, 469 F.2d 907 (9th Cir. 1972); United States v. Roberts, 470 F.2d 858 (9th Cir. 1972).

[4]*See* United States v. Olivares, 496 F.2d 657 (5th Cir. 1974); United States v. Martinez-Tapia, 499 F.2d 1244 (9th Cir. 1974).

[5]*See* United States v. Martinez-Tapia, 499 F.2d 1244 (9th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974); United States v. Portillo, 469 F.2d 907 (9th Cir. 1972). Smugglers often use two vehicles, the front car serving as a scout, closely followed by the rear car, which carries the aliens.

[6]*See* United States v. Ojeda-Rodriquez, 502 F.2d 560 (9th Cir. 1974).

[7]*See* United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974), *cert. denied*, 417 U.S. 972, 94 S. Ct. 3178, 41 L. Ed. 2d 1143 (1974); United States v. Vital-Padilla, 500 F.2d 641 (9th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Ojeda-Rodriquez, 502 F.2d 560 (9th Cir. 1974) (per curiam). *Cf.* United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974) (court refused to take judicial notice of a smuggling *modus operandi* employing a scout car behind the load car and held that border patrol agents did not have founded suspicion to stop the automobile). Even where there is no search subsequent to the stop and the only purpose of the stop is to question the passengers about

Considering the difficulty of interdicting smugglers and aliens at the Mexican border, the Ninth Circuit's ready acceptance of founded suspicion to justify searches near the border is not surprising.[8] The United States Supreme Court, however, has consistently held that the mere presence of an important governmental interest does not justify vitiating Fourth Amendment protections.[9] The Fourth Amendment requires courts to scrutinize closely the interests of the individual prior to concluding that the interests of the government, however exigent and compelling, are paramount.[10] This comment, after analyzing the conceptual underpinnings of automobile seizure law and "stop and frisk"--the possible grounds supporting the founded suspicion doctrine--concludes that the doctrine is unconstitutional as presently applied to cases arising near the border.

The authority of customs and immigration officers to search persons and vehicles crossing the border is both longstanding and uncontroverted.[11] This plenary power to search

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their nationality, the court has held that there must be founded suspicion. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974) (en banc), *cert. granted*, 95 S. Ct. 40 (1974), United States v. Esquer-Rivera, 500 F.2d 313 (1974).

[8]*See generally Hearings on Law Enforcement on the Southwest Border Before a Subcomm. of the House Comm. on Government Operations*, 93rd Cong., 2d Sess., (1974) [hereinafter cited as *1974 Hearings*].

[9]*See, e.g.*, Almeida Sanchez v. United States, 413 U.S. 266, 273, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973).

[10]*See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Camara v. Municipal Court, 387 U.S. 523, 534-35, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[11]The first statute passed by Congress to regulate the collection of duties allowed customs agents to board any vessel seeking entrance into the United States to search for goods subject to duty. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (now 19 U.S.C. § 482 [1970]). Customs agents also have statutory authority "to go on board . . . any . . . vessel at any place in the United States . . . and search the vehicle" for contraband. 19 U.S.C. § 1581(a) (1970). In 1875, Congress granted immigration officials a similar authority to search for aliens. Act of March 3, 1875, ch.141, § 5, 18 Stat. 477 (now 8 U.S.C. § 1225(a) [1970]). Then in 1946, Congress empowered immigration officers to search any vehicle within a "reasonable distance" of the border. Act of Aug. 7, 1946, ch. 768, 60

at the border has proved ineffective, however, in controlling illegal immigration and smuggling.[12] Congress and the federal courts have responded to the border officials' plight by allowing them ever-increasing latitude to search away from the border.[13] Although courts initially required that customs searches be conducted near the border to qualify as functionally equivalent to border searches, the Ninth Circuit later upheld searches further from the border by modifying its definition of equivalency.[14] Congress granted even greater flexibility to federal

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Stat. 865 (now Immigration Arrests and Seizures Act, 8 U.S.C. § 1357(a)(3) [1970]). In both Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886) and Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 68 L. Ed. 543 (1925), the Court reaffirmed, in dictum, the power of the federal government to conduct searches at the border without probable cause or a warrant. Likewise, the Court in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), although striking down searches conducted without probable cause by roving patrols away from the border, reaffirmed the power of federal officials to conduct "routine inspections and searches of individuals or conveyances" at the border. 413 U.S. at 272. The Court implied that the exception to the probable cause requirement was reasonable in light of the government's power to exclude aliens and contraband as a means of rational self-protection. *Id.*

[12] *See generally* Hadley, *A Critical Analysis of the Wetback Problem*, 21 L. & CONTEMP. PROB. 334 (1956); Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. INT'L. L. & POL. 93 (1972). Although border officials maintain constant surveillance over regular ports of entry, they obviously are unable to surveil continually the entire 2,000-mile Mexican border. Of the 39,000 deportable aliens located by the Border Patrol traffic-checking operations in 1972, 30,000 entered the United States at a place other than a port of entry. *Almeida-Sanchez*, 413 U.S. at 294 (White, J., dissenting). Moreover, the number of deportable Mexican aliens located in the United States grew from 77,000 in 1967 to over 348,000 in 1971, 83% of the total number of deportable aliens discovered in that year. Additionally, in 1971 immigration officers uncovered over $5,000,000 worth of drugs. 1971 ATT'Y GEN. ANN. REP. 151-52.

[13] Cases cited at note 2 *supra*.

[14] Initially federal courts struck down searches too far removed from the border. *See, e.g.*, Contreras v. United States, 291 F.2d 63 (9th Cir. 1961) (72 miles); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959) (70 miles); *but see* Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959) (75 miles, border search upheld). The Ninth Circuit, however, in United States v. Weil, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971), concluded that the vehicle need not have crossed the border in order for an extended border search to be conducted. The new definition of functional equivalency encompassed searches where the customs agent was

immigration officers, empowering them to stop and search any vehicle within a reasonable distance of the border.[15] The Supreme Court, however, invalidated such a search in *Almeida-Sanchez v. United States*.[16]

The Ninth Circuit Court of Appeals, having postponed argument in *Bugarin-Casas* pending the outcome of *Almeida-Sanchez*, narrowly interpreted the Supreme Court's opinion. In *Almeida-Sanchez*, federal agents discovered marijuana while searching without probable cause for illegal aliens under the seat of the defendant's automobile. The Supreme Court rejected the government's argument that both the stop and the search were valid exercises of statutory power and concluded that an automobile search requires probable cause regardless of any manifes

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"reasonably certain" that parcels had been smuggled across the border and placed in a vehicle, or that a person who might be carrying contraband had crossed the border illegally and entered a vehicle. The court never expressly defined reasonable certainty, although the court later implied that it would defer to the experience of the border authorities. United States v. Markham, 440 F.2d 1119, 1122 (9th Cir. 1971).

[15] 8 U.S.C. § 1357(a)(3) (1970). Reasonable distance was later defined to mean within 100 air miles of the border. 8 C.F.R. § 287.1(a)(2). Within the 100-mile area immigration officers in the Ninth Circuit could search without any showing of cause, even though customs agents were required to have at least a minimum level of suspicion to search for drugs. *See* note 14 *supra*. Originally this distinction may have been reasonable since the customs agents were empowered to conduct a more extensive search than the immigration official, who was restricted to searching where an alien might be concealed; *see* Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969). The greater level of intrusion allowed in a customs search would seem to require a greater show of cause. But in practice there was very little difference between a customs or immigration search. Pursuant to 19 U.S.C. § 1401(1) (1970), the Secretary of the Treasury authorized local customs agents to appoint border patrol officers as acting customs officers. Customs Delegation Order No. 42, 36 Fed. Reg. 13410 (1971). Equipped with the authority of both offices, immigration agents then stopped any vehicle within 100 miles of the border and conducted a full customs search. *See* United States v. McDaniel, 463 F.2d 129, 134 (5th Cir. 1972) and United States v. Thompson, 475 F.2d 1359, 1362 (5th Cir. 1972), approving this "two-hat" theory. Logically there should be no constitutional difference between a search conducted by an immigration agent and one conducted by a customs agent. *See* United States v. Almeida-Sanchez, 452 F.2d 459, 464 (9th Cir. 1971) (Browning, J., dissenting).

[16] 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973).

urgency created by the border problem.[17] Moreover, a plurality of the Court asserted that the stop as well as the search requires probable cause.[18] Nevertheless, the Ninth Circuit, construing *Almeida-Sanchez* as applicable to roving searches only, maintained that federal officers could stop and detain automobiles on less than probable cause.[19] To support its decision, the court resurrected founded suspicion, a relatively obscure

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[17]Almeida-Sanchez v. United States, 413 U.S. 266, 273, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973).

[18]The plurality quoted from Chief Justice Taft's opinion for the Court in Carroll v. United States, 276 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925):

> It would be intolerable and unreasonable if a prohibition agent were authorized to *stop* every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. *But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.* 413 U.S. at 274-75, citing 267 U.S. at 153-54. (emphasis added)

[19]452 F.2d 459, 460 (1971). Neither the Fifth nor the Tenth Circuits are in accord with the Ninth Circuit's interpretation of *Almeida-Sanchez*. The Fifth Circuit Court of Appeals in the United States v. Byrd, 483 F.2d 1196 (1973), *aff'd on rehearing*, 494 F.2d 1284 (1974), apparently decided that the stop as well as the subsequent search had to be based on probable cause. In United States v. Miller, 492 F.2d 37 (1974), however, the Fifth Circuit concluded that *Almeida-Sanchez* was not retroactive to searches conducted prior to the date of the decision. Thereafter, the court reconsidered *Byrd* and affirmed its earlier decision on the basis of pre-*Almeida-Sanchez* standards. *Accord*, United States v. Speed, 489 F.2d 478 (5th Cir. 1973), *aff'd on rehearing*, 497 F.2d 546 (5th Cir. 1974); United States v. Olivares, 496 F.2d 657 (1974) (case arose after the Court's decision in *Almeida-Sanchez*). The Tenth Circuit Court of Appeals interprets *Almeida-Sanchez* more narrowly than either the Fifth or the Ninth. The court maintains that *Almeida-Sanchez* does not affect the statutory right of immigration officers, pursuant to 8 U.S.C. § 1357(a)(1) (1970), to stop and interrogate a person believed to be an alien regarding his right to remain in the country. United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973); *accord*, United States v. Newman, 490 F.2d 993 (10th Cir. 1974).

doctrine originally arising in the context of general police work.[20]

Following *Bugarin-Casas* the Ninth Circuit has relied almost exclusively on founded suspicion to justify automotive stops and searches near the border.[21] That reliance appears misplaced considering the rule of law quoted by the *Almeida-Sanchez* plurality from the Supreme Court's decision in *Carroll*

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[20]Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), the seminal decision relating to founded suspicion, arose out of a routine police investigation rather than a border encounter. In *Wilson*, two police officers noticed the defendant's car slowly drive by them twice during the predawn hours. The officers followed the vehicle after the second pass and directed the driver to pull over by flashing their red light. At the officer's request a passenger seated to the right of the driver opened the door and stepped out of the car. Thereupon one of the officers, shining his flashlight through the open door, noticed what appeared to be the barrel of a gun protruding from underneath the front seat. After ascertaining that the object was a pistol, the officers arrested both the driver and passenger for possession of an illegal weapon.

The Ninth Circuit Court of Appeals, dismissing a writ of habeas corpus issued by the federal district court, concluded that the stop of the defendant's automobile was valid. Even though the officers in *Wilson* failed to articulate the reasons that led them to stop the car, the court discerned from the record circumstances which might reasonably have prompted their action. An officer, according to the court, should not be required to reconstruct his motivations, which at the time of the event may have been nothing more than the "instinctive reaction of one trained in the prevention of crime." *Id.* at 415. Thus, the court in *Wilson* was apparently reluctant to scrutinize closely the investigative conduct of police officers and was willing to grant considerable deference to the officer's unarticulated intuition. Founded suspicion was all that was necessary to justify the temporary detention of the vehicle and its passengers. Subsequent to *Wilson* and prior to *Bugarin-Casas*, the doctrine of founded suspicion appeared primarily in cases involving general police investigation. *But see* United States v. Jackson, 423 F.2d 506 (1970) (the first reported case relying on *Wilson* to support a detentive stop by a federal officer near the border); United States v. Roberts, 470 F.2d 858 (9th Cir. 1972); United States v. Oswald, 441 F.2d 44 (9th Cir. 1971); United States v. Zubia-Sanchez, 448 F.2d 1232 (9th Cir. 1971).

[21]The Ninth Circuit observed in United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974) that:

> [T]he government seems to be turning more and more to the doctrine of "founded suspicion" to justify searches and seizures that would otherwise violate the Fourth Amendment as expounded in *Almeida-Sanchez*. *Id.* at 942.

v. United States.[22] In *Carroll*, the Court concluded that a person lawfully on the highways has a right to free passage without interruption unless probable cause exists to believe the vehicle is carrying contraband or illegal merchandise.[23] Since the Court has never expressly overruled or modified the *Carroll* rule, any authority for departing from its strict mandate must be found in related areas in which the Court has spoken--automobile seizure law and the doctrine of stop and frisk.

In the few cases squarely presenting the issue of a forcible automobile stop, the Supreme Court required probable cause.[24] *Carroll v. United States*, decided in 1925, concerned a search similar to those arising today near the Mexican border. At that time, "bootleggers" smuggled liquor across the border at Detroit, Michigan, and drove to a primary market area at Grand Rapids. Federal prohibition agents, aware of the heavy traffic in illegal liquor, were patrolling the main highway between Grand Rapids and Detroit when they recognized Carroll's car from prior encounters. After stopping the car and searching it, the agents discovered a large quantity of contraband whiskey. The Court upheld the stop and search, concluding that the agents' specific knowledge of Carroll's illegal operations constituted probable cause to believe that he was carrying illegal liquor; absent probable cause, the Court emphasized, both the stop and the ensuing search would have violated the Fourth Amendment.[25] Thus, despite the widespread national problem, the Court was unwilling to reduce

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[22] *See* note 18 *supra*.

[23] *Id.*

[24] Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

[25] *See* note 18 *supra*. Relying on *Carroll*, the Supreme Court in Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), upheld a stop and search of a vehicle carrying illegally imported liquor. The Court reaffirmed the *Carroll* rationale by stating that "mere suspicion" was

constitutional protections to facilitate law enforcement.

Despite the clear language of *Carroll*, lower courts have upheld certain types of detentive automobile stops without requiring probable cause.[26] Police officers routinely set up roadblocks to check vehicle licenses, registrations, and equipment and, less frequently, conduct checks on a roving basis. No court has cited the *Carroll* rule to invalidate such a roadblock[27] and only one court has relied on *Carroll* to find a roving license check unconstitutional.[28] When courts sustain a routine vehicle license or equipment check, however, they

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insufficient justification for intruding on the rights of a traveller by detaining him and subjecting him to the indignity of a search. The Court, however, may have been less committed to the rationale of *Carroll* than would appear at first blush. The lower court in *Brinegar*, perhaps presaging the doctrine of founded suspicion, had held that evidence obtained after a stop based on suspicion could be used to establish probable cause for the subsequent search, 165 F.2d 512 (10th Cir. 1947):

> The question presented then is whether the investigators, having sufficient information to suspect Brinegar, but not sufficient information to constitute probable cause for a search of the coupe and the arrest of Brinegar, could, after stopping him and interrogating him with respect to whiskey in the coupe, lawfully act upon the information obtained as a basis for probable cause for the search and seizure. *Id.* at 515.

Instead of reversing the conviction for an erroneous interpretation of the law, the Court expended considerable effort in showing that both the district court and the court of appeals were wrong in concluding there was no probable cause for the stop. In so doing the Court was able to affirm the conviction without overruling *Carroll*.

[26] *See, e.g.*, Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); Mincy v. District of Columbia, 218 A.2d 507 (D.C. Ct. App. 1966); Morgan v. Town of Heidelburg, 246 Miss. 481, 150 So. 2d 512 (1963); State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960); City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959). *See generally* Note *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973).

[27] *See, e.g.*, Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287 (1971).

[28] Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973); *cf.* State v. Colman, 254 Or. 1, 6 n.2, 456 P.2d 67, 69 n.2 (1969) (the Oregon Supreme Court expressly reserved ruling upon "the right to stop and examine the driver's operating license or the right to stop at a general roadblock"); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (dictum) (the court expressed doubts about the constitutionality of "spot checks" of drivers' licenses).

generally stress the administrative nature of the procedure.[29] In an administrative stop the officer's primary responsibility is insuring citizen compliance with safety regulations. Since the emphasis is upon correcting vehicle defects rather than upon detecting possible criminal activity, the stops are not accusatory and are less coercive than investigative stops designed to ferret out crime.[30] Moreover, the brief intrusion appears justified considering the strong governmental interest in highway safety and the lack of alternative means to accomplish the desired regulation.[31]

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[29] *See, e.g.*, United States v. Turner, 442 F.2d 1146 (8th Cir. 1971); United States v. Berry, 369 F.2d 386 (3rd Cir. 1966); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

[30] Courts recognize that the officer's reason for stopping a vehicle determines to a large extent whether the stop will be offensive to the vehicle's occupants. *See, e.g.*, Palmore v. United States, 290 A.2d 573, 583 n.25 (D.C. Ct. App. 1972), *aff'd* 411 U.S. 389 (1973) (*cert. denied* with respect to Fourth Amendment claim) where the court asserted that, depending on the motivation of the police officers, the "spot check" might be "a minor intrusion for a public health and safety purpose" or an "investigation . . . focusing on a particular individual . . . ." *cf.* Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) and See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), dealing with administrative searches to detect housing code violations. Police occasionally use roadblocks as a means of detecting criminal activity rather than vehicle defects or expired licenses. In one instance a five-hour roadblock on Chicago's south side reportedly stopped 1,190 cars, out of which seven persons were arrested for narcotics violations, five for drunk driving and six for driving without a license. Foote, *The Fourth Amendment, Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L.C. & P.S. 402, 406 (1960). Such an indiscriminate use of the roadblock appears to circumvent unconstitutionally the warrant requirement and at least one court has so held. *See* Wirin v. Horrall, 85 Cal. App. 2d 497, 193 P.2d 470 (1948); *cf.* People v. Hyde, 12 Cal. App. 3d 158, 524 P.2d 830, 833, 115 Cal. Rptr. 358 (1974). A roadblock to catch a fleeing felon appears to stand on a different footing since the police have probable cause to believe a crime has been committed. *See* Williams v. State, 226 Md. 614, 174 A.2d 719 (1961), *cert. denied*, 369 U.S. 855 (1962); State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932); Kagel v. Brugger, 19 Wis. 2d 1, 119 N.W.2d 394 (1963); *see also* United States v. Robinson, 471 F.2d 1082, 1111-12 (D.C. Cir. 1972), *rev'd on other grounds*, 414 U.S. 218 (1973), in which Judge Bazelon observed that "[t]he applicable police regulations . . . may conceivably be interpreted as hints encouraging the use of spot checks to conceal Fourth Amendment violations."

[31] *See generally* Cook *supra* note 27.

Detentive automobile stops conducted near the border by federal officers, on the other hand, are both accusatory and investigatory. Customs and immigration officers, having no authority to check for minor violations of state motor vehicle codes, are responsible solely for discovering illegal aliens or drugs.[32] Officers searching for illegal aliens and drugs are likely to carry out a completely different type of inquiry than officers checking turn signals and drivers' licenses. The type of questions asked of a potential smuggler would logically be directed toward discovering his destination, past travels, general character and other matters normally considered personal. Such questions, especially when asked in an accusatory context, are likely to be a substantial affront to an innocent citizen's dignity.[33] These stops are therefore more intrusive than administrative stops and cannot be supported by the same reasoning. By contrast, stop and frisk, a police technique enunciated in *Terry v. Ohio*,[34] portends a criminal accusation and engenders considerable coercion, thus providing a better analogy to founded suspicion.[35]

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[32] *See* United States v. Jackson, 423 F.2d 506, 508 (9th Cir. 1970), in which the court distinguished the narrowly defined duties of the federal border authorities from the general law enforcement duties of local and state police.

[33] *See generally* Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

[34] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Although the Supreme Court did not announce "stop and frisk" until *Terry v. Ohio*, the dissent in Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959), presaged the doctrine nine years earlier. In *Henry* a majority of the Court, following *Carroll*, rejected the opportunity to define the minimum evidentiary standard for an automobile stop and instead accepted the government's concession that the stop, without more, constituted an arrest. Since at the time of the stop the police did not have probable cause to make an arrest, the Court reversed the conviction without considering whether the police conduct was reasonable. Justice Clark and Chief Justice Warren dissented. In their view, the police were justified in stopping the petitioner's car after observing suspicious conduct. Thus, they argued, the Court's overly rigid definition of arrest excluded evidence obtained by reasonable and therefore constitutional means.

[35] *See generally* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1968).

In *Terry*, the Supreme Court upheld the detentive stop of a pedestrian despite the police officer's lack of probable cause to make an arrest. A police officer in that case observed two men walk back and forth in front of a store approximately twenty-four times, pausing each time to look in the window. A third man joined the pair for a moment and then quickly departed, thereafter followed by the other two. The officer, suspecting that the three individuals were casing the store for a robbery, approached them and asked their names. In response, one of the men "mumbled something." The officer immediately spun him around, frisked him, and discovered a concealed weapon. The Court sustained the subsequent arrest and conviction, concluding that the defendant's conduct as observed by the arresting officer, though not rising to the level of probable cause, provided reasonable grounds for the stop and frisk.[36]

According to Chief Justice Warren, the *Terry* holding brought within judicial scrutiny an area of police conduct that had previously escaped review.[37] Prior to *Terry*, lower courts faced a Hobson's choice.[38] If they defined an arrest broadly, as any interference with individual freedom of movement, they would be requiring probable cause for all stops.[39] Alternatively, if they defined an arrest narrowly, as taking an individual into custody so that he might answer for a crime, the police officer would decide when the arrest occurred.[40] Until the moment when he intended to take the suspect into

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[36] 392 U.S. at 21-22.

[37] 392 U.S. at 16. The Court "emphatically" rejected the idea that seizures which do not result in a formal arrest are outside the purview of the Fourth Amendment.

[38] Named for Tobias Hobson, the English currier commemorated by Milton in two epitaphs. It was rumored that Hobson compelled customers to choose between leasing the "nag" next to the stabledoor or walking. The term now means that a person is forced to make a choice between two unattractive alternatives.

[39] *See generally* Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465 (1967); LaFave, *supra* note 35.

[40] *Id.*

custody, the officer could detain him without any justification whatsoever. Thus, a court's choice was to hamper unduly police investigation by requiring probable cause for all stops or to allow the police to determine what constituted an arrest, thereby granting them almost unreviewable discretion.

The Court in *Terry* attempted to solve this problem by avoiding the labeling of particular types of police conduct.[41] According to the Court, the reasonableness of the conduct should be assessed by balancing the governmental interest in detecting and preventing crime against the invasion that the search or seizure entails.[42] To aid the Court's balancing, the officer must allege specific and articulable facts, known to him at the moment of the search or seizure, reasonably warranting the intrusion.[43] Theoretically, the judge could provide retrospectively the same constitutional protection that the warrant procedure would have provided prospectively.[44]

Although the *Terry* Court indicated that all intrusions were subject to the reasonableness test, it expressly reserved the question of the minimum justification for the detentive

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[41]The "rigid all-or-nothing model of justification," according to Chief Justice Warren, "obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." 392 U.S. at 17. The Court has not escaped the problem of categorizing types of police conduct, *Terry* notwithstanding. Particularly when dealing with the issue of *Miranda* warnings, [as required by the Court's earlier holding in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] the Court finds it necessary to define the point at which an arrest occurred. *See, e.g.*, Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969).

[42]392 U.S. at 19, 21.

[43]*Id.* at 22.

[44]*See generally* LaFave *supra* note 35, in which the author suggests that probable cause is nothing more than a determination that the police conduct was reasonable. While the quantum of evidence required for a stop on the street might be less than that required to take a suspect to the station house, both require a showing of reasonableness. This method of analysis results in defining probable cause as a variable quantum of evidence which justifies particular levels of intrusion. *See also* Note, *United States v. Bailey: Probable Cause and Reasonableness Tests Under the Fourth Amendment - A Distinction Without a Difference?*, 45 TEMPLE L.Q. 610 (1972).

stop of a pedestrian.[45] The Court implied that an officer could approach a pedestrian in the interest of detecting and preventing crime, but it did not articulate the specific individual interests potentially invaded by such a stop. The majority avoided the issue by assuming that no detention of the petitioner occurred until the moment the officer frisked him.[46] The Court upheld the frisk itself by balancing the officer's interest in self-protection, based on his reasonable suspicion that the petitioner might be armed and dangerous, with the limited intrusion the frisk entailed.[47]

The Court in *Terry* perhaps intentionally avoided detailed analysis of the conflicting interests involved in detentive stops, since no empirical evidence was available to evaluate the merits of the procedure.[48] Nevertheless, several policy considerations, apparently unconsidered by the Court, arguably support the use of forcible stops. First, physical evidence may be discovered during a frisk incident to the stop; second, the suspect may make inculpatory statements; third, police visibility may deter the commission of crimes; and fourth, the officer may detain the suspect while obtaining information concerning the possible crime. When balancing each of these potential interests against the intrusiveness of the stop to the individual, the Court will not have the benefit of a precise formula for defining reasonableness.[49] Nevertheless, the Court must determine which of the above interests it can properly

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[45] 392 U.S. at 19 n.16.

[46] *Id.* at 19. Justice Harlan criticized the *Terry* majority for avoiding the difficult issue of when an officer may forcibly stop a suspect for investigatory purposes. *Id.* at 32. (Harlan, J., concurring). Unfortunately, Justice Harlan, though recognizing the majority's short-comings, also failed to provide an adequate explanation for sustaining the stop.

[47] *Id.* at 27.

[48] *See* Brief for Nat'l. Dist. Attorney's Ass'n. as amicus curiae at 12, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[49] The Supreme Court has long recognized that, in the final analysis, the test of reasonableness is common sense. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

consider in the balance.[50] A stop, for example, cannot be justified by evidence discovered during the frisk. To do so would be tantamount to justifying an arrest by evidence obtained during a search incident to the arrest. The Supreme Court has emphatically concluded that such bootstrapping is impermissible.[51]

A more difficult issue is whether the stop can be justified as a means of eliciting incriminating information from the person detained. In *Miranda v. Arizona*[52] the Supreme Court held that a person must be advised of his Fifth and Sixth Amendment rights anytime he "has been taken into custody or otherwise deprived of his freedoms in any significant way."[53] If *Miranda* applies to every official interrogation, the utility of investigative stops as an information gathering tool would be greatly reduced. The Supreme Court, however, probably will not require *Miranda* warnings in investigative street encounters. Despite the relatively coercive atmosphere of the stop and the possibility that the suspect is unaware of his right to remain silent, the Court may presume that the suspect "voluntarily" cooperated with the police. In an analogous factual situation involving the issue of whether a valid consent to search requires actual knowledge of the right to refuse, the Court implied that the interest in gaining information possibly outweighs the suspect's right to be informed of his constitutional

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[50] According to Professor Gunther, the most important trait of responsible balancing is the capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests. Gunther, *The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 7 (1972).

[51] Sibron v. New York, 392 U.S. 40, 63, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); Johnson v. United States, 333 U.S. 10, 16-17, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

[52] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[53] *Id.* at 444.

guarantees.[54] Thus, the Court may presume the suspect's voluntary waiver rather than require the *Miranda* warnings[55] which discourage the suspect from cooperating.

Yet, even assuming the warning is not required, if the suspect chooses not to cooperate, the officer probably cannot compel him to answer questions.[56] Unfortunately, the Supreme Court has never answered the thorny question of whether police can legitimately detain an uncooperative suspect solely to compel cooperation.[57] Logic indicates, however, that the police should not be empowered to compel information the suspect has a constitutional right to withhold.[58] Nor should the suspect's refusal to answer be a factor in determining whether probable cause for an arrest exists.[59]

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[54]Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2040, 36 L. Ed. 2d 854 (1973) (consent search held voluntary despite the fact that no *Miranda* warning was given). Although the Court asserted that it was considering *Miranda* from the standpoint of the Fifth and Sixth Amendments, its decision not to require *Miranda* warning appears to be framed in terms of Fourth Amendment reasonableness.

[55]*Cf.* People v. Henze, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (Dist. Ct. App. 1967) (Hendron, J., dissenting).

[56]*See* Terry v. Ohio, 392 U.S. at 34 (White, J., concurring).

[57]The issue of compelled citizen cooperation was raised in Wainwright v. City of New Orleans, 392 U.S. 598 (1968), but the Court, after accepting certiorari, dismissed the writ as improvidently granted.

[58]Justice White expressed this more clearly than the *Terry* majority. He observed that there is nothing in the Constitution which prevents a policeman from addressing questions to citizens in the street. But only under "special circumstances" (i.e., the need for a protective frisk) may the person be detained; otherwise he may refuse to cooperate and go his way. 392 U.S. at 34.

[59]*See* 392 U.S. at 34 (White, J., concurring); *see also* United States v. Bonanno, 180 F. Supp. 71, 86 n.21 (S.D.N.Y. 1960), in which the court said "that the defendants in this case had a constitutional right to remain silent when questioned by police or other investigatory agents or bodies, but they chose not to do so. Had they chosen such a course, they would have suffered no penalty." Green v. United States, 259 F.2d 180 (D.C. Cir. 1958) (dicta). Brooks v. United States, 159 A.2d 876 (D.C. Mun. Ct. App. 1960). Suspects, however, rarely refuse to cooperate with the police. In one empirical study it was reported that of 300 field interrogations in Chicago, in not one instance did the suspect refuse to answer questions. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 475 (1967).

Even if detentive stops cannot be justified as a means t frisk for evidence or as a way to compel the cooperation of a suspect, valid rationales for allowing forcible street encounters still exist. Consider the following hypotheticals:

> (i) A police officer hears a scream coming from an unidentified source in an apartment building. Moments later he observes an individual leaving the building.[60]
>
> (ii) At 2:00 a.m. a police officer notices two individuals walking back and forth in front of a store window, intermittently whispering and carefully scrutinizing the merchandise.[61]

In both of these situations the officers should intervene, albeit for a different reason in each case.

In the first hypothetical, notwithstanding the lack of probable cause, the officer should detain the suspect until he determines the source of the scream.[62] Admittedly, the suspect may be totally innocent, but the public interest in detecting crime appears to outweigh the minimal intrusion caused by detaining the suspect.

The rationale for allowing intervention by the officer in the second hypothetical is perhaps even more compelling. Some commentators maintain that the principal purpose of the stop and frisk power is to prevent crime rather than to investigate crimes already committed.[63] Arguably, in the second hypothetical police visibility will prevent the crime.[64] An individual is less likely to commit a crime if he realizes the police are not only present but also suspicious of his activity.

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[60] Kaufman, J., posed this hypothetical in his opinion in United States v. Bonanno, 180 F. Supp. 71, 78-79 (S.D.N.Y. 1960), *rev'd on other grounds* (2d Cir. 1960).

[61] This set of facts is similar to People v. Rivera, 14 N.Y.2d 441, 252 N.Y.S.2d 458 (1964) as well as Terry v. Ohio, 392 U.S. 1 (1968).

[62] *Cf.* Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

[63] *See* LaFave, *supra* note 35; *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 178, 182 (1968).

[64] *See* LaFave, *supra* note 35.

Maintaining the status quo to allow the officer to obtain evidence from other sources and increasing police visibility as a deterrent to crime apply to general investigatory detentions of automobiles as well as to forcible stops of pedestrians.[65] Had the suspect left the apartment building by automobile in hypothetical number one, it would have been even more essential for the officer to intervene. The suspect's greater mobility increases the difficulty of apprehending him later if the officer allows him to proceed while investigating the possibility of a crime. Similarly, in the second hypothetical the presence of an automobile would make a forcible stop no less reasonable. The need to dissuade suspects from committing a crime is equally compelling. These same rationales, however, do not justify forcible automobile stops conducted by federal officers near the border.

In carrying out their duties near the border, federal officers stop vehicles for a different purpose than do general law enforcement officers.[66] Immigration and customs officials assigned to the border area are not engaged in the general prevention and detention of crime. When they conduct roving patrols away from the border their sole responsibility is to discover illegal aliens or drugs.[67] Customs or immigration officers gain nothing by forcibly stopping an automobile solely to

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[65] *But see* Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973), in which the author argues that automobile stops are inherently more intrusive than stops of pedestrians. Thus, according to the author, the minimum evidentiary requirement for auto stops should be probable cause. A contrary view--that auto stops are less intrusive than pedestrian stops--has also been advocated. *See, e.g.*, State v. Fish, 280 Minn. 163, 167, 159 N.W.2d 786, 790 (1968). This latter view rests on one of two premises: that permission to drive a motor vehicle is a privilege, and therefore can be peremptorily denied or that the extensive amount of regulation reduces the expectation of privacy. Only the latter of these two arguments seems persuasive. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[66] *See* United States v. Majourau, 474 F.2d 766, 770 (9th Cir. 1973).

[67] *Id.* The court maintained that customs agents are not "general guardians of the public peace" but are federal officers with "duties and powers

maintain the status quo. These officers have no extraneous source of information from which they can determine whether smuggling exists, since no effective communication apparently takes place between the roving patrols and the intelligence-gathering arms of the two agencies.[68] Moreover, even assuming that the vehicle carries drugs or aliens and has recently crossed the border, the guilty parties probably left no incriminating evidence at the border. Illegal aliens and soft drug smugglers enter the United States surreptitiously at unsupervised crossings.[69] Hard drug smugglers, on the other hand, typically cross the border at regular ports of entry, where they are either apprehended or pass through unnoticed.[70] Thus, any automobile stopped by a roving patrol after crossing the border probably entered the country without alerting federal officers that it was carrying contraband.[71]

Furthermore, the officer's visibility, perhaps effective in specifically deterring many types of crimes, will provide little deterrence to smuggling. The potential bank robber will undoubtedly have second thoughts about committing the crime if a police officer stops and questions him.[72] By contrast, that kind of immediate specific deterrence is not possible in the case of a smuggler who, when stopped, already will have substantially committed the crime. A *Terry*-type stop certainly will not motivate a smuggler to recross the border or otherwise attempt to undo the crime. The skeptic may nevertheless argue that such stops might so unnerve smugglers that later smuggling attempts are deterred. Increased general deterrence, however, is unlikely. Smugglers are aware from the outset that highly

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limited to activities of the type that the title implies." *See also* United States v. Jackson, 423 F.2d 506, 508 (9th Cir. 1970) and United States v. Blackstock, 451 F.2d 908, 911 (9th Cir. 1971) (dissenting opinion).

[68] *Hearings*, *supra* note 8 at 19.

[69] *Id.* at 22.

[70] *Id.*

[71] *Id.*

[72] *See* LaFave, *supra* note 35.

trained officers at the border have almost unlimited discretion to search. Smugglers undergoing such an imminent threat of detection will not be deterred by the knowledge that, once across the border, they may be stopped by a federal officer and asked some questions. Thus, roving patrols, presumably lacking the power to search without probable cause, will not significantly increase the deterrence already present.

The only substantial reason for allowing federal officers to stop vehicles, as the Ninth Circuit apparently recognized in *United States v. Majourau*,[73] is to permit officers to search for aliens or contraband.[74] While the general law enforcement officer may occasionally engage in a "fishing expedition" when he stops a suspect, the immigration or customs officer is always "fishing."[75] At the very least the agents will want to observe the contents of the passenger compartment,[76] and more likely they will want to inspect all areas in which an alien or drugs may be hidden.[77] Hypothetically, the agent must have probable cause prior to conducting a search. But an officer, singularly responsible for the discovery of aliens or contraband and suspicious that the vehicle contains smuggled goods or aliens, will be tempted to search the auto even if he does not have probable cause.

Many commentators and judges suggest restricting the power of officials to stop individuals suspected of possessory crimes.[78]

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[73]474 F.2d 766 (9th Cir. 1973).

[74]*Id.* at 770.

[75]*See* LaFave, *supra* note 35.

[76]The agent's desire to observe the contents of the passenger compartment receives considerable assistance from the "plain view" doctrine as announced in Harris v. United States, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); *see, e.g.*, United States v. Johnson, 506 F.2d 674 (8th Cir. 1974); United States v. Hood, 493 F.2d 677 (9th Cir. 1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973); United States v. Henderson, 472 F.2d 157 (6th Cir. 1973).

[77]*See, e.g.*, United States v. Cullen, 499 F.2d 545 (9th Cir. 1974); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969); Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970).

[78]*See* Williams v. Adams, 436 F.2d 30, 38 (2d Cir. 1971) (Friendly, J.,

They argue that in such cases the police are likely to abuse their authority by conducting generalized dragnet operations in an effort to discover evidence of crimes. That argument applies equally well to customs or immigration stops since the officer's primary goal is to search the vehicle. Without reasonable suspicion, federal officers may stop and search large numbers of vehicles to obtain evidence of a crime. They can later fabricate justifications for intrusions that in fact unconstitutionally invaded individual privacy.[79]

The protection of the Fourth Amendment breaks down when the officer fabricates facts to justify his conduct. According to *Terry* the notions underlying the Fourth Amendment's warrant clause and the probable cause requirement relate as well to detentions short of an official arrest.[80] Although advance judicial approval through the warrant procedure is not constitutionally required, at some point the officer's conduct must be subjected to the "more detached, neutral scrutiny of a judge."[81] The decision in *Terry* presupposes, however, that

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dissenting) quoted in Adams v. Williams, 407 U.S. at 149 (Douglas & Marshall, J.J., dissenting); LaFave, *supra* note 44, at 65-66; *cf.* Sibron v. New York, 392 U.S. 40, 74 (Harlan, J., concurring).

In Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), the Supreme Court apparently rejected the suggestion that the power to stop be limited according to the nature of the suspected crime. The officer in *Williams*, having been informed that an individual seated in a nearby automobile had narcotics and a gun in the car, approached the vehicle and asked the driver to open the door. When the man rolled down the window instead, the officer immediately reached inside and grabbed a revolver at the spot where the informer had said the gun would be found. The officer arrested the suspect for illegal possession of the weapon and then searched the car discovering a number of other weapons and twelve ounces of heroin.

The majority in *Williams*, ignoring the arguments of Judge Friendly and the dissent, did not discuss the question of whether stops should be allowed when the officer suspects a narcotics violation. Most likely, the Court did not wish to draw a distinction which would be extremely difficult to enforce, short of excluding all drugs properly or improperly seized during a frisk.

[79] *See* LaFave, *supra* note 35, at 65 n.126; Comment, *Police Perjury in the Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

[80] 392 U.S. at 20.

[81] *Id.* at 21.

the officer will provide the court with "specific and articulable" facts that prompted his conduct.[82] If such facts are not available or are manufactured by the officer after the search, the constitutional protections provided by the Fourth Amendment are vitiated.

The judiciary's ability to scrutinize closely the officer's conduct during detentive vehicle stops near the border appears minimal. It would be extremely difficult for judges to disbelieve an officer's assertion that the defendant admitted carrying drugs,[83] that he consented to the search,[84] or that the officer smelled marijuana.[85] In most cases judges either have to assume the basic honesty of the police, or risk alienating the law enforcement authority. Under the latter alternative, an atmosphere of mutual disrespect could jeopardize the effectiveness of the judicial process. In rare instances, the officer's testimony might be so contradictory on cross-examination that a court would refuse to accept his version of the facts,[86] but usually courts will have to assess the reasonableness of the invasion by objectively evaluating the facts as the officer presents them.

Although the problem of pretext pervades search and seizure law,[87] Congress and the courts invite the problem when

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[82] *Id.*

[83] *Cf.* Brinegar v. United States, 338 U.S. 160, 163, in which liquor agents alleged that the petitioner admitted having twelve cases of liquor in the car.

[84] *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2040, 36 L. Ed. 2d 854 (1973); *see also* United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); United States v. Walling, 486 F.2d 229 (9th Cir. 1973).

[85] *See, e.g.*, United States v. Ojeda-Rodriquez, 502 F.2d 560 (9th Cir. 1974); United States v. Diamond, 471 F.2d 771 (9th Cir. 1973).

[86] *See* United States v. Portillo, 469 F.2d 907 (9th Cir. 1972); United States v. Davis, 459 F.2d 458 (9th Cir. 1972).

[87] A particularly troublesome pretext problem is present in a line of California cases dealing with "furtive gestures." Generally, the arresting officer testifies that, while following the defendant's automobile, he saw one of the occupants make a suspicious motion as if to hide something. After stopping the vehicle, the officer usually searches for the secreted contraband. A group of student law review editors, after studying arrest

they allow the customs or immigration agent less authority than he needs to accomplish his job. In normal police work a *Terry*-type stop serves to deter crime, and preserve the status quo. The same type stop, when utilized by a customs agent, is designed primarily to find probable cause for a search. Without conducting a search a customs agent will seldom achieve his goal--uncovering goods or persons smuggled across the border. Thus, if an agent who has founded suspicion may stop a vehicle but may not search it without probable cause, he may be tempted to find or to create probable cause. Arguably, the courts' efforts to guard the constitutional rights of citizens near the border under these circumstances, though laudable, will be totally ineffective.

The constitutionality of any search involves a balancing of the individual's right to be free of intrusion with the extent of the government's need to investigate the individual.[88] Although the government's interest in controlling the influx of drugs and illegal aliens is compelling, the intrusion resulting from a non-border stop is so extensive that it affronts basic constitutional rights. Searches at ports of entry, however, are less intrusive and hence are constitutionally justifiable. An individual crossing the border knows he may be searched and can plan his time and activity accordingly. If he is carrying highly personal items he may either refrain from crossing the border or refrain from carrying those items with him. In addition, the individual crossing the border knows the government is not singling him out to be searched, but is treating him like all persons who cross the border. Thus, in most instances, searching a person at the border is considerably less offensive than randomly searching automobiles or individuals

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reports, observed that officers apparently tailor their language in order to achieve "write-in" probable cause. *See Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L. REV. 1499, 1534 n.95 (1968); 11 SANTA CLARA LAWYER 449 (1970).

[88] Cases cited note 10 *supra*.

in the interior.[89]

Although the Supreme Court in *Almeida-Sanchez* recognized the clear distinction between stops at the border and stops near the border, the Ninth Circuit continues to uphold the latter by resorting to the doctrine of founded suspicion. The court has failed, however, to provide a sound analytical basis to support the doctrine. Careful analysis reveals that the only logical rationale for the doctrine--providing an opportunity for an officer to search automobiles--is unconstitutional.

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[89] *Cf.* People v. Hyde, 12 Cal. App. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974).