NONARREST INVESTIGATORY DETENTIONS IN SEARCH AND SEIZURE LAW

GEORGE E. DIX*

Under current law the police may detain a suspect for investigatory purposes without meeting the legal requirements that protect individuals who are placed under arrest. Police authority to conduct such investigatory detentions, however, is limited by fourth amendment considerations and, in some jurisdictions, by local statutory and case law. There is a tendency to view issues arising from nonarrest detentions purely as matters of federal constitutional law; as a result, such issues have been inadequately addressed in terms of their relevance to state policy and law. This article considers the major aspects of nonarrest detention law that might usefully be addressed both as federal constitutional problems and as matters of legitimate local law concern. It then examines certain issues raised by such detentions that have significance for the legal regulation of law enforcement conduct more generally.

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* Lloyd M. Bentsen, Jr., Centennial Professor of Law, University of Texas.

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I. INTRODUCTION

The last several terms of the United States Supreme Court have witnessed the development of three reasonably clear trends in the constitutional doctrines relating to law enforcement activity and in the enforcement of these doctrines by exclusionary remedies. First, the Court has increasingly tended to limit the substantive doctrines—primarily the fourth amendment's requirement that searches and seizures be "reasonable" and the fifth amendment's prohibition against compelled self-incrimination—to those law enforcement activities that intrude most significantly upon the interests that the Court perceives as underlying the doctrines.¹ Second, the Court has abandoned its earlier unbridled enthusiasm regarding exclusionary sanctions. As a result, the Court is increasingly limiting the application of exclusionary sanctions as a method of preventing future violations of substantive constitutional doctrines.² Fi-

1. In regard to the fourth amendment, see *Oliver v. United States*, 104 S. Ct. 1735 (1984) (entry of "open fields" not a search); *United States v. Place*, 462 U.S. 696 (1983) (sniffing of luggage in public place by trained dog not a search); *United States v. Knott*, 460 U.S. 276 (1983) (use of "beeper" to trace automobile driven on public highways not a search). But see *United States v. Karo*, 104 S. Ct. 3296 (1984) (use of "beeper" to determine presence of object inside residence was a search). In regard to the fifth amendment, see *Minnesota v. Murphy*, 104 S. Ct. 1136, 1147 n.7 (1984) (dictum) (fifth amendment does not bar compulsion to reveal information that would result only in probation revocation); *South Dakota v. Neville*, 459 U.S. 553 (1983) (no fifth amendment bar to use of driver's refusal to submit to blood-alcohol test).

2. The most important illustration is the Court's recent acceptance of a "reasonable good faith" exception to the exclusionary sanction in searches pursuant to invalid warrants. See *United States v. Leon*, 104 S. Ct. 3405, 3421 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424, 3428 (1984); see also *Nix v. Williams*, 104 S. Ct. 2501, 2509 (1984) ("inevitable discovery" exception to sixth amendment exclusionary rule recognized).

nally, the Court has expressed a fluctuating inclination to construe these substantive doctrines in a manner that will provide law enforcement officers and lower courts with standards capable of relatively easy and objective application—so-called “bright line rules.”³

These trends reflect a growing perception by a majority of the Court's members that the role of the federal constitution in regulating state law enforcement must be carefully defined and limited in order to provide no more than an outer regulatory framework. Within this framework, substantial discretion must be left to the states to determine whether to pursue further regulation and, if so, how to go about the task. As a result, state law—constitutional, statutory, judicial and administrative—is assuming greater significance in criminal procedure.⁴

In its pursuit of these objectives, there is significant risk that the Supreme Court may abandon other aspects of its responsibility in the criminal procedure area. One of the Court's obligations is to encourage reasonable as well as independent resolution of state law issues. From one perspective, the Supreme Court may be viewed as having no legitimate concern with whether or how states address those issues that the Court's decisions define as beyond the limits of federal constitutional law. But some responsibility must rest on the Court. *Mapp v. Ohio*,⁵ *Miranda v. Arizona*,⁶ and their progeny created the impression, if not the actuality, that the Court had largely “constitutionalized” the regulation of search and interrogation practices. The opinions of the Supreme Court became the guiding jurisprudence in these areas, either by direct holding or by analogy.⁷ The Court's recent retrenchment enlarges the potential role of state law, yet prior Supreme Court decisions have fostered the impression

3. Compare *Oliver v. United States*, 104 S. Ct. 1735, 1742-43 (1984) (rejecting suggestion that case-by-case approach should be taken in determining whether entry of open fields constitutes a search, because such an ad hoc approach makes it difficult for officers to discern the scope of their authority and creates risk of arbitrary enforcement of rights) and *New York v. Quarles*, 104 S. Ct. 2626, 2632 (1984) (existence of “public safety” exception to *Miranda* does not depend upon officer's subjective intent) with *New York v. Quarles*, 104 S. Ct. at 2633 (public safety exception recognized despite acknowledgment that this will “to some degree . . . lessen the desirability of [the *Miranda*] rule”). The “bright line” approach has been extensively discussed by Professor LaFave. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307 (1982); LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127; see also Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

4. See generally Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 AM. J. CRIM. L. 109 (1983) (sources cited therein).

5. 367 U.S. 643 (1961).

6. 384 U.S. 436 (1966).

7. One commentator has noted that federal case law “defines the issues, furnishes the concepts, [and] supplies even the . . . vocabulary.” Kelman, *Forward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 431 (1981).

that these areas are to be regulated by federal standards. In light of this, the Court should assume some responsibility for stimulating and guiding state regulation of these law enforcement activities.

Another obligation of the Court is to define the scope of judicial review of constitutionally mandated law enforcement conduct. The scope of review may accommodate varying positions that local jurisdictions take on uncertain factual matters. It may also accommodate some inevitable and perhaps unreviewable exercise of discretion by law enforcement officers. Yet it must also provide sufficient substantive review of law enforcement action in order to be meaningful.

Even in regard to matters that are not of federal constitutional concern, the Court has significant responsibility. Formulation of exclusionary sanctions for violating suspects' rights has become, or at least is widely perceived as having become, as constitutionalized as the rights themselves. Insofar as state lawmakers seek to develop or strengthen state judicial review of law enforcement activity, recourse will inevitably be had to the Supreme Court's approach on the federal constitutional level.⁸ The Court will to some extent lead by example, with the result that its responsibility will become broader.

The Court's fulfillment of its responsibilities might be examined in many areas of criminal procedure. This article, however, considers the matter in one particular context, that of nonarrest investigatory detentions—or "field stops"—of suspects. The subject is important in its own right. Increasing evidence indicates that nonarrest detentions are an effective tool for dealing with crime.⁹ A 1973-74 experiment conducted in San Diego¹⁰ examined the effect of discontinuing investigatory stops in a designated area for a period of seven months. During this period, the rate of certain offenses as reported to the police increased by about one-third. When investigatory stops were resumed, the rate substantially decreased. No similar fluctuations occurred in a control area where investi-

8. There is widespread acceptance of the proposition that the result reached by the Supreme Court on a federal issue is "presumptively" the result that should also be reached by a state court on an analogous state law issue and that a difference in result requires justification. *See* Kelman, *supra* note 7, at 420; *see also* Falie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982).

9. Some of the research is clearly unsatisfactory. *See, e.g.,* Wilson & Boland, *The Effect of the Police on Crime*, 12 L. & SOC'Y REV. 367 (1978) (report on a study of 35 cities). Wilson and Boland found that robbery rates were "strongly and negatively correlated" with robbery arrest rates, which were, in turn, affected by aggressive patrol strategies. *Id.* at 376-78. But as a measure of the aggressiveness of patrol strategies, the investigators used the number of citations for moving traffic violations issued per officer. *Id.* at 371. Whether traffic tickets were a reliable indicator of patrol aggressiveness is questionable. *See* Jacob & Rich, *The Effects of the Police on Crime: A Second Look*, 15 L. & SOC'Y REV. 109, 112-14 (1980-81).

10. J. BOYDSTUN, SAN DIEGO FIELD INTERROGATION FINAL REPORT (1975).

gatory stops were continued.¹¹

A more recent study¹² using data from sixty residential neighborhoods in three metropolitan areas found that the rate of investigatory stops by officers had a "strong negative effect" on the rate of robberies and a greater although not stable effect on auto theft and vandalism rates.¹³ Although it is impossible to specify precisely what effect the use of nonarrest detentions has upon various offenses, there is at least some empirical reason to believe that investigatory stops have an anticrime impact. Their availability as a law enforcement technique is thus a matter of considerable importance.

In addition, nonarrest investigatory detentions should be a fertile subject for exploration of the Court's broader responsibilities. Since at least 1968, the Supreme Court has made clear that nonarrest detentions must be distinguished from arrests and that such detentions present numerous federal constitutional issues distinguishable from those presented by arrests. Despite this, many areas of concern regarding detentions were long left undeveloped in the Court's case law.¹⁴ Several recent decisions of the Supreme Court, however, have either addressed, or provided strong indications of the Court's likely approach to, important detention issues.¹⁵ Thus, review of the area in light of this recent action by the Court is especially warranted.

The discussion begins by tracing the development of the basic legal doctrines relating to nonarrest investigatory detentions. The primary issues concerning the structure of the law authorizing such detentions are then identified and discussed. Attention is next turned to several issues with broader ramifications.

II. THE LAW OF NONARREST INVESTIGATORY DETENTIONS

Introducing the topic of nonarrest investigatory detentions is diffi-

11. *Id.* at 30.

12. Whitaker, Phillips, Haas & Worden, *Aggressive Policing and the Deterrence of Crime*, 7 L. & POL'Y 395 (1985).

13. *Id.* at 403. The study also showed that there were negative but small effects on the rates of burglaries and thefts from autos. *Id.*

14. See Williamson, *The Dimensions of Seizure: The Concept of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 771 (1982) (stating that the law governing seizures of the person is "the stepchild of fourth amendment jurisprudence").

15. See, e.g., *United States v. Hensley*, 105 S. Ct. 675 (1985) (addressing investigatory stops to investigate completed criminal conduct and officers' "intent" at time of detention) (discussed *infra* notes 72, 166-68, 173, 191-94 and accompanying text); *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984) (applicability of *Miranda* to "traffic stop" questioning) (discussed *infra* notes 68-70, 358-67 and accompanying text); *INS v. Delgado*, 104 S. Ct. 1758 (1984) ("factory surveys" as seizures of the person) (discussed *infra* notes 67, 131-46 and accompanying text).

cult in part because the definition of the practice is unclear.¹⁶ It is clear, however, that "nonarrest investigatory detentions" include those detentions that provide a law enforcement officer with further information upon which to decide whether to arrest or otherwise invoke the criminal justice process.¹⁷ Like other issues related to detentions of suspects or defendants, an improper investigatory detention has procedural significance in later prosecution only if the government's evidence is tainted by the unlawful detention.¹⁸

A. *The Supreme Court's Constitutional Case Law.*

The Supreme Court has long made it clear that the fourth amendment requires that a seizure of a person tantamount to an arrest must be "reasonable," and a search of a person while in police custody as the result of an arrest will be upheld only if the arrest is "reasonable."¹⁹ "Reasonableness," in this context, requires knowledge on the part of the arresting officer of information sufficient to give the officer "probable cause" to believe that the suspect is guilty of an offense.²⁰ The Supreme Court, in 1976,²¹ confirmed the traditional assumption that the fourth amendment's warrant requirement is inapplicable to arrests.²² But

16. See *infra* text accompanying notes 124-46.

17. See *infra* text accompanying notes 79-89.

18. Specifically, a showing that a defendant on trial was the subject of an improper apprehension does not affect the ability or jurisdiction of the trial court to try and convict the defendant. *Ker v. Illinois*, 119 U.S. 436, 474 (1886); see also *United States v. Crews*, 445 U.S. 463, 474 (1980); *United States v. Blue*, 384 U.S. 251, 255 (1966).

Issues concerning field stops for investigation prompted by less than probable cause have been extensively addressed in the literature. Among the recent discussions are Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681 (1978); Greenberg, *Drug Courier Profiles*, Mendenhall and Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981); Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771 (1982). But the issues raised in recent discussions are seldom new ones. See, e.g., LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968); Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 465 (1967). See also Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287 (1971).

Legislation in a number of jurisdictions—much of it based on the Uniform Arrest Act—has addressed several nonarrest detention issues. See *supra* notes 79-110 and accompanying text.

19. *Draper v. United States*, 358 U.S. 307, 310-11 (1959).

20. *Id.* at 310.

21. *United States v. Watson*, 423 U.S. 411, 414-24 (1976).

22. Arrests made other than in public places require a warrant. If the place where the arrest is made is the suspect's own residence, an arrest warrant is sufficient. *Payton v. New York*, 445 U.S. 573, 602-03 (1980) (Powell, J., concurring). If the arrest is made on "third party" premises, a search warrant authorizing a search of those premises for the suspect is necessary. *Steagald v. United States*, 451 U.S. 204, 216 (1981). These holdings are best understood, however, as demanding that a warrant exist to support the pre-arrest search for the suspect rather than as requiring a warrant for the arrest itself. If the arrest is the product or "fruit" of an improper search for the suspect, the

whether the fourth amendment regulated nonarrest detentions long remained uncertain.

In 1968, a trilogy of Supreme Court opinions—*Terry v. Ohio*,²³ *Sibron v. New York*,²⁴ and *Peters v. New York*²⁵—indicated that the fourth amendment recognizes and regulates, but does not prohibit, detention of a person other than by arrest. The Court thus rejected a standard of “reasonableness” that would validate only those detentions that were supported by probable cause.²⁶ The Court also rejected the argument that because the fourth amendment only protects against “seizures,” constitutional concerns are raised only when a detention rises to the level of an arrest.²⁷

Terry and its companion cases vastly increased the complexity of that part of fourth amendment doctrine concerning seizures of the person. The Court, however, appeared willing to pay this price for the development of a doctrine flexible enough to accommodate both the impact of different kinds of detentions upon citizens’ fourth amendment interests and the variety of law enforcement interests involved in different detentions. It is not clear, however, that the Court appreciated the magnitude of the complexity that would result.

In retrospect, it is clear that the Court’s objective in the *Terry* trilogy was merely to announce the framework that it would use to address nonarrest detention issues, postponing consideration of most of those issues until it had more experience in the nonarrest detention area.²⁸ In disposing of the three cases, however, the Court highlighted the difficulties that would follow in the development of nonarrest detention law.

The Supreme Court in *Terry* rejected the notion that the development of the fourth amendment requirement of probable cause for an arrest had necessarily prescribed the constitutionally required balance among the relevant interests of citizens and the government in other police-citizen confrontations; the Court examined these interests to determine whether a lesser standard might suffice for some nonarrest detentions.²⁹ As to citizens’ interests, the Court noted that nonarrest detentions involve significantly less intrusion upon the personal security of

arrest is tainted by the invalidity of the search and therefore transmits this taint to any search after the arrest.

23. 392 U.S. 1 (1968).

24. 392 U.S. 40 (1968).

25. *Id.* (decided with *Sibron v. New York*, *id.*).

26. *Terry*, 392 U.S. at 20.

27. *Id.* at 16.

28. See LaFave, *supra* note 18, at 46-47.

29. *Terry*, 392 U.S. at 26-27.

the subject than do arrests.³⁰ In addition, the Court examined the "nature and extent" of the governmental interest served by permitting nonarrest detentions. Encounters between law enforcement officers and citizens were found to involve a high risk of serious harm to the officers.³¹ Nonarrest detentions that reduce the risks to law enforcement officers serve an important interest. Having thus established that the validity of nonarrest detentions under the fourth amendment would be determined by weighing the need for such detentions against their intrusiveness, the Court proceeded to apply this analysis to only a single and limited nonarrest detention issue.

In *Terry*, the Court chose to "assume" that the officer did not seize the suspect until the officer made physical contact with him while conducting a weapons search.³² Similarly, in both *Sibron* and *Peters*, the Court saw no need to decide whether there was a nonarrest detention before the suspect had been searched.³³ This enabled the Court to avoid addressing the validity of any pre-search detention. It also made clear, however, that an investigatory confrontation between a police officer and a citizen, begun at the officer's initiative, might not constitute a seizure and thus might not be subject to fourth amendment scrutiny.³⁴ *Terry* indicated that even if a confrontation included a weapons search, no seizure of the subject need occur other than the seizure necessary to effect—and thus "incident to"—the search.³⁵ In other words, a seizure to implement the officer's right to make a weapons search is not an *investigatory* seizure and thus is not subject to the same fourth amendment requirements as investigatory seizures.

The *Terry* trilogy, then, evidenced a general sympathy toward the proposition that the fourth amendment permitted certain detentions other than arrests. *Terry* held that one such type of detention—a detention for the purpose of a weapons search—was permissible on less than

30. *Id.* at 26.

31. *Id.* at 22-24.

32. *Id.* at 19 n.16.

33. In *Sibron*, the Court concluded that it did not need to determine whether Sibron had been seized before his search because the officer had not obtained any information from the suspect before he engaged in a physical search. *Sibron*, 392 U.S. at 63. Additionally, the Court concluded that whether or not an earlier seizure occurred, the weapons search was improper; the officer lacked sufficient indication that Sibron was armed and dangerous. *Id.* at 64. The search—which did not involve a preliminary patdown—was not sufficiently limited in scope to what a weapons search would permit. *Id.* at 65. In *Peters*, the Court concluded that for fourth amendment purposes, the detention was an arrest and the search was incident to that arrest. *Id.* at 66.

34. *Terry*, 392 U.S. at 19 n.16; see also *id.* at 32 (Harlan, J., concurring) (indicating that the officers' right to make a forcible stop was a logical corollary to the Court's holding that officers had the right to make a weapons frisk).

35. *Id.* at 19 & n.16.

probable cause.³⁶ Further, *Terry* indicated the Court's willingness not only to consider whether any seizure had occurred, but also to distinguish among a variety of different seizures. The notion that a confrontation involving both questioning by the officer and a weapons search could involve no investigatory seizure, but only a seizure to implement the right to make a weapons search, assumes some quite sophisticated distinctions. Yet the Court completely failed to address the criteria for determining when an investigatory seizure occurs, the factors distinguishing investigatory seizures from other detentions, and the validity of nonarrest detentions other than those incident to weapons searches.

The Court has returned only haphazardly to the issues identified but unresolved by the *Terry* trilogy. In 1969, in *Davis v. Mississippi*,³⁷ the Court suggested that stationhouse detentions for certain investigatory purposes—such as fingerprinting—might be reasonable despite the absence of probable cause.³⁸ But it tantalizingly offered the further suggestion that judicial authorization—a warrant-like procedure³⁹—would be constitutionally required.⁴⁰ In 1972, in *Adams v. Williams*,⁴¹ the Court upheld a weapons search of a nonarrest detainee in an opinion with a flavor far different from those issued in the *Terry* trilogy. For no apparent reason, the Court assumed that the validity of the weapons search depended in part on the existence and validity of a pre-search nonarrest detention.⁴² Without acknowledging the careful reservation of this issue in the *Terry* trilogy, the *Adams* Court simply assumed the constitutional validity of investigatory field detentions on less than probable cause.⁴³ It then concluded that the case presented both a valid detention of this sort—the officer had sufficient information that Williams was in unlawful possession of drugs and a firearm—and a proper weapons search during that detention.⁴⁴

36. *Id.* at 27.

37. 394 U.S. 721 (1969).

38. *Id.* at 727 (dictum).

39. Perhaps the Court was reluctant to characterize the procedure under discussion as a warrant procedure because of the suggestion that the terms of the fourth amendment specifically prohibit issuing a "warrant" on less than "probable cause." In *Hayes v. Florida*, 105 S. Ct. 1643, 1646-47 (1985), the Court expressly disclaimed abandoning the suggestion in the *Davis* dicta.

40. *Davis*, 394 U.S. at 728.

41. 407 U.S. 143 (1972).

42. *Id.* at 146.

43. *Id.* at 147.

44. *Id.* at 147-49. Arguably, *Adams* presented a more difficult record on which to "assume" that no presearch detention took place. The suspect was sitting in a parked car when the officer approached and "asked" him to open the car door. *Id.* at 145. Perhaps the request was in fact a demand that showed sufficient police domination to transform the confrontation into a "seizure." The fact that the state did not contend that the suspect's response—rolling down the window—was

The Court, in 1977, served notice that not all aspects of officers' actions during nonarrest detentions would be subject to federal constitutional scrutiny. In *Pennsylvania v. Mimms*,⁴⁵ the Court examined the fourth amendment significance of an officer's demand—made while stopping the driver of a vehicle “for the purpose of issuing a traffic summons” for driving with an expired license plate⁴⁶—that the driver step out of the car. After noting that the case presented no questions concerning the legality of Mimms's “detention,” the Court held that the officer's demand that the driver step out of his car was so minimally intrusive upon fourth amendment interests as to be beyond constitutional scrutiny.⁴⁷

In several subsequent decisions—*United States v. Brignoni-Ponce*,⁴⁸ *Brown v. Texas*,⁴⁹ and *Reid v. Georgia*⁵⁰—the Court found insufficient justification for specific investigatory stops. But in *United States v. Cortez*,⁵¹ a nonarrest detention was upheld, based on the conclusion that the officers had “a particularized and objective basis for suspecting” that the subjects were engaged in criminal activity.⁵² Detaining an automobile driver on the basis of a mere desire to ascertain whether he had a valid operator's permit, on the other hand, was held unreasonable in *Delaware v. Prouse*.⁵³ The Court might have rested its holding on the ground that reasonable or objective suspicion is a minimally necessary prerequisite to all nonarrest detentions, including ones of this sort. But the Court's analysis suggested instead that the fatal defect was the risk of arbitrariness, a risk created by the fact that inherent in such stops is the exercise of extensive discretion by law enforcement personnel.⁵⁴

When compelled to confront issues other than the bare existence of adequate grounds for suspicion, however, the Court has sometimes been unable or unwilling to address the questions clearly and definitively.

voluntary, *id.* at 146 n.1, tends to confirm this view. Thus, in *Adams*, the Court displayed a strong desire to acknowledge summarily the constitutional validity of nonarrest investigatory detentions and ignored the subtleties of the record.

45. 434 U.S. 106 (1977) (per curiam).

46. *Id.* at 107. The Court did not acknowledge that a traffic stop was a different kind of nonarrest detention from those that it had previously considered.

47. *Id.* at 111.

48. 422 U.S. 873 (1975).

49. 443 U.S. 47 (1979).

50. 448 U.S. 438 (1980).

51. 449 U.S. 411 (1981).

52. *Id.* at 417-18.

53. 440 U.S. 648, 663 (1979).

54. *Id.* at 662-63. The Court clarified its rationale by intimating that detentions made without reasonable suspicion, but conducted in such a manner as to reduce or regulate the officers' discretion, may be valid. *Id.* at 663 (dictum) (checks for operators' permits involving the stopping of all traffic at a roadblock constitute a potentially permissible alternative).

*Dunaway v. New York*⁵⁵ is an example. In that case a murder suspect was apprehended at the home of a neighbor. He was driven to police headquarters and questioned in an interrogation room.⁵⁶ The Court held that by the time he made incriminating admissions during the interrogation, his detention had become "unreasonable" for fourth amendment purposes.⁵⁷ Precisely why this was so, or even when the detention became invalid, was left uncertain.⁵⁸ The issues of whether a nonarrest detention occurred and, if so, whether it was valid were raised in a similar manner in *United States v. Mendenhall*,⁵⁹ but the division of opinion among the Court's majority makes the significance of that decision uncertain at best.⁶⁰

In the 1982 term, several cases raised nonarrest detention issues. A nonarrest investigatory detention that was valid at its inception was held to have become unreasonable in *Florida v. Royer*.⁶¹ No opinion of the Court was issued,⁶² however, and accordingly, the implications of the holding are uncertain. A variety of fourth amendment issues relating to nonarrest detentions under a California "disorderly conduct" statute⁶³ were raised in *Kolender v. Lawson*,⁶⁴ but the Court reached only the question of the statute's facial validity under the void-for-vagueness doctrine.⁶⁵ In *United States v. Place* the right to seize or detain on less than probable cause was extended to items—in this case luggage—as well as persons.⁶⁶

Two cases during the 1983 term presented nonarrest detention issues. In *INS v. Delgado*,⁶⁷ a divided Court addressed the constitutional problems raised by a "factory survey" conducted to locate illegal aliens. Perhaps of more far-reaching significance, the Court held in *Berkemer v. McCarty*⁶⁸ that the requirements of *Miranda v. Arizona*⁶⁹ did not apply

55. 442 U.S. 200 (1979).

56. *Id.* at 203.

57. *Id.* at 215.

58. See *infra* text accompanying note 228.

59. 446 U.S. 544 (1980).

60. See also *Ybarra v. Illinois*, 444 U.S. 85 (1979) (mere presence in commercial establishment searched under warrant not basis for weapons search); *Michigan v. Summers*, 452 U.S. 692 (1981) (occupant of premises to be searched under warrant could be detained while search conducted).

61. 460 U.S. 491 (1983); see also *Michigan v. Long*, 463 U.S. 1032 (1983) (weapons search during nonarrest detention may extend to interior of car).

62. *Royer*, 460 U.S. at 493.

63. CAL. PENAL CODE § 647(e) (West 1970).

64. 461 U.S. 352 (1983).

65. See *id.* at 355.

66. 462 U.S. 696 (1983).

67. 104 S. Ct. 1758 (1984).

68. 104 S. Ct. 3138, 3150 (1984).

69. 384 U.S. 436 (1966).

during routine traffic stops.⁷⁰

In the 1984 term, nonarrest detention issues were addressed in several cases. Detentions were upheld in *Florida v. Rodriguez*⁷¹ and *United States v. Hensley*.⁷² *Hensley* considered the propriety of a nonarrest detention to investigate a completed offense and the effect on the detention's validity of an officer's intention to detain the suspect in a manner apparently beyond permissible limits. The permissible length of nonarrest detentions was considered in *United States v. Sharpe*.⁷³ *Hayes v. Florida*⁷⁴ definitively held that movement to the stationhouse of a suspect detained pursuant to a nonarrest detention was constitutionally impermissible, but left unaddressed what limits, if any, federal standards place on less dramatic transportation of suspects.

The most immediately apparent characteristic of the Supreme Court's case law in this area is the dramatic change in approach between the *Terry* trilogy and several of the subsequent cases. The *Terry* trilogy assumed that nonarrest investigatory detentions presented numerous and quite subtle distinctions and resulting constitutional issues. *Adams* assumed—virtually without discussion—a resolution of the major issue left open by the *Terry* trilogy: the validity under the fourth amendment of nonarrest detentions for investigatory purposes. Some subsequent cases have acknowledged the existence of further unresolved constitutional issues of the sort perceived by the *Terry* Court—such as the constitutional limits on the duration of detentions and on the compelled movement of suspects. Yet, as decisions such as *Dunaway*, *Royer*, and *Hayes* demonstrate, the Court has failed to meet these issues directly or even to carefully define and structure them for further development. The Court's approach has also perpetuated the myth that nonarrest detention law has been constitutionalized. When matters have been resolved as a matter of fourth amendment law, the Court has failed to acknowledge that analogous and independent issues may be presented by state law.⁷⁵ When matters have been left open, it has similarly failed to address the extent to which these might appropriately be resolved by state law.⁷⁶

70. See *infra* text accompanying notes 415-25.

71. 105 S. Ct. 308 (1984).

72. 105 S. Ct. 675 (1985).

73. 105 S. Ct. 1568 (1985).

74. 105 S. Ct. 1643, 1646 (1985).

75. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (discussed *supra* text accompanying notes 45-47).

76. See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979) (raising questions concerning the significance of detaining officers' intent, permissible length of detentions, and the movement of suspects, without suggesting that state law might play useful role in providing answers); *Terry v. Ohio*, 392 U.S. 40 (1968) (Court failed to mention that state law might designate the type of investigatory

B. *Model and State Action.*

Despite the general constitutionalization of search and seizure law, there has been some state legislative and judicial activity regarding nonarrest investigatory detentions. To some extent, state activity preceded the Supreme Court's decisions; police practice has long assumed the existence of authority to make nonarrest detentions. Pre-exclusionary rule challenges of wrongful detentions provided no meaningful remedies, however, and therefore the issue was seldom raised in litigation.⁷⁷ One commentator reports that although some early judicial decisions appeared to approve detentions in situations where no arrest would be permissible, they did not unequivocally establish a common law right to detain and question suspects where no right of arrest exists.⁷⁸ Early statutes, however, sometimes created such a right. For example, 1926 New Hampshire legislation⁷⁹ authorized every "watchman" to "arrest" a person "strolling about the streets at unreasonable hours," if that person failed to give an account of his or her suspicious actions.

More extensive and definitive state legislative action was stimulated by efforts to develop "models" for legislative recognition of nonarrest detention authority. In 1939, the Uniform Arrest Act was promulgated.⁸⁰ It was soon adopted in New Hampshire⁸¹ and Rhode Island,⁸² and, in 1951, it was adopted in Delaware.⁸³ It remains in effect in these three jurisdictions.⁸⁴ The Act authorizes a nonarrest⁸⁵ detention—not to exceed two hours—of a person "abroad" who an officer has "reasonable ground to suspect is committing, has committed or is about to commit a crime" and "who fails to identify himself or to explain his actions to the satisfaction of the officer."⁸⁶

In 1963, the American Law Institute began work on its Model Code

practices that trigger state regulation and the limits placed on police conduct in the investigation context).

77. LaFave, *supra* note 18, at 43.

78. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318-19 (1942). *Contra* People v. Rivera, 14 N.Y.2d 441, 445-46, 252 N.Y.S.2d 458, 462, 201 N.E.2d 32, 35 (1964) (right of police to stop and question persons observed under suspicious circumstances "was recognized at common law" and is "extensively treated both by statute and by judicial decision as a reasonable and necessary police authority").

79. Act of Jan. 1, 1926, ch. 363, § 12, 1926 N.H. Laws 1431, 1432.

80. UNIFORM ARREST ACT (1939), reprinted in Warner, *supra* note 78, at 343-47.

81. Act of June 10, 1941, ch. 163, 1941 N.H. Laws 242, 243.

82. Act of Apr. 18, 1941, ch. 982, § 68, 1941 R.I. Pub. Laws ch. 21, 22.

83. Act of June 5, 1951, ch. 304, §§ 50-51, 48 Del. Laws 769, 769-70.

84. DEL. CODE ANN. tit. 11, § 1901-10 (1974); N.H. REV. STAT. ANN. § 594:1-14 (1979); R.I. GEN. LAWS §§ 12-7-1 to -11 (1956).

85. The detention is not to be recorded as an arrest "in any official record." UNIFORM ARREST ACT § 2(3) (1939), reprinted in Warner, *supra* note 78, at 344.

86. UNIFORM ARREST ACT §§ 2(1)-2(2) (1939), reprinted in Warner, *supra* note 78, at 344.

of Pre-Arraignment Procedure.⁸⁷ The first tentative draft, submitted to the membership for discussion in 1966, contained provisions authorizing nonarrest detentions for investigation⁸⁸ and for requests by officers to citizens for "voluntary cooperation."⁸⁹ A revised proposal for nonarrest detentions was in the second tentative draft.⁹⁰ The final text of the Code, approved in 1975, contains these provisions.⁹¹

In 1964, New York adopted its so-called "Stop and Frisk" statute,⁹² modeled largely after the Uniform Arrest Act. Similar legislation was adopted in Nebraska in 1965⁹³ and in Alabama in 1966.⁹⁴ Illinois⁹⁵ and Louisiana⁹⁶ enacted similar statutes in 1968. In 1969, legislation patterned after the Uniform Arrest Act was adopted in five states—Florida,⁹⁷ Indiana,⁹⁸ Nevada,⁹⁹ North Dakota,¹⁰⁰ and Wisconsin.¹⁰¹ Kansas¹⁰² and Virginia¹⁰³ adopted similar legislation in 1970, Colorado¹⁰⁴ in 1972, and both Montana¹⁰⁵ and Oregon¹⁰⁶ in 1973. Utah en-

87. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE foreword (1975).

88. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966).

89. *Id.* § 2.01.

90. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 2, 1969).

91. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 110.1-110.2 (request for cooperation and stopping of persons) (1975).

92. Act of Mar. 2, 1964, ch. 86, § 2, 1964 N.Y. Laws 111 (codified at N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1981)). See 78 Harv. L. Rev. 473 (1966).

93. Act of Mar. 8, 1965, ch. 132, 1965 Neb. Laws 471 (codified at NEB. REV. STAT. § 29-829 (1979)).

94. Act of Aug. 19, 1966, No. 157, 1966 Ala. Acts 183 (codified at ALA. CODE § 15-5-30 to -31 (1982)).

95. Act of July 24, 1968, 1968 Ill. Laws 218 (codified at ILL. ANN. STAT. ch. 38, § 107-14 (Smith-Hurd 1980)).

96. Act of July 20, 1968, No. 305, 1968 La. Acts 750 (codified at LA. CODE CRIM. PROC. ANN. art. 215.1 (West 1985)).

97. Act of Oct. 1, 1969, ch. 69-73, 1969 Fla. Laws 289 (codified at FLA. STAT. ANN. § 901.151 (West 1985)).

98. Act of Mar. 13, 1969, ch. 226, 1969 Ind. Acts 854 (repealed by Act of May 5, 1981, Pub. L. No. 298, § 9(a), 1981 Ind. Acts 2314, 2391).

99. Act of Apr. 11, 1969, ch. 307, 1969 Nev. Stat. 535 (codified at NEV. REV. STAT. §§ 171.123, .1232 (1979)).

100. Act of Mar. 25, 1969, ch. 302, 1969 N.D. Sess. Laws 616 (codified at N.D. CENT. CODE § 29-29-21 (1974)).

101. Act of Nov. 25, 1969, ch. 255, §§ 968.24-.25, 1969 Wis. Laws 602, 628-29 (codified at WIS. STAT. ANN. §§ 968.24-.25 (West 1985)).

102. Act of Mar. 23, 1970, ch. 129, § 22-2402, 1970 Kan. Sess. Laws 472, 476-77 (codified at KAN. STAT. ANN. § 22-2402 (1981)).

103. Act of Apr. 2, 1970, ch. 390, 1970 Va. Acts 609 (codified at VA. CODE § 19.2-83 (1983)).

104. Act of May 21, 1972, ch. 44, 1972 Colo. Sess. Laws 190, 198 (codified at COLO. REV. STAT. § 16-3-103 (1978 & Supp. 1984)).

105. Act of Apr. 4, 1973, ch. 513, § 4, 1973 Mont. Laws 1335, 1398-99 (codified at MONT. CODE ANN. §§ 46-5-401 to -402 (1983)).

106. Act of July 22, 1973, ch. 836, §§ 30-32, 1973 Or. Laws 2703, 2713 (codified at OR. REV. STAT. §§ 131.615, .625 (1983)).

acted its stop and frisk statute in 1980.¹⁰⁷ California has no general statutory provision authorizing nonarrest investigatory detentions. In 1982, however, that state enacted statutory authority for nonarrest detentions of persons who an officer has "reasonable cause to believe" are in unlawful possession of firearms or other deadly weapons.¹⁰⁸ Several jurisdictions have statutory authority for nonarrest detentions that pre-dates even the Uniform Arrest Act.¹⁰⁹ A wide variety of statutory provisions may also affect law enforcement authority in this area;¹¹⁰ a complete catalogue of relevant legislative enactments is difficult, if not impossible, to compile.

Even in the absence of legislative authority, however, state courts have been willing to recognize the validity of nonarrest investigatory detentions on less than probable cause. Some decisions seem to have been influenced by the suggestion in the *Terry* trilogy that such detentions would survive fourth amendment scrutiny.¹¹¹ But many state court decisions preceded the *Terry* trilogy,¹¹² and some of the state decisions after the trilogy give no indication that they were influenced by the Supreme Court's decisions in the trilogy cases.¹¹³ Even in those jurisdictions where statutory provisions governing arrests were construed as preemptive, courts upheld nonarrest investigatory detentions on less than probable cause without apparent concern regarding the absence of legislative

107. Act of Jan. 31, 1980, ch. 15, § 77-7-15 to -16, 1980 Utah Laws 110, 123 (codified at UTAH CODE ANN. §§ 77-7-15 to -16 (1982)).

108. Act of Mar. 31, 1982, ch. 142, § 3, 1982 Cal. Stat. 468, 476 (codified at CAL. PENAL CODE § 833.5 (West Supp. 1985)).

109. See Act of June 3, 1920, ch. 591, § 24, 1920 Mass. Acts 623, 632 (codified at MASS. ANN. LAWS ch. 41, § 98 (Michie/Law. Coop. 1983)). See also HAWAII REV. STAT. § 803-5 (Supp. 1984).

110. See, e.g., CAL. PENAL CODE § 647(e) (West 1970) (loitering) (held facially unconstitutional in *Kolender v. Lawson*, 461 U.S. 352 (1983)); TEX. PENAL CODE ANN. § 38.02 (Vernon 1974) (person lawfully stopped and asked to provide name and residence who intentionally refuses to provide this information or who provides false information is guilty of misdemeanor of "failure to identify as witness"); see also TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon 1977) (authorizing "arrest" of persons found "in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws"). Because the Texas criminal procedure provision authorizes arresting a suspect for something that is not itself an offense—such as being "about to commit some offense"—it might be construed to authorize nonarrest investigatory detentions. See *Lara v. State*, 469 S.W.2d 177, 180 (Tex. Crim. App. 1971) (full search of suspect justified because, during "bona fide arrest" under art. 14.03, officers discovered evidence that suspect was committing an offense and therefore an arrest for that offense was permitted).

111. E.g., *People v. Gurule*, 172 Colo. 159, 164, 471 P.2d 413, 415-17 (1970); *Robertson v. State*, 84 Nev. 559, 562, 445 P.2d 352, 353 (1968).

112. E.g., *State v. Gunter*, 100 Ariz. 356, 360-61, 414 P.2d 734, 737 (1966); *People v. Mickelson*, 59 Cal. 2d 448, 452, 380 P.2d 658, 660-61, 30 Cal. Rptr. 18, 20-21 (1963); *Wilson v. State*, 186 So. 2d 208, 221 (Miss. 1966); *Huebner v. State*, 33 Wis. 2d 505, 516-17, 147 N.W.2d 646, 651-52 (1967).

113. See, e.g., *State v. Cloman*, 254 Or. 1, 456 P.2d 67 (1969) (not citing *Terry* trilogy).

authorization.¹¹⁴

State law restrictions on law enforcement activities might appear in the legislation or case law authorizing such activities. In addition, however, restrictions might be based on state constitutional provisions. Virtually all state constitutions require that seizures of the person and other law enforcement activity be "reasonable."¹¹⁵ State courts have no obligation to construe these requirements as having the same content that the Supreme Court finds in the fourth amendment.¹¹⁶ Aspects of nonarrest detention that survive fourth amendment scrutiny may therefore be unreasonable for state constitutional purposes.

Where state law imposes limits upon nonarrest detention authority, it is uncertain whether or not a violation justifies or demands exclusion of any evidence obtained during the detention.¹¹⁷ Nevertheless, there has been a widespread and almost uncritical willingness on the part of state courts to assume that such limits are, as a matter of state law, enforceable by a state law exclusionary sanction analogous to that read into the fourth amendment by the United States Supreme Court.¹¹⁸

The mere existence of a significant amount of state case law and legislation, however, does not necessarily reflect a meaningful allocation of responsibility between federal constitutional law and state law. Nor does it establish that those issues that have not been addressed as matters of federal constitutional law have been meaningfully addressed as matters of state law. These concerns can be evaluated only in the context of specific issues presented by nonarrest detentions.

114. In North Carolina an arrest without a warrant is held to be invalid except where authorized by a specific statute. *State v. Moore*, 275 N.C. 141, 145, 166 S.E.2d 53, 56 (1969). But when the state supreme court addressed the validity of nonarrest detentions, it did not consider either the absence of statutory authority or the appropriate roles of the court and the legislature in authorizing such stops. See *State v. Allen*, 282 N.C. 503, 511, 194 S.E.2d 9, 15 (1973); see also *State v. Armstrong*, 292 Minn. 471, 472-73, 194 N.W.2d 293, 294 (1972); *State v. Fish*, 280 Minn. 163, 168, 159 N.W.2d 786, 789-90 (1968).

115. E.g., CAL. CONST. art. I, § 13; PA. CONST. art. 1, § 8; see Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1123 n.124 (1982).

116. See, e.g., *State v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (holding unreasonable under state constitutional provision an automobile inventory inspection upheld against federal constitutional attack in *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

117. See Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 AM. J. CRIM. L. 109, 119-23 (1983). This question may be addressed by the legislature. The Florida "stop and frisk" statute, for example, has its own directive that evidence obtained in violation of its terms must be excluded. FLA. STAT. ANN. § 901.151(6) (West 1985).

118. For a critical consideration of this issue, see *State v. Valdez*, 277 Or. 621, 629, 561 P.2d 1006, 1011 (1977), reasoning that a state exclusionary sanction will attach to a state statute defining the nonarrest detention authority because such statutes are intended to protect interests of the kind also protected by constitutional prohibitions against unreasonable searches and seizures, and exclusion is the only practical method yet devised to protect rights of this kind.

How, in general terms, matters are appropriately allocated between federal constitutional and state law regulation is obviously controversial, though most would agree that there are several major considerations. Some aspects of law enforcement activities clearly intrude upon interests protected by the fourth amendment, but are so minimally intrusive as to be of no ultimate fourth amendment significance. This was illustrated by *Mimms*.¹¹⁹ It is clear that the fourth amendment protects the public's interest in freedom of movement. But *Mimms* held that in a traffic stop, where the suspect had already been detained, the minimal incremental intrusion upon the protected interest in freedom of movement occasioned by a request that the suspect step out of the car was insufficient to invoke fourth amendment scrutiny. State lawmakers, however, remain free to conclude, as a matter of state policy, that the intrusion upon the public's protected interest is sufficient to warrant regulation of this type of action. For instance, a state might restrict police conduct by requiring a showing that the conduct was motivated by a concern for the officer's safety.

What requirements are placed upon law enforcement activity by fourth amendment reasonableness depends in part on the extent to which the activity intrudes on interests protected by the amendment, considered perhaps in light of the social interests served by that activity, the availability of less intrusive means of pursuing those social interests, and the extent to which limitations would interfere with pursuit of those interests.¹²⁰ Some aspects of nonarrest detentions may intrude on interests protected by both the fourth amendment and state law. In this situation, state lawmakers remain free to consider whether the interests protected by state law are adequately safeguarded by the limits placed on the detention power by the fourth amendment. The Supreme Court's conclusion that the public's interests are adequately protected if nonarrest detentions are permissible only on particularized and objective suspicion, for example, does not foreclose a state from concluding that a more stringent requirement is necessary to safeguard state-protected interests.

Some aspects of nonarrest detentions, finally, may intrude on interests or values that are simply not among those protected by the fourth amendment.¹²¹ These interests may be appropriately considered in imposing state law limits on nonarrest detention authority.

Within the area of state law, further allocation of responsibility is necessary, especially between matters properly of state constitutional concern and others appropriately addressed by the legislature—the basic

119. See *supra* notes 45-46 and accompanying text.

120. See, e.g., *Winston v. Lee*, 105 S. Ct. 1611, 1616-20 (1985).

121. See *Cady v. Dombrowski*, 413 U.S. 433, 449 (1973) (failure to file complete list of items seized during a search conducted pursuant to a warrant raised at most an issue of state law).

policy-setting forum. But state courts, by interpreting and developing the state constitutional authority for law enforcement officers to detain citizens,¹²² also act in a policy-setting role. State courts, in construing the state constitutional requirements of reasonableness, are not affected by the need to accommodate federalism, a policy that favors restraint by federal courts in the application of the fourth amendment's reasonableness requirement. Nevertheless, state tribunals should often defer to the legislature on decisions involving uncertain or closely balanced considerations.

C. Nonarrest Detention Authority Issues.

Nonarrest detentions have been addressed at some length both in Supreme Court case law and in judicial and legislative action at the state level. Despite this, however, a number of issues remain unresolved. This section discusses in detail a number of those unresolved issues that have the broadest implications for search and seizure law. A number of narrower issues that concern the scope of the authority to make nonarrest field detentions are also identified and briefly discussed in this section.¹²³

1. *The Occurrence of a Detention.* *Terry v. Ohio* illustrates the significance and potential difficulty of the question whether a confrontation between a citizen and an officer constitutes a "seizure" for fourth amendment purposes.¹²⁴ It is amazing that the issue was left unresolved for so long and, when addressed, was disposed of in such an ambiguous manner. Virtually all of the existing legislation dealing with investigatory field stops fails to provide any indication of when a citizen/officer

122. State courts have demonstrated a questionable willingness to allow law enforcement officers—as a matter of state law—to engage in conduct that the Supreme Court has held violates no federal constitutional mandate. See *supra* text accompanying note 8.

123. This article does not address the question of what constitutes a "reasonable suspicion" sufficient to justify detention, except insofar as this is relevant to other issues. Nor does it address either the information necessary to support a weapons search during a nonarrest detention or the permissible scope of such a search. See *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (weapons search may in some cases extend to automobile interior).

One specific matter is, however, worth noting. The legitimate law enforcement objectives furthered by a stop unquestionably influence how long the stop may last. See generally *infra* text accompanying notes 216-65. Perhaps these objectives also affect the detention's initial validity. Despite the existence of reasonable suspicion to believe that a person is involved in an offense, the likelihood that a stop will provide additional information about the offense may be so low that the stop itself should be regarded as unreasonable. See, for example, *infra*, the text accompanying notes 264-65, suggesting that in certain circumstances officers not involved in an investigation could not reasonably believe that questioning a suspect would provide useful information. In such cases, a stop for questioning would seem unreasonable despite the existence of "reasonable suspicion."

124. See *supra* notes 23-36 and accompanying text.

interaction rises to the level of a detention. Thus, by default, the matter has become almost entirely one of fourth amendment law.

This fourth amendment issue was first confronted by several members of the Supreme Court in *United States v. Mendenhall*.¹²⁵ Justice Stewart, joined by Justice Rehnquist, asserted that a person is "seized" under the fourth amendment only if, in view of the circumstances, a reasonable person would believe he was not free to leave.¹²⁶ Three members of the Court concurred on other grounds, but indicated they did not "necessarily disagree" with Justice Stewart's analysis.¹²⁷ In *Florida v. Royer*,¹²⁸ a majority of the Court appeared to have largely adopted a version of Justice Stewart's objective definition of "seizure," by requiring a showing "of official authority such that 'a reasonable person would have believed that he was not free to leave.'"¹²⁹

The *Mendenhall/Royer* standard might well be the only appropriate and feasible one. It brings legal regulation into play when, but only when, a reasonable person would perceive an intrusion upon his protected interest in personal liberty. Unless officers' unaffected intentions to intrude on this liberty are sufficiently threatening to warrant regulation, the *Mendenhall/Royer* standard is probably the only practical one. The underlying interest—personal liberty—is one that is generally protected by both fourth amendment and state law, and any intrusion on the interest by a detention is undoubtedly of significance to both state and federal concerns. But the lack of any reasonable alternative to the Court's federal constitutional resolution suggests that there is little room for state law independence.¹³⁰

Although the *Mendenhall/Royer* standard is rather straightforward, the Supreme Court has not applied it perspicaciously. This is illustrated by *INS v. Delgado*.¹³¹ Unlike virtually all of the other detention cases, *Delgado* was not a criminal prosecution. *Delgado* involved an action for injunctive relief concerning a practice known as "factory surveys,"¹³² in

125. 446 U.S. 544 (1980). In *Terry*, the Court suggested that a "seizure" occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry*, 392 U.S. at 19 n.16. But the record was found insufficient to permit a determination of whether a seizure took place. *Id.*

126. *Mendenhall*, 446 U.S. at 554. The officer's intention to detain the person if the person sought to leave "is irrelevant except insofar as that may have been conveyed to [the suspect]" and thus affected her reasonable perception. *Id.* at 554 n.6.

127. *Id.* at 560 n.1 (Powell, J., concurring in part and concurring in the judgment).

128. 460 U.S. 491 (1983).

129. *Id.* at 502 (plurality opinion of White, J., joined by Marshall, Powell & Stevens, J.J.) (quoting *Mendenhall*, 446 U.S. at 554), 514 (Blackmun, J., dissenting).

130. But see *supra* note 114.

131. 104 S. Ct. 1758 (1984).

132. *Id.* at 1760-61.

which the Immigration and Naturalization Service makes surprise visits to factories in order to determine whether an employer has hired illegal aliens.¹³³ In *Delgado*, federal agents secured a work facility and confronted and questioned workers in that facility.¹³⁴ The lower court granted summary judgment for the defendants.¹³⁵

For present purposes, the issue of major importance in *Delgado* was whether the factory surveys resulted in fourth amendment seizures of the workers. Justice Rehnquist's opinion for the Court characterized the issue—whether “mere questioning of an individual by a police official, without more,” constitutes a seizure—as one on which the Court had yet to rule “directly.”¹³⁶ The opinion then, however, proceeded to find in *Florida v. Royer* grounds for concluding that it was “apparent” that police questioning alone would be “unlikely” to bring the fourth amendment into play.¹³⁷ Justice Rehnquist explained that “[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that [police questioning] resulted in a detention under the Fourth Amendment.”¹³⁸

The summary judgment affidavits established that in the factory surveys, officers were stationed at the exits of the factories. The plaintiffs argued that these agents prevented workers from leaving the factories, and therefore the workers were “seized.” In a confusing response, Justice Rehnquist at one point suggested that a worker could reasonably perceive that he was not free to leave only if that worker had been confronted by an officer, had refused to respond or unsatisfactorily responded to questions, and was then prevented from leaving. Because the record failed to demonstrate that this had occurred in the case, the Court concluded that the issue was not properly presented for decision.¹³⁹ In other portions of the opinion, however, the Court appeared to concede that the agents at the doors would not permit persons—including the named plaintiffs—to leave without being questioned.¹⁴⁰ But such action, it indicated, involved no seizure or detention “in any meaningful way” and thus did not invite fourth amendment scrutiny.¹⁴¹

133. *Id.* at 1760.

134. *Id.* at 1760-61.

135. *Id.* at 1761.

136. *Id.* at 1762.

137. *Id.*

138. *Id.* at 1763.

139. *Id.* (“The obvious purpose of the agents’ presence at the factory doors was to insure that all persons in the factories were questioned.”).

140. *Id.* at 1764.

141. *Id.*

Taken at face value, the Court's discussion in *Delgado* presents a confusing and uncertain application of the objective standard to which a majority of the Justices seem committed. The discussion suggests that a reasonable person would consider himself able in effect to ignore the questions of an officer stationed at the door and would feel free to leave the location. Insofar as this reflects the standard of objective reasonableness adopted by the Supreme Court, the Court seems to have lost contact with reality. If nonarrest detention law is developed on the basis of the *Delgado* approach, it will leave totally unregulated a large number of situations in which law enforcement activity actually and significantly intrudes upon the liberty interests of citizens.

Alternatively, *Delgado* can be read as recognizing that a reasonable person would perceive that he was required to stop and listen to an officer's queries, but not to respond. Such a situation, the opinion further suggests, might not be a "meaningful" interference with liberty and thus might not be subject to fourth amendment scrutiny. If this is an accurate reading, the opinion modifies the reasonable expectation test by requiring that the perceived lack of freedom to leave be "meaningful," and by concluding that a detention for purposes of brief questioning is not a "meaningful" interference with the detainee's liberty. This approach either abandons or distorts the reasonable expectation standard.

The precedential value of *Delgado* is difficult to evaluate. A majority of the Court joined Justice Rehnquist's opinion.¹⁴² Justice Stevens concurred in the opinion of the Court and suggested that, given the procedural posture of the case, the Court was holding only that the Court of Appeals erred in finding that no genuine issue of fact was presented by the government's claim that detentions did not occur.¹⁴³ Justice Powell concurred in the result on the ground that if any seizures took place they were reasonable under the special circumstances of border security enforcement.¹⁴⁴

As Justice Powell indicated, the case can be construed as addressing border-related law enforcement activity in which standard fourth amendment requirements may not apply.¹⁴⁵ Yet the Court's discussion appears to resolve the issue as if it involved no special circumstances. So read, it apparently reflects the majority's attitude toward application of fourth amendment standards to day-to-day law enforcement activity.

142. *Id.* at 1760-65 (Rehnquist, J., writing for a five-Justice majority); *see also id.* at 1765 (Stevens, J., concurring); *id.* at 1765-67 (Powell, J., concurring in the result); *id.* at 1767-76 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part).

143. *Id.* at 1765 (Stevens, J., concurring).

144. *Id.* at 1765-67 (Powell, J., concurring in the result).

145. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

State definitions of the seizures or detentions regulated by state law might be phrased in terms identical to those in *Royer*. The standard might, however, be applied as a matter of state law in a manner different than was suggested in *Delgado*. A confrontation between an officer and a citizen in which the officer identifies himself and begins to ask the citizen questions might not, under *Royer* and *Delgado*, constitute a seizure of the citizen's person. But it might—at least in the absence of additional facts suggesting that the citizen perceived himself free both to decline to respond and to move away—constitute a seizure or detention as a matter of state law. The widespread assumption that Supreme Court approaches are presumptively appropriate, however, makes the development of a consistent and independent approach by state courts unlikely. Such an independent approach could provide the basis for legal regulations that operate when citizens' liberty interests—realistically defined—are infringed. The Court, however, has not invited states to take advantage of this opportunity or even acknowledged that such an opportunity exists.¹⁴⁶

2. *Offenses That Will Support a Detention.* As a matter of fourth amendment law, an investigatory detention must be based upon "reasonable" or "objective" suspicion. But are there any limits on the nature or severity of the offense that the officer "reasonably suspects"?¹⁴⁷ The Uniform Arrest Act imposes none.¹⁴⁸ The Model Code of Pre-Arrest Procedure, however, requires that the offense, whether a felony or misdemeanor, be one involving danger of forcible injury to persons or of appropriation of or damage to property.¹⁴⁹

Most state statutes follow the Uniform Arrest Act approach and

146. Perhaps the standard articulated by the *Royer* plurality differs somewhat from Justice Stewart's *Mendenhall* proposal in that the *Royer* standard requires "a show of official authority." See *supra* text accompanying notes 125-29. It is difficult to imagine a situation in which a suspect's perception that he was not free to leave was based entirely on circumstances apart from the actions of the officer. But the *Royer* plurality's requirement of a "show[ing] of official authority" may suggest a willingness to place greater emphasis upon the actions of the officer. *Delgado* might be explained, then, as resting on a failure to demonstrate that the workers' perception that they were not free to leave was based upon the federal agents' "official show of authority." To the extent that the *Delgado* result is inappropriate, it may suggest the desirability of a standard that does not emphasize the officer's actions.

147. Whether reasonable suspicion that an offense *will be* committed in the future will justify a detention is considered *infra* at notes 173-215 and accompanying text.

148. See UNIFORM ARREST ACT § 2(1) (1939) (stop permitted of any person officer has "reasonable ground to suspect" is committing or has committed "a crime"), reprinted in Warner, *supra* note 78, at 344.

149. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1)(a)(i) (Final Draft 1975).

require only reasonable suspicion concerning a crime or offense.¹⁵⁰ Arkansas requires that the suspected offense be a felony.¹⁵¹ The Virginia statute provides that the offense must be either a felony or criminal possession of a concealed weapon.¹⁵² New York requires the offense to be either a felony or a misdemeanor defined in the state penal code; the statute apparently bars detentions for investigations of misdemeanors defined only in county or city ordinances.¹⁵³ Several jurisdictions are more selective. Montana requires that the offense be a felony and involve the use or attempted use of force against a person, or constitute theft, damage, or destruction of property.¹⁵⁴ North Dakota provides that the offense must be a felony, a misdemeanor relating to the possession of concealed or dangerous weapons, a burglary or unlawful entry, or a drug offense.¹⁵⁵ Generally, the lower courts have been unreceptive to suggestions that constitutional or statutory construction might limit the offenses for which investigatory stops can be made.¹⁵⁶

Two rationales can be offered for narrowing the set of offenses that justify an investigatory detention. First, if the offense is minor, the social interest in identifying and convicting offenders is presumably minor. Where the underlying social interest reflected in the prohibition of an activity is of such minor significance, even brief restriction of a suspect's movement may be excessive and thus unreasonable. Second, the nature of some offenses is arguably such that law enforcement detention authority to investigate these offenses is particularly susceptible to abuse.¹⁵⁷

The two objections are quite different: one is based upon the excessiveness of the intrusion when the detention authority is *properly used* while the other rests upon both the excessiveness and the arbitrariness of

150. *E.g.*, ALA. CODE § 15-5-30 (1982) (officer must reasonably suspect "a felony or other public offense"); KAN. STAT. ANN. § 22-2402(1) (1981) (officer may stop a person who he "reasonably suspects is committing, has committed or is about to commit a crime").

151. ARK. STAT. ANN. § 43-429(a) (1977).

152. VA. CODE § 19.2-83 (1983).

153. N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 1981). *Compare* FLA. STAT. ANN. § 901.151(2) (West 1985) (stop permitted upon reasonable suspicion concerning violation of state criminal laws or "the criminal ordinances of any municipality or county").

154. MONT. CODE ANN. § 46-5-401(3)(a) (1983).

155. N.D. CENT. CODE § 29-29-21 (1974).

156. *See, e.g.*, *Schultz v. State*, 437 So. 2d 670 (Ala. Crim. App. 1983), *cert. denied*, 104 S. Ct. 976 (1984), and cases discussed therein, holding permissible investigatory stops for misdemeanor game violations. The Oregon courts, on the other hand, have held that traffic "infractions" are not public offenses within the meaning of the Oregon statute and stops may not be made upon reasonable suspicion that the suspect has committed such an infraction. *State v. Painter*, 296 Or. 422, 676 P.2d 309 (1984); *State v. Brister*, 34 Or. App. 575, 579 P.2d 863 (1978).

157. The condemnation in *Prouse* of random detentions for purposes of checking motorists' operators licenses, *see supra* text accompanying notes 53-54, rested heavily if not exclusively upon the risk of arbitrary application of an otherwise acceptable procedure.

the intrusions when the detention authority is *misused*. As might be expected, the two objections support different limitations on the types of offenses for which stops should be permitted.

The first objection might support limitation of the investigatory stop power on the basis of the grading of the offense. The authority to detain might be available, for example, only if the offense suspected is a serious offense, perhaps a felony. Or the authority might be limited instead in terms of the underlying risk rather than by the graded seriousness of the suspected offense; this is done in the Montana statute, which requires, in effect, that the officer reasonably suspect the detainee to be involved in an offense that poses a significant risk to personal or property security.¹⁵⁸

The second objection supports limiting the investigatory detention authority so as to render it unavailable in the case of offenses in which such authority is particularly likely to be abused. Possession of controlled substances is the most appropriate example. Indicia of reasonable suspicion that a person is in possession of such substances may be so inherently vague as to be essentially meaningless. Moreover, the availability of a right to search for weapons during a detention—especially if the exercise of this right is subject to little effective judicial review¹⁵⁹—may encourage officers to use nonarrest detentions as a means of discovering by search that a suspect is carrying drugs.¹⁶⁰ The power to conduct nonarrest field stops for such offenses lends itself to both intentional abuse and arbitrary administration even by officers making good faith efforts to function evenhandedly.

Perhaps the most controversial question is whether field stops should be permitted if the officer has a reasonable suspicion that the detainee is in criminal possession of a weapon. Arguably, the indicia of reasonable suspicion of such offenses are so unclear as to create an unacceptable risk of arbitrary enforcement. The very nature of the suspected offense is likely to justify a weapons search if a stop is permitted,¹⁶¹ so the maximum incentive may exist for an officer to make the stop in order to

158. See *supra* note 154.

159. Although such a search seems to require reasonable apprehension of harm on the part of the officers, meaningful standards for determining when such apprehension exists may be impossible to articulate or apply.

160. See *Williams v. Adams*, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting) ("There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."), *rev'd*, 441 F.2d 394 (2d Cir. 1971) (en banc), *rev'd*, 407 U.S. 143 (1972).

161. In *Terry v. Ohio*, the likelihood that the suspect had a weapon—which in turn depended on the nature of the crime at issue—created the reasonable fear permitting the weapons search. *Terry*, 392 U.S. at 28. Although the suspect was somewhat uncooperative, the Court did not appear to rely upon this fact except insofar as it did not dispel the officer's belief that the suspect was armed. *Id.*

search for weapons.¹⁶²

On the other hand, given the serious results of using such weapons in crimes and interpersonal disputes, it can be argued that whatever the classification of the offense, a search that discloses the illegal possession of a weapon serves an important social interest. Further, aggressive field practices, especially in high risk areas, may be the only available—or at least the most effective—method of addressing the problem of the widespread availability of such weapons on the streets.

Whatever the reason, state legislatures have not so limited the authority to make nonarrest detentions. Some statutes, on the contrary, consider the authority to make investigatory stops for weapons offenses especially appropriate. Virginia authorizes stops for misdemeanor weapons offenses as the only exception to its general requirement that the suspected offense be a felony.¹⁶³ California has even more emphatically embraced the view that nonarrest detentions for weapons offenses are justifiable. Although California has no general statutory authorization for investigatory stops, 1982 legislation specifically authorizes detention of persons who an officer reasonably suspects illegally possess firearms or other deadly weapons.¹⁶⁴

Limitations of either sort might be imposed as part of the fourth amendment's reasonableness requirement. There is some basis in existing case law for the argument that an offense may be of such a minor nature as to render certain seizures on suspicion of that offense unreasonable for fourth amendment purposes.¹⁶⁵ In *United States v. Hensley*,¹⁶⁶

162. This may, however, be less offensive than making a stop for a drug possession offense with the sole or major intent of conducting a search that might disclose the contraband. In the drug possession situation, the offensive risk is that the entire procedure—the stop and the search—will be conducted in order to utilize the opportunity to search for a reason unrelated to its purpose. But in the weapons possession situation, perhaps the right to search is so intricately bound to the right to stop that there is no such risk of subversion of the process.

163. See *supra* text accompanying note 152.

164. CAL. PENAL CODE § 833.5 (West Supp. 1985).

165. In general, the Court has declined to construe the fourth amendment reasonableness requirement as imposing absolute prohibitions upon any law enforcement actions. Cf. *Warden v. Hayden*, 387 U.S. 294 (1967) (rejecting argument that seizures of "mere evidence" are inherently unreasonable). This suggests a reluctance to conclude that a particular law enforcement activity, in light of the fact that minimal social interests are served by that activity, is inherently unreasonable for fourth amendment purposes. But in *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984), the Court held that whether an officer is justified in conducting a warrantless entry to make an arrest must be evaluated in light of the gravity of the offense prompting the arrest. *Id.* at 2099. If the "minor" nature of the offense requires a conclusion that there was insufficient justification for a warrantless entry to make an arrest, perhaps that same characteristic of the offense requires a conclusion that a nonarrest detention made on less than probable cause is unreasonable. Cf. *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (custodial arrest for a minor traffic offense may be unreasonable for fourth amendment purposes).

166. 105 S. Ct. 675 (1985).

the Court carefully reserved the question whether "all past crimes, however serious" permit nonarrest detentions on less than probable cause.¹⁶⁷ It held, however, that the stop at issue, based on a reasonable suspicion that Hensley was involved in an armed robbery, was permissible because the offense was a felony.¹⁶⁸ *Delaware v. Prouse* strongly suggests that the risk of arbitrary application may render an otherwise acceptable procedure unreasonable for fourth amendment purposes.¹⁶⁹ But whether either concern is of sufficient magnitude to call into play a fourth amendment prohibition upon nonarrest detentions for certain offenses remains uncertain.

*Adams v. Williams*¹⁷⁰ arguably presented the Court with the arbitrary and abusive enforcement issue. The officer's information raised a reasonable suspicion that Williams was in criminal possession of both drugs and a firearm. Justice Douglas, in dissent, expressed concern over "easy extension" of the field stop power to possessory offenses.¹⁷¹ The Court, however, upheld the validity of the detention with no discussion of the effect of the nature or seriousness of the offense on the existence of adequate grounds for the detention. Perhaps *Williams* stands for the proposition that the fourth amendment does not prohibit investigatory stops for minor and possessory offenses.¹⁷² Yet the constitutional question is of such complexity and gravity as to warrant greater examination than *Williams* gave it. There is no indication that the issue has received serious consideration under state constitutional provisions requiring seizures or searches to be reasonable.

Any limitations imposed on the nonarrest detention authority as a matter of state law must rest upon the proposition that the Supreme Court's construction of the fourth amendment reasonableness requirement is inadequate to safeguard an interest—personal liberty—that is protected by both the fourth amendment and state law. *Williams*'s rejection of the fourth amendment arguments presented to the Court is especially unfortunate because the Court also failed to acknowledge the existence of the similar but clearly independent state law issues raised by the considerations advanced. Nevertheless, sound state policy-setting de-

167. *Id.* at 681.

168. *Id.* at 683-85.

169. *See supra* note 54 and accompanying text.

170. 407 U.S. 143 (1972).

171. *Id.* at 151 (Douglas, J., dissenting, joined by Marshall, J.). In the Court of Appeals, Judge Friendly had dissented in part out of reluctance to extend the power to "crimes like the possession of narcotics." *Williams v. Adams*, 436 F.2d 30, 38 (Friendly, J., dissenting).

172. *But cf.* *United States v. Sharpe*, 105 S. Ct. 1568, 1577 n.1 (1985) (Marshall, J., concurring) ("We have never suggested that all law enforcement objectives, such as the investigation of possessory offenses, outweigh the individual interests infringed upon [by investigatory stops].").

mands that the question of which offenses will serve as the basis for nonarrest detentions must be resolved either as a matter of state constitutional law or as a matter of state legislative policy.

3. *Preventive Stops or Detentions.* Despite the care with which the issue was reserved in the *Terry* trilogy, *Adams* and *Cortez* indicate that the Supreme Court regards nonarrest detentions as constitutionally valid where the officer has "reasonable suspicion" that the subject is committing but has not yet completed an offense. In *United States v. Hensley*,¹⁷³ the Court confirmed the assumption that nonarrest detentions are also permissible where the suspicion concerns a completed offense. But what of the situation in which the officer's reasonable suspicion concerns the probability that the subject will commit an offense in the future?

The importance of preventive detentions should not be underestimated. The empirical evidence concerning the impact of investigatory stops on criminal activity suggests that only a very small percentage of stops—probably less than two percent—result in arrests. Seldom, then, does an investigatory detention lead to an arrest from which prosecution might follow.¹⁷⁴ Rather, such detentions are effective because they "emphasize to potential offenders that the police are aware of their specific identity, presence, and activity in the community"¹⁷⁵ and thus directly discourage future criminal activity.

If nonarrest detentions generally discourage future criminal activity, it does not necessarily follow that they are conducted with crime prevention in mind. Officers may stop suspects because of suspicions concerning the suspects' past activity, with the intention of obtaining evidence concerning this past conduct. Nevertheless, the major *effect* of such stops may be to discourage such persons from future criminal activity, despite the fact that they are seldom arrested or prosecuted for the past offenses that served as the basis for their detention. It seems likely, however, that many or most officers—whether acquainted with the research literature or not—sense that stops are most effective as a preventive measure and intentionally utilize them in this fashion. The vast majority of nonarrest investigatory detentions, then, may well be made for preventive reasons and achieve their objective by discouraging future offenses rather than permitting arrests for prior offenses.

173. 105 S. Ct. 675 (1985).

174. J. BOYDSTUN, *supra* note 10, at 45; Whitaker, Phillips, Haas & Worden, *supra* note 12, at 401.

175. J. BOYDSTUN, *supra* note 10, at 7.

The Uniform Arrest Act authorizes the detention of a person who an officer has adequate grounds to believe "is about to commit" an offense.¹⁷⁶ This terminology was adopted by the Model Code of Pre-Arrest Procedure;¹⁷⁷ identical¹⁷⁸ or similar language¹⁷⁹ appears in most, but not all,¹⁸⁰ of the state statutes authorizing field stops. In jurisdictions where the authority to make nonarrest investigatory detentions is derived from case law, the authority is often stated in a manner that expressly includes the right to make preventive stops.¹⁸¹ The authorization is often phrased, however, in general terms that, although capable of being construed to cover preventive stops, tend to obscure this breadth.¹⁸²

The constitutional validity of such detentions could have been addressed in *Terry*. The officer confronted three persons. Two of them had, several minutes before, repeatedly walked from a corner, past a store, and back, pausing each time to look in the store window. The two men then proceeded west on another street, soon stopping to talk with a third man who had previously conversed with them at the street corner.

176. UNIFORM ARREST ACT § 2(1) (1939), reprinted in Warner, *supra* note 78, at 344.

177. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1)(a)(i) (Final Draft 1975).

178. ALA. CODE § 15-5-30 (1982); ARK. STAT. ANN. § 43-429(a) (1977); COLO. REV. STAT. § 16-3-103(1) (Supp. 1984); DEL. CODE ANN. tit. 11, § 902(a) (1979); FLA. STAT. ANN. § 901.151(2) (West 1985); ILL. REV. STAT. ch. 38, § 107-14 (1980); KAN. STAT. ANN. § 22-2402(1) (1981); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (West Supp. 1985); MONT. CODE ANN. § 46-5-401(1) (1983); NEB. REV. STAT. § 29-829 (1979); NEV. REV. STAT. § 171.123(1) (1983); N.H. REV. STAT. ANN. § 594:2(I) (1974); N.Y. CRIM. PROC. LAW § 140.50(1) (Consol. 1981); N.D. CENT. CODE § 29-29-21 (1974); R.I. GEN. LAWS § 12-7-1 (1981); VA. CODE § 19.2-83 (1983); WIS. STAT. ANN. § 968.24 (West 1985).

179. MASS. ANN. LAWS ch. 41, § 98 (Michie/Law. Co-op. 1983) (stop authorized if officer had reason to suspect person of "unlawful design"); TEXAS CODE CRIM. PROC. ANN. art. 14.03(a) (Vernon Supp. 1985) ("arrest" authorized where officer believes suspects "are about to commit some offense").

180. OR. REV. STAT. § 131.615(1) (1983) limits the authority to make detentions to situations in which the officer "reasonably suspects that the person has committed a crime." The Oregon Supreme Court has noted that this terminology was the result of legislative rejection of that part of the proposal of a law revision commission that would have permitted stops of those "about to commit" an offense. See *State v. Valdez*, 277 Or. 621, 625 n.4, 561 P.2d 1006, 1009 n.4 (1977). UTAH CODE ANN. § 77-7-15 (1982) also authorizes detention of one suspected of "attempting to commit" an offense. Under HAWAII REV. STAT. § 803-4 (1976), detention is permitted only when "a crime is committed" and the person is found "near" the place.

181. *E.g.*, *Cortinas v. State*, 571 S.W.2d 932, 933 (Tex. Crim. App. 1978) ("A police officer may detain a person temporarily for investigative purposes where the circumstances reasonably indicate that the person either has or is preparing to commit a crime.") (emphasis added).

182. See, *e.g.*, *Patterson v. State*, 270 Ind. 469, 472, 386 N.E.2d 936, 938 (stop is proper where facts known to the officer "warrant a man of reasonable caution [to believe] that an investigation is appropriate"), *cert. denied*, 444 U.S. 935 (1979); *State v. Buie*, 297 N.C. 159, 162, 254 S.E.2d 26, 28 (1979) (detention permissible upon reasonable belief that criminal activity "may be afoot"); *State v. Bennett*, 430 A.2d 424, 427 (R.I. 1981) (stop permitted where officer reasonably concludes that "the individual may be involved in criminal activity").

The officer suspected that the group was "casing" the store for an armed robbery. He confronted the group; a frisk disclosed the weapon that later served as the basis for Terry's prosecution. Confining itself to the validity of the frisk and the seizure of Terry "incident to" the frisk, the Court expressly declined to address whether the officer "seized" or detained Terry prior to beginning the frisk and whether any such detention if it occurred was valid.¹⁸³ Implicit in the Court's analysis was an understanding that the officer had a "reasonable suspicion" that the group's actions were part of an investigation into the feasibility of robbing the store.¹⁸⁴

Did the officer have reasonable suspicion that the suspects had committed an offense or were in the process of committing one? If the suspects intended to commit a robbery of the store and their actions were part of a scheme intended to lead to such a robbery, they may have been guilty of attempted robbery.¹⁸⁵ Even if they had not progressed far enough along in their scheme to be guilty of attempted robbery under Ohio law, the fact that their actions were concerted might well have rendered them guilty of conspiracy to commit robbery.¹⁸⁶ The officer's observations arguably gave rise to reasonable suspicion that the suspects were guilty of the completed attempt or conspiracy offenses. One can assume, however, that the inchoate crimes of attempted robbery and conspiracy to commit robbery were not on the mind of the officer; they are ordinarily not within the contemplation of patrol officers.¹⁸⁷ Realistically, nonarrest detentions are not prompted by, and should not be evaluated as being prompted by, a suspicion of such preparatory offenses.¹⁸⁸

More likely, the officer's intention was—in part at least—a preventive one. His objective was not to determine whether to arrest for some inchoate offense, but rather to prevent the completion of the intended

183. *Terry*, 392 U.S. at 19 n.16.

184. *Id.* at 23. The Court reasoned that the officer had grounds for a weapons search because he suspected the group of intending to commit a "daylight robbery" that might, in turn, involve weapons that they might have with them at the time of the search. *Id.* at 28.

185. See MODEL PENAL CODE § 5.01(2)(c) (1985) ("reconnoitering the place contemplated" for the crime is not to be held insufficient as a matter of law as an indication of an attempt).

186. OHIO REV. CODE ANN. §§ 2923.01-.02 (Page 1982).

187. But see *State v. Congeni*, 3 Ohio App. 3d 392, 396, 445 N.E.2d 698, 704 (1981) (stop upheld on alternate ground that officers had reasonable suspicion to believe suspects had committed conspiracy to rob).

188. In light of the anticipatory nature of attempt, conspiracy, and similar offenses, nonarrest detentions for these offenses either are probably not supported by a sufficient social interest, or pose too great a risk of arbitrary application, to be reasonable for fourth amendment purposes. See *supra* text accompanying notes 157-60. Cf. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 203 (1981) (broad definition of "attempt" means that arrests for attempts have potential to circumvent basic fourth amendment requirements, although no evidence suggests that arrests for attempt have actually increased).

crime. He may have hoped to accomplish this in any of several ways. By ascertaining their identities and residences, he may have intended to convey to the suspects that if the target store was robbed, they would be the focus of a police investigation. Alternatively, he may have intended to foster a perception of police omnipresence and, therefore, of a high risk of apprehension for any offense they might consider.¹⁸⁹ So characterized, the detention raises issues distinguishable from those raised by detentions of persons suspected of past or contemporaneous criminal behavior.

The case law indicates that stops are commonly made of suspects who—if the officer's suspicions are correct—have not yet completed an offense. Although these stops are not uniformly upheld, judicial analysis almost never poses the validity of such preventive stops as an issue separate from the issues posed by stops concerning suspected past or contemporaneous offenses. Yet the two situations are clearly distinguishable.

Professor LaFave, probably the leading commentator on search law, has taken the position that the case for the constitutional validity of such preventive stops is stronger than the case for the validity of "detection" detentions. LaFave contends that the *Terry* trilogy established, or at least strongly suggested, the constitutional validity of preventive stops.¹⁹⁰ But a more convincing argument can be made that the *Terry* Court perceived, and properly so, that preventive detentions were more problematic than detection stops. The Court's labored effort in the *Terry* trilogy to avoid addressing the constitutional validity of any field detentions other than those incident to frisks is perhaps a product of the Court's strong desire to avoid having to address the validity of any pre-search detention that might have occurred in *Terry*. Addressing such an issue would necessarily have taken the Court into one of the more difficult peripheral issues relating to nonarrest field detentions.

Hensley confirmed the suggestion in *Terry* that the Court will resolve fourth amendment questions concerning the validity of various categories of nonarrest detentions by balancing the importance of the governmental interests served and the effectiveness of such stops in serving those interests against the intrusiveness of such detentions on the interests protected by the fourth amendment.¹⁹¹ There can be little doubt that a similar approach is best taken in addressing the desirability of per-

189. See Burkoff, *Non-Investigatory Police Encounters*, 13 HARV. C.R.-C.L. L. REV. 681, 711 (1978).

190. Whether stops for detection of *past* crimes were permissible—resolved in the affirmative in *United States v. Hensley*, 105 S. Ct. 675 (1985)—posed the major remaining issue. See LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40, 66 (1968); see also W. LAFAVE, SEARCH AND SEIZURE § 9.2(a) (1978).

191. *United States v. Hensley*, 105 S. Ct. 675, 680-81 (1985).

mitting such detentions as matters of state law where they are not prohibited by federal constitutional law.

In determining the validity of the post-offense detentions in *Hensley*, the Court focused on the extent to which the detentions directly served the state's interest in crime prevention.¹⁹² The Court relied on preventive detentions as an apparent benchmark.¹⁹³ Because post-offense detentions occur after offenses have been completed, officers have more discretion concerning the timing of their implementation, and thus there is a higher risk of abuse. Since the offense has been completed, the governmental interest in identifying and apprehending the perpetrator could be pursued by delaying detention until other investigatory methods reveal information justifying an arrest. No such alternatives exist, of course, in a preventive situation. Finally, the Court concluded that because post-offense detentions cannot prevent the commission of an offense, they do not serve the purpose of crime prevention as "directly" as pre-offense stops. Nevertheless, the Court concluded that post-offense detentions sufficiently serve the interest in apprehending offenders to justify the intrusion upon citizens' privacy interests.¹⁹⁴

Perhaps the use of preventive detentions as a benchmark by the unanimous *Hensley* Court indicates that the fourth amendment validity of such detentions—even though the issue was expressly reserved in *Terry*—is a foregone conclusion. If so, this is unfortunate. The matter is too complex and too important to be resolved without direct consideration.

A preventive detention may actually prevent the crime with which the officer is directly concerned and thus in one sense more directly serve the state interest in crime prevention than do post-offense detentions. Yet identification and prosecution of offenders also serves the interests of preventing future offenses by the particular offender and of deterring offenses by others. Whether crime prevention is served more effectively by identifying and convicting past offenders or by intervening before an offense is committed is not as clear as the *Hensley* Court suggested.

What alternatives to nonarrest detentions are available to officers who wish to prevent the commission of a crime? Where no offense has yet been committed, officers obviously do not have the alternative of pursuing other investigatory techniques in the hopes of developing grounds for arrest. But other means of pursuing the preventive objective may be available. One alternative is to require that intervention be delayed until

192. *Id.*

193. *See id.* at 680-81.

194. *Id.* at 683.

the suspects have progressed far enough to permit an arrest for attempt or conspiracy. Blatant surveillance by law enforcement agents may be as effective as detention in deterring some offenders. In addition, approaching a suspect and asking questions may be done in a manner that does not constitute a detention for fourth amendment purposes,¹⁹⁵ but that nevertheless effectively discourages offenses.¹⁹⁶ Situations involving preventive detentions may permit the use of as many alternatives as are available in post-offense situations.¹⁹⁷

Preventive and post-offense detentions, however, are perhaps most readily distinguishable in terms of the actual or potential intrusiveness upon the detainees. As *Hensley* pointed out, preventive stops must ordinarily be conducted within a short period of time; this may render them less subject to misuse and thus less intrusive. There are, however, many other considerations related to comparative intrusiveness. Because the purpose of preventive detentions, for example, is not necessarily to obtain evidence of guilt of a past offense, the officers may have less incentive to engage in questioning or other investigatory procedures that may intrude on privacy¹⁹⁸ and prolong the detention. On the other hand, the absence of a clearly defined evidence-gathering objective may encourage arbitrary and prolonged—and therefore more intrusive—detentions in the hope that incriminating information may fortuitously be uncovered.¹⁹⁹

That the nature of preventive detentions increases the difficulty of effective regulation, thereby increasing the potential for arbitrary use by officers, is perhaps of greater significance. Developing a meaningful stan-

195. See *supra* text accompanying notes 125-46.

196. The officer would often be unable to immediately obtain a verified identification. Such an observation, however, could result in obtaining a description of the suspect and, perhaps more importantly, in conveying to the suspect that such a description was obtained.

197. Some may regard the alternatives as more intrusive. There is some authority for the proposition that where none of several alternative approaches can be identified as less intrusive upon fourth amendment interests, the fourth amendment does not impose any limits upon law enforcement officers' choice of how to proceed. *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (relative intrusiveness of seizing a car while warrant is being obtained, as compared to conducting an immediate warrantless search, depends on circumstances; neither can be determined to be necessarily less intrusive in all cases, so fourth amendment leaves choice to officers).

198. To the extent that preventive detentions pose less of a risk to those interests protected by the privilege against compelled self-incrimination, this may be an independent basis for regarding them as less constitutionally suspect.

199. The amorphous purpose of preventive detentions may encourage officers to take advantage of the opportunity to conduct other, potentially abusive, activities. Thus, rigorous interrogation for purposes of general information-gathering may be encouraged; since no incriminating information is sought, there is no risk that the rigor of the questioning may taint evidence that the officers may later wish to use. Alternatively, the stop may serve as the foundation for a weapons search as part of a general policy of removing weapons from the street, despite the absence of any realistic concern that the weapons will be used against the officers during the detention.

dard for defining those situations that justify a preventive detention may be difficult, if not impossible.

The Uniform Arrest Act and the vast majority of those statutes that address the matter require that the officer reasonably suspect that the subject "is about to" commit an offense. This suggests that even a well-supported belief that a suspect is generally inclined toward criminal activity cannot justify a detention even if there is reason to believe that a detention might—because it creates or reinforces the perception of police omnipresence²⁰⁰—reduce the suspect's criminal propensities. If preventive detentions are reasonable for purposes of the fourth amendment, are they appropriate only if limited to situations where an officer reasonably suspects that an offense is imminent in the sense suggested by the "about to commit" language used in so many statutes? Arguably, only when commission of a crime is imminent is the social interest in preventing crime sufficient to justify the intrusion.

The "about to commit" standard, however, may not provide sufficient clarity or adequately limit law enforcement authority. The difficulties with its use can be illustrated by considering its application to the *Terry* facts. If the officer could have stopped Terry only on a reasonable suspicion that he was "about to" commit a robbery, would a stop in *Terry* have been valid? Terry and his companions had walked away from the scene of the suspected offense. Even if the suspects had been sufficiently close to committing a crime to justify a preventive detention, perhaps their walking away from the scene meant that the commission of a crime was no longer imminent. The difficulty of resolving this issue—whether the officer's reasonable suspicion concerned an offense that was sufficiently imminent to permit a preventive stop—may well explain the Court's desire to avoid the question. The opinion does not address the issue,²⁰¹ but there is a widespread perception that the Court implicitly approved the making of a preventive stop on facts such as those presented in *Terry*.²⁰² *Terry*'s careful reservation of this issue reveals that

200. See *supra* text accompanying note 189.

201. The Chief Justice commented that the suspects' actions did not "indicate abandonment of an intent to commit a robbery at some point." *Terry*, 392 U.S. at 28 (emphasis supplied). But this is far from a definitive statement that the officer's belief was sufficient to justify a preventive detention.

202. *E.g.*, *People v. Gurule*, 172 Colo. 159, 164, 471 P.2d 413, 415-16 (1970) ("In *Terry* . . . the United States Supreme Court approved the right of police officers to 'stop' and 'frisk' a citizen without probable cause . . ."); *State v. Watson*, 165 Conn. 577, 584, 345 A.2d 532, 537 (1973) ("Police have the right to stop for investigation short of arrest 'where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.'") (citing *Terry*, 392 U.S. at 30), *cert. denied*, 416 U.S. 960 (1974). This is also implicit in the common practice of referring to nonarrest investigatory stops as "*Terry*" stops. *E.g.*, *United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983). The Supreme Court itself used this terminology. *E.g.*, *United States v. Hensley*, 105 S. Ct. 675, 680 (1985) (refer-

the Court was aware either of the difficulty in formulating a meaningful and sufficiently limited criterion for determining when preventive stops are permissible, or of the inadequacy of the "about to commit" criterion.²⁰³

State court and lower federal court decisions virtually never confront or even acknowledge the issues posed by the preventive nature of some nonarrest detentions; in fact, the preventive nature of the detention is often ignored or obscured.²⁰⁴ Despite this, the decisions indicate a willingness—on what are almost purely intuitive grounds—to hold such detentions invalid.²⁰⁵ The result is that the decisions neither address the substantive issues presented by such detentions nor provide officers with reasonable guidance concerning their implementation.

Two cases illustrate the problem. In *State v. McGary*,²⁰⁶ the manager of a day care center reported that two cars had been parked in front of her establishment for some time. She had been robbed before and asked officers to investigate. When an officer arrived, the cars were found side by side about twelve feet from the door to the day care center. Finding that this was "more than sufficient" to justify stopping the drivers, the Louisiana court failed to consider whether the preventive nature of the situation added anything to the analysis.²⁰⁷ In contrast, *State v. Master*²⁰⁸ involved officers of the crime prevention unit of the Phoenix police. A car with out-of-state plates was observed parked in the driveway of a motel next to a convenience store. The store had a parking lot

ring to "Terry stops" and characterizing *Terry* as involving a stop or seizure on suspicion that suspect was about to commit a crime).

203. Even if a meaningful standard can be developed, enforcing it may pose another, independent problem. Field detentions of all kinds are low visibility activities; it is difficult in litigation to determine exactly what occurred during a field stop. If the primary purpose of the detention is something other than gathering evidence, another major impediment to regulation is created: the impact of the exclusionary sanction will be of reduced significance. Insofar as officers regard detentions as being effective regardless of any evidence that is obtained, officers are unlikely to be discouraged from making such detentions by the prospect that any evidence obtained might be inadmissible. Perhaps this argues against imposing requirements that could be enforced only by an exclusionary sanction on preventive stops. On the other hand, no suggestion has been made that there is any meaningful alternative to the exclusionary sanction that might be an appropriate means of regulating this sort of activity.

204. See *infra* notes 206-12 and accompanying text.

205. See, e.g., *State v. Master*, 127 Ariz. 210, 619 P.2d 482 (1980).

206. 397 So. 2d 1305 (La. 1981).

207. See also *Commonwealth v. Lybrand*, 272 Pa. Super. 475, 481-82, 416 A.2d 555, 558-59 (1979) (stop was proper where officers from a robbery prevention unit saw suspect several times enter bar and liquor store, come out, look around, and go back in); *In re G.T.*, 387 So. 2d 485, 486-87 (Fla. Dist. Ct. App. 1980) (stop proper where sole employee of flower shop reported "gut feeling" concerning two black youths who entered store but were "just looking"; teenagers unlikely to "hang out" innocently at a flower store).

208. 127 Ariz. 210, 619 P.2d 482 (1980).

for its customers. One person appeared to the officers to have gotten out of the passenger's side and was walking towards the store with his hand in his left front pants pocket. The driver turned the car around so that it was facing the street. As the officers turned around to investigate, the person walking towards the store abruptly turned and went back to the car. Holding the stop invalid, the Arizona court merely commented—incorrectly, it seems—that the suspects' activity “was no different from the activity one might expect of any pedestrian lawfully in the area.”²⁰⁹ No consideration was given to the apparent preventive motive of the officers, the immediacy of the risk given that the suspects appeared to have been at least temporarily deterred by observing the officers, or the information likely to be obtained from a detention.²¹⁰ Even when the officers' concern is not focused on as specific a future offense as in either *Masters* or *McGary*, the state and lower federal court cases are similarly inconsistent.²¹¹ The question whether—and when—“suspicious” persons may be detained simply because of their presence in high crime rate areas has not been settled, although courts generally appear suspicious of such detentions.²¹²

209. *Id.* at 211, 619 P.2d at 483.

210. *See also* Hall v. State, 366 So. 2d 865, 866 (Fla. Dist. Ct. App. 1979) (stop improper where manager of retail clothing store reported that two black males had been in store several times and acted in a “suspicious manner” in that they did not appear to be interested in buying anything). Generally, however, courts appear receptive to stops made in such situations. *See, e.g.,* State v. Liljedahl, 327 N.W.2d 27, 29-30 (Minn. 1982) (stop valid where two men, at 10 p.m., wearing clothes inappropriate for the cold weather, stood outside sandwich shop and occasionally peeked inside, then returned to car containing two other men); State v. Hamel, 123 N.H. 670, 676, 466 A.2d 555, 557 (1983) (detention valid where officers staking out store at 11:45 p.m. observed that car similar to one reportedly involved in other offenses stopped near the store, and passenger got out, looked into store, “scanned” neighborhood, looked again into store, then returned to car and spoke to driver).

211. *Compare* United States v. Collom, 614 F.2d 624, 626, 628 (9th Cir. 1979) (stop “easily justified” by showing that two suspects were observed stooped down behind car in parking lot to which officer was sent to investigate possible burglary of automobile and, when officer approached, suspects began to walk rapidly away) and United States v. Thornton, 582 F.2d 993, 994 (5th Cir. 1978) (stop proper where citizen reported that black male wearing brown leather jacket was “loitering” around parking lot and looking into parked cars) with Johnson v. United States, 468 A.2d 1325, 1326-28 (D.C. 1983) (stop improper when officers familiar with area observed unrecognized car with “bad” paint and body damage parked with three men inside, although officers knew area had frequent robberies, that such cars were often used in robberies, and that robberies were often committed by men working in groups of two or three); Freeman v. State, 433 So. 2d 9, 10 (Fla. Dist. Ct. App. 1983) (stop improper where officers observed three people with flashlight walk through apartment complex parking lot at 2:20 a.m. and drive off moments later, even though auto break-ins had recently occurred in this parking lot); and Brooks v. State, 144 Ga. App. 97, 98, 240 S.E.2d 593, 594-95 (1977) (stop improper where officer observed suspect looking into window of car parked in shopping center lot and, when suspect saw officer, suspect ran to nearby car, which had engine running, and drove off).

212. *Compare* Boal v. State, 368 So. 2d 71, 73 (Fla. Dist. Ct. App. 1979) (stop valid where, at 2:00 a.m., officers observed two persons walking along street in residential and commercial area with

Despite the conceptual importance of the preventive detention issue, it may be of relatively little practical significance for two reasons. First, the definition of the reasonable suspicion of past or contemporaneous criminal conduct required for a field stop may be so broad that field stops made for preventive reasons can always be defended on those alternative grounds.²¹³ If an officer is regarded as having the authority to make such an investigatory stop for offenses such as attempt and conspiracy, the standard is broadened even further.²¹⁴ Second, as the Court develops the standard for determining when, during a field confrontation, a "seizure" that demands a showing of reasonableness occurs,²¹⁵ many preventive law enforcement acts may become characterized as nondetention confrontations. These acts would then not be subject to scrutiny under a reasonableness standard.

In summary, the Supreme Court's case law leaves open the question of the validity of some or all so-called preventive field stops. Such detentions are widely regarded as valid; the *Hensley* discussion suggests that the Court may have resolved this issue in the same *sub rosa* fashion as—between the *Terry* trilogy and *Williams*—it resolved the validity of detentions for offenses in the process of being committed. It is clear, however, that the state decisions reflecting this perception are not the result of identification and careful resolution of the matter as a state law concern. Preventive detentions on the basis of objective suspicion that the suspect will commit an offense in the future may be so susceptible to abuse or so

high crime rate) and *People v. Johnson*, 98 A.D.2d 952, 952-53, 470 N.Y.S.2d 194, 194-95 (1983) (brief detention permitted when officers observed "known burglar" "walking and looking at houses" shortly before noon in neighborhood where daytime burglaries had occurred) with *Mullins v. State*, 366 So. 2d 1162, 1163 (Fla. 1978) (stop improper where suspect observed merely riding bicycle slowly through residential area early in morning) and *State v. Phipps*, 429 So. 2d 445, 446-47 (La. 1983) (stop improper where officer saw four young men in parking lot at 1:00 a.m. and stopped them "to check 'em out [to] see what they were doing").

213. See *People v. McGowan*, 69 Ill. 2d 73, 370 N.E.2d 537 (1977), upholding a stop of two men, dressed in black, observed walking at 12:50 a.m. in an industrial and commercial area. It seems likely that the officers suspected that the men were both guilty of a completed offense and planning to commit another offense. Upholding the stop, the Illinois Supreme Court acknowledged that the case was a close one, but found that the officers had reason to suspect either past or future offenses. *Id.* at 78-79, 370 N.E.2d at 540.

214. The Oregon statute, see *supra* note 106, does not authorize preventive stops. This absence of statutory authorization has apparently caused the Oregon courts to limit officers' authority more severely than do the courts in other jurisdictions. See *State v. Painter*, 296 Or. 422, 676 P.2d 309, 312 (1984) (detention invalid where suspect observed in alley at 3:00 a.m. by officer on patrol looking for "suspicious people"); *State v. Brown*, 31 Or. App. 501, 570 P.2d 1001 (1977) (detention of woman loitering on street in area frequented by prostitutes invalid). But see *State v. Anderson*, 46 Or. App. 501, 503-04, 612 P.2d 309, 310 (1980) (stop of suspect who, at 1:00 a.m., approached front door of automobile supply business where parts were lying around was valid where officer had reasonable suspicion that burglary or larceny was "underway").

215. See *supra* text accompanying notes 125-29.

unsupported by important social objectives that they should not survive fourth amendment scrutiny. Or, these considerations may dictate that preventive stops be permitted only when the officers' basis rises to the higher level of probable cause to believe that the suspect will, if not stopped, commit an offense in the future.

Insofar as preventive nonarrest detentions survive federal constitutional scrutiny, they would seem to be an especially appropriate subject for consideration under state law. Whether such detentions are adequately justified is at best a close question that may lend itself to no answer clear enough to be constitutionalized by a court on either the state or federal level. Yet such a conclusion demands that the issue be addressed on the state policy-setting level where positions reflecting close judgment calls are more appropriately embodied in legal requirements. The Supreme Court, however, has shown no sensitivity to the fourth amendment issue since *Terry*. Nor has it made any effort to balance this insensitivity with an acknowledgment that important state law issues are presented by preventive detentions. The near-total lack of sensitivity to the issue at the state level may be attributable in part to the Court's lead.

4. *The Permissible Length of Investigatory Detentions.* Virtually all discussions of nonarrest investigatory detentions have assumed that they must be limited in length and that this is a federal constitutional necessity. The Uniform Arrest Act specifies that the detention "shall not exceed two hours."²¹⁶ The Model Code of Pre-Arrest Procedure, on the other hand, provides that detentions may last only for such a period as is reasonably necessary to accomplish the purposes for which detentions are authorized, but in no case more than twenty minutes.²¹⁷

State legislation varies greatly. Although most statutes simply do not address the matter, several provide that the detention may last a "reasonable" time.²¹⁸ The Florida provision directs that a detention is not to last longer than is reasonably necessary to effect its purpose.²¹⁹ Others follow the lead of the model codes by imposing a time limit. Sometimes, as in the Pre-Arrest Code, this is qualified by identifying the maximum period of detention permissible; the detention is not to last even the designated period if a shorter period would suffice to accomplish the purposes of the stop.²²⁰ Others, however, contain no such qualification and—at face value—can be read as almost automatically

216. UNIFORM ARREST ACT § 2(3) (1939), reprinted in Warner, *supra* note 78, at 344.

217. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1) (Final Draft 1975).

218. OR. REV. STAT. § 131.615(2) (1983); WIS. STAT. ANN. § 968.24 (West 1985).

219. FLA. STAT. ANN. § 901.151(3) (West 1985).

220. Arkansas, for example, authorizes detention "for a period of not more than fifteen (15) minutes." ARK. STAT. ANN. § 43-429(a) (1977). Montana and Nevada require arrest or release

sanctioning an initially valid detention for a period specified.²²¹

State courts have frequently considered claims that a nonarrest detention exceeded its permissible length. Their assumption has been that detention for twenty to thirty minutes, and sometimes longer, is permissible at least where expeditious efforts are being made that are likely to determine within a short period whether grounds for arrest exist.²²² If the detention was made on generalized suspicions, the courts have displayed a tendency to impose more stringent limits on the length of detention.²²³ Likewise, where there is no indication as to how the prolonging of the detention served legitimate investigatory purposes, more severe limits are likely to be imposed.²²⁴ There is substantial divergence, however, on the propriety of continued detention after the officer receives information tending to dispel the initial suspicions.²²⁵

The Supreme Court has assumed that the fourth amendment requires nonarrest detentions to be "brief."²²⁶ No effort has been made, however, to define the temporal limit. It remains likely that some exten-

after the authorized purposes of the stop have been accomplished or after thirty minutes have elapsed. MONT. CODE ANN. § 46-5-402(4) (1983); NEV. REV. STAT. § 171.123(3) (1981).

221. Delaware and Rhode Island provide that the total period of detention is not to exceed two hours. DEL. CODE ANN. tit. 11, § 1902(c) (1979); R.I. GEN. LAWS § 12-7-1 (1981). New Hampshire bars detentions exceeding four hours. N.H. REV. STAT. ANN. § 594:2 (1974).

222. *E.g.*, *Finney v. State*, 420 So. 2d 639, 643 (Fla. Dist. Ct. App. 1982) (detention of 90 minutes permissible to obtain photo for photo array to be taken to hospitalized victim of robbery and assault for identification), *overruled on other grounds*, *State v. Navarro*, 464 So. 2d 137 (Fla. Dist. Ct. App. 1984) (per curiam); *Meeks v. State*, 653 S.W.2d 6, 12 (Tex. Crim. App. 1983) (suspect detained while walking away from parked truck could be further detained while officer went to truck to determine if break-in had taken place).

223. *See, e.g.*, *People v. Bloyd*, 416 Mich. 538, 553-55, 331 N.W.2d 447, 455-56 (1982) (prolonged detention of suspect who declined to reveal source of X-rated movies found in car held improper; officer had no information of break-in in which movies might have been obtained).

224. *See, for example*, *People v. Hazelhurst*, 662 P.2d 1081 (Colo. 1983), in which the suspects were properly stopped as they came from an area where marihuana was being cultivated. After they identified themselves and claimed that they were looking for Indian ruins, they were detained for twenty to thirty minutes so that the chief investigator could talk with them. The Colorado court's conclusion that this extended duration was improper appears to have been influenced by the absence of any explanation of why questioning by the chief investigator was necessary.

225. *See Commonwealth v. Tosi*, 14 Mass. App. 1029, 442 N.E.2d 419 (1982), in which the suspects' truck was stopped following the robbery of a UPS truck driver. After a license and registration check confirmed that the suspect's truck was rented and the driver had a valid license, the detention was extended for fifteen minutes to await the arrival of the robbed driver to peek into the truck to view its contents. This was upheld. Compare *State v. Swaite*, 33 Wash. App. 477, 656 P.2d 520 (1982), in which a person meeting the description of a burglar was stopped and ivory cigarette holders were found during a frisk. Continuation of the detention until the homeowner was shown the items was held permissible. After the homeowner failed to identify the items, further detention was held improper, despite discovery of the suspect's car nearby in operating condition, which tended to contradict his explanation that he had experienced car trouble.

226. In *Terry*, Chief Justice Warren acknowledged that the authority that the law enforcement officers sought was to detain, on less than probable cause, "*briefly*." *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (emphasis added).

sions of the period of detention, like the removal of the motorist from the car in *Mimms*,²²⁷ involve such a minimal incremental intrusion into privacy that they are of no constitutional significance.

The issue was clouded by *Dunaway v. New York*.²²⁸ Officers lacking probable cause took Dunaway into custody at a neighbor's house and transported him an undescribed distance away to the stationhouse, where he was interrogated. He then made incriminating admissions, the first about an hour after his arrival at the stationhouse.²²⁹ Holding that the admissions were obtained in violation of the fourth amendment, the Court rejected the argument that the officers' conduct, based on reasonable suspicion, was supportable under *Terry* and its progeny.²³⁰ Justice Brennan, writing for the Court, failed to indicate whether the detention was invalid from its onset because of the officers' intentions or, alternatively, whether it was initially permissible but became invalid because of its duration, the movement of the suspect, or the stationhouse interrogation.

The confusion was compounded in 1983 by *Florida v. Royer*.²³¹ Royer was approached by two officers in an airport concourse. When the officers asked if Royer had a "moment" to speak with them, he responded affirmatively and complied with their request that he produce and permit inspection of his airline ticket and driver's license. After observing Royer's increased "nervousness" and a discrepancy between the name on the license and that on the ticket and luggage, the officers—without returning Royer's ticket or license—informed him they were narcotics investigators and had reason to suspect him of transporting narcotics. They then asked him to accompany them to a nearby room. He proceeded with the officers to the room, approximately forty feet from the initial confrontation. There, the officers revealed that they had obtained the luggage that Royer had previously checked and asked him to consent to a search of it. No more than fifteen minutes had passed since the officers first confronted him.²³²

Justice White, writing for a plurality of four, concluded that Royer had been "seized" when he was asked to accompany the officers to the nearby room and that this seizure was based on adequate grounds.²³³ Yet by the time Royer was asked for consent to a search of his luggage,

227. See *supra* text accompanying notes 45-47.

228. 442 U.S. 200 (1979).

229. *Id.* at 203 & n.2.

230. *Id.* at 216.

231. 460 U.S. 491 (1983).

232. *Id.* at 495.

233. *Id.* at 501-02.

he was "[a]s a practical matter . . . under arrest."²³⁴ Because probable cause was lacking, the detention was unreasonable.²³⁵

Precisely *why* the detention had become constitutionally indistinguishable from an arrest is unclear. A major factor stressed by the plurality, however, was the officers' failure to pursue their objective immediately and at the scene of the initial confrontation; they neither sought Royer's consent to a luggage search nor attempted to determine the contents of that luggage in "a more expeditious way," i.e., by exposing the luggage to dogs trained to discover the presence of drugs through "sniff tests."²³⁶ Had these alternatives been used, only a momentary detention would have been required²³⁷ and "Royer would have been free to go much earlier."²³⁸ In any case, the plurality apparently concluded that even a stop lasting less than fifteen minutes may be constitutionally excessive.²³⁹

Later during the 1982 term the Court dropped another hint concerning fourth amendment limits on the permissible duration of nonarrest detentions. In *United States v. Place*,²⁴⁰ federal drug agents, alerted by other agents who had observed Place's departure from Miami, confronted him on his arrival in New York's La Guardia Airport on a Fri-

234. *Id.* at 503.

235. *Id.* at 501.

236. *Id.* at 504-06. The Supreme Court has held that the use of dogs to perform "sniff tests" on luggage does not constitute a fourth amendment search. *United States v. Place*, 462 U.S. 696, 706-07 (1983).

237. *Id.* at 506.

238. *Id.* at 505. Justice Brennan construed the facts as showing that Royer was seized when the officers asked him to produce his ticket and driver's license. Brennan believed this seizure improper. *Id.* at 511-12 (Brennan, J., concurring in the result). Although he agreed with the plurality that the officers' actions exceeded the limits of an investigative stop, *id.* at 509, he expressed some misgivings concerning the plurality's application of "a least intrusive means requirement" to an investigatory stop. *Id.* at 511 n.*. Because such detentions must, in his view, be "strictly limited," Brennan found it difficult to believe that less restrictive methods would be effective to accomplish the same purpose. He further suggested, however, that the plurality did not mean that an otherwise improper detention might become constitutionally acceptable upon a showing of an absence of less intrusive means. In his view, they meant that "the availability of a less intrusive means may make an otherwise reasonable stop unreasonable," *id.*, or, presumably, the otherwise proper duration of such a stop unreasonable.

239. To some extent, *Royer* may be viewed as a burden of persuasion case. The plurality announced: "It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigatory seizure." *Id.* at 500. In a technical sense, the plurality reasoned that the Florida state courts did not err in concluding that the state had failed to meet its burden of establishing the necessity for a detention of the scope and duration shown by the facts. *Id.* at 503. Perhaps if the Florida courts had held that the officers had proceeded reasonably given all of the circumstances, the Supreme Court would have deferred to this judgment and found no error in the conclusion that the evidence need not be excluded.

240. 462 U.S. 696 (1983).

day afternoon. They seized his luggage, representing that they would take it to a federal judge as part of the process of applying for a warrant for its search. The agents, however, first proceeded to Kennedy Airport where they had a trained narcotics detection dog "sniff" the luggage; this occurred about ninety minutes after the luggage had been seized. The officers applied for and obtained a warrant the following Monday morning.²⁴¹ The Court agreed that physical items as well as persons could reasonably be subjected to an investigatory detention.²⁴² When the item seized is luggage, it continued, the limitations applicable to nonarrest investigative detentions of the person should also determine the scope of the officers' right to detain the luggage.²⁴³ Turning to the limits on personal detentions, the Court declined to adopt "any outside time limitation" because such a limitation would provide insufficient flexibility to allow officers "to graduate their responses to the demands of any particular situation."²⁴⁴ The extent to which the police "diligently pursue their investigation," the Court continued, is relevant to the permissible duration of the detention.²⁴⁵ On the facts before it, the Court noted, the officers were aware in advance of Place's arrival, but apparently made no effort in advance to enable them to have his luggage sniffed by trained dogs without a prolonged seizure.²⁴⁶ No nonarrest detention of a person for a "prolonged" period of ninety minutes had ever been approved by the Court, it concluded, and, on the facts presented by *Place*, it could not approve a luggage seizure of similar duration.²⁴⁷ Thus the length alone of the detention precluded a conclusion that it was reasonable.²⁴⁸

When the Court granted review in *United States v. Sharpe*,²⁴⁹ the Justices may have intended comprehensive consideration of the duration problem. In *Sharpe*, a Drug Enforcement Administration (DEA) agent—Cooke—in an unmarked car had a pickup truck and a Pontiac under surveillance on a South Carolina highway. He attempted to secure assistance from other DEA agents in the area, but was unable to do so because they could not be reached. He then secured the assistance of a South Carolina highway patrol officer—Thresher—driving a marked patrol vehicle. The officers decided to stop the two vehicles and Thresher pulled up beside the Pontiac, which was ahead of the pickup, turned on

241. *Id.* at 699.

242. *Id.* at 706.

243. *Id.* at 709.

244. *Id.* at 709 n.10.

245. *Id.* at 709.

246. *Id.*

247. *Id.* at 709-10.

248. *Id.* at 709.

249. 712 F.2d 65 (4th Cir. 1983), *rev'd*, 105 S. Ct. 1568 (1985).

his flashing lights, and motioned the driver to pull over. As the Pontiac pulled over, the pickup proceeded—or “cut”—between the Pontiac and Thresher’s car and continued down the highway. Cooke pulled up behind the Pontiac; Thresher followed the pickup and stopped it about one half-mile down the road.

Cooke secured identification from Sharpe, the driver of the Pontiac. He then called local police and, when they arrived, asked them to “maintain the situation.” Cooke proceeded to the pickup truck and arrived about fifteen minutes after the truck had been stopped. He asked for and was refused permission to search the truck by the driver, Savage. After confirming that the truck was heavily loaded and smelled like marihuana, Cooke searched it without consent and found marihuana. Cooke arrested Savage. He then returned to the Pontiac and arrested Sharpe; this occurred about thirty to forty minutes after the Pontiac had been stopped.²⁵⁰ The Court of Appeals held that the detentions of both Savage and Sharpe had exceeded permissible lengths for investigatory purposes and thus tainted the marihuana discovered in the search.²⁵¹

The Court acknowledged that an investigatory stop that continues “indefinitely” becomes, at some point, a seizure that can no longer be justified as a nonarrest detention.²⁵² It also reaffirmed that the fourth amendment imposes no “rigid time limitation” on such stops.²⁵³ The majority indicated that the appropriate test was “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”²⁵⁴ Without expressly stating so, the Court appeared to confirm the *Royer* plurality’s suggestion that the availability of more expeditious means of conducting the investigation was relevant. But—at least in “a swiftly developing situation”—a judge “should not indulge in unrealistic second-guessing.”²⁵⁵ Mere availability of more expeditious and hence less intrusive methods does not render the detention unreasonable. Only if officers act “unreasonably” in failing to recognize or pursue a more expeditious alternative is the slower method chosen insufficient to justify a prolonged period of detention.²⁵⁶

250. *United States v. Sharpe*, 105 S. Ct. 1568, 1572 (1985).

251. *Sharpe*, 712 F.2d at 65.

252. *Sharpe*, 105 S. Ct. at 1575.

253. *Id.*

254. *Id.*

255. *Id.* at 1576.

256. *Id.* Justice Marshall concurred, arguing that if any detention was prolonged beyond the few minutes necessary to conduct a brief investigation it should be presumptively regarded as a de facto arrest requiring probable cause. The presumption could be rebutted by a showing that, despite its duration, the detention was not more intrusive than was appropriate for a nonarrest detention.

Applying this standard to the detention of Savage, the majority found the twenty-minute duration permissible. Most of the delay, it emphasized, was caused by Savage's failure to stop at the same time and place that the Pontiac stopped. Whether this was an effort to elude the officers or an innocent failure to understand that Thresher wished both vehicles to halt was irrelevant.²⁵⁷ To hold Savage's detention invalid because of its duration, the majority offered, would be to adopt in effect a per se rule that a twenty-minute detention was inherently impermissible; this the Court was unprepared to do. The Court found it unnecessary to consider whether these same considerations justified the significantly longer detention of Sharpe. The evidence at issue was obtained by a search of the pickup, and any invalidity of Sharpe's detention would not taint that search.²⁵⁸

Justice Brennan offered a variety of alternatives that might have reduced the need for the relatively prolonged stop. The two vehicles could have been stopped together. Cooke—who was apparently regarded by both officers as the one carrying out the investigation—could have followed and stopped the truck rather than remaining with the Pontiac. Alternatively, the investigation of the truck could have been carried out by Thresher immediately after he stopped the truck.²⁵⁹ The majority addressed only the second alternative, and commented simply that Thresher may have lacked Cooke's training and experience, as well as information related to the case. Therefore, his failure to conduct the investigation at the scene of the stop was not unreasonable.²⁶⁰

The discussions in *Place* and *Sharpe* clarify what was evident earlier—at some point a nonarrest detention, proper at its inception, becomes unreasonable for fourth amendment purposes simply because of its extended duration. *Place* and *Royer* together, however, strongly suggest that in most, if not all, situations the validity of the detention's dura-

Marshall would not, however, permit the presumption to be rebutted—that is, the detention upheld—upon a mere showing of law enforcement need. *Id.* at 1581 (Marshall, J., concurring in the judgment).

257. *Id.* at 1576 n.6. Justice Brennan argued that if Savage's action was innocent, it could not justify prolonging his detention. *Id.* at 1591-92 n.20 (Brennan, J., dissenting). He apparently saw the effect of evasive action as a "waiver" and reasoned that, absent evasive intent, Savage's action could not appropriately be characterized as a waiver. *Id.* Even innocent conduct by suspects that increases the time required for police actions might support the reasonableness of a prolonged detention on a rationale other than waiver. But it is difficult to see why the fact that the suspects' activity necessitated the prolongation should be significant. The significance that the majority attached to the fact that Savage's actions increased the time required for Cooke to conduct his investigations certainly suggests a waiver-like rationale.

258. *Sharpe*, 105 S. Ct. at 1574.

259. *Id.* at 1589-90 (Brennan, J., dissenting).

260. *Id.* at 1576 n.5.

tion will be evaluated under a flexible standard that takes into account the length of the detention, the officers' legitimate objectives, the various means that might have been employed in pursuit of those objectives, and the dispatch with which the officers pursued those means that would reduce the necessary length of the detention.

Place rejected a rigid constitutional maximum time limit and this was reaffirmed in *Sharpe*. The Court's rationale, however, is open to dispute. A specific time limit—a "per se rule"—need not interfere with the ability of officers *reasonably* to graduate their responses to the demands of specific situations. Instead, it would provide some guidance to officers as to the maximum length of time permitted for detention that is based on reasonable suspicion. On the other hand, the refusal to impose such a limit might be defensible on grounds other than those articulated in *Place*. Given the difficulties of case-by-case review—especially under an approach such as that employed by the *Royer* plurality—there may well be resistance to the task on the part of trial judges and officers. To the extent that this is the case, there would be a strong temptation for the specific limit to become the "rule." Trial judges might seldom find that a detention within that limit was unreasonable, whatever the officers' diligence and alternatives. Officers might conclude—and perhaps with practical reason—that they had an unrestricted authority to detain up to that limit in almost all cases. A rigid time requirement, in other words, might frustrate the objective of imposing meaningful judicial limits upon law enforcement action.

The argument for a specific time limit is strengthened, however, by the nature of the case-by-case review mandated by the Court's case law. Given the ambiguity and flexibility of the review, it seems unlikely to be rigorous and therefore unlikely to be effective. The Court's decisions afford little guidance as to the weight to be given to the duration of a detention. *Place* indicates that a ninety-minute detention gives rise to, at the least, an extremely heavy burden of justification. Within shorter time frames, however, little guidance is provided. *Royer* and *Dunaway* suggest that detentions of even fifteen minutes may be excessive. But in *Sharpe* the Court evidenced little willingness to review rigorously the justification for the twenty-minute detention there at issue.²⁶¹ Moreover, it characterized *Royer* and *Dunaway* as focusing "primarily" on matters other than the duration of the suspects' detention.²⁶² As a result, lower courts are left with little guidance concerning the significance of detentions in the common intermediate range, such as the thirty- to forty-minute de-

261. *Id.* at 1574.

262. *Id.*

tention of Sharpe not discussed by the Court in *Sharpe*.²⁶³

In addition, it is unclear which law enforcement objectives are "legitimate" ones that justify prolonging a detention, whether permissible objectives may differ in their degree of "legitimacy," and to what amount of weight each objective is entitled. To the extent that *Royer* is a duration-of-detention case, it suggests that an officer's desire to secure an advantageous surrounding in which to solicit consent or to question a suspect may not be a legitimate objective. Certainly the *Royer* plurality was oblivious to the officers' interest in seeking Royer's consent in the privacy of the "police room," where they could reasonably believe that their chances of obtaining that consent were maximized. Does this mean that officers are prohibited from prolonging a detention for the purpose of encouraging the suspect to waive his search or, perhaps, self-incrimination rights? Are they prohibited from prolonging the detention only if their purpose is to encourage such waivers in an impermissible—or a "suspect"—manner? Perhaps the more "suspect" the manner, the less weight should be given to the need to question in determining how long the detention may last.

It is also uncertain whether the likelihood that an officer's investigatory technique will succeed is relevant. In *Sharpe*, the Court implied that this was significant. Yet other discussions suggest far less sensitivity to the effectiveness of investigatory techniques. In *Hensley*, for example, the Court acknowledged that the officers were permitted to detain Hensley to check identification, to determine whether a warrant had been issued for his arrest, to pose questions to him, and to inform him that the officers of the jurisdiction in which the robbery was committed wished to question him.²⁶⁴ If the length of Hensley's detention had been at issue, could the detention legitimately have been prolonged based upon the speculation that officers who were unfamiliar with the details of the offense could persuade a suspect to make incriminating admissions? The Court's suggestion that a nonarrest detention was justified in part by the need to inform the suspect that other officers wished to question him is little short of incredible. It is unlikely that a suspect located and stopped

263. In *United States v. De Hernandez*, 105 S. Ct. 3304 (1985), the Court upheld a sixteen-hour detention of a person seeking entry into the United States upon reasonable suspicion that she was carrying contraband in her alimentary canal. Given the officers' expectation that the suspect would produce a bowel movement without extended delay and thus either confirm or dispel their suspicions, the Court upheld the detention. The duration of the detention, it emphasized, was caused by the suspect's "visible efforts to resist the call of nature." *Id.* at 3312. But it seems clear, in addition, that the Court's decision was influenced by the fact that the detention occurred at the international border "where the Fourth Amendment balance of interests leans heavily to the Government." *Id.* It is unlikely that domestic enforcement needs could justify a nonarrest detention of this length.

264. *United States v. Hensley*, 105 S. Ct. 675, 684 (1985).

in another jurisdiction would respond favorably to a "suggestion" that after his release he make himself available to the issuing department for a discussion concerning an armed robbery. *Hensley* suggests a willingness by the Court to give credence to all logically possible functions of an investigation with little critical regard to the likelihood of their success.²⁶⁵

This is consistent, however, with the major contribution of *Sharpe* to nonarrest detention analysis. The message of *Sharpe* is that in deciding whether officers have proceeded expeditiously, courts should show substantial deference to the officers' judgment and decisions. To the ex-

265. Whether anyone could seriously believe that such tactics would be successful is at best questionable. During oral argument, an unidentified Justice asked Hensley's counsel whether the Covington officers could have stopped Hensley to notify him of the St. Bernard department's interest and to inquire whether he wished to stop in and talk with the St. Bernard department to exonerate himself. Transcript of Official Proceedings Before the Supreme Court of the United States at 44-45, *United States v. Hensley*, 105 S. Ct. 675 (1985). The Justice's inquiry, however, was most likely an effort to push defense counsel into a discussion of the detention at issue as a nonarrest detention rather than a serious suggestion that such police actions were a legitimate law enforcement objective.

In fact, the Covington police officers initially focused their attention upon Hensley when one officer—Eger—observed what he believed to be a drug transaction. Eger requested a warrant check on Hensley, but the police dispatcher responded that additional information would have to be elicited from the suspect in order to perform a warrant check. Joint Appendix at 48, *Hensley*. Apparently the dispatcher needed to know the suspect's birthday. The dispatcher attempted to contact the Cincinnati department by telephone to determine if Hensley was wanted by that department, but after being referred several times to the incorrect telephone extension, she finally hung up in frustration. *Id.* at 49-50. Petitioner claimed that the record reflected that at the time of the stop, the Covington department intended—despite the request in the St. Bernard flyer—only to detain Hensley to determine if a warrant had been issued. If none had been issued, the officers would have released him. Brief for the United States at 16, *Hensley*. In oral argument, the government's counsel explained that the Covington officers could have stopped Hensley for questioning, but would not in fact have done so because they "wouldn't have known what to question him about." Transcript of Official Proceedings Before the Supreme Court of the United States at 19, *Hensley*. The officer who made the stop explained the detention thus: "He was being held for investigation . . . [a]nd for whatever Officer Eger might have wanted him for." Joint Appendix at 15, *Hensley*.

If the only purpose of the stop was to determine whether a warrant was outstanding, it would seem important whether there was any justification for the original flyer's failure to specify this. One Justice raised this question at oral argument. Transcript of Official Proceedings Before the Supreme Court of the United States at 6, *Hensley*. Counsel for petitioner responded that flyers sometime do and sometimes do not provide this information. She asserted, however, that even if the flyer had indicated that no warrant then existed, the Covington officers would have been justified in stopping Hensley and detaining him pending inquiry as to whether or not a warrant had been issued in the six days since the flyer was published. *Id.* at 7.

The case appears to have provided the Court with an opportunity for addressing the constitutional need, if any, for flyers or other interdepartmental communications to specify what action is desired by the receiving departments and to update this information when the nature of the request changes. The failure of the original flyer to specify whether a warrant had been issued and the lack of any follow-up efforts arguably made delay to obtain that information insufficient to justify detention. If—as the Covington officers apparently believed—officers not involved in the investigation were incapable of effectively questioning the suspect, there was arguably no legitimate law enforcement purpose served by the stop, and it was therefore invalid from its inception.

tent that the fourth amendment requires that the techniques being pursued pose a likelihood of success, *Sharpe* suggests similar deference to the officers' judgment that the likelihood of success is high. If the already ambiguous and flexible standard for determining how long a nonarrest detention may last is to be applied with the deference suggested by *Sharpe*, there is little reason to believe that the standard will permit meaningful review.

The duration of a nonarrest detention implicates citizens' liberty interests as protected by state law as well as by the fourth amendment. The duration issue is an especially appropriate one for further consideration as a state law issue. In light of *Place*'s rejection of a rigid maximum time limit for nonarrest detentions as a matter of fourth amendment reasonableness, state lawmakers have a clear obligation to consider independently whether such a limitation might be appropriate as a matter of state law. Again, the close issue presented by the conflicting considerations may mean that no particular resolution should be constitutionalized as a matter of state or federal law. This passes the responsibility on to the state policy-setting forum, where close issues are more appropriately resolved and where these resolutions can be embodied in legal requirements. The Court, however, has done nothing to dispel the *Place* opinion's implication that specific time limits on nonarrest detentions are inappropriate in general—whether as a matter of fourth amendment law or as a matter of state law.

The present approach toward limiting the duration of nonarrest detentions is unsatisfactory. The absence of specific standards, even as an absolute limit, combined with the Court's willingness to relate duration of detention to other considerations, results in the worst of both worlds. Lower courts regard themselves as obligated to review the duration of such detentions and occasionally find the duration of detentions excessive. Law enforcement officers, then, are faced with the reality of judicial review, yet the decisions and the analyses courts employ provide them with no reasonable guidance. Officers, therefore, are left unable to ascertain what the fourth amendment demands.

Conceptually, there is much appeal in careful judicial case-by-case scrutiny of detentions to determine if the duration was supported by the officers' desire to pursue legitimate and comparatively nonintrusive procedures that are likely to be fruitful. But it is probably unrealistic to expect courts effectively to review officers' decisions to prolong detention for periods of fifteen to thirty minutes, especially within the framework established by *Royer*, *Place*, and *Sharpe*. The difficulty in achieving effective and rational case-by-case scrutiny of the duration of nonarrest detentions argues persuasively for a rigid limit of the sort rejected in *Place*,

perhaps one of thirty minutes, as a matter of state law. Such a limit might be adopted with the recognition that defendants would bear a heavy burden of showing that nonarrest detentions within that period were unreasonable. Similarly, any nonarrest detention lasting longer than the period should give rise to an equally heavy burden of justification. Such an approach would contain some flexibility for exceptional cases. Yet it would also establish a benchmark that, in most cases, would provide reasonable protection for citizens' privacy interests.

5. *Movement of the Suspect.* Although less often discussed than the duration of detentions, there is a widespread perception that a nonarrest investigatory detention permits only limited movement of the suspect.²⁶⁶ Little agreement exists, however, on the source or content of any limitation on the suspect's movement. The Uniform Arrest Act does not address the matter. The Model Code of Pre-Arrest Procedure, however, defines the officers' authority as including the right to require the person to remain in the officer's presence "near" the place where the suspect was confronted.²⁶⁷ Some—but a distinct minority—of the state statutes authorizing such detentions impose similar limitations.²⁶⁸ Whether or to what extent the fourth amendment places a similar limit upon movement of the suspect, however, is less clear.

In *Terry*, the rationale suggested by the Court for upholding investigatory detentions on less than probable cause implied some limit on the officer's ability to move the suspect from the point of the initial confrontation. The reduced intrusiveness that justifies diluting the probable cause requirement stems in part from the fact that investigatory detentions are generally "on the scene" investigations. This was confirmed by

266. *E.g.*, *State v. Fauria*, 393 So. 2d 688, 690 (La. 1981) (in upholding detention, court notes that "suspects were not transported from the scene"); *People v. Bloyd*, 416 Mich. 538, 551-52, 331 N.W.2d 447, 454 (1982) (in finding that a detention that was proper at the outset became invalid, court emphasizes that suspect was compelled to ride with officers in police car while the officers checked various buildings to see if a break-in had taken place).

267. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1) (Final Draft 1975).

268. ARK. STAT. ANN. § 43-429(a) (1977) (officer may require suspect to remain "in or near" place of detention); FLA. STAT. ANN. § 901.151(3) (West 1985) (detention "shall not extend beyond the place where it was first effected or the immediate vicinity thereof"); ILL. ANN. STAT. ch. 38, § 107-14 (Smith-Hurd 1980) (detention and questioning must be conducted "in the vicinity of where the person was stopped"); NEV. REV. STAT. § 171.123(3) (1983) (similar to Florida statute); OR. REV. STAT. § 131.615(2) (1983) (detention and inquiry to be conducted "in the vicinity of the stop"); WIS. STAT. ANN. § 968.24 (West 1985) ("in the vicinity where the person was stopped"). The Virginia statute allows police officers to "detain a person in a public place." VA. CODE § 19.2-83 (1983). Perhaps this constitutes a prohibition against movement of the suspect, at least to a "private" location. On the other hand, this may be simply an awkward statement of the requirement in other statutes that detentions be limited to persons encountered in public places. *E.g.*, ALA. CODE § 15-5-30 (1982).

the suggestion in *Davis* that stationhouse detentions on less than probable cause, if constitutionally acceptable, would be a separate category of detentions for fourth amendment purposes. On the other hand, *Mimms* specifically holds that some movement of a nonarrest detainee so minimally intrudes upon privacy interests as to render it of no constitutional significance.

The Court's post-*Mimms* case law makes clear that there are some limitations upon the permissible movement of suspects. In *Dunaway*, for example, the Court relied upon Dunaway's movement from the neighbor's house in which he was apprehended to the stationhouse as one of the "important respects" in which his detention was indistinguishable from an arrest.²⁶⁹ *Hayes v. Florida*²⁷⁰ held that Hayes's movement—from the porch of his home where he was initially confronted by the officer to the stationhouse—for purposes of fingerprinting was impermissible where the officer lacked probable cause to believe that Hayes was guilty of the burglaries and sexual assaults under investigation. The Court's language strongly suggests a per se prohibition against movement of the suspect to the stationhouse during nonarrest detentions.²⁷¹ The decision may have been influenced, however, by the proposition that such movement was not essential to the purposes of the detention—securing fingerprints and questioning the suspect.

Whether or not *Hayes* establishes a rigid prohibition against movement of the suspect to the stationhouse, the Court's case law is much less clear concerning the permissibility of less dramatic movements of the suspect. Movement seems to be significant. In *Place*, for example, the validity of holding Place's luggage—which the Court analyzed under field stop principles—was undoubtedly influenced by the movement of that luggage from one airport to another.²⁷² In the plurality's analysis of Royer's detention, his movement from the airport concourse to the nearby room was certainly significant.²⁷³

269. *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

270. 105 S. Ct. 1643 (1985).

271. The Court explained:

There is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. . . . [O]ur view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes.

Hayes, 105 S. Ct. at 1647.

272. *United States v. Place*, 462 U.S. 696, 706 (1983).

273. *Florida v. Royer*, 460 U.S. 491, 494 (1983).

On the other hand, the cases can readily be construed to attach significance to movement of the suspect primarily or exclusively to the extent that the movement increased the detention's intrusiveness in other ways. If, for example, the movement resulted in the suspect's being further detained in an area that was isolated, police-dominated, or both, the detention may have exceeded permissible limits and the movement of the suspect may have been significant only because of the nature of the environment into which the suspect was moved. Such a construction is consistent with both *Dunaway* and *Royer*. In *Dunaway*, the movement was to the stationhouse. In *Royer*, it was to a location that apparently precluded observation by others in the airport and that was under the virtually complete control of the police.²⁷⁴

The state courts appear to have considered movement of the suspect, if at all, only in this fashion.²⁷⁵ In a number of cases, the movement of a suspect is apparently given no significance whatsoever.²⁷⁶ These cases do not indicate whether state courts have considered, in light of the Supreme Court's fourth amendment standard, further restrictions on the movement of suspects as a matter of state law. The ambiguity of the fourth amendment standard would make such an analysis difficult. Although some state statutes impose limitations on a suspect's movement, these likewise do not appear to be given much significance.²⁷⁷

274. Cf. *United States v. Sharpe*, 105 S. Ct. 1568, 1574 (1985) (characterizing *Royer* as focusing upon "the fact that the police confined the defendant in a small airport room for questioning").

Similarly, in *Place*, the removal of the luggage from the scene may have been significant primarily because it both caused an interruption of Place's travel plans and caused him to anticipate that interruption. See *Place*, 462 U.S. at 708 (where seizure of luggage disrupts travel plans because suspect might perceive need to remain with luggage or arrange for its return, seizure of luggage can also constitute effective restraint on person).

275. See, e.g., *People v. Roybal*, 655 P.2d 410, 412 (Colo. 1982) (transporting suspect "down-town" to administer blood alcohol test was "arrest"); *People v. Bloyd*, 416 Mich. 538, 541-55, 331 N.W.2d 447, 450-56 (1982) (detention became invalid when officer took suspect to several establishments from which X-rated movies found in suspect's car might have been taken).

276. *Finney v. State*, 420 So. 2d 639 (Fla. Dist. Ct. App. 1982) (no discussion of significance of taking robbery-assault suspect to stationhouse for photographing so hospitalized victim could be shown photos), *overruled on other grounds*, *State v. Navarro*, 464 So. 2d 137 (Fla. Dist. Ct. App. 1984) (per curiam); *Commonwealth v. Woodard*, 307 Pa. Super. 293, 453 A.2d 358 (1982) (no significance attached to officer's action in taking suspect to stationhouse while determining if car was taken in an unreported theft).

277. The Florida statute limits detentions to the "immediate vicinity" of the place where they were first effected. FLA. STAT. ANN. § 901.151(3) (West 1985). In *Finney v. State*, 420 So. 2d 639 (Fla. Dist. Ct. App. 1982), *overruled on other grounds*, *State v. Navarro*, 464 So. 2d 137 (Fla. Dist. Ct. App. 1984) (per curiam), the suspect was taken to the stationhouse during the investigation. In upholding the detention, the court mentions neither the statute nor its limitation upon movement of the suspect. 420 So.2d at 642-43. See also *People v. Lippert*, 89 Ill.2d 171, 181-84, 432 N.E.2d 605, 609-10 (despite statutory directive that detention be in the "vicinity" of stop, ILL. ANN. STAT., ch. 38, § 107-14 (Smith-Hurd 1980), officers properly transported stopped robbery suspects back to scene of the robbery so that they could be viewed by victims), *cert. denied*, 459 U.S. 841 (1982).

Perhaps movement of the victim does not significantly and independently affect the intrusiveness of an investigatory detention upon the liberty and privacy interests protected by the fourth amendment. If other aspects of such detentions are held constant, movement arguably either adds nothing to the intrusiveness of the procedure or at most contributes negligibly to that intrusiveness. On the other hand, in at least some situations there can be little doubt that movement of the suspect to a less open and more police-dominated situation will substantially increase the anxiety experienced by the suspect. If this increase in privacy intrusion is not sufficient to invoke specific fourth amendment protection, it seems clearly sufficient to warrant attention as a matter of state law enforcement policy.

Setting meaningful limits on the movement is difficult, either as a matter of the fourth amendment or state law. No criterion in terms of specific footage is possible; the situations presented are far too variable for such an approach. *Royer* suggests a limit based on the nature of the situation into which the suspect is moved: at least in the absence of a specific and legitimate reason, movement of the victim to a police-dominated location is impermissible. But when is there a legitimate reason for such movement? Was the officers' apparent hope that the isolation of the location would increase the chance that *Royer* would admit to the crime and grant consent to search an illegitimate rationale? Admissions and consents given in such isolated situations are unlikely to be deemed involuntary due to isolation alone. So the *Royer* approach must mean that movement to a location will sometimes be improper even if that movement would not render elicitation of admissions there violative of any specific legal mandate. Neither the need for effective review nor that for bright-line rules to guide future conduct is likely to be served by an approach that requires movement of the suspect to be scrutinized in such a manner.

Perhaps, as the *Royer* plurality suggested, the ultimate question must be whether the detention was sufficiently limited in scope and duration to accomplish its legitimate purposes in a reasonable manner.²⁷⁸ Yet, just as *Place* declined to adopt a rigid time frame for evaluating challenges to the duration of stops, there may be no independent fourth amendment limitations—rigid or not—upon movement of the suspect during the detention. To the extent that movement does affect the detention's intrusiveness, this may be adequately accommodated by an approach that makes movement relevant to whether other considerations—

278. See *supra* text accompanying notes 234-39.

especially the duration of the detention—have rendered the detention unreasonable.

On balance, however, the impact of movement justifies giving that aspect of nonarrest detentions independent significance. Moreover, the difficulty of line drawing suggests the wisdom of relatively objective standards. Movement of the suspect a significant distance from the scene of the initial confrontation should be impermissible if the detention is based on less than probable cause. Unless so limited, nonarrest detentions pose too great a risk of becoming indistinguishable from other detentions—such as *Davis*-type stationhouse detentions—that are of sufficiently greater intrusiveness to demand separate treatment for fourth amendment purposes. Such a limitation would be appropriate as a matter of fourth amendment law. Whether or not it is so imposed, sound state constitutional or law enforcement policy demands a limitation of this sort.

6. *Admonitions.* The intrusiveness of a detention is probably affected by how it is perceived by the detainee. Although an investigatory detention in fact results in more rapid restoration of the detained person's freedom of movement than does an arrest, the intrusiveness of the period of detention is undoubtedly influenced by the detainee's perception that such restoration will or may occur shortly. If it is necessary or desirable to minimize the intrusiveness of investigatory detentions, it may be useful to inform the suspect of the nature of the detention to which he is subjected.²⁷⁹ The Uniform Arrest Act makes no provision for an admonishment,²⁸⁰ but the Model Code of Pre-Arraignment Procedure demands, under certain circumstances, that the suspect be told that he or she will be either released or arrested within a twenty-minute period.²⁸¹

Several state statutes require admonishments of some sort. The Illinois provision requires that the officer identify himself as a peace of-

279. This function of an admonishment needs to be distinguished from the function of reducing the risk questioning poses to the interests protected by the privilege against compelled self-incrimination. See *infra* text accompanying notes 404-43.

280. Although the terms "admonition" and "admonishment" are commonly used in the sense of a reproof or warning, the terms have acquired—in the context of criminal procedure—a broader meaning that includes the conveying of information. This article uses these terms only in the latter sense; their use is not intended to suggest a reproof or warning.

281. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(5)(a)(ii) (Final Draft 1975). The Code provides that "the officer shall warn such person as promptly as is reasonable under the circumstances, and in any case before engaging in sustained questioning." *Id.* § 110.2(5)(a). This suggests that the drafters intended the provision to be not merely a means of minimizing the intrusiveness of the detention, but also a means of minimizing the risks of improper pressure to make self-incriminating statements.

ficer.²⁸² Under the Arkansas statute, the officer is directed to advise the detainee of the officer's official identity and the "reason for the detention,"²⁸³ an instruction that might indirectly provide information as to the nature of the detention. Only Montana demands this directly: the statute requires that the officer inform the suspect that he is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that "upon the completion of the investigation the person will be released unless he is arrested."²⁸⁴

Until *United States v. Place*,²⁸⁵ nothing in the Supreme Court's case law suggested an affirmative fourth amendment requirement that the officer provide information regarding the nature of the detention or the officer's intentions concerning its duration.²⁸⁶ In *Place*, the officers simply told the suspect that his luggage would be taken "to" a federal judge in an effort to obtain a search warrant and that he was free to accompany the luggage. Place was not told that the officers would make a detour to another airport to have the luggage "sniffed" or that the process might require several days. After repeatedly stressing that the detention violated the fourth amendment due to its length *alone*,²⁸⁷ the Court nevertheless suggested that the violation was "exacerbated" by the agents' failure to inform Place accurately as to where his luggage would be taken, how long the process would take, and what arrangements might be made for regaining the luggage if the investigation led to no arrest.²⁸⁸

Whether admonishing a detainee might sufficiently reduce the intrusiveness of a nonarrest detention as to warrant a constitutional requirement is, at best, problematic. Again, the issue may be sufficiently close that any requirement of an admonition would be appropriate only as a matter of state law and, even then, perhaps only as a matter of nonconsti-

282. ILL. REV. STAT. ANN. ch. 38, § 107-14 (Smith-Hurd 1980).

283. ARK. STAT. ANN. § 43-429(b) (1977).

284. MONT. CODE ANN. § 46-5-402(3) (1983). In *Huebner v. State*, 33 Wis. 2d 505, 516, 147 N.W.2d 646, 651 (1967), the Wisconsin Supreme Court commented in upholding a nonarrest detention that "it must be made plain to the person he is not under arrest."

285. 462 U.S. 696 (1983).

Some language in *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), suggests that the use of deadly force to make an arrest may only be "reasonable" for fourth amendment purposes if, where feasible, the suspect has been given "some warning." *Id.* at 1701. Any such admonition or warning that developed out of the *Garner* holding, however, would be designed to render force unnecessary in making an arrest rather than to reduce the intrusiveness of a stop by informing the detainee of the nature of the detention.

286. The Court had commented, however, that the failure of officers to inform the suspect that he was not under "arrest," "while not insignificant for all purposes," would not itself prevent the detention from being characterized as an arrest. *Dunaway v. New York*, 442 U.S. 200, 212-13 (1979).

287. *Place*, 462 U.S. at 709, 710.

288. *Id.* at 710.

tutional law enforcement policy. So addressed, a requirement that a suspect be informed, as soon as feasible, that his detention is both temporary and for purposes of investigation seems to be a reasonable means of attempting to ensure that the difference between arrests and nonarrest detentions is meaningful to those citizens subjected to nonarrest detentions.²⁸⁹

7. *Use of Force.* Implicit in the power to make an investigatory detention is the authority to use at least some force to make the detention. Further, it is clear that this right to use force is limited to the use of such force as the officer reasonably believes necessary to effectuate the detention.²⁹⁰ But it is largely unclear whether there are further limits on the use of force in making a nonarrest detention, and if so, what the source of any such limits might be. The Uniform Arrest Act does not address the matter.²⁹¹ The Model Code of Pre-Arrest Procedure, on the other hand, limits the permissible force to nondeadly force reasonably necessary for the detention.²⁹²

A few state statutes address the question. Arkansas specifically authorizes the use of such force "as may be reasonably necessary under the circumstances" to detain a person for nonarrest investigation.²⁹³ Deadly force is apparently permissible under this provision *if* the officer reasonably believes that the stop could not be effectuated by using nondeadly force. In contrast, an Alaska statute authorizes the use of nondeadly force and the threat of deadly force when an officer reasonably believes that such use or threat of force is necessary "to make a lawful stop."²⁹⁴ The statute authorizes the use of deadly force only to arrest or detain

289. There are, however, other considerations bearing upon the wisdom and perhaps necessity of admonishments. See *infra* text accompanying notes 370-75.

290. The law defining defenses to criminal liability is often regarded as embodying the major limits upon the use of force in law enforcement activities. The defenses generally require that the actor have believed that the force used was necessary to accomplish a permissible purpose. See W. LAFAVE, CRIMINAL LAW 392-93 (1972) (self-defense requires actor to believe that force used was necessary to prevent threatened harm). Whether the belief must be "reasonable"—that is, whether a reasonable person in the actor's situation would have believed such force necessary—is less clear. *Id.* at 393-94 (in self-defense situations, belief must generally be reasonable). The Model Penal Code, however, imposes no reasonableness requirement in the most analogous situation addressed in the Code. MODEL PENAL CODE § 3.07(1) (Proposed Official Draft 1962) (force may be used to make an arrest when actor believes force necessary).

291. This is especially interesting in light of the Act's provision for force to make an arrest. UNIFORM ARREST ACT § 4 (1939), reprinted in Warner, *supra* note 78, at 344-45. Perhaps the drafters uncritically assumed that an authorization to use force to make an "arrest" applied to all detentions. This is hardly consistent, however, with the drafters' careful distinction between arrests and investigatory detentions.

292. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(3) (Final Draft 1975).

293. ARK. STAT. ANN. § 43-430 (1969).

294. ALASKA STAT. § 11.81.370(a) (1983).

persons who the officer "reasonably believes" have committed certain offenses or pose certain risks.²⁹⁵ Deadly force cannot be used under this statute to make an ordinary investigatory stop.²⁹⁶

Most state statutes addressing the right of law enforcement officers to use force in making detentions, however, apply only to arrests.²⁹⁷ The vast majority of state statutory law predates the recognition of a distinction between arrests and nonarrest detentions and therefore simply does not address the officers' right to use force in the latter situation.

The state and lower federal courts often review the merits of claims that detentions were made with "excessive" force, generally without specific consideration of the source of any use-of-force limitation. There is widespread agreement that some amount of force that the officer reasonably believes necessary to make the detention may be used.²⁹⁸ Further, the exhibition of firearms²⁹⁹ and the use of handcuffs³⁰⁰ are generally

295. *Id.*

296. *Cf.* Howard v. State, 664 P.2d 603, 609-10 (Alaska Ct. App. 1983) (officers may threaten to use deadly force in making a nonarrest detention; use of force must be proportional to risk reasonably foreseen by officers at time of detention).

297. *E.g.*, CAL. PENAL CODE § 835a (West 1970); FLA. STAT. ANN. § 776.05 (West 1976); ILL. ANN. STAT. ch. 38, § 7-5 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-3(b) (Burns 1985); MINN. STAT. ANN. § 609.06(1)(a) (West 1964); N.Y. PENAL LAW § 35.30(1) (McKinney 1975); 18 PA. CONS. STAT. ANN. tit. 18, § 508(a) (Purdon 1983); UTAH CODE ANN. §§ 76-2-404(2) (deadly force), 77-7-7 (force in general) (1953); WIS. STAT. ANN. § 939.45(4) (West 1982). The Model Penal Code provision, entitled "Use of Force in Law Enforcement," actually addresses only the use of force to make arrests, to prevent escape after arrests, and to prevent the commission of crime. MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

Given the general acceptance of the importance of the distinction between arrests and nonarrest detentions, it is unlikely that many courts would be willing to assume that legislatures intended that statutes addressed to arrest situations would also cover nonarrest detentions. *But see* Blackmon v. State, 644 S.W.2d 738, 740 (Tex. Crim. App. 1983) (holding without discussion that suspect who fled from officers attempting to make investigatory stop committed offense of intentionally fleeing from peace officer attempting to "arrest").

298. *E.g.*, United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982) ("If there is sufficient reasonable suspicion to justify an investigatory stop, reasonable force may be used to effect that stop."); State v. Goodson, 444 So. 2d 1337, 1340 (La. 1984) (citing LA. CODE CRIM. PROC. ANN. art. 220 (West 1981), which authorizes use of reasonable force to make *arrest*).

299. United States v. Roper, 702 F.2d 984, 987-88 (11th Cir. 1983) (citing numerous cases); People v. Lewis, 659 P.2d 676, 682 (Colo. 1983); Smith v. State, 165 Ga. App. 333, 334, 299 S.E.2d 891, 893 (1983).

Force was found to be excessive in United States v. Ceballos, 654 F.2d 177, 183-84 (2d Cir. 1981), in which officers stopped the suspects' car by blocking it with at least three police vehicles and then approached with drawn guns. Information available to the officers, reasoned the court, did not establish sufficient danger to justify this. *But see* United States v. Harley, 682 F.2d 398 (2d Cir. 1982) (drawing guns was reasonable where suspects in drug investigation fled after officers signaled them to stop).

300. *See* United States v. Bautista, 684 F.2d 1286, 1289-90 (9th Cir. 1982) (initial handcuffing of robbery suspect reasonable because of nature of offense and suspect's nervous appearance; continued handcuffing more questionable but permissible because of risk of escape or assault on officers during detention).

agreed to be permissible under many circumstances. No case, however, addresses whether, to effect a detention, a firearm may actually be discharged in a manner that creates a risk that the suspect will be killed or seriously injured.

The extent to which the fourth amendment requirement of reasonableness imposes limits upon the use of force in making otherwise reasonable searches or seizures remained unaddressed³⁰¹ until *Tennessee v. Garner*.³⁰² *Garner* held, in the context of a civil action for damages, that the fourth amendment prohibited the use of deadly force to arrest a suspect who could not reasonably have been regarded as posing a risk of serious physical harm to the officer or to others.³⁰³ No reason appears, however, for the Court to have limited its holding to the civil context; almost certainly an arrest made with such excessive force will also taint subsequently discovered evidence and render that evidence inadmissible under the fourth amendment exclusionary rule.

Will the fourth amendment be construed to place similar limits on the force that may be used to effect a nonarrest detention? *Garner's* language is sufficiently broad to include nonarrest seizures such as investigatory stops.³⁰⁴ More significantly, the Court's rationale for finding fourth amendment limits on the force that may be used to make an arrest applies to nonarrest detentions as well. The Court reasoned that the fourth amendment validity of a seizure depends in part on the "nature and quality" of its intrusion on the suspect's fourth amendment interests.³⁰⁵ Because the extent of the intrusion depends in part on the amount of force used, consideration of the force used is relevant in determining the ultimate fourth amendment reasonableness of the seizure.³⁰⁶ The extent to which force is used to implement an investigatory stop has no lesser effect on the intrusiveness of that seizure than does force used in an arrest. Indeed, because of the reduced intrusiveness of the detention itself, the incremental impact of the use of force on the intrusiveness of the detention is greater than in the case of an arrest. *Garner's* rationale thus applies to nonarrest detentions more strongly than it does to arrests.

301. See Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89, 146-47 (1982); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (federal court did not have jurisdiction to enjoin the Los Angeles Police Department from applying "chokeholds," since the plaintiff failed to allege an actual case or controversy).

302. 105 S. Ct. 1694 (1985).

303. *Id.* at 1701.

304. *Id.* at 1699, 1700 ("Because one of the factors [in the balancing process] is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but how it is carried out. . . . The intrusiveness of a seizure by means of deadly force is unmatched.").

305. *Id.* at 1699-700.

306. *Id.*

If limits on the use of force do frustrate some efforts to make nonarrest detentions, what costs are involved? Some empirical evidence suggests that fewer than two percent of stops result in arrests.³⁰⁷ Seldom, then, will the inability to make an investigatory stop mean the loss of an arrest.³⁰⁸ To the extent that investigatory stops deter future offenses,³⁰⁹ an officer's inability to complete an investigation—for example, if the officer is unable to obtain identification and other information from a suspect—may reduce the preventive impact of the officer's action. In some cases, however, the experience of being the subject of a police investigation may itself have substantial deterrent effect despite the officer's lack of success in making a nonarrest detention. On balance, the costs of limiting the use of force to make investigatory stops will be substantially less than the costs of limiting the use of force to make arrests. Given these considerations, there can be little doubt that the Court will construe the fourth amendment to place some limits upon the use of force in making nonarrest detentions.

What will—or should—these limits be? Analysis is impeded by uncertainty as to what fourth amendment limitations will be placed on the use of force to make arrests. Perhaps most significantly, *Garner* provides little basis for predicting whether any excessive force will render an arrest unreasonable for fourth amendment purposes or, in the alternative, whether the constitutional prohibitions will be limited to what are regarded as *extraordinarily excessive* uses of force. With regard to nonarrest detentions, however, there are several alternative approaches that warrant consideration.

One alternative would be a simple prohibition against unnecessary force, or at least against force that the officer could not have reasonably regarded as necessary to make the detention. As a matter of general policy, such a limitation is obviously appropriate. It is likely that state tort and perhaps criminal law already imposes such a requirement.³¹⁰

307. See *supra* note 174 and accompanying text.

308. It is possible that force is most often needed to make those stops that develop into arrests, because those suspects who have actually committed offenses are most likely to resist or flee. To the extent that this is true, the suggestion in the text that the frustration of fifty stops will result in the loss of only one arrest is misleading.

309. See *supra* notes 10-13 and accompanying text.

310. Tort law speaks primarily in terms of "arrest," especially in false imprisonment cases. But "arrest" is defined so broadly in criminal procedure law that it encompasses both investigatory stops and arrests. See PROSSER & KEETON ON THE LAW OF TORTS 50 (W. Keeton 5th ed. 1984). It seems clear that if the issue were posed, intentional tort cases would adopt the distinctions drawn by criminal procedure. In regard to criminal liability, the right to use force to make an arrest is merely an example of a broader notion that acts otherwise criminal create no criminal liability if done under valid public authority. Unauthorized departure from the scope of the authority, however, destroys the privilege. See R. PERKINS & R. BOYCE, CRIMINAL LAW 1093 (3d ed. 1982). Recognition of

Whether the fourth amendment does or should impose a similar or identical requirement, however, is far more problematic. Such a fourth amendment requirement would constitutionalize virtually the entire subject of force used to effect a detention. *Garner* gives no hint that the Court intended to so constitutionalize the use of force to effect arrests. Although marginally excessive use of force may increase the intrusiveness of an arrest on the suspect's fourth amendment interests, such increases may be insufficient to be constitutionally cognizable. Moreover, constitutional recognition of such minor increases in the level of intrusion would render a large percentage of detentions subject to attack in suppression hearings on grounds of excessive force. Whether the implementation of the exclusionary sanction in this context justifies the increased disruption of litigation and the other costs that would be involved is at best unclear. *Garner*, in other words, may have indicated only that exceptionally intrusive instances of excessive force have fourth amendment significance. So construed, *Garner* does not signal that the fourth amendment is violated by proof that the force used to make a nonarrest detention simply exceeded what the officer could have reasonably regarded as necessary to make the detention.

Garner is likely to portend limited prohibitions on the use of particular kinds of force to make both arrest and nonarrest detentions under certain circumstances. These prohibitions are likely to be ones that bar the use of extraordinarily intrusive force and that can be defined—and limited—in a sufficiently bright-line fashion to avoid the costs of full constitutionalization of the amount of force used for detentions. “Deadly force,” quite obviously, is both extraordinarily intrusive in this sense and capable of being distinguished from force in general. It is therefore most likely to be the focus of the fourth amendment limitation.

Garner leaves little doubt that in the arrest context the fourth amendment permits the use of deadly force in some situations. On the other hand, a complete fourth amendment prohibition against the use of deadly force to make investigatory stops may be appropriate. The same social interests are at stake in both arrest and nonarrest situations—the interests in investigating potential criminal activity, in prosecuting, convicting and punishing offenders, and in doing all of this with the dispatch that becomes possible when the offender is rendered available by apprehension. Yet in investigatory stop situations, the substitution of reasonable suspicion for probable cause means that there is significantly less basis for believing that these interests are implicated in any particular

officers' authority to make nonarrest detentions undoubtedly creates the sort of public authority necessary to provide the officer a defense to liability, but courts are equally certain to limit that authority to force reasonably necessary to effectuate the detention.

case. As in arrest situations, the use of deadly force defeats—or at least endangers—the social interests in securing the suspect's cooperation with further investigative efforts, in prosecution, and in formal punishment. On balance, the more tenuous relationship between nonarrest detentions and the social interests implemented by criminal prohibitions may render any use of deadly force to effect these detentions unreasonable for fourth amendment purposes.³¹¹

Alternatively, the fourth amendment may limit the use of deadly force to those situations in which the officers' reasonable suspicions implicate the extraordinarily important interest in preserving the physical safety of citizens and law enforcement officers. Reasonable suspicion may be sufficient if the social interest implicated is an especially important one. Deadly force, then, may be constitutionally permissible only if an officer reasonably suspects not only that the suspect is involved in an offense, but also that the suspect poses a threat of serious physical harm to the officer or someone else.

The significance of whatever limitations might exist upon the use of deadly force to make detentions will depend in part upon how deadly force is defined. *Garner* assumed that shooting a firearm at a suspect with the intention of hitting that suspect constituted the use of deadly force within the meaning of the fourth amendment's limitation on using such force in making an arrest.³¹² It is unclear whether deadly force is used when an officer draws, otherwise indicates the availability of, or displays to a suspect a firearm, when an officer verbally threatens to shoot the suspect, when an officer points a firearm at a suspect, or when an officer fires at a suspect with the intention of missing him. If the fourth amendment limitation is one on the use of "deadly force," the definition of that term will substantially affect the impact of the limitation on law enforcement activity.

A suspect's perception that he may be shot or is being threatened with deadly force is quite different from being killed, injured, or even the target of a fired weapon. Perhaps a perception is not sufficient to trigger fourth amendment analysis, and something more is necessary to render the officer's use of force of fourth amendment significance. Limiting the *Garner* holding to situations in which a firearm is actually discharged would provide a bright-line method of defining the prohibited deadly

311. Several pre-*Garner* decisions rejected the notion that there is any limit upon the use of force except that the force must be reasonable. This apparently means that the officers must reasonably regard the force used as necessary to effect the detention or to protect themselves. See *United States v. Merritt*, 695 F.2d 1263, 1274 (10th Cir. 1982); *State v. Williams*, 34 Wash. App. 662, 670-71, 663 P.2d 1368, 1373 (1983).

312. *Tennessee v. Garner*, 105 S. Ct. 1694, 1699-702 (1985).

force, at least in the context of a firearm.³¹³

On the other hand, the effect of being detained by being threatened with the use of a firearm is scarcely insignificant. Given the reduced intrusiveness of investigatory detentions as compared to arrests, the incremental intrusiveness of such a threat of force is arguably much greater when the detention is for investigatory purposes. Even if the exhibition or threatening display of a firearm does not constitute prohibited deadly force in the context of an arrest, perhaps it is of sufficient incremental intrusiveness in the nonarrest detention context that it should be limited or prohibited there.

It remains to be seen whether such a limitation would be practical. Although there seems to be no reason why officers could not be prohibited from expressly or implicitly threatening to use their firearms to prevent a prospective detainee from fleeing, in many situations officers may need to ready and perhaps display their weapons in anticipation of the need to use them in self-defense. If, during the course of a proper detention, the suspect resists and the officer reasonably concludes that deadly force is necessary to overcome that resistance, it seems likely—by analogy to the law governing the use of force to make arrests—that the officer may use even deadly force under traditional notions of self-defense.³¹⁴ If this is so, should the prohibition against use of deadly force bar the officers from drawing their weapons—because of the risk that the suspect will perceive this as a threat to use the weapons—if the suspect offers no resistance but merely attempts to flee? Little can be said in favor of requiring that an officer be seriously at risk before permitting him to draw his weapon. On the other hand, officers may be able in practice to cir-

313. Those drafting the Model Penal Code noted "some authority" for the proposition that the common law prohibited threatening extreme force in those situations in which the actual use of extreme force was prohibited. MODEL PENAL CODE § 3.04 commentary at 29 (Tent. Draft No. 8, 1958). Observing only that this was "an unduly severe rule," *id.*, the Code proposed an alternative that would define deadly force as "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm," *id.* § 3.12(2). But a threat to cause such harm was specifically excluded from the definition. MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962). This has been adopted in a number of jurisdictions. *See, e.g.,* FLA. STAT. ANN. § 776.06 (West 1976); ILL. ANN. STAT. ch. 38, § 7-8 (Smith-Hurd 1972). *See also* *Wilson v. Warminster Township*, 28 Bucks 162, 166, 74 Pa. D. & C.2d 407, 414 (1976) (officer's action in firing warning shot into the air "fell far short of the use of deadly force").

314. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 56, at 404 (1972). Suppose, however, the officer recognizes that if he curtails his efforts to make the detention, the suspect—probably because he will escape—will no longer resist in a manner justifying the use of deadly force. Must the officer desist? LaFave indicates that the fact that the rule requiring retreat before the use of deadly force does not apply to arrests, *id.*, suggests that desistance is not required. In both the arrest and investigatory stop contexts, this may circumvent the prohibition against the use of deadly force to make the detention. Arguably, this circumvention is more offensive in the nonarrest detention context and perhaps ought not be permitted in that setting.

cumvent any limitation on displaying or threatening to use their firearms to effect a detention by asserting that their actions were taken in anticipation of a need to engage in self-defense. Any limitation on an officer's right to exhibit or point a firearm that is qualified by an exception for situations where the officer anticipates possible resistance may become so flexible as to be meaningless.

In any case, *Garner* made clear that the use of force in making detentions has fourth amendment as well as state law implications.³¹⁵ It gave little hint, however, of the limits that the fourth amendment places on the use of force in making arrests, of the extent to which similar or other limits are placed on the use of force in effectuating other investigatory tasks, or even of the approach that the Court is inclined to take in distinguishing federal constitutional issues from those remaining within state control. These uncertainties are of special concern in the area of nonarrest detentions, where the abandonment of the probable cause standard provides a possible rationale for more rigorous fourth amendment limits on the use of force than are imposed in arrest situations.

There is no doubt that state law should—and probably already does—prohibit the use of more force than an officer reasonably believes necessary to make a detention.³¹⁶ *Garner* indicates that the fourth amendment will impose some limitations upon the use of excessive force. Given the result in *Garner*, it seems clear that the fourth amendment would be violated by the actual use of force likely to cause death or serious injury for purposes of effectuating nonarrest detentions for investigation of nonviolent crimes. It is far from certain, however, whether the actual or threatened use of force should be further restricted and whether any such limitations should be imposed by the fourth amendment or by analogous state constitutional provisions.

On balance, however, dilution of the probable cause standard for nonarrest detentions justifies greater constitutional limits upon the use of force to make such detentions than may be appropriate in the arrest situation. *Garner* would be best developed by construing the fourth amendment as prohibiting the use of force or threats to use force likely to cause

315. Some federal constitutional limits upon grossly excessive force may also be imposed under the general requirement of due process. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (officers' actions, taken without probable cause, in forcing entry into suspect's bedroom and having medical personnel cause suspect to vomit swallowed contraband constituted "conduct that shocks the conscience," and conviction for possession of contraband violated due process). But, in light of *Garner*, it is likely that any force that arguably would be impermissible under *Rochin*'s "shock the conscience" test would also—and independently—violate the fourth amendment.

316. Whether these limits should or may be enforced by excluding evidence obtained through a detention effectuated by excessive force is a separate issue, but again one of purely state law. See *Dix, Exclusionary Rule Issues as Matters of State Law*, 11 AM. J. CRIM. L. 109, 119-23 (1983).

death or serious physical injury in the making of any nonarrest detention. Despite the problems such a position creates, the display of firearms ought not be prohibited if the officers can demonstrate that, in addition to grounds for the stop, they had reason to anticipate forcible resistance of a sort that would justify the use of their weapons. This standard should be administered, however, with recognition that its uncritical application could destroy the effectiveness of the general prohibition against displays of and threats to use firearms.

D. *Summary.*

Despite widespread acceptance of the validity of nonarrest detentions, the resolution of many related issues remains uncertain.³¹⁷ More importantly, the Supreme Court has perpetuated uncertainty as to the extent to which many of these issues are or may be "constitutionalized." This prevents state lawmaking authorities from identifying those areas that federal constitutional considerations will relegate to state regulation. The inability to identify those areas creates a risk that state lawmaking activity may be superseded by subsequent federal constitutional developments. This may help explain why state lawmakers have declined to engage in sustained and creative considerations of many nonarrest detention issues.

In addition, insofar as areas of state prerogative can be identified, the Supreme Court has failed to provide reasonable guidance for state lawmakers in identifying the issues. To some extent, it seems to have almost intentionally concealed them. *Williams*, for example, appears to have been written so as to obscure the question of whether nonarrest detentions should, as a matter of either fourth amendment or state law, be permitted for weapons or drug possession offenses. In rejecting a rigid specified limit on the duration of nonarrest detentions, the *Place* Court made no effort to develop the issues in a way that would sensitize state lawmakers to the possible value of imposing such a limit as a matter of state law. Even the hint in *Place* that admonitions might occasionally have fourth amendment significance was provided with no effort to encourage reasoned consideration, on the state level, of whether a state law requirement of routine admonishments might be desirable.

The *Terry* trilogy suggested the constitutionalization of nonarrest detention law; the Supreme Court has never disclaimed this approach

317. There remains substantial uncertainty concerning the point at which a police/citizen confrontation becomes subject to the requirements of nonarrest detentions, the limits on the type of offense that can justify a detention, the length of permissible detentions, any limits that may exist on movement of the detained person, the need to inform the detainee of the nonarrest nature of the detention, and the force that may be used to effect a detention of this sort.

and continues to define broadly the scope of federal constitutional concerns. In large part, this results from a failure to resolve the fourth amendment issues carefully and responsibly. Uncertainty as to the content of the fourth amendment's reasonableness requirement in this context greatly decreases the effectiveness of federal constitutional review of nonarrest detentions. But it also discourages state lawmaking authorities from identifying and acting on those matters that might not have federal constitutional dimensions. This, in turn, greatly disserves the public's legitimate interest in having state governments formulate legal requirements for law enforcement conduct that mesh with the federal constitutional framework, and in having those requirements enforced by meaningful legal procedures on the state level.

III. BROADER ISSUES REGARDING NONARREST INVESTIGATORY DETENTIONS

In addition to questions concerning the scope of the authority to detain, nonarrest investigatory detentions raise at least three issues related to more general concerns in search and seizure law. Those general concerns include the permissible or desirable extent of reliance on case law for the development of legal limits on law enforcement authority, the manner of characterizing police action for purposes of judicial review, and the interrelationships among police inquiries, restrictions on citizens' liberty, and the citizens' interest in avoiding self-incrimination.

A. *The Need for and Significance of Enabling Legislation.*

The existence in some but not all states of statutory provisions authorizing nonarrest investigatory detentions raises the dual issues of the validity and the necessity of such authorizations. Underlying these issues is the broader question of the desirability, and perhaps constitutional necessity, of having lawmakers place comprehensive limits on law enforcement authority before that authority is made available to police agencies.³¹⁸

318. Perhaps any such requirement as may exist could be met by court rule as well as by legislation. Judicial rulemaking authority is generally limited to "procedural" matters, but the definition of "procedural" remains unclear. See generally C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY (1978); Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). Although the process of issuing court orders for those law enforcement practices that require judicial authorization may be within the realm of rulemaking, it is doubtful whether the rulemaking power extends to police practices not undertaken pursuant to court orders. *But cf.* State v. Leonardis, 73 N.J. 360, 367-75, 375 A.2d 607, 611-14 (1977) (state court's rulemaking power permitted it to promulgate rules for prosecutor's pretrial diversion programs). In any case, whether and when to subject citizens to deprivations of liberty would seem to be a substantive law decision beyond the bounds of the

Both the authority of law enforcement officers to engage in certain activities and the limits on that authority might be developed in case law. Perhaps, however, this method is unacceptably ineffective and expensive. It may not produce the comprehensive guidelines necessary to acceptable administration of police authority. Or, if the case law does produce comprehensive guidelines, it may accomplish this only after a prolonged period of uncertainty during which the authority is exercised within insufficient limits. To the extent that the case law method contains these defects, legislative action may be both desirable and constitutionally necessary.

This issue recently arose in the nonarrest investigatory detention context in *Kolender v. Lawson*.³¹⁹ *Lawson* involved the facial validity of a California statute³²⁰ defining the offense of disorderly conduct. Among the ways in which the offense could be committed under the statute, as construed by the state courts, was for a citizen properly subjected to an investigatory stop to fail to provide "credible and reliable" identification or to fail to "account for his presence."³²¹ The statute, the Court held, did not provide sufficient standards for determining whether a properly detained individual had complied with its requirements; the statute therefore violated the due process prohibition against vagueness.³²² Further, the substantial discretion that law enforcement officers could exercise under the statute encouraged arbitrary enforcement.³²³ Thus, the statute violated the rationale as well as the letter of the vagueness doctrine.

To what extent is other state legislation concerning field stops suspect under *Lawson*? Does *Lawson's* demand that certain statutory language authorizing nonarrest law enforcement activity be precise suggest that such activity must be affirmatively authorized by state legislation that limits the officers' authority in sufficiently precise terms?

rulemaking power. *E.g.*, *Lunsford v. Commonwealth*, 436 S.W.2d 512, 514 (Ky. 1969) (determining the number and duration of "peace bonds" beyond rulemaking authority because power to deprive a person of liberty is substantive). *But see* *State v. Hall*, 93 N.J. 552, 557, 461 A.2d 1155, 1158 (1983) (despite absence of legislative authorization, state courts have authority, on less than probable cause, to issue orders directing suspects to appear in lineups); *State v. Fields*, 85 Wash. 2d 126, 128-29, 530 P.2d 284, 285-86 (1975) (although statute authorized search warrants only for evidence of felonies, court could promulgate rule authorizing search warrants to issue for evidence of misdemeanors as well). But if a state should determine that its judiciary had authority to promulgate rules concerning nonarrest detentions, the analysis developed in the text for enabling legislation would apply to those rules as well.

319. 461 U.S. 352 (1983).

320. CAL. PENAL CODE § 647(e) (West 1970 & Supp. 1985).

321. *Lawson*, 461 U.S. at 356-57.

322. *Id.* at 361.

323. *Id.*

1. *Adequacy of Existing Legislation.* Several modern statutes follow the lead of the Uniform Arrest Act and authorize further police action if an "objectively suspicious" subject "fails to identify himself or explain his actions to the satisfaction of the officer."³²⁴ Under *Lawson*, is this statutory language facially valid? The language is no more precise than that condemned in *Lawson*. To the extent that the California statute in *Lawson* conferred unacceptable discretion upon the officer in the field, it is difficult to see how this language might limit such discretion.

Perhaps, however, there is a significant difference in the effect of this language. Failure to meet the statutory language at issue in *Lawson* authorized a criminal conviction. Under the Uniform Arrest Act and legislation modeled after it, however, an officer's determination that the suspect has failed to identify himself adequately or to explain his suspicious actions merely authorizes further investigatory detention. Whether, under *Lawson*, the fact that a suspect is subject merely to further detention rather than a potential criminal conviction will allow more imprecision in the statutory language is uncertain. If the result of arbitrary police action can be at most a brief period of detention, this constitutes a less significant intrusion upon citizens' interests than the potential conviction under the California statute. Perhaps where the underlying interests are less threatened, because only a brief detention is possible, a higher likelihood of abuse can be tolerated, and, therefore, less precision in the enabling authority is required. Yet the *Lawson* opinion gives little indication that the Court had this distinction in mind. The opinion suggests that the functional defect in the statute was not that it permitted ultimate conviction of the offense of disorderly conduct, but rather that it encouraged arbitrary police action in further detaining suspects.³²⁵

Although the Court, in *Lawson*, commented that "further precision" in the language of such statutes was practicable,³²⁶ it failed to indicate what degree of precision would suffice. The Model Code of Pre-Arrest Procedure simply avoids the issue by structuring its provision so as to make a statement of any criterion unnecessary: an officer is authorized to detain an individual, if reasonably necessary, in order "to obtain or verify the identification of such person, to obtain or verify an account of such person's presence or conduct, or to determine whether to

324. UNIFORM ARREST ACT § 2(2) (1939), reprinted in Warner, *supra* note 78, at 344. See, e.g., DEL. CODE ANN. tit. 11, § 1902(b) (1979); MASS. ANN. LAWS ch. 41, § 98 (Michie/Law. Co-op. 1983) ("who do not give a satisfactory account of themselves").

325. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (California has failed to establish standards "by which the officers may determine" whether suspect has complied with statute) (emphasis added).

326. *Id.* But cf. *United States v. Powell*, 423 U.S. 87, 94 (1975) (availability to Congress of clearer language does not mean that language used is unconstitutionally vague).

arrest such person.”³²⁷ The detention may last “for such period as is reasonably necessary for the accomplishment of the purposes [of the detention],” but not longer than a specified maximum time.³²⁸ Some state statutes take a similar approach.³²⁹ If *Lawson* requires precision in the language defining an officer’s authority to detain a person after requesting or demanding identification or an explanation of the person’s conduct, does the language of the Model Code of Pre-Arrest Procedure satisfy that requirement? It is difficult to see how. The Code assumes, without expressly saying so, that an explanation or identification satisfactory to the officer should result in release of the suspect. Yet it makes no effort whatsoever to define the type of identification, explanation, or verification that would require the officer to release the detainee. If the Uniform Act’s approach is unsatisfactory, certainly the Code’s is little better.

Many of the statutes authorizing field investigatory detentions are even less comprehensive. The statutes typically authorize officers to detain suspects and request or demand information, but do not address the officers’ further options or responsibilities.³³⁰ If due process or the fourth amendment demands precision concerning officers’ authority to detain after the initial stop, these provisions are less satisfactory than the California statute at issue in *Lawson*.

Despite the Court’s comment in *Lawson*, however, it is difficult to see how statutory language could adequately guide and limit officers’ discretion during an otherwise proper detention, other than to direct them to limit the suspect’s detention to a period necessary to obtain reasonable evidence of the suspect’s identity, information dispelling the officer’s initial suspicions, or grounds for arrest. Although this language may be acceptable as the basis for brief field detentions, it may not suffice when the issue is instead the suspect’s guilt of a crime. *Lawson*, then, may best be read as limited to statutory language that creates a criminal offense the enforcement of which involves the exercise of substantial field discretion by police officers.

2. *The Need for Enabling Legislation.* If *Lawson* does require precision in the language authorizing nonarrest investigatory detentions,

327. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1)(a)(ii) (Final Draft 1975).

328. *Id.* § 110.2(1).

329. *E.g.*, FLA. STAT. ANN. § 901.151(3) (West 1985) (detention may not last longer than is “reasonably necessary” to effect its purpose).

330. *E.g.*, ILL. REV. STAT. ch. 38, § 107-14 (Smith-Hurd 1980) (officer “may demand the name and address of the person and an explanation of his actions”); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 1981) (officer “may demand of [the suspect] his name, address and an explanation of his conduct”).

does it also require any particular type of authorization? Nonarrest detentions may be "reasonable" for fourth amendment purposes only if they are made pursuant to the enabling authority of a statute that is precise enough to minimize the risk of improper administration.

The fourth amendment sometimes demands enabling and limiting authority for law enforcement activity. In *Berger v. New York*,³³¹ the Supreme Court considered the fourth amendment propriety of certain surveillance actions by New York police taken under court orders issued pursuant to the state's eavesdropping statute. Over the objection of Justice White,³³² the majority disregarded the issue whether the particular police activity to which Berger was subjected could have been constitutionally authorized by the New York legislature and courts. Instead, it held that the eavesdropping statute was invalid "on its face," and therefore action taken under its authority violated the fourth amendment.³³³ Similarly, the dictum in *Davis v. Mississippi*³³⁴ can be read as suggesting that stationhouse investigatory detentions on less than probable cause would satisfy fourth amendment requirements only if made pursuant to statutory provisions that assured the proper issuance and execution of court orders authorizing such detentions.³³⁵

Such a position can be convincingly defended. Fourth amendment reasonableness can be considered violated if there is an unacceptable risk that law enforcement authority will be arbitrarily applied.³³⁶ In some situations, the absence of enabling legislation or its equivalent may create such a risk. A firm tradition of case law that establishes the limits of a certain enforcement authority may be sufficient to prevent arbitrary application. The limits on the arrest authority, for example, are generally agreed upon and are firmly embodied in case law. Yet when law enforcement officers are granted new authority the limits of which are not defined by any readily-available and authoritative source, fourth amendment reasonableness can reasonably be read as requiring that at least the most important limits on the authority be specified in advance.

The arguments for such a requirement are strongest with respect to law enforcement activity at the periphery of fourth amendment acceptability. Such activity may intrude most severely on the interests protected

331. 388 U.S. 41 (1967).

332. *Id.* at 108 (White, J., dissenting).

333. *Id.* at 55.

334. 394 U.S. 721 (1969).

335. The dictum refers to "narrowly circumscribed procedures," *id.* at 728 (emphasis added), and suggests that detentions might comply with fourth amendment requirements "under narrowly defined circumstances," *id.* at 727 (emphasis added).

336. See *Delaware v. Prouse*, 440 U.S. 648 (1979) (discussed *supra* text accompanying notes 53-54).

by the fourth amendment or pose the highest risks of improper application, or both. It therefore presents the strongest argument for well-defined, enforceable limits.

This reading of the fourth amendment is consistent with *Berger* and with the *Davis* dictum. Both cases involved law enforcement activities arguably at the periphery of fourth amendment acceptability. Eavesdropping, the issue in *Berger*, is by its nature exceptionally intrusive on privacy interests; the stationhouse detention procedures discussed in *Davis* come dangerously close to being arrest-like detentions without the traditional protection of the probable cause requirement. Both activities, then, would be appropriate subjects for a fourth amendment requirement of enabling authority.

Field detentions would also be primary candidates for inclusion in a fourth amendment requirement of enabling authority. There is no clearly defined common law authority for nonarrest detentions,³³⁷ and certainly the case law contains no clear and comprehensive development of the limitations upon such detentions. Once the requirement of probable cause is abandoned, the activities approach the periphery of the fourth amendment's realm of acceptability. Moreover—as the Court recognized in *Terry*—the highly discretionary nature of field stops creates an exceptionally high risk of arbitrary enforcement. Thus, *if* the fourth amendment requires that any state law enforcement activity be conducted pursuant to specific and limiting enabling authority, field investigation stops should be among those activities.

This argument, however, was apparently rejected in *Sibron*. Refusing to address the facial validity of the New York "Stop and Frisk" statute, the Court instead focused on whether the search in the case—regardless of whether it was authorized by the state statute—was within fourth amendment limitations. Chief Justice Warren's opinion purports to distinguish *Berger* as applicable only when the law enforcement action is one that under fourth amendment standards requires a valid warrant.³³⁸ Perhaps this distinction makes sense. Such situations may create an especially high risk of error in the complex process of preparing,

337. See *supra* text accompanying note 78.

338. The Court contrasted the issue presented in *Sibron* with the situation in which a defendant challenges a search under a warrant issued pursuant to a statute and questions "the adequacy of the procedural safeguards written into [the] statute." *Sibron*, 392 U.S. at 59. In such situations:

No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment.

Id. In contrast, the Chief Justice commented, the constitutional validity of a warrantless search "is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Id.*

evaluating, and acting on an application for a warrant or its equivalent. Only if the process is conducted pursuant to precise and limiting enabling authority can this risk of error be reduced to acceptable levels.³³⁹

On balance, however, the distinction seems inappropriate. If the risk of noncompliance with fourth amendment standards sometimes requires that state law enforcement activity be conducted pursuant to limiting enabling authority in order to minimize noncompliance, the rationale for the requirement seems to apply more strongly to certain warrantless police actions. Presumably compliance with fourth amendment standards in field stops will be accomplished by pre-stop announcement of the constitutional requirements and post-stop imposition of exclusionary penalties when those requirements have not been met. The effectiveness of these mechanisms for encouraging compliance demands reasonable certainty both in the pre-stop standards made available to law enforcement officers and in the standards later used in litigation to determine whether exclusionary penalties should be imposed. There is no apparent reason why the sort of comprehensive standards that are likely to be established only through enabling legislation should be limited to the context of law enforcement activities in which officers are required to act pursuant to a warrant.³⁴⁰ To the contrary, judicial officers charged with issuing warrants or their equivalents would be expected to discern from less "direct" sources—such as judicial precedent and analogous situations—the contents of fourth amendment requirements, an expectation that could not reasonably be imposed upon law enforcement officers untrained in legal research and analysis. The argument for fourth amendment-mandated enabling legislation thus seems to be strongest where the law enforcement activity at issue is not subject to the warrant requirement.

339. This would accommodate the dictum, in *Davis*, in which the Court implies that there is a need for enabling authority for *court-ordered* stationhouse investigatory detentions on less than probable cause. See *supra* text accompanying note 275.

It is also possible that the Court is more willing to demand rules for judicial action than for administrative (i.e., law enforcement) action because of a notion that, as a superior tribunal, it is entitled to exercise more rigorous supervision over judicial action. Although this approach may be appropriate as a general matter of judicial review, it is quite artificial as applied to the exercise of the Court's constitutional authority to demand enabling legislation.

340. The Court's recent recognition of a "reasonable good faith" exception to the exclusionary sanction for situations in which officers act pursuant to invalid warrants is consistent with this suggestion. See *United States v. Leon*, 104 S. Ct. 3405, 3420 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424, 3428 (1984). This exception is based at least in part on the Court's conclusion that an exclusionary sanction is unnecessary to encourage judicial officers to follow legal standards in issuing warrants. See *Leon*, 104 S. Ct. at 3418. If the warrant process presents a less compelling case for using the exclusionary sanction to assure compliance with the applicable constitutional standards, it also presents a similarly less compelling case for a requirement of limiting enabling legislation.

3. *Conclusion.* *Lawson* tends to confirm that state law enabling authority for some police actions must exist and must be sufficiently comprehensive and precise to minimize improper administration.³⁴¹ Such a requirement may, most reasonably, apply to several types of law enforcement activities. First, it may apply to activities with no well-defined common law analogue, where the existence of and limitations on the authority to engage in the activities cannot be presumed to have been developed and adopted in the absence of legislative action. Field detentions, unlike arrests, are of this type. Second, the enabling authority requirement may apply to those activities that deviate significantly from the fourth amendment's benchmark requirements of a warrant and probable cause. Field detentions, of course, require neither. Finally, the enabling law requirement may apply to those activities that impinge most significantly on the underlying privacy interests protected by the fourth amendment. Field stops, because of their limited nature, arguably constitute comparatively minor intrusions on citizens' privacy. On the other hand, other field stop characteristics suggest that such detentions, viewed comprehensively, are exceptionally intrusive. They are low-visibility activities and are thus difficult to regulate by exclusionary sanctions or other legal devices. They are likely to be applied disproportionately to members of racial and other minorities, who, because of their historical exposure to police abuse and their consequently heightened sensitivity to police contact, experience a more significant privacy intrusion during

341. To the extent that such a requirement exists, can it be satisfied by carefully drafted state judicial action that purports to anticipate and address limits on police authority? In applying the due process void-for-vagueness doctrine, the Supreme Court has considered state statutes as construed by the state courts without critical consideration of whether the state judicial constructions were dicta or holdings. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 355-56 n.4 (1983) (construing statute in light of construction given it by state intermediate appellate court). Supreme Court case law is replete with examples of opinions in which the Court purported to address an area of concern comprehensively in language clearly unnecessary to disposing of the precise issues before the Court. *Miranda v. Arizona*, 384 U.S. 436 (1966), is the best example. See also *Illinois v. Gates*, 462 U.S. 213 (1983) (addressing sufficiency of search warrant affidavits relying upon "tips"); *Franks v. Delaware*, 438 U.S. 154 (1978) (addressing defendants' right to a hearing on claim that search warrant was based upon an affidavit that contained factual errors). But judicial dicta is notoriously flexible, as the post-*Miranda* decisions of the Court make clear. See *Berkemer v. McCarty*, 104 S. Ct. 3138, 3149-51 (1984) (declining to accord "talismanic power" to *Miranda's* dictum that its requirements applied whenever suspect deprived of freedom of action, and holding requirements inapplicable during "traffic stop"); *Harris v. New York*, 401 U.S. 222, 224 (1971) (rejecting "comments" in *Miranda* that statements obtained in violation of its requirements were inadmissible for all purposes and holding such statements admissible to impeach a testifying defendant). Although judicial construction of a statute or court rule may reasonably be regarded as bearing upon the statute or rule's adequacy under the vagueness doctrine, case law should not, given its tendency towards impermanence, itself suffice as the enabling authority. If there is a federal constitutional requirement of precise enabling authority, it should be construed to require either legislation or court rule as interpreted in judicial decisions in which the terms of the statute or rule were reasonably germane to the issues before the courts.

even a brief law enforcement detention. Finally, field stops are common—probably occurring more frequently than any other law enforcement activity covered by the fourth amendment. Thus, because of this frequency, even if each detention involves a minimal intrusion on a citizen's privacy, the practice considered as a whole has important ramifications for society's privacy interests.

A requirement of limiting enabling legislation or its equivalent would encourage state lawmakers to address those aspects of nonarrest field detentions that remain prerogatives of state law. In this sense, the *Lawson* suggestion that such legislation is necessary is quite consistent with the Court's responsibilities in this area. A review of current state law regarding nonarrest detention issues suggests that state lawmakers have failed to engage in the sort of comprehensive limit-setting that would make the nonarrest detention authority an acceptable way to accommodate citizens' interests in liberty and in effective law enforcement.³⁴² Occasional legislative action and the haphazard common law process have not provided a sufficient framework to protect against misuse of the nonarrest detention power.

Whether or not the fourth amendment prohibits state officers from making nonarrest detentions in the absence of comprehensive state enabling and limiting legislation, this analysis suggests that as a matter of sound state policy such legislation should precede the grant of authority to make nonarrest detentions. This suggestion comes late in the game, however, given the widespread state judicial willingness to authorize nonarrest detentions even in the absence of legislative action. Moreover, even where legislative action has occurred, it has seldom produced the sort of comprehensive framework for the nonarrest detention authority that should exist. Legislatures, of course, are free to return to the matter or, if nonarrest detention authority has been judicially recognized, to turn to it *de novo*. Given the complex and controversial nature of the issues, however, there seems little likelihood that many legislatures will do so in the absence of a federal constitutional mandate.

B. *Characterizing Detentions for Judicial Review Purposes.*

Administration of exclusionary sanctions has created a system for judicial review of many aspects of law enforcement conduct. Implementation of this system often requires preliminary characterization of law enforcement conduct in order to ascertain the appropriate criterion for review. Given the variety of possible review criteria, this characteriza-

342. See *supra* notes 77-123 and accompanying text.

tion often determines the outcome of litigation. The variety of detentions makes this an especially important issue in detention analysis.

The major question regarding judicial review of nonarrest detentions is whether there are or should be any limits on the prosecution's ability to characterize a detention as a nonarrest investigatory detention. *Hogan v. State*³⁴³ illustrates the problem. Officers were told by the complainant that Hogan had robbed him in front of the House of Joy Lounge. Apparently because the complainant had been intoxicated, the officers doubted whether they had probable cause for an arrest. Nevertheless, they proceeded to the lounge and located Hogan. One officer told Hogan that the officers needed to talk to him outside and grabbed him by his left arm. Once outside, the officer informed Hogan that he was "under arrest for robbery investigation." A search of Hogan revealed a pistol; the admissibility of the pistol ultimately became the controlling issue.³⁴⁴

Hogan's detention might be characterized two ways. If regarded as a nonarrest investigatory detention, it could be valid even if the officers lacked probable cause to believe Hogan guilty of the robbery. On the other hand, under this approach, the officers could conduct only a weapons search, and their right to do even this would be limited by the need to demonstrate reasonable apprehension for their safety. If the detention were characterized as an arrest, a full search of Hogan would be permissible. On the other hand, if so characterized, the detention (and the search) would be constitutionally valid only if the officers' information rose to the level of probable cause. Arrests, moreover, may be subject to additional requirements under state law. Although either theory presents certain problems from the prosecution's perspective, there may be nothing in the definition of either arrest or nonarrest detention that restricts the prosecution in the approach that it may take in characterizing the officers' actions.³⁴⁵

A number of jurisdictions purport to characterize arrests by the fact of custody.³⁴⁶ But such definitions obviously predate the development of distinctions among types of detentions and are of no value in characteriz-

343. 631 S.W.2d 159, 160 (Tex. Crim. App. 1982).

344. *Id.*

345. A recent study indicated that, at least for statistical purposes, law enforcement agencies vary significantly in what they characterize as an arrest. Sherman & Glick, *The Quality of Police Arrest Statistics*, POLICE FOUND. REP., Aug. 1984, at 1-7. Generally, police agencies did not regard a detention as an arrest, even if it resulted in the suspect's transportation to the stationhouse, unless the suspect was "booked." *Id.* at 4. But one department included field interrogations as arrests. *Id.* at 5.

346. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977) (person is arrested "when he has been actually placed under restraint or taken into custody"). For a general discussion of the variation among legal definitions of "arrest," see Sherman, *Defining Arrest: Practical Consequences of Agency Differences* (pt. 1), 16 CRIM. L. BULL. 376, 376-78 (1980).

ing detentions for purposes of modern analysis. It seems virtually certain that, for fourth amendment and other purposes, whether or not a detention *took place* at all will be resolved in the same way, whatever the nature of the detention. The more difficult task is identifying the appropriate method for *categorizing* detentions for purposes of review of their validity and related matters.

There are several major alternatives in categorizing detentions. One looks to the detaining officers' subjective intentions, while a second looks to the citizen's perception of the detention, and under a third approach, some objective benchmark such as the officer's contemporaneous statements would be controlling. A fourth approach would simply permit the prosecution to characterize the detention in any manner it chooses.

1. *Post Hoc Characterization.* The simplest approach would permit a detention to be characterized in any fashion that would enable a court to uphold it and the activity incident to it. Under this approach, the only issues in *Hogan* would be whether the officers reasonably suspected that Hogan had committed the offense, whether they had a sufficient basis to fear for their safety, and whether the search was within the scope of a permissible weapons search. If these issues were all answered affirmatively, the detention would then be characterized as a field stop—and a valid one—and the search would be upheld on these grounds.³⁴⁷

This approach has the virtue of simplicity, but there are at least two arguments that can be raised against it. First, it does not penalize detentions on less than probable cause that are made for the purpose of detaining a suspect longer than is permissible on reasonable suspicion or for the purpose of conducting procedures that are impermissible during a non-arrest investigatory detention. Nor does the approach penalize detentions on less than probable cause that are perceived by the detainee as likely to be impermissibly long or likely to involve impermissible procedures. Therefore, the post hoc characterization approach does not directly attempt to discourage such detentions. Perhaps this is appropriate. A nonarrest detention may not be significantly more intrusive simply because it is intended or expected to result in prohibited activity.³⁴⁸ Therefore, there may be insufficient reason to seek to deter such

347. Professor LaFave favors characterizing detentions by examining the actions—and not the intentions—of the detaining officers. See LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 427-28 (1984) (even when officer communicates to suspect intention to make "arrest," whether or not detention is to be characterized as arrest is best determined "by what the officer did rather than what he said").

348. Professor LaFave acknowledges the argument that a detention becomes more intrusive when the officer communicates to the suspect that an arrest has been made. *Id.* at 428. But he quickly jumps to the conclusion that nevertheless it is more appropriate to "measure the extent of

detentions. Or, sufficient disincentive for these detentions may already be provided by attaching an exclusionary penalty to their fruits if and when—but *only* if and when—the officers' intentions or the subjects' apprehensions materialize.

On the other hand, it seems clear that in at least some circumstances the intrusiveness experienced by a detainee will be significantly affected by the detainee's perception of what will or might occur, whether or not that apprehension materializes. Actually experiencing a twenty-four-hour detention is, of course, substantially more intrusive on privacy and liberty interests than experiencing a twenty-minute detention, though experiencing a twenty-minute detention may similarly be made substantially more intrusive if the detainee believes throughout this period that the detention is the initial stage of an arrest with its prolonged period of detention and increased risk of prosecution.

Some increases in intrusiveness are so incrementally minimal as to warrant little or no concern, especially as matters of fourth amendment law. *If*, however, a detention is rendered substantially more intrusive by such factors as the officer's intention or the detainee's perception as to its likely progression, suspects' interests in protection from such increased intrusiveness argue strongly for an approach that directly discourages detentions based on the intended or expected progress of the detention.

Second, the post hoc characterization approach is arguably inconsistent with an effective system of judicial review of law enforcement actions. Meaningful review is most likely to be accomplished if police actions are reviewed on the same basis as they were taken. Thus, review is unlikely to be meaningful if detentions made as custodial arrests are reviewed as though they were made as investigatory stops. Judicial review that proceeds without regard to the officers' actual grounds for action, moreover, may reinforce law enforcement's perception that judicial review is a largely technical and post hoc process of manipulating meaningless categories of police conduct. Such a perception is itself likely to reduce the effectiveness of the exclusionary sanction.

Whatever the ultimate merits of the post hoc characterization approach, it is sufficiently objectionable to warrant consideration of the major alternatives.

2. *Subjective Intention Approach.* Detentions could be distinguished on the basis of the detaining officer's subjective intention. Supreme Court case law is conflicting on the role played by officers' in-

the intrusion by what the officer did rather than what he said." *Id.* Apparently—although this is not clear—he regards the detainee's perception of the intrusiveness as having minimal significance compared to the officer's actions.

tentions in characterizing police conduct for fourth amendment review purposes. The Court's development of the concept of the "custodial arrest" necessary to make a full incidental search of a suspect appeared to rely heavily upon the officers' motivation. In *Gustafson v. Florida*,³⁴⁹ for example, the Court apparently assumed that Gustafson's detention became a custodial arrest when the officer formed the intention to transfer Gustafson to the stationhouse.³⁵⁰ On the other hand, in *Scott v. United States*,³⁵¹ the Court strongly suggested that the officers' intentions were irrelevant to fourth amendment analysis of their actions.³⁵² More recently, however, the Court has made clear that whether and when arson investigators require a traditional search warrant to enter burned premises depends upon their "intent." A traditional search warrant is necessary if and only if they have probable cause to believe that arson was committed and are proceeding with the objective of gathering evidence of the crime.³⁵³

If detentions are to be distinguished by the officers' intentions, what state of mind should be necessary to render a detention an arrest or an investigatory detention? Obviously, the test for distinguishing detentions

349. 414 U.S. 260 (1973).

350. See *id.* at 262 (parties conceded that officer "took petitioner into custody in order to transport him to the stationhouse for further inquiry"). Compare *United States v. Robinson*, 414 U.S. 218, 221 n.2 (1973) (police witness defined "'full custody arrest'" as "one where an officer 'would arrest a subject and subsequently transport him to a police facility for booking'"), which defined custodial arrest in terms of what the officer did rather than the officer's initial intention.

A number of state decisions hold that a blood sample may not be taken from a suspect despite the existence of probable cause to believe such a sample will produce evidence of intoxication unless the suspect has been "formally" arrested. *E.g.*, *People v. Superior Court*, 6 Cal. 3d 757, 761, 493 P.2d 1145, 1147, 100 Cal. Rptr. 281, 283 (1972); *Commonwealth v. Murray*, 441 Pa. 22, 25, 271 A.2d 500, 501 (1970). *Contra* *People v. Sutherland*, 683 P.2d 1192, 1195-96 (Colo. 1984) (relying in part on *Rawlings*). But even these cases have not definitively addressed what is required for a formal arrest.

351. 436 U.S. 128, 136-39 (1978).

352. The issue before the Court was whether a federal officer's actions in conducting electronic surveillance violated a federal statute. The statute requires that the surveillance be "conducted" in such a way as to minimize the interception of other communications. 18 U.S.C. § 2518(5) (1982). In rejecting an argument that the officer's failure to make a good faith effort to comply established noncompliance, the Court relied primarily upon the language of the statute. *Scott*, 436 U.S. at 139. Any "lingering doubt," it continued, was dispelled by Congress's intention not to go beyond then-current search and seizure law, which relied primarily upon an objective standard of reasonableness rather than the subjective intent or motivation of the officers. By using the term "conducted," the Court reasoned, Congress intended to make the actions rather than the motives of the officers controlling. *Id.* at 139. See generally *Burkoff, Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982).

353. See *Michigan v. Tyler*, 436 U.S. 499, 508-09, 512 (1978) (entry of burned premises generally requires only administrative warrant, but where there is probable cause to believe arson was committed and further entries are desired to gather evidence for prosecution, traditional warrant necessary); see also *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (plurality opinion of Powell, J., announcing the judgment of the Court) (where primary object of post-fire search is to gather evidence of criminal activity, search warrant based on probable cause is required).

should not require the officer to characterize his actions in legal terms. Rather, the distinction would most appropriately turn upon what conduct the officer contemplated. If, at the time the suspect was seized, the officer intended to pursue—insofar as he was able—the development of further proceedings or formal charges, the detention would be an arrest. If, on the other hand, the officer intended to detain the suspect for a period and in a manner permitted by nonarrest detention law, and to decide later whether or not to seek further proceedings or charges, the action would be a nonarrest detention.

The case for attributing no direct significance to intent in characterizing detentions according to the officers' intentions must rest heavily upon the desirability of a system of review that accommodates the reality of the conduct being reviewed. Review, it can be argued, will be most effective if law enforcement conduct is reviewed with consideration given to the basis on which it was taken. If officers do in fact distinguish detentions on the basis of intent, a realistic system of review arguably must take into account such intent.³⁵⁴

The case for attributing no direct significance to intent in characterizing detentions is easily established. Formulation of a meaningful standard for distinguishing detentions on the basis of intent may be difficult or impossible. What sort of intention should preclude characterization of the detention as a nonarrest detention? If an officer has tentatively determined that a suspect should be transported to a police facility for further processing, but remains open to considering further information about the suspect or the offense, must the detention be characterized as an arrest? In other words, for the detention to constitute an arrest, how unconditionally and inflexibly must an officer be consciously committed to transporting the suspect to the stationhouse? A standard that required total and inflexible commitment would be unrealistic; anything less, on the other hand, may render the standard so vague as to be meaningless.

354. The intent of the officer will nevertheless be irrelevant if the validity of the officer's action does not depend upon the reasons for taking that action. In regard to searches incident to arrest, for example, the Supreme Court has made clear that for fourth amendment purposes it is unnecessary that in each case a risk of harm to the officer or to property be demonstrated. *See United States v. Robinson*, 414 U.S. 218, 235 (1973); *see also Illinois v. LaFayette*, 462 U.S. 640, 646-47 (1983) (personal property of arrested person can be inventoried at time of booking, whether or not officers actually fear harm from the particular item). It follows that the validity of a search incident to an arrest should not depend upon the officer's perception regarding these risks. This is the Court's position. *Robinson*, 414 U.S. at 236. Intent, under the approach discussed in the text, should be required only where the applicable law subjects the justification for an officer's action to judicial review. In such situations as a search incident to an arrest, a decision has been made for other reasons to forego such review. The officer's state of mind is therefore properly regarded as irrelevant.

Even if conceptually satisfying standards can be developed, applying those standards may involve further and overwhelming problems given the unavailability of direct and reliable evidence about officers' past intentions. *Hogan* provides an example. Because the officers' action in *Hogan*, as in many cases, was affected by the result of the search, the officers' intent cannot be inferred from what the officers actually did. Inquiry must focus instead upon what the officers intended to do, assuming that the search was merely a protective weapons search and that it did not produce grounds for arrest. In *Hogan*, the officers articulated words capable of being construed as notice of arrest; this, of course, suggests an intention to arrest. On the other hand, the announced arrest was "for investigation" of robbery. Insofar as this announcement indicates that the officers had not yet formed an intention to pursue formally charging Hogan with the offense, should this preclude characterizing the detention as an arrest? Does it sufficiently indicate an intention to transport Hogan to the stationhouse for the announced "investigation"? The most appropriate inferences to be drawn from the officers' announcement are unclear; given the uncertainty as to what "intentions" are controlling, however, the significance of any such inferences is even more uncertain.

Whether or not inquiries into officers' intent are in fact accurate and economical, police officers may well perceive them as neither. As a result, review that includes an examination of officers' intentions can be expected to have either of two results. Officers may increasingly hesitate to make even proper nonarrest detentions, in order to avoid erroneous condemnation or simply the experience of being subjected to inquiry. Alternatively, they may regard such review as so divorced from reality as to be purely arbitrary and, thus, as something to be ignored. This reaction, of course, would greatly reduce the effectiveness of judicial review.³⁵⁵

355. A different approach was suggested by *New York v. Quarles*, 104 S. Ct. 2626 (1984), which held *Miranda* inapplicable to certain situations involving danger to the "public safety." Rejecting the argument that this exception to *Miranda* was unavailable because the lower courts had made no finding that the officer in fact acted with intent to preserve the public safety, the Court held that the availability of the exception does not depend upon the officer's motivation. *Id.* at 2632. Precisely what the Court intended as the standard was left unclear. Apparently, however, noncompliance with *Miranda* is excused under *Quarles* on a showing that the interrogation took place under circumstances in which a reasonable police officer would conclude that public safety necessitated immediate questioning without *Miranda* compliance. This approach, emphasizing what a reasonable officer in the circumstances would—or perhaps could—intend, might also be utilized in the detention context.

If the objections to reliance on actual intention are convincing, does the *Quarles* reasonable-intent approach provide a desirable or at least useful compromise? To some extent, such an approach would structure review so as to encourage reference to the legal standards. Police action would be characterized for review purposes according to the purpose for which a reasonable officer would have acted in the situation. Perhaps it would even recreate for review a more accurate view of the law enforcement action than does an approach emphasizing actual intention. Law enforcement

3. *The "Reasonable Perception" Approach.* In many areas of fourth amendment concern, a citizen's perception of a confrontation with a law enforcement officer—modified by the further requirement that such a perception be reasonable—has long been a touchstone of analysis. Whether law enforcement action constitutes a search subject to the amendment's demand of reasonableness, for example, depends upon whether it was reasonably perceived by the citizen as intruding on his privacy concerns.³⁵⁶ More directly related to detention law, a majority of the Court appears to have embraced a definition of seizure of the person that brings the fourth amendment into play only on demonstration that the citizen reasonably perceived that his freedom of movement was limited.³⁵⁷ If this approach were followed in characterizing detentions,

officers may develop, in response to their training and experience, an almost instinctive or intuitive response to recurring situations. In the *Quarles* situation, for example, officers apprehending a suspect who has exhibited a weapon may respond intuitively and without conscious consideration by attempting to locate the weapon as soon as possible. This may be a desirable state of affairs, or at least as much as the law can expect. If an officer did not form a conscious intent or purpose for certain action, a review standard that requires inquiry into such an intent or purpose is obviously undesirable.

It may be, then, that judicial review of law enforcement action ought not to encourage officers to consider in all, or many, situations whether their action is justified. Perhaps the only realistic objective is to encourage officers to develop reasonable but instinctive responses to such situations. A *Quarles* approach reviews police action on this basis and may most accurately correspond to how officers do and should act.

If such an approach is desirable in some situations, however, it may not be in others. The *Quarles* approach might be most appropriate where the underlying law enforcement activity is performed in potential emergency situations and where the activity poses relatively little risk to citizens' interests in privacy and avoiding self-incrimination. If so, it may not be appropriately brought into play for purposes of distinguishing between arrests and nonarrest investigatory detentions. The decision to make an investigatory detention may lend itself to conscious consideration more than those decisions involved in *Quarles* public emergency situations and even weapons searches. In a situation like *Hogan*, for example, it is not unrealistic to expect officers to consider consciously and to decide, before or while initially detaining a suspect, what type of detention is appropriate. Moreover, the characterization of a detention as an arrest has serious implications for the citizen's privacy interest because it allows a longer and more flexible detention and carries with it the right to conduct a full incidental search. On balance, the *Quarles* approach, whatever its merits elsewhere, is poorly suited to distinguishing investigatory stops from arrests for purposes of judicial review.

356. The leading case is *Katz v. United States*, 389 U.S. 347 (1967). See also *United States v. Place*, 462 U.S. 696, 706-07 (1983) (sniffing of luggage in public place by trained dog does not intrude upon reasonable expectation of privacy); *Smith v. Maryland*, 442 U.S. 735, 741-42 (1979) (persons using telephones probably do not expect that numbers they dial will be private, and any such expectation is not reasonable; thus, interception of such numbers is not a "search").

357. In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart, joined by Justice Rehnquist, stated that a person is "seized" under the fourth amendment only if, in view of the circumstances, a reasonable person would have believed he was not free to leave. *Mendenhall*, 446 U.S. at 554. The officer's intent to detain the person if the person sought to leave "is irrelevant except insofar as that may have been conveyed to [the suspect and thus affected her reasonable perception]." *Id.* at 554 n.6. Three other members of the Court concurred on other grounds, indicating they did not "necessarily disagree" with Justice Stewart's analysis. *Id.* at 560 n.1 (Powell, J., concurring in part and concurring in the judgment). In *Florida v. Royer*, 460 U.S. 491 (1983), a

the focus would be on how the detainee reasonably perceived his detention and its likely progression. If he reasonably perceived that the detention would lead to events—such as movement to the stationhouse—permitted by the law only incident to arrests, the detention would be characterized as an arrest. If the citizen reasonably perceived that the detention would not so progress, it would be characterized as an investigatory detention.

A 1983 Supreme Court decision indicated that the reasonable perception approach might be appropriate in characterizing detentions for fourth amendment purposes. In *Berkemer v. McCarty*,³⁵⁸ the Court was faced with the question of when a “traffic stop” became an arrest and therefore triggered the requirements of *Miranda*. After following McCarty’s weaving car for two miles, the officer stopped the car and required McCarty to get out. When the officer observed McCarty experiencing difficulty standing, he apparently formed the intent to “charge” McCarty with an offense, rather than merely to issue a citation; the officer’s intent was not, however, communicated to McCarty. McCarty, at the officer’s direction, unsuccessfully attempted to perform a field sobriety test; the officer then questioned him about his recent use of intoxicants. Only after McCarty gave incriminating responses did the officer “formally” place McCarty under arrest and transport him from the scene of the detention to the jail.³⁵⁹ The Court concluded that officers conducting only “traffic stops” do not place detainees “in custody” for purposes of determining *Miranda*’s applicability, but that *Miranda* does apply to custodial—that is, “arrest”—interrogations, even for minor offenses.³⁶⁰ It therefore became necessary to determine when the “traffic stop” ripened into an “arrest.”

At no point did Justice Marshall’s opinion for the Court expressly state the standard being applied. On the facts before it, the Court concluded that no arrest occurred until the officer “placed [McCarty] under arrest.”³⁶¹ By this the Court apparently—although this was not made explicit—meant that the arrest occurred when the officer formally and expressly communicated to McCarty that he was being arrested. The Court unambiguously rejected, however, the proposition that an arrest

majority of the Court appears to have adopted a version of Justice Stewart’s objective *Mendenhall* standard, by requiring “a show of official authority such that ‘a reasonable person would have believed that he was not free to leave.’” *Id.* at 502 (plurality opinion of White, J., joined by Marshall, Powell & Stevens, J.J.) (quoting *Mendenhall*, 446 U.S. at 554), 513-14 (Blackmun, J., dissenting). See also *INS v. Delgado*, 104 S. Ct. 1758 (1984).

358. 104 S. Ct. 3138 (1984).

359. *Id.* at 3142.

360. *Id.* at 3151.

361. *Id.*

occurred when the officer formed the intention to take McCarty into custody and charge him. "[T]he only relevant inquiry," the Court explained, "is how a reasonable person in the suspect's position would have understood his situation."³⁶² The officer's uncommunicated intention could not have affected this understanding.

The Court acknowledged that an inflexible rule that *Miranda* applies only when a suspect is formally placed under arrest would enable law enforcement officers to circumvent the *Miranda* requirements by simply delaying the formalities of arrest.³⁶³ To avoid this circumvention, the Court continued, the subject of a traffic stop must be regarded as "in custody" for purposes of *Miranda*, even in the absence of a formal arrest, if he "is subjected to treatment that renders him 'in custody' for practical purposes"³⁶⁴ or he is "subjected to restraints comparable to those associated with a formal arrest."³⁶⁵ The Court's rejection of the argument that this doctrine applied to the facts before it provides some hint as to what type of detention might be functionally equivalent to a formal arrest. A long period of time had not elapsed before the formal arrest was made. McCarty was not told that "his detention would not be temporary." During the detention, he was confronted by only a single police officer at a location visible to passing motorists, was asked only "a modest number" of questions, and was asked to perform a "simple" balancing test.³⁶⁶ Apparently, then, the Court might have held McCarty's detention to be the functional equivalent of an arrest if the detention had been prolonged, if McCarty had been told it would be lengthy, if it had involved movement to an isolated or police-dominated location, or if McCarty had been subjected to prolonged questioning or required to perform extensive—perhaps complex—tests.

Despite its length, the Court's opinion never clearly identifies the standard to be applied. The initial discussion suggests that the "only relevant inquiry" is the detainee's reasonable perception, but at no point is this suggestion developed. Later discussion, on the other hand, suggests the use of a post hoc approach, under which the detention would be characterized as an arrest if, but apparently only if, the officers actually did things—detained the suspect too long, for example—that are permissible only incident to a valid custodial arrest. Whether the selection of one of these approaches would have made a difference in the outcome of the case is uncertain because of the Court's ambiguity in defining what

362. *Id.* at 3152.

363. *Id.* at 3151.

364. *Id.*

365. *Id.*

366. *Id.* at 3152.

police conduct is permissible pursuant to a "traffic stop." McCarty might reasonably have perceived that his detention would lead to a stationhouse detention, despite the officer's having—at that point—actually detained him for only a few minutes at the scene of the original detention.

McCarty involved an inquiry into whether a defendant was "in custody" for purposes of *Miranda*; an approach for characterizing detentions in that context need not govern detention characterizations in other contexts.³⁶⁷ Yet the Court's concern for bright-line rules suggests that it is unlikely to look with favor on approaches that characterize detentions differently depending on whether the issue raised involves *Miranda* or the fourth amendment.

Would a reasonable perception approach appropriately categorize detentions for review purposes in the context of detention issues? In at least one way, clearly so. Under such an approach, a detention would be characterized as an arrest when, but only when, the citizen perceived himself as subject to a sufficiently intrusive detention. This approach would recognize the greater intrusiveness of those detentions, whatever their length, that are reasonably perceived by the detainee as the first step in a prolonged or otherwise more serious restriction on liberty, and would require correspondingly greater justification for such detentions. This would create a direct incentive not to undertake such detentions on information falling short of probable cause. Review would also proceed on a basis somewhat related to the officers' intentions; there is likely to be a high correlation between officers' intentions and detainees' perceptions. Although a reasonable perception approach might not structure review as effectively as an intent approach, it might be preferable to the ad hoc approach.

A reasonable perception approach, however, would involve line drawing problems similar to those raised by the intent standard. What must the citizen anticipate, and how likely must the citizen believe the anticipated consequence to be, before the detention becomes an arrest under a reasonable perception approach? Certainly the citizen's anticipation that the officer will use words of "arrest" cannot be controlling. Must the citizen anticipate, then, that the officer will engage in activity

367. *Miranda* is concerned, albeit indirectly, with the "voluntariness" of suspects' self-incriminating statements. Because suspects' perceptions are highly relevant in measuring voluntariness, perhaps whether *Miranda* applies should be tied as directly as possible to those perceptions. Suspects' perceptions may not be as relevant, however, in measuring the interests implicated in situations that do not involve self-incriminating statements. Cf. LaFave, *supra* note 347, at 426-28 (officer's announced intention to "arrest" should be taken into account if a statement is obtained, but not for otherwise characterizing the detention).

beyond that which customarily—or legally—accompanies an investigatory stop? If this is the inquiry, it will encounter ambiguity in the legal requirements and uncertainty about the reasonable person's understanding of those requirements. Under this approach, for example, a citizen's reasonable apprehension that he has been detained for purposes of moving him further than is permissible under a field stop may render the detention an arrest. But in the absence of a definitive standard for determining the amount of permissible movement, the lower courts will be left without a useful standard for determining whether the citizen's apprehension—if reasonable—rendered the detention an arrest.³⁶⁸

Even if the legal standards are clarified, perhaps they should not control. Citizens are unlikely to be aware of the legal significance of police activity under these standards. A citizen's perception that he is being subjected to procedures that the law permits only pursuant to an arrest may not signal to the citizen that the detention has become significantly more intrusive. If this is so, the interests that underlie search and seizure law are perhaps poorly served by imposing on the prosecution the duty of meeting arrest standards when such perceptions develop. On the other hand, the major apparent limits on nonarrest detentions—the prohibitions against excessive movement of the detainee and against prolonging the detention—are most likely tied to sensitivities shared by most citizens. Suspects will often perceive a significant difference in the detention when it exceeds these limits. This perception is arguably sufficiently related to the severity of the privacy intrusion to make the perception an appropriate benchmark.

If it can be determined what a citizen must anticipate, for purposes of characterizing a detention, how likely must the citizen believe such an outcome to be? It seems clear that movement of a citizen to a stationhouse would be impermissible pursuant to a field stop. It seems equally clear that a citizen in McCarty's position might reasonably anticipate from the onset of the detention some chance that the detention would result in movement to the stationhouse. Apparently, this is insuf-

368. Perhaps courts can consider the amount of evidence in the officers' possession and the officers' perception of the evidence. If the officers had probable cause, is it reasonable to infer that they intended to make an arrest? *Cf.* *State v. Mumbaugh*, 107 Ariz. 589, 594, 491 P.2d 443, 448 (1971) (where probable cause exists, it should be presumed that officers will arrest and therefore that interrogated suspect was "in custody" for purposes of *Miranda*). This seems unlikely, at least in the absence of proof that the officers recognized that the evidence they possessed would support an arrest. Yet even if the officers did so perceive the evidence, officers may decline to make a constitutionally permissible arrest often enough to raise doubts about the validity of such an inference. Suppose—as might well have been the case in *Hogan*—that the evidence suggests that the officers believed they lacked probable cause. Does this imply that they did not intend an arrest? Given the lack of procedural significance of an invalid arrest in most criminal cases, this, too, seems doubtful.

ficient. Must the citizen reasonably anticipate that such action is certain to occur? That it is more likely than not? Perhaps the inquiry simply cannot be made with the precision that such a standard appears to demand. If it cannot, is the reasonable apprehension standard acceptable? If reality requires that it be diluted into an amorphous and ill-defined inquiry, perhaps the standard is insufficient for such an important task.

McCarty substantiates such concerns. Insofar as it relied upon *McCarty*'s reasonable understanding, the Court somehow divined that *McCarty* did not—or did not *reasonably*—entertain a sufficient perception to render his detention an arrest until the officer announced his intention to transport *McCarty* to the stationhouse. This seems extremely artificial. The Court uncritically assumed that a reasonable citizen—perhaps one who has recently consumed intoxicants—who is operating a motor vehicle and is signaled by a police officer to stop would anticipate being detained only the brief period of time necessary for a citation. Further, the Court assumed that a reasonable citizen's expectations in this regard would not significantly change despite the officer's demand that the citizen perform a field sobriety test and despite the citizen's difficulty in performing it. Almost certainly, as the events progressed, a reasonable person would perceive an increasing likelihood that the detention would involve movement to the stationhouse. The Court's insensitivity to the *McCarty* facts casts substantial doubt on the ability of courts to apply a reasonable perception test.

4. *Admonitions: A Potential Per Se Rule.* Given the difficulty of relying on a detaining officer's intentions or a detained citizen's expectations, it is not unreasonable to consider alternative approaches. One possibility would require or encourage a detaining officer to inform the citizen, as soon as possible, of the nature of the detention intended. A reviewing court would then review the detention as characterized by the officer, at least in the absence of important reasons for modifying the officer's characterization. Under such an approach, a detention would be reviewed as a nonarrest detention only if the officer so informed the citizen.

An admonition³⁶⁹ informing the detainee of the nature of a nonarrest detention is required by the Model Code of Pre-Arrestment Procedure³⁷⁰ and by the Montana stop and frisk statute.³⁷¹ The requirement

369. See *supra* note 280 (note regarding usage of the terms "admonition" and "admonishment").

370. MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 110.2(5)(a)(ii) (Final Draft 1975) (suspect detained must be told "as promptly as is reasonable under the circumstances" that, among other things, he will be released within 20 minutes unless arrested).

371. MONT. CODE ANN. § 46-5-402(3) (1983) (person detained must be informed, "as promptly as possible under the circumstances" that "the stop is not an arrest but rather a temporary detention

that law enforcement officials provide this information was apparently intended to reduce the risk of improper pressure being placed on the suspect in order to prompt incriminating admissions, rather than to ease the task of characterizing the detention for judicial review purposes.³⁷² An admonition requirement, however, can also be supported by the need to review police activities accurately and economically under a set of standards that accommodates the need of law enforcement officials to be able to respond flexibly to various detention situations. If the arrest and nonarrest detention powers are to be separated and reviewed according to different criteria, it is important that officers be encouraged to distinguish between the two situations in their actions. If they are required to make an announcement of their planned actions, perhaps this will encourage them to structure their thinking and action along the lines of the legal standards and thus make review of their actions more meaningful.

An admonition requirement would provide a bright-line standard. Officers would have clear guidance as to the conduct required to ensure later review of their activity as a nonarrest detention. More significantly, lower courts would be provided with a standard for making the frequent detention characterizations required by search and seizure law.

Several arguments can be marshalled against an admonition requirement, however, especially as a requirement having fourth amendment dimensions.³⁷³ First, the need for such a requirement may be overstated.

for an investigation, and that upon completion of the investigation the person will be released unless he is arrested").

372. In both cases, the reasonable promptness requirement is modified by a more stringent demand that the admonition be provided before "questioning," under the Montana statute, MONT. CODE ANN. § 46-5-402(3) (1983), and before "sustained questioning," under the Pre-Arrestment Code, MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 110.2(5)(a) (Final Draft 1975).

Admonishments might also be regarded as necessary or desirable to reduce the intrusiveness of the detention. See *supra* text accompanying note 279.

373. In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court rejected—for fourth amendment purposes—the argument that a search could not be justified incident to an arrest where no "formal arrest" was made until after the search: "Where the formal arrest followed quickly on the heels of the challenged search . . . we do not believe it particularly important that the search preceded the arrest rather than vice versa." *Id.* at 111 (citations omitted). Apparently, the Court did not consider the potential value of requiring a "formal arrest." In fact, the term was never defined; presumably, however, the Court regards a "formal arrest" as an announcement by the officer that he is making an arrest. *Rawlings* in no way binds states to reject an announcement requirement for particular types of detentions.

There may also be reason, though, to limit an announcement or admonishment requirement to nonarrest detentions. Given the central nature of arrests in fourth amendment law as well as in the general perception of the public, it would not be inappropriate to hold law enforcement officers to arrest standards as a general rule when they have made a detention, whether or not anything was communicated to the suspect. If officers seek to bring themselves within one of the exceptions to the probable cause requirement, it may be reasonable to require as a prerequisite that they give the relevant admonishment to the suspect.

Without such a requirement, in the vast majority of situations, detentions can be accurately characterized for review purposes with a minimum of costly inquiry. Second, the cost may be excessive. A requirement of this sort may result in a significant number of detentions being held invalid for failure to admonish, despite little or no doubt about how the detention was perceived by those involved. Whatever is accomplished in terms of encouraging admonitions and facilitating review may simply not be worth the loss of evidence necessitated by enforcing the requirement.

Third, an admonition requirement may be impractical for several reasons. Often, officers would be uncertain about its applicability. The point at which an officer/citizen field confrontation escalates into a detention is often uncertain. Yet an officer who fails to anticipate the answer to this question and therefore fails to admonish the citizen may be penalized. Field confrontations often involve efforts by officers to encourage citizens to assist officers voluntarily in investigating suspicious situations. Formal *Miranda*-like admonitions may be recognized by officers as out-of-place, given the nature of the atmosphere that the officers are attempting to develop; the admonitions would often, then, be forgone. The increased formality of detentions accompanied by admonitions may discourage citizens from cooperating with the police. In practice, the admonitions may be inconsistent with the effective and reasonable use of the nonarrest detention authority.³⁷⁴

Finally, the ease with which such a requirement could be circumvented may make its adoption unwise. In many, if not most, situations in which the issue arises, the citizen will have been confronted by one or several officers in a somewhat isolated location. The only witnesses to what, if any, admonitions were given will be the officers and the suspect. If officers erroneously recall that they properly admonished the suspect—or if they are willing to misrepresent the admonitions—trial judges are unlikely to credit the suspect's testimony to the contrary. Effective implementation of *Miranda* has been hindered by the "swearing matches" its requirements generate.³⁷⁵ An admonition requirement might encounter the same difficulties.

5. *Conclusion.* *Hogan* demonstrates the need for criteria that will enable detentions to be characterized for both federal constitutional purposes and other purposes. Without discussing or articulating the standard being applied, the state appellate court held in *Hogan* that the facts

374. This seems, in part, to have been the Supreme Court's rationale for rejecting a fourth amendment requirement that consent to a search be preceded by an admonition that the consent need not be given. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 231-32 (1973).

375. See MCCORMICK ON EVIDENCE § 163, at 442 (E. Cleary ed. 1984).

showed that an arrest—not a temporary detention—had occurred.³⁷⁶ The prosecution was limited, then, to supporting the detention as an arrest. The court found, however, that the arrest was supported by probable cause; thus, the court upheld the detention against fourth amendment attack. But because the detention did not fall within any of the state law doctrines authorizing arrests without warrants, it violated the state's general prohibition against warrantless arrests.³⁷⁷ The weapon seized in the search was thus improperly used to prove Hogan's guilt under the state exclusionary sanction.³⁷⁸

Despite the importance of this issue to both federal constitutional and local law, there remains substantial uncertainty about the appropriate manner of characterizing detentions. State law virtually never addresses the matter in a useful fashion. The fourth amendment issue, however, may have been settled in *United States v. Hensley*.³⁷⁹ Hensley was stopped on the basis of a "wanted" flyer received from another jurisdiction, which simply requested other departments to "hold" him for the originating jurisdiction. The flyer also specified that Hensley was believed to have been involved in a robbery, and warned that he might be armed and dangerous. On the basis of this flyer, police officers in Covington, Kentucky stopped Hensley and a companion. Almost immediately, the officers observed and retrieved a revolver from the car and placed both suspects under arrest for weapons offenses. The Supreme Court held that the flyer justified a nonarrest detention of Hensley to check his identification, to "pose" questions, to tell him that the other department wished to question him, and to check to determine whether an arrest warrant had been issued.³⁸⁰ It acknowledged that the Covington officers might have intended to detain Hensley longer than would be permissible and perhaps to transport him improperly to the stationhouse. This, however, it characterized as "irrelevant."³⁸¹ "[W]hat matters," Justice O'Connor's opinion for a unanimous Court concluded, "is that the stop and detention that occurred were in fact no more intrusive than would have been permitted an experienced officer on an objective reading of the flyer."³⁸² The detention lasted only the brief period before the officers developed grounds for and made an arrest on the weapons charge; from that point on, Hensley's detention was pursuant to the arrest.

376. *Hogan v. State*, 631 S.W.2d 159, 161 (Tex. Crim. App. 1982).

377. *Id.*

378. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979).

379. 105 S. Ct. 675 (1985).

380. *Id.* at 684.

381. *Id.*

382. *Id.*

Hensley's language appears to adopt the post hoc approach for fourth amendment analysis. The Court expressly rejected—without discussion of alternatives or rationales and without citing any authority—the proposition that the officers' intention controlled or even that it was relevant. It paid no attention to how *Hensley* perceived or could reasonably have perceived the nature of his detention. *McCarty* was neither distinguished nor cited. This can be explained in part by the failure of the briefs to address the issue.³⁸³ The issue was raised, but not significantly discussed, in oral argument.³⁸⁴

Under the *Hensley* approach, the fourth amendment analysis in *Hogan* should have been different; the prosecution should not have been required to show probable cause in order to defend the detention. If the officers' actions would have been permissible were Hogan's detention a nonarrest detention, and if reasonable suspicion existed, then their actions—under *Hensley*—should have been upheld without further scrutiny.

Whether *Hensley* in fact firmly commits the Supreme Court to a post hoc approach for fourth amendment purposes remains to be seen. Given the importance of the broader issue—how police conduct is to be characterized for federal constitutional exclusionary rule review—the matter certainly deserved more thorough consideration than the *Hensley*

383. The Government sought review on two grounds, both of which assumed that the detention was a *Terry* stop. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at I, *United States v. Hensley*, 105 S. Ct. 675 (1985). Counsel for *Hensley* maintained that the case involved an "arrest." Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 11, *Hensley*; see also Brief for the Respondent at I, *Hensley*. Cf. Reply Brief for the United States at 2, *Hensley* ("respondent's entire brief is flawed by his apparent unwillingness or inability to distinguish between an arrest . . . and an investigatory stop").

384. Counsel for the government assumed without challenge during argument that the detention was a nonarrest investigatory stop. Transcript of Official Proceedings Before the Supreme Court of the United States at 3-31, *United States v. Hensley*, 105 S. Ct. 675 (1985). During his argument, counsel for *Hensley* maintained:

As we see it, there's no question. This was not an investigatory stop. It was an arrest. The purpose was to arrest him, to detain him, take him back to the station until [an officer from the police department that had issued the "wanted" flyer] could come down and talk to him.

Id. at 36. An unidentified Justice suggested that *Hensley's* counsel was making the nature of the detention turn upon the intention of the officer: "You want us to look inside [his] head . . . Now, we don't do that normally, do we?" The Justice continued: "[W]e have to look at what happened." *Id.* at 46-47. *Hensley's* counsel responded: "I'm not asking you to look inside of the officer's head. I think the officers themselves have testified." *Id.* at 47. Perhaps counsel was suggesting by this remark that, in the case before the Court at least, an inquiry into the officer's state of mind posed no significant difficulties. Counsel was then specifically asked why the Court should not stop its analysis if it found that a brief stop could legitimately have been made and that "that objectively is what had happened here." *Id.* at 47. The response of counsel did not address the question. *Id.* Counsel for the government did not address the matter in rebuttal argument. *Id.* at 49-51.

opinion suggests it was given. Even if *Hensley* definitely answers this question for purposes of the fourth amendment, however, states remain free to adopt a different approach—such as that suggested by *Hogan*—for state law purposes.

The cost of an approach making the officers' intent controlling may outweigh its value in structuring judicial review. A *per se* requirement that a detaining officer inform the detainee of the nature of the detention, combined with a policy of holding the state to that characterization would—in theory at least—facilitate judicial review of police actions. But the cost of imposing exclusionary sanctions simply on the basis of an officer's failure to articulate "magic words" is likely to become excessive. Constitutionalization of such a standard may therefore be inappropriate.

On the other hand, if judicial review of law enforcement conduct is to be seriously pursued there is little merit in an approach that requires a detention to be upheld so long as any basis appears available after the fact. Almost by default, an approach based upon the detainee's reasonable perception becomes attractive. A detention could be characterized according to the reasonable apprehensions or expectations of the detainee. If the detainee reasonably perceived a substantial likelihood that the detention would result in investigatory procedures that the law permits only pursuant to a valid custodial arrest, the detention should be upheld only if arrest requirements were met. Whether the detainee was aware of the law's requirements should remain irrelevant.

Under this approach, *Hogan* was probably decided correctly. The detention had not lasted longer than a few moments, and his movement from the bar to the outside area was probably not beyond the authority of a field detention. Yet the officers did nothing to convey the impression that this was something other than the initiation of a detention that would result in his movement to the stationhouse, nor did they begin a general inquiry that *Hogan* could have anticipated would last only briefly and would probably be followed by his release. Further, the officers' use of the term "arrest" affirmatively suggested that the detention would result in transportation to the stationhouse. Although the officers qualified "arrest" with the term "investigatory," which may be interpreted by some as indicating that the officers were not at that point prepared to seek formal charges, it is unlikely that they would be understood as indicating an intention to detain the suspect only briefly in the vicinity. By the time of the search, *Hogan* probably—and reasonably—believed that his detention was virtually certain to result in his being taken to the stationhouse. This should be sufficient to characterize the detention as an arrest.

C. *Questioning and Self-Incrimination.*

One of the major themes of American criminal procedure law has been an effort to develop an appropriate way to accommodate law enforcement's interest in questioning those individuals suspected of crimes, citizens' interest in avoiding at least certain forms of self-incrimination, and the effect on suspects of being placed in official custody. In 1966 the Supreme Court abandoned the voluntariness test as the major vehicle for accommodating those considerations on the federal constitutional level and replaced it, for at least some situations, with the more prophylactic and structured requirements of *Miranda v. Arizona*.³⁸⁵ But the twenty years that have passed since *Miranda* have made clear that this shift was no ultimate answer.³⁸⁶ The continuing controversy is nowhere more evident than in the area of police inquiries of citizens who have been subjected to a nonarrest investigatory detention.

In the *Terry* trilogy, the Supreme Court acknowledged that a major purpose of an investigatory detention is to question the detainee.³⁸⁷ Since none of the cases was construed as presenting the Court with such a detention, however, the Court had no occasion to address those issues related to detainee questioning. Specifically, the Court was not compelled to address the relationship between such questioning and the Court's landmark decision two years earlier in *Miranda*. When, four years later in *Adams v. Williams*,³⁸⁸ the Court assumed the fourth amendment validity of investigatory detentions,³⁸⁹ it was somewhat more circumspect in its description of their purposes,³⁹⁰ perhaps to de-emphasize potential conflicts between the limits placed on custodial interrogation in *Miranda* and the apparent license to question during detention assumed in *Terry*. Despite the Court's consistent preoccupation with custodial interrogation issues since *Terry* and *Adams*, and the widespread assumption that questioning of detainees during nonarrest detentions is proper, the Court has made no effort to develop any federal constitutional limitations on the questioning. Nor has it explicitly addressed po-

385. 384 U.S. 436 (1966). See generally Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981).

386. E.g., Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731 (1981); Inbau, *Over-reaction—The Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982).

387. *Terry v. Ohio*, 392 U.S. 1, 10 (1968) ("[I]t is argued [that] the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity.").

388. 407 U.S. 143 (1972).

389. *Id.* at 145.

390. *Id.* at 146 (describing purpose of detentions as "obtaining more information" without addressing means by which this might be accomplished).

lice officers' right to ask questions or to have those questions answered.³⁹¹

Statutory provisions are often less reticent about the right of officers to question suspects. The Uniform Arrest Act authorizes an officer who has properly stopped a suspicious person to "demand of him his name, address, business abroad and whither he is going."³⁹² A failure to comply subjects the suspect to further detention,³⁹³ but the statute is silent regarding whether or not a refusal to respond—on self-incrimination or other grounds—can be considered in deciding whether to arrest the suspect. The Act requires no warnings of any sort. The Model Code of Pre-Arrest Procedure also contemplates the questioning of the suspect during an investigatory detention. It assumes, however, that the officer has no right to receive responses tending to incriminate the detainee. The Code requires officers to give certain warnings to this effect³⁹⁴ as promptly as the circumstances reasonably will allow, but always before "sustained questioning" of the detainee.³⁹⁵ Further, the Code directs that no questioning may occur if the subject indicates "in any manner" that either he does not wish to be questioned or he wishes to consult with an attorney before questioning.³⁹⁶

Although several statutes follow the Uniform Arrest Act model,³⁹⁷ most statutes that set out enabling authority for investigatory stops simply authorize the officer—often in the language of the Uniform Arrest Act—to "demand" that the suspect reveal his identity and give an explanation of his actions without specifying how an officer may respond to a refusal or an unsatisfactory response.³⁹⁸ Several statutes authorize the officer to demand or require identification, but do not address other types

391. The issue was avoided in *Brown v. Texas*, 443 U.S. 47 (1979). *Brown* was convicted for violating a state law that criminalized a lawfully stopped person's refusal to identify himself. Finding no reasonable suspicion on the facts of the case, the Court held the stop was not lawful. Therefore, no issues concerning the scope of interrogation or the effect of a refusal to respond during a proper nonarrest detention were presented.

392. UNIFORM ARREST ACT § 2(1) (1939), reprinted in Warner, *supra* note 78, at 344.

393. *Id.* § 2(2).

394. See *infra* text accompanying note 428.

395. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(5)(a) (Final Draft 1975).

396. *Id.* § 110.2(b).

397. DEL. CODE ANN. tit. 11, § 1902 (1979); N.H. REV. STAT. ANN. § 594:2 (1974); R.I. GEN. LAWS § 12-7-1 (1981).

398. ALA. CODE § 15-5-30 (1975); ILL. ANN. STAT. ch. 38, § 107-14 (Smith-Hurd 1980); KAN. STAT. ANN. § 22-2402(1) (1981); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1983); NEB. REV. STAT. § 29-829 (1979); N.Y. CRIM. PROC. LAW § 150.50 (McKinney 1981); N.D. CENT. CODE § 29-29-21 (1974); UTAH CODE ANN. § 77-7-15 (1982); WIS. STAT. ANN. § 968.24 (West 1985). Colorado, with what is probably not significantly different language, authorizes the officer to "require" such information from the suspect. COLO. REV. STAT. § 16-3-103(1) (1978).

of inquiries.³⁹⁹ The Texas statute provides that an intentional failure to provide the demanded identification constitutes a criminal offense.⁴⁰⁰ A few statutes appear to authorize a detention to permit the officer to ascertain or obtain information, but stop short of specifically permitting the officer to seek this information by questioning the subject.⁴⁰¹ The Oregon statute simply authorizes the officer to "make a reasonable inquiry."⁴⁰² None of the statutes require the detaining officer to inform the detained subject of any right he may have not to respond to the questions.

The issues that arise in the context of the questioning of nonarrest detainees involve the applicability of the letter or spirit of either the federal or state prohibitions against compelled self-incrimination. It is reasonably clear that the federal fifth amendment privilege applies to inquiries by law enforcement officers in this context.⁴⁰³ What the privilege means in this context, however, is more problematic. The major issues are whether any *Miranda*-like prophylactic safeguards are or should be required before such questioning, and whether a refusal or failure to respond on the part of the detainee can be considered by the detaining officer in deciding whether to make an arrest.

1. *Prophylactic Safeguards.* Generally speaking, one who is officially questioned under circumstances in which the questioner has the legal authority to penalize refusals to answer is entitled to the protection of the fifth amendment privilege against compelled self-incrimination⁴⁰⁴

399. NEV. REV. STAT. § 171.123 (1981); TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974); VA. CODE § 19.2-83 (1983).

400. TEX. PENAL CODE § 38.02(a) (Vernon 1974).

401. ARK. STAT. ANN. § 43-429 (1977) (detention permitted if reasonably necessary "to identify or determine the lawfulness of [the] person's conduct"); FLA. STAT. ANN. § 901.151(2) (West 1985) (detention permitted "for the purpose of ascertaining the identity of the person . . . and the circumstances surrounding his presence abroad"); MONT. CODE ANN. § 46-5-401(1) (1983) (stop permitted if reasonably necessary "to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person").

402. OR. REV. STAT. § 131.615(1) (1983).

403. *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* rejected the earlier position that the privilege applied only where the questioning person had legal authority to compel an answer. See MCCORMICK ON EVIDENCE § 150, at 385-86 (E. Cleary ed. 1984). Conceivably, the Court could take the position that the fifth amendment is invoked in situations involving no *legal* compulsion only where the situation presents dangers akin to those of stationhouse police interrogation and thus that the constitutional privilege is not at issue in nonarrest field detentions. But this is unlikely. See *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984). In any case, the due process requirement of voluntariness would nevertheless apply and impose very similar requirements.

404. Some doubt may exist about whether questions asked during nonarrest detentions call for answers that are incriminating within the meaning of the privilege. Generally, information sought is incriminating for this purpose only if there is a "real and appreciable" risk that it will increase the likelihood of the subject being prosecuted or convicted of a crime. MCCORMICK ON EVIDENCE § 121, at 290-91 (E. Cleary ed. 1984). Questions concerning the circumstances giving rise to a stop

only if, before responding, he claims its advantage. Failure to claim the privilege, even if this failure does not amount to a "knowing and intentional waiver," results in the loss of any advantage the privilege would have provided.⁴⁰⁵

In some situations, however, this approach has been abandoned. In *Miranda v. Arizona*,⁴⁰⁶ to choose the best-known example, the Court held that the risks to the privilege posed by custodial police interrogation were sufficiently great that effective implementation of the privilege required additional prophylactic safeguards. Thus, the Court held that a person subjected to such an interrogation is entitled to the presence and assistance of an attorney during questioning and must be warned that he has a right to remain silent and that this right may be surrendered by voicing an incriminating admission. Moreover, upon asserting a desire to remain silent, the suspect is entitled to be free from further questioning. The Court also held that a suspect has a right to be free from incriminating use of the products of a custodial interrogation in the absence of proof of a voluntary and intelligent waiver of the right to remain silent and—

seem to call for answers that would be incriminating according to this definition. If the suspect acknowledges guilt or the accuracy of suspicious facts, this may constitute admissible evidence. If he gives an exculpatory response, this may later be admissible to prove consciousness of guilt. *Id.* § 144, at 362. In *California v. Byers*, 402 U.S. 424 (1971), however, the Court upheld a requirement that a motorist involved in an accident leave his name and address. The plurality opinion suggested that the risk of incrimination was insufficient to bring the fifth amendment into play. *Id.* at 431. It seems clear that the Court's evaluation of the risk was colored by its perception that the requirement was essential to the statute's important and noncriminal primary objective of fairly distributing financial losses resulting from accidents. *See id.* Perhaps the risk of answers given during nonarrest detentions should be evaluated in light of the important "investigatory"—as contrasted with prosecutorial—purposes associated with such detentions. Even so, it seems clear that the risk is high enough to render responses incriminating.

Questions calling only for the suspect's identity may be another matter. Insofar as the answers may lead to specific items of incriminating information, the risk of incrimination may be too low to bring the privilege into play. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (words or actions "normally attendant to arrest and custody" do not constitute interrogation under *Miranda* and thus do not invoke its prophylactic requirements). But providing identification certainly increases the risk that the suspect, if released without arrest, will later be apprehended for prosecution and trial. This, however, may not be "incrimination" within the meaning of the privilege. The increased risk of conviction might be discounted in view of the tremendous cost of sacrificing what amounts to jurisdiction over the person of the defendant. Alternatively, the increased likelihood of apprehension and prosecution may, for similar reasons, be arbitrarily defined as outside the scope of "incrimination" as protected by the privilege. *Cf. United States v. Crews*, 445 U.S. 463 (1980) (unlawful arrest does not bar witnesses from basing testimony upon observation of defendant in the courtroom); *Byers*, 402 U.S. at 434 (whether providing one's identity at an auto accident will lead to arrest and charge depends on "different factors and independent evidence," and therefore this risk does not bar such a requirement). These distinctions are artificial. Realistically, information concerning one's identity in the nonarrest detention context is incriminating as that concept has traditionally been understood.

405. *Minnesota v. Murphy*, 104 S. Ct. 1136, 1142 (1984).

406. 384 U.S. 436 (1966).

unless a lawyer was present—of the right to have the assistance of counsel. Mere failure to claim the privilege before making a self-incriminating admission during custodial interrogation, obviously, does not result in the loss of the privilege's protection.

To the extent that questioning during nonarrest detentions poses the risk of compelling self-incriminating responses from the suspect, does the fifth amendment require the application of prophylactic rules in this setting? A literal application of *Miranda* would not be feasible. Arranging for an attorney to be present during the limited period of a field detention would seldom if ever be possible, though a modified *Miranda* approach might be feasible. Thus, suspects might be given no right to the assistance of a lawyer at the scene of the detention, but only the right to refuse to respond to some or all questions.⁴⁰⁷ The officer might be required to inform the suspect only of this more limited right.

Miranda indicated that its requirements apply whenever a suspect is "in custody."⁴⁰⁸ Language in the opinion strongly suggested that custody, for purposes of *Miranda*, exists whenever there has been a deprivation of the suspect's liberty.⁴⁰⁹ The Supreme Court's subsequent cases have suggested that, although the Court will insist on a deprivation of liberty or at least a suspect's reasonable perception that his liberty is impeded,⁴¹⁰ *Miranda* will apply whenever this requirement is met.⁴¹¹ Yet other language in the *Miranda* opinion suggested that it did not apply to at least some nonarrest field detentions; the holding of the case, indicated the *Miranda* Court, was not to affect "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process."⁴¹²

State and lower federal courts have had understandable difficulty reconciling the Court's apparently contradictory signals. Some have found the *Miranda* requirements applicable whenever custody in the lit-

407. For example, suspects might be required to answer only those questions designed to ascertain identity.

408. The suspect must also be under "interrogation." See *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (concluding that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent"). Police inquiries during nonarrest field detentions generally constitute express questioning, so the question whether the inquiries constitute the "functional equivalent" of such questioning, *id.* at 301, seldom arises in the nonarrest detention context.

409. *Miranda*, 384 U.S. at 444, 467.

410. *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam).

411. *Orozco v. Texas*, 394 U.S. 324 (1969) (*Miranda* applies to suspect detained in his own bedroom); *Mathis v. United States*, 391 U.S. 1 (1968).

412. *Miranda*, 384 U.S. at 477.

eral sense exists, even if it involves a nonarrest investigatory detention.⁴¹³ Others have evidenced an inclination almost uncritically to exempt situations from *Miranda* if they can be characterized as field stops.⁴¹⁴ For more than fifteen years the Court failed to return to the problem.

In the 1983 term, the Court came close to the mark. *Berkemer v. McCarty*⁴¹⁵ raised the issue of the applicability of *Miranda* to detentions for the purpose of issuing traffic citations. Although McCarty—whose weaving car was stopped by a police officer—was clearly deprived of his freedom of action within the meaning of the *Miranda* dictum, the Court declined to accord “talismanic significance” to its choice of words in *Miranda*. It proceeded to define—or redefine—“custody” as excluding nonarrest detentions made for the purpose of issuing traffic citations, with the apparent exception of those situations in which the detention becomes the “functional equivalent” of a formal arrest. Consequently, interrogation conducted during such a nonarrest detention need not comply with the requirements of *Miranda*.⁴¹⁶

Justice Marshall’s opinion for the Court, in explaining this result, assumed the inapplicability of *Miranda* to “so-called ‘Terry stop[s].’”⁴¹⁷ He then reasoned that detentions for issuing citations are more analogous to field stops than to “formal arrest[s]” which invoke *Miranda*.⁴¹⁸ For present purposes, the matter of major significance is the Court’s assumption that *Miranda* does not apply to *Terry* stops.

Terry and traffic stops, the Court reasoned, differ from “formal arrests” in two ways that are important for our present purposes. First, they are “presumptively”—by which Justice Marshall apparently meant “perceived as usually”—“temporary and brief.”⁴¹⁹ Thus, they do not suggest to the detainee that any questioning—or the detention itself—will continue until the detainee provides the officers with the answers they wish. Nor do they lend themselves to many of the time-consuming interrogation techniques that endanger the privilege in arrest situations.⁴²⁰ Second, they do not occur in as police-dominated an atmosphere as an arrest. Thus, they do not render the detainee “completely at

413. See, e.g., *Whitfield v. State*, 287 Md. 124, 411 A.2d 415 (*Miranda* applies to on-the-scene investigations whenever, in addition, there is “custody”), *cert. dismissed*, 446 U.S. 993 (1980).

414. See, e.g., *State v. Dickey*, 125 Ariz. 163, 608 P.2d 302 (1980).

415. 104 S. Ct. 3138 (1984).

416. No member of the Court dissented from the substance of this holding. Justice Stevens declined to join that part of the Court’s opinion addressing the application of *Miranda* to nonarrest detentions on the ground that resolution of the issue was unnecessary to disposition of the petition for certiorari. *Id.* at 3153-54 (Stevens, J., concurring in part and concurring in the judgment).

417. *Id.* at 3150-51.

418. *Id.* at 3150.

419. *Id.* at 3149.

420. *Id.* at 3150 n.27.

the mercy of the police.”⁴²¹ Unlike stationhouse detentions following arrests, these detentions are open to observation by the public. Often, only a few police officers are at the scene. These differences, the Court concluded, render both *Terry* stops and traffic detentions “comparatively nonthreatening” and unlikely to impair the free exercise of the detainee’s privilege against self-incrimination. Thus, such detentions do not require *Miranda*-like safeguards.

The Court’s approach is at best questionable. Analogies are appropriately invoked only when they exist. The Court’s analogy to the requirements applicable to questioning during a nonarrest investigatory detention does not exist, in the sense that the latter question has never been addressed by the Court. Just as *Williams* assumed a resolution of issues left open in the *Terry* trilogy, *McCarty* assumed a resolution of the potential conflict between *Miranda* and investigatory detention questioning. The matter deserves independent consideration because the risk to fifth amendment interests posed by questioning during nonarrest investigatory detentions may be sufficiently greater than that posed in benchmark situations⁴²² to merit special procedural protection for the privilege in the nonarrest detention context.

The Court’s analysis in *McCarty* suggests that questioning during nonarrest detentions does not implicate a greater risk to fifth amendment interests, because law enforcement questioning in this context may differ significantly from post-arrest custodial questioning. Yet the Court’s perception of the magnitude of the difference reflects naiveté. Constitutional or other considerations may limit the length of nonarrest detentions,⁴²³ but the permissible duration remains unclear. More importantly, given the ambiguities of the legal requirements and the frequent lack of any significant penalty for ignoring those requirements, it is likely that officers often fail to perceive that there are any meaningful limits on the duration of nonarrest detentions or that they must avoid significant movement of detainees. It is even less likely that the subjects of nonarrest detentions perceive any meaningful limitations of this sort on the officer’s power.

Citizens detained without being informed specifically that they are under “formal arrest” probably react in one of two ways. They may fail

421. *Id.* at 3150.

422. The benchmark situation is that in which the subject appears as a witness under circumstances in which the presiding authority has the legal power to penalize the subject for refusing to answer questions. *See supra* text accompanying notes 404-05; *cf.* *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (testimony given under threat of contempt is “essence” of coerced testimony prohibited by fifth amendment).

423. *See supra* notes 216-65 and accompanying text.

to perceive any difference between an arrest and other detentions and thus react no differently than a subject who is told he is "under arrest." Alternatively—and probably more likely—they may perceive the situation as giving the officer substantial or complete discretion in determining whether to proceed to formal arrest. Almost certainly they will have little basis for informed speculation on the likelihood of their own detention proceeding to such a stage. To the extent that this is the case,⁴²⁴ it is unrealistic to expect that citizens' responses to investigative detentions will usually, or often, be based on the perception that they will be free to go after a few minutes.

The *McCarty* Court also characterized investigatory detentions as generally occurring in a less police-dominated atmosphere. Such detentions, like traffic stops, will generally occur in locations that are considerably less police-dominated than is a stationhouse. Whether this should be regarded as controlling is another matter. Even in the traffic stop context, there is significant doubt that a citizen who fears blatant abuse by the officers could reasonably expect assistance from occasional passersby or that officers would generally be affected by the risk that such passersby would intervene or otherwise take action. In addition, it is likely that investigatory detentions will occur far more often in non-public locations; such detentions occur more frequently on dark streets and in alleys than on busy thoroughfares. In such situations, the presence of even a small number of officers may for all practical purposes establish police dominance.

More importantly, however, the number of officers and the quasi-public nature of the confrontation may not affect the real risk posed to fifth amendment interests. The citizen's primary concern—and the factor that may be most likely to compel a testimonial response—is likely to be that the officers will escalate the field stop into a stationhouse detention. The number of officers and the quasi-public nature of the location will have little or no effect on the detainee's fear of being moved to the stationhouse.

Perhaps the *McCarty* Court was correct in concluding that field detentions for the purpose of issuing citations and for the purpose of inves-

424. In traffic stops, the officer often has discretion either to issue a citation or summons and then release the subject or to make a "custodial arrest." This uncertainty renders the analysis in *McCarty* of traffic stop situations quite unrealistic. In *McCarty*, the Court acknowledged the broad discretion of officers, but merely commented that state law does not demand that a custodial arrest be made. *McCarty*, 104 S. Ct. at 3149 n.26. Even if citizens commonly perceive that a traffic stop is unlikely to turn into a prolonged detention, this may be attributable in part to the widespread awareness of law enforcement practices in traffic stops. Citizens subjected to nonarrest detentions are probably less likely to feel assured that their detention will be brief, in part because they are unfamiliar with police practices in this context.

tigation do not pose as severe a threat to fifth amendment interests as post-arrest custodial interrogations. This, however, merely emphasizes the oversimplification of the Court's analysis. In *McCarty*, the Court assumed that the only issue before it was whether *Miranda* applied in its entirety to the citation detention situation.⁴²⁵ The Court apparently did not consider the possibility that traffic stops pose a sufficient risk to the privilege to warrant some protection, but less protection than *Miranda* provides in the custodial interrogation situation.

This is especially surprising in view of the position taken by the Model Code of Pre-Arraignment Procedure. The Institute read the case law, as of 1975, as "almost compel[ling]" the conclusion that affirmative statutory authorization of investigatory stops without provision for full *Miranda* warnings would be unconstitutional.⁴²⁶ Nevertheless, it opined that full and literal application of *Miranda* would be "of doubtful value" in the context of field stops.⁴²⁷ The Institute, therefore, offered as an alternative to the full *Miranda* warnings a requirement that the officer inform the detainee that he has a right to remain silent, that anything the detainee says can be used in evidence, and that the detainee will be released within twenty minutes if he is not arrested.⁴²⁸

Despite the emphasis in both the popular press and the case law on the *Miranda* warnings, the core feature of the *Miranda* holding was the establishment of the right to the presence of counsel during custodial interrogation. Because of the frequency with which this right is waived, it is arguable that, as *Miranda* has developed, the right to counsel has assumed at best secondary importance. Adequate consideration of the *McCarty* issue, even as it was framed by the Court, nevertheless requires consideration of several sub-issues: whether the *Miranda* right to counsel should apply to investigatory detention questioning; whether a suspect should have a right to prevent all questioning during nonarrest detentions; and, finally, whether a nonarrest detainee should have the right to be advised of such fifth amendment rights.

Whether *Miranda*—including its recognition of the right to have an attorney present— could be applied literally to field stop situations is at best doubtful. If it were possible to delay questioning to permit retained counsel to be present or to provide counsel for those entitled to such

425. See *McCarty*, 104 S. Ct. at 3144 (certiorari granted "to resolve confusion . . . regarding the applicability of our ruling in *Miranda* . . . to questioning of motorists detained pursuant to traffic stops").

426. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 (5) note (Final Draft 1975) (citing *Orozco v. Texas*, 394 U.S. 324 (1969), discussed *supra* note 411).

427. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(5) note (Final Draft 1975).

428. *Id.* § 110.2(5)(a).

assistance, it would involve such delay as to be totally impractical. It is unlikely that federal constitutional provisions will be construed so as to prohibit indirectly a law enforcement practice by demanding compliance with procedures where compliance is impossible.⁴²⁹ The Model Code of Pre-Arrest Procedure offered something of a compromise: the suspect must be told that if he desires counsel no questioning will occur "at this time."⁴³⁰ This approach seems designed to comply with the literal mandate of *Miranda*, but also to encourage suspects as effectively as possible to waive counsel and submit to uncounseled questioning during field stops.

On balance, it seems clear that the presence of an attorney ought not to be required during either traffic citation detentions or field stops. Even if compliance with the requirement were possible, it would be too cumbersome to render legitimate questioning a feasible law enforcement technique. To impose the requirement would be to invite noncompliance. Moreover, a warning that described a right that many if not most suspects would recognize as practically useless would serve to diminish whatever value warnings might otherwise have.

It is uncertain whether there is—or should be—a right not to be questioned at all during nonarrest detentions. In those situations to which *Miranda* applies, a suspect has the right to avoid questioning either by asserting the desire to remain silent or by asking that the questioning itself cease.⁴³¹ If the privilege in this context means not only the right to avoid answering questions but also the right to avoid being questioned, the argument for some ancillary methods of protecting the privi-

429. *But see* *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that an undercover agent's deliberate elicitation—in the absence of counsel—of incriminating statements from an indicted suspect was unconstitutional). Obviously, there is no practical way to assure that a suspect being investigated by an undercover officer is aware of the right to counsel. The case, then, practically prohibits the elicitation of self-incriminating statements by undercover officers after the suspect has been indicted. *See United States v. Henry*, 447 U.S. 264 (1980).

430. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(5)(a)[(vi)] (Final Draft 1975).

431. *See Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."). Other comments in the *Miranda* opinion, however, indicate that the Court was unwilling to bar all questioning of a suspect actually represented by counsel. *Id.* at 474 n.44 (issue when counsel is present might be only whether any self-incriminatory response was voluntary). To the extent that there is a bar to further "interrogation," it may be useful to distinguish between further interrogation on the one hand and, on the other, later inquiries by officers as to whether the suspect would be willing to submit to interrogation. The Court, however, seems not to have drawn this distinction. *Compare* *Michigan v. Mosely*, 423 U.S. 96 (1975) (suspect who invoked desire to remain silent could be reapproached concerning his willingness to be interrogated concerning another offense if this was done in a way that "scrupulously honored" his continued right to cut off questioning) *with* *Edwards v. Arizona*, 451 U.S. 477 (1981) (officers violated *Miranda* rights of suspect who had invoked right to counsel when they initiated further conversations with suspect concerning his willingness to be interrogated without counsel).

lege is strengthened. This was ignored in *McCarty*. Justice Marshall's opinion simply assumed that the content of the privilege in the traffic citation context did not include a right to avoid being questioned.

Whether in the field stop context the privilege should be construed as creating a right to bar or stop questioning is more problematic than whether it should include the right to the presence of counsel. Recognition of a right to prevent questioning presents none of the mechanical difficulties of effectuating a right to the presence of an attorney.

The rationale for the *Miranda* right to preclude questioning is primarily that custodial interrogation is inherently coercive and therefore creates unacceptable risks of improper influence. Perhaps that rationale is not applicable to field investigatory stops *if* they are limited in duration. On the other hand, if other aspects of nonarrest questioning pose risks to the privilege equal or analogous to those created by the potential duration of post-arrest questioning, no distinction can reasonably be drawn. A citizen's perception that the detaining officer has unlimited discretion in deciding whether or not to make an arrest, and that silence may encourage such action, may constitute equivalent pressure.

The Supreme Court has been sensitive, however, to the proposition that *Miranda* should not be applied where its application would interfere with important social considerations other than the gathering of evidence to prosecute.⁴³² Investigatory detentions may invoke such considerations. In post-arrest situations, the investigation will already have produced probable cause to believe that the detainee is guilty of a crime. Although the state continues to have an interest in the development of further evidence, the existence of probable cause makes this need somewhat less pressing. The suspect can be arrested on probable cause, and then detained or held to bail while evidence for use at trial is sought. In the investigatory stop context, however, there is no opportunity for leisure. The detaining officer must make important and immediate decisions in the field context. The decision whether to arrest, for example, must be made within the brief period during which the suspect may be detained. If the suspect is not arrested, the investigation may be severely hampered. In addition, the undetained suspect remains free to flee or further victimize the community during the course of the investigation. The need for information on which to decide whether to make a nonarrest detention may outweigh the risks to the interests protected by the privilege against self-incrimination, especially if those risks are fewer or

432. See *New York v. Quarles*, 104 S. Ct. 2626 (1984) (*Miranda* need not be complied with where public safety is at stake) (discussed *supra* note 355).

less severe than in the post-arrest situation.⁴³³

There is evidence, however, that only a small percentage of stops ever ripen into arrests.⁴³⁴ Even if rigorous application of the privilege reduced the number of detentions in which information constituting grounds for arrest was elicited, the overall impact upon arrests and prosecutions would be quite small. Insofar as stops accomplish their law enforcement purpose by directly deterring detainees from engaging in intended crimes, the effect of rigorous application of the privilege is more difficult to estimate. To the extent that the privilege would prevent officers from obtaining information such as identity, residence, and similar matters, the deterrent impact of nonarrest detentions might be reduced. A smaller reduction of the deterrent impact could be expected, of course, if application of the privilege seldom prevented elicitation of such information, but only reduced officers' ability to obtain answers to other questions, such as ones concerning the nature of detainees' suspicious activities. Perhaps, however, even rigorous application of the privilege would have little effect. The direct deterrent effect of stops might well be almost fully accomplished if officers are permitted to stop suspects, obtain a physical description of them, and, by this action, fully convey to the suspects that the officers are aware of their activities. The effectiveness of nonarrest detentions for purposes of deterrence may not depend on access to the information that would be protected by enthusiastic application of the privilege against self-incrimination.

If the content of the right to be free from compelled self-incrimination during nonarrest detentions is different from the content of that right in the post-arrest situation, should a warning of some sort—properly modified so as to inform the detainee of the content of the privilege during field detentions—nevertheless be required? This is the compromise curiously left unaddressed in *McCarty*. Almost incredibly—given *Miranda*'s reliance on warnings—the constitutional need for other warnings in other contexts has remained largely unexplored.

The major exception is the Supreme Court's offhand consideration in *Schneckloth v. Bustamonte*⁴³⁵ of the fourth amendment need for warnings prior to elicitation or acceptance of consent to a search. In the process of reaching its conclusion that the fourth amendment does not

433. The Model Code of Pre-Arrest Procedure offers without discussion two approaches to field stop interrogation that differ, among other ways, in whether the fifth amendment privilege is regarded as conferring the right to cut off questioning. Compare MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(5)(a)(i) (Final Draft 1975) (subject must be warned that he is not obligated to say anything and that anything said can be used in evidence against him) with *id.* § 110.2(5)(a)(iv)] (subject must be warned that he will not be questioned against his wishes).

434. See *supra* note 174 and accompanying text (less than two percent of stops result in arrests).

435. 412 U.S. 218 (1973).

require proof of awareness of the right to refuse on the part of a consenting person, Justice Stewart's opinion rejected the argument that such a requirement would be acceptable because it could generally be met by proof that the suspect had been warned of such a right.⁴³⁶ The Court asserted that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."⁴³⁷ This would be "impractical," it continued, because it would interfere with the rapidly developing, often unstructured, investigatory process in which consent issues often arise. Although the Court characterized the investigation context as "immeasurably . . . far removed" from the *Miranda* custodial interrogation context,⁴³⁸ its rationale for this is unclear.

The *Bustamonte* Court extensively cited the passage from the *Miranda* opinion in which the Court indicated it did not intend to affect "on-the-scene questioning" and "general questioning of citizens in the fact-finding process."⁴³⁹ The passage indicates the Court's perception that, in both situations, the failure of available information to point to a particular suspect with sufficient certainty to establish probable cause creates a sufficient need for additional evidence to warrant dispensing with those procedural requirements that would interfere with eliciting this evidence. After the detention of a suspect on probable cause, however, the need for information for charging and prosecution is reduced, perhaps in light of what can be expected from other sources that can be pursued at relative leisure; warnings and other procedural devices can thus be implemented at acceptable costs.⁴⁴⁰

Bustamonte can also be construed as rejecting a warning requirement because it would tend to "structure" the informal relationship between the citizen and the officer and, consequently, encourage the citizen not to cooperate. To the extent that this might occur in the contexts of both nonarrest detentions and elicitation of search consents, it would impede law enforcement officers' access to potentially significant information. But a refusal to cooperate may reflect the citizen's recognition, stimulated by the "formality" of the warning, that further cooperation

436. *Id.* at 231.

437. *Id.*

438. *Id.* at 232.

439. *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)); see *supra* note 412 and accompanying text.

440. Justice Stewart's reference to an "effective" warning, *Schneckloth*, 412 U.S. at 231, also suggests that the Court regards the rapidly developing nature of search situations as preventing the detailed and probing exchange that would be necessary to provide reasonable assurance that the warnings actually inform the recipient. Insofar as this is the rationale, field investigatory stops may well pose the same difficulties. Yet this is an artificial distinction. If the Court viewed *Miranda*'s post-arrest warning process, as implemented, as analogous to the guilty plea process, this basic assumption is so devoid of reality as to make the entire analysis an exercise in futility.

would constitute the relinquishment of valuable procedural rights. To the extent that this is so, it is by no means clear that the effect is inappropriate or undesirable. If the absence of a warning is one of the characteristics of a field stop—or a consent request—that render it “informal” and thus obscure the citizen’s perception of his own best interest, the need for citizens’ choices to be informed and voluntary strongly supports a requirement for such warnings.⁴⁴¹

On balance, the fifth amendment privilege should be regarded as applicable to questioning during nonarrest investigatory detentions. Questioning of a detainee before grounds for arrest are developed should be recognized as different from post-arrest questioning. To some extent, the risk of self-incrimination is less—answers will often be purely exculpatory—while the justification for questioning is greater—officers need to develop information on which to decide how to respond to rapidly developing field situations. In addition, the pressure on a detainee to abandon rational self-interest for self-incrimination is probably less, at least to the extent that the detainee is aware of the nature of the detention. No *Miranda*-like prophylactic requirements, therefore, should be imposed on questions asked before grounds for arrest develop. Any self-incriminating responses should be admissible only if found to be voluntary. The absence of warnings regarding the right to avoid self-incrimination, the detainee’s actual awareness or ignorance of this right, and whether the statement was made while the suspect was in a police-dominated location should all be considered in determining the voluntariness of a challenged admission.

Once an officer develops grounds for arrest, however, the exigencies of the situation are largely gone. The risk of self-incrimination has increased, as has the risk that the self-incrimination will be compelled. In many cases, the suspect will be aware of the turn of events, and the inherent pressure to abandon self-interest will have increased. Even if the suspect is oblivious to this, the actions of the arresting officer are more likely to threaten the suspect’s right to avoid self-incrimination. Because the

441. The Court has also rejected the proposition that once *Miranda* has been violated and the suspect has made a self-incriminating statement, subsequent self-incriminating statements are the inadmissible “fruit” of the *Miranda* violation unless made after the officers have admonished the suspect as to the inadmissibility of the prior admissions. See *Oregon v. Elstad*, 105 S. Ct. 1285, 1297 (1985). The Court relied heavily upon its perception that officers are ill-equipped to determine whether, on the facts of a particular case, a violation of *Miranda*’s requirements has occurred. *Id.* The *Elstad* dissenters urged that the majority had overestimated such difficulties. *Id.* at 1309 (Brennan, J., dissenting), 1325 n.13 (Stevens, J., dissenting). Whatever the merits of this dispute, it arises because the proposed requirement would demand that officers not simply inform a suspect about the law applicable to a situation but, in addition, that they “apply the law to the facts”—that is, determine whether under *Miranda* a prior admission was inadmissible. No such “application” difficulties apply to warning a suspect before an incriminating statement is made.

officer will have decided to prolong the detention, the officer will not be discouraged from vigorous inquiry by a perception that time will not be available to follow through on such efforts.

Under *McCarty*, once an arrest has occurred, the requirements of *Miranda* apply fully. Perhaps officers who have developed grounds for arrest but choose to forgo that action should have somewhat more flexibility. This could be accomplished by providing that in the absence of a formal arrest or its equivalent, the right to the presence of counsel does not apply and, of course, the required warnings need not include information about a right to counsel. But at a minimum, once there is probable cause to believe that the detainee is guilty of an offense, questioning should be barred in the absence of warnings that there is a right to remain silent and to prevent further questioning. In addition, a waiver of these rights should be a prerequisite to questioning.

This detracts from the bright-line guidance that *Miranda* might otherwise provide, but the marginal detraction is negligible. In order to ascertain whether *Miranda* must be complied with, officers must now consider whether the suspect is in "custody," whether their conduct constitutes "interrogation," whether the "public interest" exception applies,⁴⁴² and, in the case of a traffic stop, whether an arrest or its equivalent has occurred. Adding to this list the need to consider, in the context of a nonarrest investigatory detention, whether grounds for arrest exist will not substantially increase the burden on law enforcement.⁴⁴³

2. *Use of Suspects' Silence During Nonarrest Detentions.* Whatever other limitations there are regarding questioning during nonarrest detentions, how an officer may use a suspect's silence is a separate question. The issue arises in the following situation: an officer makes a proper nonarrest detention and, during the detention, asks questions about the suspect's conduct under suspicious circumstances. The suspect

442. *New York v. Quarles*, 104 S. Ct. 2626, 2632 (1984) (holding that *Miranda* warnings are unnecessary prior to questioning "prompted by a concern for the public safety").

443. In *Oregon v. Elstad*, 105 S. Ct. 1285, 1298 (1985), the Court held that, despite an earlier violation of *Miranda* and consequential self-incriminating admissions by a suspect, later self-incriminating admissions made after compliance with *Miranda* are admissible as long as they are "voluntary." In the nonarrest detention context, this may greatly reduce the significance of any *Miranda*-like requirements that might apply. If such requirements exist and are violated, self-incriminating admissions made immediately by the suspect would be inadmissible. But if further and more sustained inquiries were made, admissions provided by the suspect during those inquiries would be admissible if *Miranda* was respected before those admissions were made and if those admissions were voluntary. In many cases, it is likely that despite a violation of any warning requirements that might be applicable during nonarrest detentions, later self-incriminating statements will, under *Elstad*, be admissible.

makes no protestations of innocence before the questioning begins and refuses to respond to the officer's specific inquiries. The officer arrests the suspect and, in a search incident to the arrest, finds evidence confirming the officer's suspicions. At trial, the prosecution seeks to introduce both testimony that the suspect was silent during the detention and evidence that was produced by the search. In defending the admissibility of the evidence, the prosecution seeks to rely in part on the suspect's refusal to answer in establishing that probable cause existed for the arrest. What use of silence is permissible?

The Supreme Court has not addressed the federal constitutional aspects of this question. State and lower federal courts sometimes uncritically repeat Justice White's concurring *Terry* comment that a person stopped on less than probable cause "is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest."⁴⁴⁴ Some seem willing to make a good faith effort to enforce this approach; three judges of the Louisiana Supreme Court, for example, have indicated that despite officers' statutory authority to demand identification, a suspect's refusal to provide it cannot constitute grounds for arrest.⁴⁴⁵ Despite the widespread acceptance of this position, its prohibitions appear to be easily and frequently circumvented. All circumstances that develop during a nonarrest detention may be considered in determining if probable cause exists; efforts to flee or incorrect responses to questions are among those considerations. In addition, the courts frequently rely on refusals or claims of inability to respond,⁴⁴⁶ although sometimes this is done under the umbrella of evasive responses.⁴⁴⁷

444. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring), cited with approval in *State v. Flowers*, 441 So. 2d 707, 714 (La. 1983); and *State v. Grimmer*, 54 N.C. App. 494, 498, 284 S.E.2d 144, 148 (1981), review denied, 305 N.C. 304, 290 S.E.2d 706 (1982).

445. *White v. Morris*, 345 So. 2d 461, 464 (La. 1977) (with one judge concurring and subscribing "only to the principal holding," *id.* at 467); see also *People v. Burns*, 91 Misc. 2d 1080, 1086, 399 N.Y.S.2d 352, 356 (1976) (refusal to cooperate expressed in obscene and "gutter" language could not serve as basis for arrest).

446. *E.g.*, *United States v. Rice*, 652 F.2d 521, 525 (5th Cir. 1981) (arrests for passing counterfeit bill justified in part by suspects' reluctance to identify themselves when stopped and by their denial of having identification); *Holmes v. State*, 262 Ark. 683, 687, 561 S.W.2d 56, 58 (1978) (suspect's inability to produce identification documents considered in upholding arrest for public intoxication); *State v. Ruiz*, 437 So. 2d 330, 336 (La. App. 1983) (arrest of van passenger upheld, relying in part upon his refusal—after being informed of "his rights"—to disclose ownership of van); *State v. Williams*, 34 Wash. App. 662, 671, 663 P.2d 1368, 1374 (1983) (suspect's arrest for burglary upheld, in part relying on his failure to respond to officers' query as to how his car came to be parked in front of burgled house). In at least some of these cases, it seems clear that the suspect's refusal or inability to respond was not necessary to uphold the arrest. In *Rice*, for example, a store clerk identified one of the two defendants as the person who passed the bill. In *Williams*, the suspect was pulling away from a residence in which a silent burglar alarm had been activated.

447. *E.g.*, *State v. Ruiz*, 437 So. 2d 330, 336 (La. App. 1983). Given the significance that can apparently be attributed to the suspect's "nervousness" during a stop, see *United States v. Waltzer*,

The analyses are seldom extensive, and sometimes lead to an almost overt rejection of Justice White's *Terry* position. In *Vickroy v. City of Springfield*,⁴⁴⁸ for example, an officer with probable cause to arrest one George Mordue approached Lloyd Vickroy in a bus station and asked for identification. When Vickroy refused, the officer informed him that he would be arrested if he continued to refuse. Vickroy produced identification, and the officer left.⁴⁴⁹ In later civil litigation arising from the incident, the Eighth Circuit affirmed a summary judgment against Vickroy.⁴⁵⁰ The officer's detention of Vickroy was "imminently [sic] reasonable," it concluded, and his demand for identification was not "arbitrary" and was, therefore, proper.⁴⁵¹

Perhaps the officer had probable cause to believe Vickroy was Mordue. If so, the officer was entitled to arrest Vickroy unless other factors dispelled the probable cause. It may follow that he should have offered the suspect an opportunity to dispel the grounds for arrest. Perhaps silence cannot be relied on to establish probable cause where it was previously lacking. But officers who have developed grounds for arrest might nevertheless be permitted to consider the suspect's silence for the limited purpose of determining that previously developed grounds have not been dispelled. The Eighth Circuit engaged in no such analysis, however, and summarily concluded that because the officer's threat to arrest Vickroy if he did not produce identification was not "arbitrary," there was no violation of Vickroy's federal constitutional rights. This ignores the complexity of the issue. More significantly, the Eighth Circuit's analysis assumes that a suspect's refusal to answer questions during a nonarrest detention may be considered in determining whether grounds for arrest have developed, unless the officer's inquiry was in some undefined way "arbitrary."

Two interrelated federal constitutional doctrines are potentially involved. First, the Supreme Court has held that a person invoking the privilege to be free from compelled self-incrimination may not be penalized by using the fact that the privilege was invoked as evidence of guilt.

528 F. Supp. 646, 652 (E.D.N.Y. 1981), little imagination is required to shift an argument based upon a refusal to respond to an argument based upon the nervousness of the suspect during his protected refusal. Sometimes it is arguable that the manner in which the suspect refuses may have some significance. A suspect's claim of no identification where the officer can observe a billfold on the car seat, see *State v. Harriman*, 434 So. 2d 551, 555 (La. App. 1983), for example, may be different from a refusal to provide identification.

448. 706 F.2d 853 (8th Cir. 1983).

449. *Id.* at 854.

450. *Id.*

451. *Id.*

Thus, under *Griffin v. California*,⁴⁵² it is impermissible for a prosecutor to argue that a jury should—or for the trial judge to instruct the jury that it may—infer the defendant's guilt from his failure to testify in his own defense at trial.⁴⁵³ Second, the Court has held that the fifth amendment imposes other limits on the ways in which a citizen may be disadvantaged by invoking the privilege. Thus, a person who invokes the privilege cannot be barred from public employment or denied public contracts.⁴⁵⁴

Whether the use of a defendant's silence in response to questions posed during an investigatory detention in order to prove his guilt at trial would violate *Griffin* is unclear. If the state has a right to compel answers during such confrontations, the defendant's silence in response to demands for answers is admissible.⁴⁵⁵ On the other hand, if the suspect has a right to remain silent and *expressly invokes that right*, using the suspect's silence to prove guilt would almost certainly run afoul of *Griffin*.

What about situations in which the suspect simply remains silent? In *Doyle v. Ohio*,⁴⁵⁶ the Court considered the use of arrested suspects' silence in the face of circumstances that appeared to call for a denial of guilt. The Constitution renders such silence inadmissible, the Court concluded, if the suspect has been specifically warned of the right to remain silent. The Court relied heavily upon its perception that such silence is "inherently ambiguous."⁴⁵⁷ Thus, to allow a jury to rely on the silence would pose too great a risk to the defendant's right to an accurate determination of guilt. But in addition—although this was never expressly stated by the Court—relying upon a defendant's silence is constitutionally offensive because it creates a risk that guilt will be inferred from the exercise of the right to remain silent.⁴⁵⁸ Allowing such an inference would be impermissible under *Griffin*.

452. 380 U.S. 609 (1965).

453. *Id.* at 615.

454. *E.g.*, *Lefkowitz v. Cunningham*, 431 U.S. 801, 806-09 (1977) (official of political party cannot be barred from public office for five years for invoking the privilege when called to testify before grand jury); *Slochower v. Board of Education*, 350 U.S. 551, 559 (1956) (teacher cannot be discharged for invoking privilege before congressional committee).

455. *South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983) (suspect's refusal to cooperate in blood alcohol test admissible where state had right to compel participation in such test).

456. 426 U.S. 610 (1976).

457. *Doyle*, 426 U.S. at 617-18 (citing *United States v. Hale*, 422 U.S. 171, 177 (1975)). *Hale* held that a suspect's silence in response to an accusatory question by an officer during custody was inadmissible in a subsequent federal prosecution. *Hale*, 422 U.S. at 180-81.

458. *Doyle*, 426 U.S. at 619 n.10 (unfair to permit state to base impeachment on "what may be the exercise of [the] right [to remain silent]").

The Court, however, has now adopted a narrower rationale for the *Doyle* holding, and has thus declined to expand the *Doyle* result. In *Fletcher v. Weir*,⁴⁵⁹ the Court characterized the earlier case as resting solely upon the inherent unfairness of informing a citizen of a right to remain silent and then using that silence to the citizen's disadvantage.⁴⁶⁰ Where, as in *Fletcher*, the arrested suspect has not been warned, there is no prohibition against using the suspect's silence in the face of circumstances calling for a denial of guilt.

If a nonarrest detainee who has been warned of a right to remain silent (whether or not such warnings are required⁴⁶¹) is not questioned, and is subsequently silent in the face of circumstances that call for a denial of guilt, *Doyle* seems to apply and bar use of the silence as evidence of guilt at trial. If a warning is neither necessary nor given, no questioning occurs, and the suspect remains silent when the circumstances call for a spontaneous denial of guilt, *Fletcher* appears to permit use of the silence. If the detainee is not warned, but is asked questions, does either *Doyle* or *Fletcher* apply? Insofar as the rationale for excluding silence is the inherent unfairness of telling a suspect of a right to remain silent and then using that silence against him, the answer is no. Nevertheless, the ambiguity of the suspect's response in this context may require its exclusion for constitutional reasons; the risk of error in relying on ambiguous inferences may offend due process. More importantly, however, silence in response to specific questions is more likely to represent a conscious exercise of what the suspect perceives is the right to remain silent. The risk that the suspect will be penalized for invoking that right, then, should prohibit using silence in response to questions. *Fletcher* can be distinguished as involving a substantially reduced risk that the silence at issue represented an exercise of the fifth amendment privilege.

Many jurisdictions, finding the ambiguity of post-arrest silence too offensive, bar use of such silence on nonconstitutional grounds.⁴⁶² Such

459. 455 U.S. 603 (1982) (per curiam). In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court held *Doyle* inapplicable to pre-detention silence. *Doyle* was said to be predicated on the "fundamental unfairness" of acting contrary to the implications of the *Miranda* warnings, rather than on the ambiguity of a suspect's silence. *Jenkins*, 447 U.S. at 239-40.

460. *Fletcher*, 455 U.S. at 606-07.

461. Cf. *Johnson v. United States*, 318 U.S. 189 (1943) (even if privilege has been granted mistakenly, court may not comment on defendant's silence), cited with approval in *Doyle*, 426 U.S. at 618 n.9.

462. E.g., *United States v. Hale*, 422 U.S. 171, 180 (1975) (exercising Court's supervisory power over lower federal courts to bar admission of evidence concerning suspect's silence during post-arrest interrogation); *State v. Cook*, 174 Conn. 73, 76, 381 A.2d 563, 564 (1977); *Samuel v. State*, 688 S.W.2d 492, 496 n.7 (Tex. Crim. App. 1985). Some jurisdictions state the rule as barring admission of silence when the defendant is under arrest or in custody. *Kagebein v. State*, 254 Ark. 904, 907-08,

prohibitions would appear equally applicable to silence during nonarrest detentions, whether or not the detainee has been asked questions. There is no basis for arguing that inferring guilt from silence during a detention is more reliable if the detention is for nonarrest investigatory purposes. Ultimately, the risk that silence during a nonarrest detention will be used to prove guilt strongly supports a nonconstitutional prohibition against the evidentiary use of silence during a nonarrest detention.

If silence cannot be used to prove guilt, may it nevertheless be used to support an arrest at a hearing on a motion to suppress evidence obtained in a search incident to that arrest? *Griffin* addresses the risk of using silence to influence the trier of fact to convict; if the trier of fact is not told that the defendant remained silent, this risk is eliminated. But by arresting one who invokes the presumed right to silence, the state arguably impermissibly burdens the exercise of that right. It may follow that evidence obtained as a result of the imposition of an improper burden is, because of its origin, inadmissible even in a suppression hearing.⁴⁶³

In *Baxter v. Palmigiano*,⁴⁶⁴ the Court somewhat solidified its ap-

496 S.W.2d 435, 438 (1973), *cited with approval in*, *Wilson v. City of Pine Bluff*, 641 S.W.2d 33, 36 n.1 (Ark. Ct. App.), *cert. denied*, 278 Ark. 65, 643 S.W.2d 569 (1982); *State v. Samuel*, 521 S.W.2d 374, 375 (Mo. 1975).

A number of states have barred testimony of a defendant's silence during detention as a matter of state constitutional law. *See, e.g.*, *State v. Davis*, 38 Wash. App. 600, 602-06, 686 P.2d 1143, 1145-46 (1984) (violation of state requirement of due process). Most of these decisions have rested upon state constitutional self-incrimination doctrines. *See, e.g.*, *Nelson v. State*, 691 P.2d 1056, 1059 (Alaska App. 1984); *People v. Jacobs*, 158 Cal. App. 3d, 740, 746-47, 204 Cal. Rptr. 849, 854 (1984); *Clenin v. State*, 573 P.2d 844, 846 (Wyo. 1978), *overruled on other grounds*, *Richter v. State*, 642 P.2d 1259 (Wyo. 1982) (prosecutorial comment upon an accused's silence is not per se prejudicial), *overruled*, *Westmark v. State*, 693 P.2d 220 (Wyo. 1984) (reinstating the *Clenin* rule that prosecutorial comment upon an accused's silence is per se prejudicial).

463. "Probable cause" necessary for an arrest could be defined, as a matter of either fourth amendment or state law, in a way that precludes consideration of silence evidence. Such a position would most reasonably be based upon the proposition that the ambiguity of such evidence renders it insufficiently reliable to justify any consideration at all in the probable cause decision. *Compare* *United States v. Harris*, 403 U.S. 573, 583 (1971) (opinion of Burger, C.J., joined by Black, White & Blackmun, JJ.) (assertion that suspect has reputation as trafficker in liquor for which taxes have not been paid is entitled to consideration in determining if probable cause exists) *with* *Spinelli v. United States*, 393 U.S. 410, 414 (1969) (allegation that suspect is "known" to law enforcement officers as gambler is entitled to "no weight" in appraising existence of probable cause), *overruled on other grounds*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

464. 425 U.S. 308 (1976). *See also* *Estelle v. Smith*, 451 U.S. 454, 468 (1981), in which the Court suggests that a defendant can be compelled to respond to questions of a psychiatric examiner if the answers will be applied solely to determine the defendant's competency to stand trial. It seems to follow that if such answers can be compelled, an adverse inference can be drawn from the defendant's refusal to respond. *Cf.* *South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983) (because state can compel suspect to take blood-alcohol test, it may legitimately offer suspect the option of refusing, even though inference of intoxication may arise from refusal). If so, this means that such an inference does not constitute an impermissible burden upon a defendant's invoking the "right" to silence.

proach to evaluating burdens placed on the fifth amendment privilege. In the prison disciplinary proceedings at issue, an inmate was permitted to remain silent rather than testify about certain events. These events might have involved conduct that could have given rise to criminal prosecution as well as internal discipline. During the proceedings the inmate's silence could be considered for the purpose of proving his guilt, although a finding of guilt could not be based entirely upon the inmate's silence.⁴⁶⁵ Finding no fifth amendment defect in the procedure, the Court emphasized that an inmate's silence was given only such evidentiary weight as was justified on the facts; no automatic finding of an infraction followed silence.⁴⁶⁶ In addition, important state interests other than conviction for crime—specifically, the efficient and safe operation of the correctional system—were involved.⁴⁶⁷

This suggests that at a minimum a suspect's invocation of the right to remain silent in a field stop situation may be given appropriate evidentiary weight in determining if there are grounds for a longer detention. Arrest or other prolonged detention, however, should not automatically follow a suspect's refusal to respond; rather, the officer should be permitted to consider the reasonable value of the silence, under the circumstances, as an indicator of guilt. Thus, as in *Baxter*, such use of silence would not constitute a penalty for invoking the right to silence, but merely "a realistic reflection of the evidentiary significance of the choice to remain silent."⁴⁶⁸ Moreover, the need for silence to be accorded its evidentiary significance in the investigatory stages of a criminal case may be substantially greater than at trial. The pretrial period permits extensive investigation and development of evidence other than the accused's silence. But the brief period of an investigatory stop often permits no investigation other than asking the suspect questions. An officer denied the right to draw reasonable inferences from the suspect's silence would be unable to reap the intended benefits of the detention.⁴⁶⁹

465. *Baxter*, 425 U.S. at 312-13.

466. *Id.* at 318.

467. *Id.* at 319. It is difficult to believe that the Court meant that this interest was necessarily more important than the state's interest in the conviction of those guilty of serious offenses. It is more likely that the Court meant that other means of maintaining prison discipline were less available than alternative means of securing evidence of offenders' guilt; thus, use of silence in the correctional disciplinary context was more necessary to the pursuit of a goal that itself may be no more important than the goal of prosecuting criminals.

468. *Id.* at 318.

469. It can also be argued that in many cases the law simply cannot prevent officers from relying on silence. Even if officers are prohibited from relying on a subject's silence, the fluidity of the definition of probable cause will often allow arrests following silence to be upheld. If reliance on silence cannot practically be prevented, purporting to bar such reliance as a matter of self-incrimination law can only serve to divorce that law from reality and impede its ability to accomplish realistic

The use that can be made of silence under existing fifth amendment law, then, depends to some extent on whether a detained citizen has the right to remain silent and to be warned about that right. The hard issue arises if it is assumed that there is a right to remain silent, but the suspect has not been warned of that right and has been asked questions. On balance, such silence should be inadmissible to prove guilt under *Griffin* and *Doyle*; despite the absence of warnings, it is highly likely that the citizen intended the silence as an exercise of the right to decline to answer. If the silence is offered not to prove guilt but rather to support the admissibility of evidence obtained by later police action, the problem is more difficult. Despite *Baxter*, so using the suspect's silence is a relatively direct and serious penalty for conduct that is quite likely to have been an effort to invoke the right to remain silent. Silence should not be considered in determining the probable cause necessary for a post-detention arrest.

IV. CONCLUSION

Nonarrest detentions for purposes of investigating suspected criminal activity have long been used by law enforcement officers. Until the development of the exclusionary rule, however, investigatory detentions and their validity had little procedural significance and were seldom discussed. The *Terry* trilogy confirmed the developing proposition that such detentions were seizures of the person within the terms of the fourth amendment and therefore had to be "reasonable." But the trilogy also strongly suggested that the fourth amendment was sufficiently flexible to accommodate some investigatory detentions in situations where arrests would be prohibited. Investigatory detention authority, however, was perceived as raising a number of difficult issues that the Court was at that time unprepared to address. Despite the limited holdings, the *Terry* trilogy encouraged state legislatures and courts to address the nonarrest detention authority. The Court itself has had more than fifteen years to refine the federal constitutional limits on that authority and has addressed those limits in a number of post-*Terry* decisions.

Although nonarrest detention authority has received attention on both the federal constitutional and state law levels, there remain extensive gaps in the law defining the authority. Despite apparent agreement on the standards for evaluating nonarrest detention activities, there is substantial uncertainty concerning the point at which a citizen/officer

goals. *But cf. Carter v. Kentucky*, 450 U.S. 288, 302-05 (1981) (although jurors cannot be kept from speculating about why defendant failed to testify, upon proper request, jury must be instructed to minimize such speculation).

confrontation becomes a detention and thus becomes subject to the limits on such seizures. Little attention has been paid to whether those offenses justifying detentions must or should be limited and to the scope of detention authority concerning anticipated offenses. There is widespread agreement that nonarrest detentions must be limited in duration, but the practical meaning of this requirement is clouded. Although it now appears certain that a suspect cannot be moved to the stationhouse during a nonarrest detention, what, if any, limits exist on other movement is uncertain. Almost no authority exists for the proposition that detained suspects must be informed of the nature of their detention, but the desirability of providing such information has not been seriously considered.

Insofar as these are matters of fourth amendment dimensions, the Supreme Court's decisions provide insufficient guidance regarding the substance of the amendment's requirements to ensure that scrutiny of nonarrest detentions is effective. Little attention has been paid to the extent to which these matters may be of no federal constitutional significance and thus subject only to state regulation. Given the Court's responsibility for having fostered the widespread perception that this aspect of search and seizure law has been constitutionalized on the federal level, the Court must bear some of the responsibility for the failure of state lawmakers to address these matters.

Recent decisions of the Supreme Court do make clear that nonarrest detention law shares with other areas of search and seizure law concerns related to several broader issues. The extent to which specific enabling legislation must exist for such detentions is unclear. If *Hensley* did resolve for fourth amendment purposes the troublesome question of characterizing detentions for judicial review, the inadequacy of the Court's consideration of the matter demands that it be readdressed as a matter of state law. In addition, little attention has been given to the limits, if any, that must or should be placed on law enforcement questioning during detentions.

The degree of uncertainty concerning investigatory stops is especially unsettling given the frequency with which such detentions occur. But the uncertainty also casts doubt on continued reliance on exclusionary sanctions to regulate nonarrest detentions. If the substantive limits on nonarrest detention authority are not well defined, there is little reason to believe that law enforcement misconduct can be prevented by the exclusion of evidence obtained in violation of those limits.