

1976

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### Recommended Citation

Gary D. Stumpp, *Elimination of Arbitrary Automobile Stops: Theory and Practice*, 4 Fordham Urb. L.J. 327 (1976).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol4/iss2/5>

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# ELIMINATION OF ARBITRARY AUTOMOBILE STOPS: THEORY AND PRACTICE

## I. Introduction

The authority of the police to enforce the statutory restrictions governing vehicle and traffic laws has often been considered to be concomitant with a right to stop motorists arbitrarily to determine their compliance.<sup>1</sup> Recently, some courts have eroded this power,<sup>2</sup> to protect the constitutional rights guaranteed to individuals under the fourth amendment.<sup>3</sup>

In their consideration of these arbitrary automobile stops, the courts have utilized a balancing process. They consider the state interest in promoting public safety on the highways through the guaranteed enforcement of the relevant laws, as well as the duty of the police to detect and control crime. Additionally, there is the interest of the individual in unrestricted travel, and his penumbral right of privacy under the United States Constitution.<sup>4</sup>

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1. See, e.g., *United States v. Marlow*, 423 F.2d 1064 (5th Cir. 1970); *D'Argento v. United States*, 353 F.2d 327 (9th Cir. 1965), *cert. denied*, 384 U.S. 963 (1966); *Garsed v. State*, 51 Ala. App. 622, 288 So. 2d 161 (Crim. App. 1973); *State ex rel. Berger v. Cantor*, 13 Ariz. App. 555, 479 P.2d 432 (Div. 1, 1970); *Palmore v. United States*, 290 A.2d 573 (D.C. Ct. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973); *State v. White*, 18 N.C. App. 31, 195 S.E.2d 576 (Ct. App.), *cert. denied and appeal dismissed*, 283 N.C. 587, 196 S.E.2d 811 (1973); *State v. Garcia*, 16 N.C. App. 344, 192 S.E.2d 2 (Ct. App. 1972); *State v. Maloney*, 109 R.I. 166, 283 A.2d 34 (1971); *Murphy v. State*, 194 Tenn. 698, 254 S.W.2d 979 (1953); *Black v. State*, 491 S.W.2d 428 (Tex. Crim. App. 1973); *Oliver v. State*, 455 S.W.2d 291 (Tex. Crim. App. 1970).

2. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975); *Commonwealth v. Swanger*, 300 A.2d 66 (Pa.), *aff'd on rehearing*, 453 Pa. 107, 307 A.2d 875 (1973).

3. U.S. CONST. amend. IV provides:

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

4. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968); *Myricks v. United States*, 370 F.2d 901 (5th Cir.), *petition for cert. dismissed*, 386 U.S. 1015 (1967); *Patenotte v. United States*, 266 F.2d 647 (5th Cir. 1959); *State ex rel. Berger v. Cantor*, 13 Ariz. App. 555, 479 P.2d 432 (Div. 1, 1970); *Mincy v. District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966); *State v. Fish*, 280 Minn. 163, 159 N.W.2d 786 (1968); *State v. Kabayama*, 98 N.J. Super. 85, 236 A.2d 164 (App. Div. 1967), *aff'd*, 52 N.J. 507, 246 A.2d

The elements considered by the courts in the balancing process have not changed; rather, it is the weight attached to each which is outcome determinative. The courts initially permitted such stops in all instances.<sup>5</sup> Later, this was restricted to some degree.<sup>6</sup> Now, however, some courts have held the individual's rights to be paramount.<sup>7</sup>

This Comment will survey the judicial tests that have been developed to eliminate arbitrary stops, and examine their effectiveness in protecting the rights of motorists.<sup>8</sup>

## II. Constitutional Considerations

In order to challenge these statutory provisions as unconstitu-

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714 (1968); *People v. Kuhn*, 33 N.Y.2d 203, 306 N.E.2d 777, 351 N.Y.S.2d 649 (1973); *People v. Dozier*, 52 Misc. 2d 631, 276 N.Y.S.2d 145 (Oneida County Ct. 1967); *State v. Maloney*, 109 R.I. 166, 283 A.2d 34 (1971); *Leonard v. State*, 496 S.W.2d 576 (Tex. Crim. App. 1973); *cf. United States v. Turner*, 442 F.2d 1146 (8th Cir. 1971); *United States v. Riggs*, 347 F. Supp. 1098 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir. 1973), *cert. denied*, 414 U.S. 820 (1973); *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913).

5. See cases cited in note 1, *supra*.

6. This generally has been accomplished by specifying that the stop may not be used as a subterfuge for an otherwise illegal seizure. *See, e.g., Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960); *State v. Smolen*, 4 Conn. Cir. 385, 232 A.2d 339 (App. Div.), *appeal denied*, 155 Conn. 720, 231 A.2d 283 (1967), *cert. denied*, 389 U.S. 1044 (1968); *Mincy v. District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966); *Byrd v. State*, 80 So. 2d 694 (Sup. Ct. Fla. 1955); *People v. Harr*, 93 Ill. App. 2d 146, 235 N.E.2d 1 (2d Dist. 1968); *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. App. 1971); *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. App. 1962); *State v. Fish*, 280 Minn. 163, 159 N.W.2d 786 (1968); *Coston v. State*, 252 Miss. 257, 172 So. 2d 764 (1965); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968); *State v. Williams*, 237 S.C. 252, 116 S.E.2d 858 (1960); *Murphy v. State*, 194 Tenn. 698, 254 S.W.2d 979 (1953); *State v. Baker*, 78 Wash. 2d 327, 474 P.2d 254 (1970); *cf. United States v. Leal*, 460 F.2d 385 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); *People v. Francis*, 4 Ill. App. 3d 65, 280 N.E.2d 49 (2d Dist. 1972); *People v. Carey*, 11 Mich. App. 213, 160 N.W.2d 799 (Div. 2, 1968), *rev'd on other grounds*, 382 Mich. 285, 170 N.W.2d 145 (1969); *People v. Loveland*, 71 Misc. 2d 935, 338 N.Y.S.2d 548 (Seneca County Ct. 1972). *But see Kraft v. State*, 18 Md. App. 169, 305 A.2d 489 (1973); *People v. Regan*, 30 App. Div. 2d 983, 294 N.Y.S.2d 154 (3d Dep't 1968); *People v. Isaac*, 38 Misc. 2d 1018, 239 N.Y.S.2d 624 (Sup. Ct. 1963).

7. See cases cited in note 2 *supra*.

8. Even in those decisions concerned with the legality of the search and/or arrest following the initial stop, the courts first had to rule on the validity of the stop itself, in order to reach these later issues. *See, e.g., United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *State ex rel. Berger v. Cantor*, 13 Ariz. App. 555, 479 P.2d 432 (Div. 1, 1970); *Palmore v. United States*, 290 A.2d 573 (D.C. Ct. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973); *People v. Hoffman*, 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (2d Dep't 1965).

tional<sup>9</sup> it is necessary to demonstrate the applicability of the fourth amendment<sup>10</sup> to automobile stop cases.<sup>11</sup> In order to trigger the protections of this amendment, two elements must coincide: one, that a seizure occurred, and two, that it was unreasonable.<sup>12</sup>

The basis for finding such an unreasonable seizure was enunciated by the Supreme Court in *Terry v. Ohio*.<sup>13</sup> There, in dealing with street encounters, a seizure was defined as occurring when an officer "accosts an individual and restrains his freedom to walk away."<sup>14</sup> The Court was concerned with a balancing of the governmental and individual interests, and therefore stated that to justify such a seizure, "the police officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion."<sup>15</sup> The step from a pedestrian detention to one involving an automobile, however, has been the subject of much controversy.<sup>16</sup>

Prior to *Terry*, the Supreme Court had distinguished between searches of one's home and automobile,<sup>17</sup> and although it has still never actually ruled on the applicability of *Terry* to automobiles, its general approach demonstrates that this is the case.<sup>18</sup> Nevertheless,

9. See generally Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974); Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973); Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666 (1974).

10. The fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Id.* at 27.

11. See *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971).

12. U.S. CONST. amend. IV. However, this amendment is not equivalent to a constitutional "right of privacy," as its proscription is broader. It "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Katz v. United States*, 389 U.S. 347, 350 (1967).

13. 392 U.S. 1 (1968).

14. *Id.* at 16.

15. *Id.* at 21.

16. See generally Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U. SAN FRAN. L. REV. 219, 237-41 (1974).

17. See *Carroll v. United States*, 267 U.S. 132 (1925). The primary purpose of the fourth amendment is "to prevent . . . unlawful invasion of the sanctity of the home . . ." *Adams v. New York*, 192 U.S. 585, 598 (1904); accord, *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973). See generally Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 IOWA L. REV. 1134 (1973).

18. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); cf., *United States v. Ortiz*, 422 U.S. 891, 896 (1975); *United States v.*

some lower courts have misconstrued the Supreme Court's failure to specifically hold automobile stops to be directly within the purview of the fourth amendment,<sup>19</sup> and have not applied that amendment's provisions in such situations.<sup>20</sup> However, the more modern approach is illustrated in *United States v. Mallides*.<sup>21</sup> There the Ninth Circuit reversed a conviction for transporting illegal aliens where the defendant had been stopped without having violated any traffic laws.<sup>22</sup> The court stated:<sup>23</sup>

Although a pedestrian and an automobile driver are not in identical circumstances, we see no reason why similar Fourth Amendment standards should not be applied in both situations. A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively "seized" as is the pedestrian who is detained.

### III. Existing State Law Permitting Random Stops

The statutory requirements of most states with respect to random stops are similar.<sup>24</sup> Generally, they require the motorist to carry and produce his license and registration on the demand of an authorized

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Cupps, 503 F.2d 277, 280 (6th Cir. 1974); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969).

19. [However,] [t]he States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

*Ker v. California*, 374 U.S. 23, 34 (1963).

20. Even prior to *Terry*, some courts had recognized similar types of seizures as falling within the purview of the fourth amendment. Therefore, in order to determine the validity of the stop, the interests of both the state and the individual must be balanced, and the stop may not merely be made to harass the motorist. See, e.g., *United States v. Bonanno*, 180 F. Supp. 71, 78-80 (S.D.N.Y. 1960).

Moreover, some courts attempt to justify their licensing statutes on the ground that driving is a privilege granted to the citizens by the state, and is not an inherent right. Typical of these is *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913). However, the reliance of the court on the Supreme Court's holding in *Otis v. Parker*, 187 U.S. 606, 609 (1903) was abrogated by *Graham v. Richardson*, 403 U.S. 365, 374 (1971), where the Court stated that it "now has rejected the concept that constitutional rights turn on whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

21. 473 F.2d 859 (9th Cir. 1973).

22. *Id.* at 862.

23. *Id.* at 861; accord, *Carpenter v. Sigler*, 419 F.2d 169, 171 (8th Cir. 1969).

24. However, California includes a reasonableness requirement in the statutory language itself. CAL. VEHICLE CODE § 2806 (West 1971).

official.<sup>25</sup> Additionally, many statutes specifically give the police the power to so request.<sup>26</sup>

Even where there is no provision specifically granting the authority to require such production, some courts have reasoned that this power is implicit in the language of the statute itself.<sup>27</sup> Moreover, many courts specifically state that the stop preliminary to the request does not amount to either a search or seizure,<sup>28</sup> or an arrest,<sup>29</sup> thereby circumventing the fourth amendment constitutional protections of the motorist.

For example, in *Palmore v. United States*,<sup>30</sup> defendant was stopped by the District of Columbia police, even though he had committed no moving traffic violation, and his automobile apparently had no equipment defects.<sup>31</sup> Noticing that the car was a rental similar to some recently stolen vehicles, the police stopped it for a spot check. Defendant produced a valid driver's license and an expired rental agreement, which had been orally extended. As this was occurring, one of the police officers noticed a pistol protruding from the front seat of the car. After learning that it was unregistered, he placed defendant under arrest.<sup>32</sup>

Defendant argued that the police had "seized"<sup>33</sup> him within the

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25. See, e.g., ARIZ. REV. STAT. ANN. §§ 28-305(D), 28-423 (1956); D. C. CODE ENCYCL. ANN. §§ 40-104(a)(1), 40-301(c) (1968), as amended, (Supp. 1975); MO. ANN. STAT. § 302.181(3) (Vernon 1972); N.M. STAT. ANN. §§ 64-3-11, 64-13-49 (1972); N.Y. VEH. & TRAF. LAW § 401(4) (McKinney 1970); PA. STAT. ANN. tit. 75 § 614(b) (1971); cf. N.Y. VEH. & TRAF. LAW § 501(1)(e) (McKinney 1970).

26. See, e.g., NEB. REV. STAT. § 60-435(4) (1974); PA. STAT. ANN. tit. 75 § 1221(a) (1971); cf. MO. ANN. STAT. §§ 43.160, 43.195 (Vernon 1969); N.Y. VEH. & TRAF. LAW §§ 390, 423(1) (McKinney 1970); PA. STAT. ANN. tit. 75 §§ 819(g), 834(g), 1221(b) (1971).

27. Many arguments have been raised for the preservation of this police authority, most notably the lack of any other realistic mode by which to detect such violations. See, e.g., *Palmore v. United States*, 290 A.2d 573 (D.C. Ct. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973); *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965); *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. App. 1962); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975).

28. See, e.g., *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. 1971); cf. *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965).

29. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 188 (1949) (Jackson, J. dissenting); *Rodgers v. United States*, 362 F.2d 358 (8th Cir.), *cert. denied*, 385 U.S. 993 (1966); *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); *Commonwealth v. Hagan*, 464 S.W.2d 261 (Ky. 1971).

30. 290 A.2d 573 (D.C. Ct. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973).

31. *Id.* at 581.

32. *Id.*

33. See text accompanying notes 9-14 *supra*.

meaning of the fourth amendment and could not at that time point to the "specific and articulable facts" required by *Terry*.<sup>34</sup> The government, however, contended that the police had a statutory right and duty to stop an automobile without having even reasonable suspicion.<sup>35</sup> The court decided that these two apparently opposing positions were not irreconcilable.<sup>36</sup>

In affirming the conviction, the court held that stops to determine compliance with the District of Columbia Code are "not so unreasonable as to be violative of the fourth amendment."<sup>37</sup> Although cautioning against use of the Code as a mere subterfuge for otherwise unconstitutional stops,<sup>38</sup> it held that after the production of the required documents, the police must release the driver immediately, and that it is only at this specific point that the relevant safeguards enunciated by the Supreme Court in *Terry* become applicable.<sup>39</sup> However, the holding of the *Palmore* court is now questionable because of its failure to recognize that the defendant was effectively "seized" at the time of his initial stop by the police.<sup>40</sup>

Cases following *Palmore* have usually employed a balancing process in which the governmental and individual interests are weighed.<sup>41</sup> The rationale of the court in *State ex rel. Berger v. Cantor*<sup>42</sup> is illustrative of this balancing process. Defendant was driving an old, dirty car when he was stopped by the highway patrol

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34. 392 U.S. at 21. See text accompanying note 15 *supra*.

35. 290 A.2d at 581-82; see D.C. CODE ENCYCL. ANN. §§ 40-104(a)(1), 40-301(c) (1968), as amended, (Supp. 1975).

36. 290 A.2d at 582.

37. *Id.*

38. *Id.*; see cases cited in note 6 *supra*.

39. 290 A.2d at 583.

40. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *Id.* at 878.

However, as was noted in *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971) (see text accompanying notes 61-67 *infra*):

In determining whether the seizure . . . violated his Fourth Amendment rights, we are required, under *Terry*, to make a dual inquiry:

(1) whether the officers' action was justified at its inception, and

(2) whether it was reasonably related in scope to the circumstances which justified the interferences in the first place.

*Id.* at 624 (emphasis added).

41. See cases cited in note 4 *supra*.

42. 13 Ariz. App. 555, 479 P.2d 432 (Div. 1 1970).

for a license and registration check.<sup>43</sup> As he opened the glove compartment to procure the registration, the officer observed a kilogram of marijuana and arrested him.<sup>44</sup> The Arizona Court of Appeals concluded that this stop was a permissible exercise of the state's police power, due to its interest in maintaining highway safety.<sup>45</sup>

In this balancing process, the most forceful argument advanced for the state is that there is no other practical method of guaranteeing compliance with the relevant vehicle and traffic regulations. *Palmore* reasoned that a limitation on this power to stop motor vehicles would make prevention of violations virtually impossible, since people driving in disregard of licensing and registration regulations would not demonstrate the required conduct for the existence of an "articulable suspicion," and would therefore gain effective immunity.<sup>46</sup>

Many courts have adopted this type of reasoning<sup>47</sup> to hold that there existed such a blanket right on the part of the police,<sup>48</sup> even

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43. *Id.* at 556, 479 P.2d at 433; see ARIZ. REV. STAT. ANN. §§ 28-305(d), 28-423 (1956).

44. 13 Ariz. App. at 556, 479 P.2d at 433.

45. *Id.* at 558, 479 P.2d at 435; cf. *United States v. Riggs*, 347 F. Supp. 1098, 1102-03 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

Subsequently, Division 2 of the Arizona Court of Appeals, noting the apparent split in authority between the two divisions, stated that these stops were constitutional only when the police had a "rational suspicion" that the person was involved in some unusual activity which was connected to crime. *State v. Ochoa*, 23 Ariz. App. 510, \_\_\_, 534 P.2d 441, 444-45 (Div. 2, 1975). Although such a test is initially equivalent to the "suspicious circumstances" stated in *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971), it is still questionable as to which course will finally be adopted as controlling in Arizona. See text accompanying notes 61-67 *infra*.

46. 290 A.2d at 582; *accord*, *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965); *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. App. 1962); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *People v. Dozier*, 52 Misc. 2d 631, 276 N.Y.S.2d 145 (Oneida County Ct. 1967). Moreover, in *Holmberg*, the court stated: "It would be most unusual to have an observable indication of a licensing violation of a moving vehicle. Stopping the vehicles for inspection is the only practical method of enforcement . . . ." 194 Neb. at \_\_\_, 231 N.W.2d at 675.

47. For an argument in the opposite extreme, see note 71 *infra*.

48. See cases cited in note 1 *supra*. The New York decisions in this area are of special interest, as following the decision of *People v. Battle*, 12 N.Y.2d 866, 187 N.E.2d 793, 237 N.Y.S.2d 341 (1962), the lower New York courts consistently held that the police had a virtually unlimited right to arbitrarily stop automobiles in order to determine compliance with the statute, even though the Court of Appeals did not speak on the issue until *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975), and *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975). See, e.g., *People v. Jeffries*, 45 App. Div. 2d 6, 355 N.Y.S.2d 878 (4th Dep't 1974); *People v. Denti*, 44 App. Div. 2d 44, 353 N.Y.S.2d 10 (1st Dep't 1974); *People v. Baer*, 37 App. Div. 2d 150, 322 N.Y.S.2d 534 (3d Dep't 1971);



though the factual situation provided the officers involved with probable cause or reasonable suspicion upon which they could have made such a stop.<sup>49</sup> In *People v. Hoffman*,<sup>50</sup> the police stopped defendant due to his suspicious activities in operating his car at four o'clock in the morning, and found stolen license plates in it.<sup>51</sup> In denying his motion to suppress this evidence, the court stated that such a stop was justified by the defendant's actions.<sup>52</sup> However, this

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*People v. Merola*, 30 App. Div. 2d 963, 294 N.Y.S.2d 301 (2d Dep't 1968); *People v. Koposkesky*, 25 App. Div. 2d 777, 269 N.Y.S.2d 484 (2d Dep't 1966); *People v. Hoffman*, 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (2d Dep't 1965); *People v. Scianno*, 20 App. Div. 2d 919, 249 N.Y.S.2d 456 (2d Dep't 1964); *People v. Dozier*, 52 Misc. 2d 631, 276 N.Y.S.2d 145 (Oneida County Ct. 1967); *People v. Russo*, 38 Misc. 2d 957, 239 N.Y.S.2d 374 (New York City Ct. 1963).

49. The justification for permitting such stops in these situations was amply stated in *State v. Fish*, 280 Minn. 163, 159 N.W.2d 786 (1968) (defendant stopped driving away from a bar at 2:30 a.m. after police received a report it had been burglarized). The court stated that "[p]ersons found under suspicious circumstances are not clothed with a right of privacy which prevents law-enforcement officers from inquiring as to their identity and actions." *Id.* at 167, 159 N.W.2d at 789; *accord*, *United States v. Lara*, 517 F.2d 209 (5th Cir. 1975) (citing factors of *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), for finding reasonable suspicion for a search); *United States v. Fallon*, 457 F.2d 15 (10th Cir. 1972) (stopped since the occupants of a Jeep station wagon appeared young and the vehicle was new and expensive); *Welch v. United States*, 361 F.2d 214 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966) (defendant was stopped since he was driving slowly and weaving as if drunk); *Santos v. Bayley*, 400 F. Supp. 784 (M.D. Pa. 1975) (defendants stopped in response to a police broadcast identifying their van as one suspected of transporting marijuana); *State v. Cobuzzi*, 161 Conn. 371, 288 A.2d 439 (1971), *cert. denied*, 404 U.S. 1017 (1972) (defendant was stopped after driving in a circuitous route in a commercial district area in the early morning); *People v. Miezio*, 103 Ill. App. 2d 398, 242 N.E.2d 795 (2d Dist. 1968) (defendant stopped since he had no license plates); *State v. Valstad*, 282 Minn. 301, 165 N.W.2d 19 (1969), *citing State v. Fish, supra*; *People v. Merola*, 30 App. Div. 2d 963, 294 N.Y.S.2d 301 (2d Dep't 1968); (defendant stopped by police while running to a parked car with its motor on and a number of coats on the back seat); *cf. People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965) (police stopped and frisked defendants after watching them walk back and forth in front of a bar and grill at 1:30 a.m., and walk away rapidly after seeing police). *But see Dodge v. Turner*, 274 F. Supp. 285 (D. Utah 1967) (no probable cause to arrest defendant after police officer saw him lean over in his car as if he were putting something under the seat); *People v. Diaz*, 36 Misc. 2d 195, 232 N.Y.S.2d 208 (New York City Ct. 1962) (no probable cause to stop defendant driving up and down the same street, an action which the police had thought suspicious).

The Supreme Court has recently upheld the constitutionality of such "suspicious individual" stops, reasoning that "in order to determine his identity or to maintain the status quo momentarily while obtaining more information, [such a brief stop] may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citations omitted).

50. 24 App. Div. 2d 497, 261 N.Y.S.2d 651 (2d Dep't 1965).

51. *Id.* at 498, 261 N.Y.S.2d at 653.

52. *Id.*

was not until the court had first stated in universal language that it was "clear that the arresting officer was lawfully authorized to stop" defendant and demand production of the documents required to be carried by the statute.<sup>53</sup>

Other courts have been faced with the issue of routine stops at fixed checkpoints.<sup>54</sup> It is generally easier to justify such a stop,<sup>55</sup> since the element of arbitrariness is removed,<sup>56</sup> and the discretion of the state to intrude is considerably lessened.<sup>57</sup> In these cases, the police do not randomly choose to stop a particular driver,<sup>58</sup> and any chance of discrimination at the whim of the officers involved is therefore removed. Unless such a universal procedure were held to be unconstitutional, its application would be upheld.<sup>59</sup>

#### IV. Evolving Law

In answer to the arguments raised against permitting arbitrary stops, a trend developed whereby the police were required to have more than naked statutory power to conduct such "routine traffic checks." To some extent, the foundation for this was laid in the various caveats and exclusions the courts devised to prevent the total abuse of this authority.<sup>60</sup> However, its real inception may be traced to the decision of the Eighth Circuit in *United States v. Nicholas*.<sup>61</sup>

There, three St. Louis City police officers were patrolling an area known for its high volume of narcotic trafficking, and observed a

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53. *Id.*

54. See *State v. Kabayama*, 98 N.J. Super. 85, 236 A.2d 164 (App. Div. 1967), *aff'd*, 52 N.J. 507, 246 A.2d 714 (1968).

55. See, e.g., *United States v. Hart*, 506 F.2d 887, 895 (5th Cir.), *vacated*, 422 U.S. 1053 (1975).

56. See, e.g., *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975); *State v. Smolen*, 4 Conn. Cir. 385, 232 A.2d 339 (App. Div.), *appeal denied*, 155 Conn. 720, 231 A.2d 283 (1967), *cert. denied*, 389 U.S. 1044 (1968); *cf. United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960).

57. See, e.g., *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970).

58. *Cf. People v. Kuhn*, 33 N.Y.2d 203, 208, 306 N.E.2d 777, 779, 351 N.Y.S.2d 649, 652 (1973). Although speaking of magnetometer searches at airports, the rationale used by the court is the same as that used in differentiating checkpoint from arbitrary stops.

59. But see *United States v. Ortiz*, 422 U.S. 891 (1975). "We therefore . . . hold that at traffic checkpoints removed from the border and its functional equivalents, [Border Patrol] officers may not search private vehicles without consent or probable cause." *Id.* at 896-97.

60. See cases cited in note 6 *supra*.

61. 448 F.2d 622 (8th Cir. 1971); *accord, United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973).

Cadillac with out-of-state plates in a parking lot. After seeing a black man enter, they stopped it to ascertain the registration, and to question his presence in that neighborhood. Upon smelling burning marijuana, they arrested the defendant; in a search of the car, they found stolen cashier's checks in the trunk.<sup>62</sup>

In reversing his conviction for possession of the checks, the court held that the police were only acting upon a generalized suspicion that any black person in such a position would be engaged in some sort of prohibited activity.<sup>63</sup> The court reasoned that the intrusion on fourth amendment rights could not be predicated on "such scant basis."<sup>64</sup>

In answer to the government's contention that the police were merely complying with Missouri law giving them the authority to check licenses,<sup>65</sup> the court explicitly stated: "Our examination of Missouri law indicates that there is no general power, either by virtue of statute or common law, to approach the driver of any vehicle absent suspicious circumstances."<sup>66</sup>

This requirement of "suspicious circumstances" is the first instance of a substantive limitation being placed upon the power of the police to stop vehicles arbitrarily under the relevant vehicle and traffic laws.<sup>67</sup> This same rationale was utilized by the Pennsylvania Supreme Court in *Commonwealth v. Swanger*.<sup>68</sup> There, the defen-

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62. 448 F.2d at 623.

63. *Id.* at 625.

64. *Id.*; accord, *United States v. Rias*, 524 F.2d 118, 121 (5th Cir. 1975).

65. 448 F.2d at 626; see Mo. ANN. Stat. §§ 43.160, 43.195, 302.181(3) (Vernon 1969).

66. 448 F.2d at 626 n.5.

67. See *State v. Rankin*, 477 S.W.2d 72 (Mo. Sup. Ct. 1972). The court held that: "It is clear that an officer has a right to stop an automobile to make a routine check for an operator's license." *Id.* at 75, citing *United States v. Turner*, 442 F.2d 1146 (8th Cir. 1971). However, the court's reliance on *Turner* is incorrect for two reasons, aside from the later law laid down in *Nicholas*. First, the police in *Turner* stopped the car for a routine check only after they noticed its punched out trunk lock (which would then meet even the 'suspicious circumstances' test subsequently stated by *Nicholas*). Second, the power of the police to stop for a routine check for an operator's license in *Turner* was conceded by the parties. 442 F.2d at 1147. In reference to such concessions made as to the power of the police to make such stops, see *United States v. Croft*, 429 F.2d 884 (10th Cir. 1970). Although there the court was dealing with a roadblock stop, it may well have foreshadowed the decisions against these arbitrary stops. Finding a lawful stop, the court emphasized that "[d]efendant was not singled out for this check but was simply the first car stopped." *Id.* at 886.

68. 300 A.2d 66 (Pa.), *aff'd on rehearing*, 453 Pa. 107, 307 A.2d 875 (1973). The court granted the petition for reargument of the attorney general, and then reiterated its prior decision to reverse appellant's conviction. 453 Pa. at 109, 307 A.2d at 875.

dant was stopped for a routine check by the state police, and did not have an operator's license or valid registration as required by law.<sup>69</sup> After shining a flashlight through the window of the car, the police officer noticed burglar's tools and arrested defendant on that charge. He was subsequently convicted of burglary.<sup>70</sup>

The court was concerned with the adverse effect an extension of the power would have<sup>71</sup> on fourth amendment rights.<sup>72</sup> In accord with the standards of *Terry* the court required "'specific and articulable facts' which had led them [the police] reasonably to conclude that either the automobile or its driver were not properly licensed. . . ."<sup>73</sup>

In its analysis, the court reiterated that an automobile is a place where a person reasonably expects privacy,<sup>74</sup> and also asserted that the police officer had effectively "'seized' that automobile and its passengers."<sup>75</sup> This decision then establishes that the state interest served by such traffic checks must be subordinated to the right of the individual to be left alone.<sup>76</sup> Hence, the true value of *Swanger* is its explicit statement that fourth amendment rights are not subject to the whim of police officers, even when such power is invoked under legislative authority.<sup>77</sup>

Following this trend, the New York Court of Appeals recently held

69. *Id.* at 67. See PA. STAT. ANN. tit. 75 § 614(b) (1971).

70. 300 A.2d at 67-68.

71. Although the court noted the validity of the state's argument for deterrence, it took such a position to its extreme. The court pointed out that this logic would permit exactly those unconstitutional seizures which the Supreme Court prohibited in *Terry*. 300 A.2d at 69.

72. U.S. CONST. amend. IV. See 47 TEMPLE L.Q. 640 (1974).

73. 300 A.2d at 70; see *Terry v. Ohio*, 392 U.S. 1 (1968). "Anything less [than 'specific and articulable facts'] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22 (citations omitted).

74. 300 A.2d at 68; see *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United States*, 389 U.S. 347, 359 (1967); *Henry v. United States*, 361 U.S. 98, 104 (1959).

75. 300 A.2d at 68; 453 Pa. at 111, 307 A.2d at 877.

76. *Cf. Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

77. This is even more significant when it is realized that the Circuit Court for the District of Columbia considered virtually the same rights in *Palmore*, but arrived at a contrary decision. See text accompanying notes 30-40 *supra*.

Although the Pennsylvania court has generally adhered to its rule stated in *Swanger*, see, e.g., *Commonwealth v. Murray*, 331 A.2d 414 (Pa. 1975), some doubt as to following the policy *Swanger* was expressing was reflected by the dissent in *Glass v. Commonwealth*, 333 A.2d 768 (Pa. 1975).

in *People v. Ingle*<sup>78</sup> that a true balancing of governmental and individual interests requires the elimination of any arbitrariness in the enforcement of the motor vehicle statute.<sup>79</sup> Although systematic routine checks of automobiles are permitted, other types of unjustified stops are "impermissible intrusion[s] on the freedom of movement."<sup>80</sup>

In *Ingle*, defendant was driving a 1949 Ford with no apparent defects and was violating no traffic laws. He was stopped for a routine traffic check and produced his license and registration as required by statute.<sup>81</sup> Defendant consented to the trooper's examination of a small wire screen on the floor, and of a pouch, which contained marijuana and various smoking implements. Defendant was arrested, and after his suppression motion was denied, he pleaded guilty to a reduced charge.<sup>82</sup>

In vacating his conviction, ordering suppression, and dismissing the indictment, the court clearly noted that the facts required to permit such routine traffic checks are minimal.<sup>83</sup> As long as the stop was based on the "specific and articulable facts" as stated in *Terry*,<sup>84</sup> then the "minor intrusion" caused to the motorist must be subordinated to the interest of the State to maintain highway safety.<sup>85</sup> However, where the arbitrary intrusion on individual freedom is maximized, then this discretion must be restricted.<sup>86</sup> Hence, even the statutory language permitting these inspections cannot be utilized so as

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78. 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975).

79. *Id.* at 419, 330 N.E.2d at 43, 369 N.Y.S.2d at 73.

80. *Id.* at 416, 330 N.E.2d at 41, 369 N.Y.S.2d at 70.

81. *Id.* at 415, 330 N.E.2d at 40, 369 N.Y.S.2d at 69-70. *See*, N.Y. VEH. & TRAF. LAW §§ 401(4), 501(1)(e) (McKinney 1970).

82. 36 N.Y.2d at 415-16, 330 N.E.2d at 40-41, 369 N.Y.S.2d at 69-70.

83. *Id.* at 420, 330 N.E.2d at 44, 369 N.Y.S.2d at 74.

84. 392 U.S. at 21; *see* *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975) (decided less than two months before *Ingle*). The court held that the "proscription against unreasonable searches and seizures is designed to prevent random, unjustified interference with private citizens whether it is denominated an arrest, investigatory detention, or field interrogation." *Id.* at 112, 324 N.E.2d at 876, 365 N.Y.S.2d at 515 (citations omitted). The court also discussed the requirement of "founded suspicion" to effectuate a detective stop under the New York "stop and frisk" statute. *Id.* at 114, 324 N.E.2d at 878, 365 N.Y.S.2d at 517. *See* N.Y. CRIM. PRO. LAW. § 140.50 (McKinney 1971).

85. 36 N.Y.2d at 420, 330 N.E.2d at 44, 369 N.Y.S.2d at 74.

86. *Id.* at 419, 330 N.E.2d at 43, 369 N.Y.S.2d at 73-74.

to authorize a stop by the shibboleth of a 'routine traffic check,' if such a stop is gratuitous, arbitrary, and without justification or excuse to support even that limited intrusion on movement on the highways.<sup>87</sup>

Thus, these courts have articulated three tests to justify such routine stops: the "suspicious circumstances" of *Nicholas*; the "probable cause based on specific facts" of *Swanger*; and the "non-arbitrariness" of *Ingle*. Each is an attempt to formulate a practical rule whereby the individual's constitutional rights will be protected and the power of the police to meet their duty of enforcing the statutory regulations will not be unduly restricted.<sup>88</sup>

The Supreme Court has spoken, peripherally, to the issue of random stops. *Almeida-Sanchez v. United States*<sup>89</sup> involved the stopping of defendant by a roving Border Patrol looking for illegal aliens,<sup>90</sup> twenty-five air miles north of the Mexican border.<sup>91</sup> The car was thoroughly searched, large quantities of marijuana were found, and the defendant was convicted.<sup>92</sup> Although the Border Patrol admittedly had no warrant and no probable cause for the search,<sup>93</sup> the stop was conducted under authority granted by the Immigration and Naturalization Act.<sup>94</sup>

In reversing the conviction, the Court stated that the stop and

87. *Id.* at 418, 330 N.E.2d at 42, 369 N.Y.S.2d at 72.

88. It is significant to note that these decisions viewed the rights of the individual as paramount, instead of attempting to circumvent them, or to somehow fit them in between the statutory grants of police power. See text accompanying notes 27-29 *supra*.

89. 413 U.S. 266 (1973).

90. See 8 U.S.C. § 1324(a)(2) (1970). See generally Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

91. However, the road defendant was travelling did not itself reach the border. 413 U.S. at 267.

92. *Id.* at 267. For discussions of *Almeida-Sanchez*, see Tribe, *The Supreme Court 1972 Term*, 87 HARV. L. REV. 1, 196 (1973); Note, *Almeida-Sanchez and its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975); Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355 (1974); 1973 WASH. U.L.Q., 889.

93. 413 U.S. at 268.

94. *Id.* 8 U.S.C. § 1357(a) (1970) provides in pertinent part:

Any officer or employee of the [Immigration and Naturalization] Service . . . shall have power without warrant . . . (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens . . . for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . .

8 C.F.R. § 287.1(a)(2) (1976) provides in pertinent part:

The term 'reasonable distance' . . . means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director . . .

search were not conducted at the border or its functional equivalent, and that the provisions of the Act itself did not justify it. Since there was no probable cause for the search, it abridged the defendant's fourth amendment rights.<sup>95</sup>

This decision, although directed at Border Patrol agents,<sup>96</sup> demonstrates the unwillingness of the Supreme Court to permit unfettered discretion of police in their random stopping of vehicles. The thrust of *Nicholas*, *Swanger*, *Ingle*, and now *Almeida-Sanchez* is clearly that some curtailment must be placed on the power of the police in this area, to prevent the abuse of that authority, and the abrogation of the constitutional rights of those citizens involved.

This rule was later expanded by the Court in *United States v. Brignoni-Ponce*.<sup>97</sup> There, defendant was stopped by a roving Border Patrol<sup>98</sup> solely because the three occupants of the car appeared to be of Mexican ancestry. After learning that the passengers were illegal aliens, the officer arrested the three occupants, and charged defendant with knowingly transporting illegal immigrants.<sup>99</sup> After the trial court denied his motion to suppress the testimony of the two aliens, and permitted them to testify, defendant was convicted of both counts.<sup>100</sup>

The Supreme Court also concerned itself with a balancing of the interests involved. On the one hand was the government's "convincing demonstration that the public interest demands effective mea-

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95. 413 U.S. at 273. However, Mr. Justice White, in his dissent, felt that the stopping of defendant's car, under these circumstances was reasonable. *Id.* at 285. In *United States v. Foerster*, 455 F.2d 981 (9th Cir. 1972), *vacated*, 413 U.S. 915 (1973) it had been stated: "This court has consistently upheld the right of Immigration officers to stop and investigate vehicles for concealed aliens, as was done here, without a showing of probable cause." *Id.* at 981.

96. For a discussion of border and related searches, see Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U. J. INT'L. L. & POLITICS 93 (1972).

97. 422 U.S. 873 (1975).

98. In fact, the Border Patrol operated fixed check points in Southern California, but on the night in question this one was closed due to the weather, and the officers were simply observing the northbound traffic from their car parked on the highway. The Ninth Circuit Court of Appeals had held that the stop more closely resembled a roving-patrol stop rather than that of a checkpoint, and the government did not challenge this conclusion. *Id.* at 874-76.

99. This is a violation of 8 U.S.C. § 1324(a)(2) (1970).

100. 422 U.S. at 875. As the Court noted, this case was different from *Almeida-Sanchez* "in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status." *Id.* at 874.

tures to control the illegal entry of aliens.”<sup>101</sup> On the other was the “interference with individual liberty that results when an officer stops an automobile and questions its occupants.”<sup>102</sup> The rights of the individual were found to be paramount.<sup>103</sup>

On its facts, the case may not be determinative of the entire issue. Indeed, in dictum, the Court stated that *Brignoni-Ponce* did not preclude the states from “conduct[ing] such limited stops as are necessary”<sup>104</sup> to enforce their motor vehicle provisions. However, the

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101. *Id.* at 878. Specifically, they cited figures of the Immigration and Naturalization Service which stated that there are up to ten to twelve million illegal aliens in the United States, approximately 85% of whom are from Mexico. *Id.* The Court also discussed the social and policy considerations of such a problem. *Id.*; see *id.* at 899 (Burger, C.J., concurring); *Id.* at 900 (app.). See also Note, *supra* note 96.

102. 422 U.S. at 879. Moreover, since the stop was usually of no more than one minute, and involved no search, the court felt it was modest and could be justified on a basis less than the probable cause required for an arrest. *Id.* at 880.

103. *Id.* at 883-84. The Court was concerned with the relatively unlimited discretion of the Border Patrol agents in this area, as well as the concomitant interference a different holding would place on highway usage. *Id.*

104.

Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interest in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters.

*Id.* at 883 n.8 (emphasis added). This footnote has subsequently become significant as a means for allegedly circumventing the Court's holding. See text accompanying notes 111-38 *infra*. Although the practical invalidity of utilizing such an exclusion approach does not appear justified (see text accompanying notes 136-138 *infra*), the concurring opinion of Mr. Justice Rehnquist seems to indicate that it may be.

[A] strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. I regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision.

*Id.* at 887-88. (citations omitted). However, this is somewhat mitigated by the concurring opinion of Mr. Justice White, joined by Mr. Justice Blackman.

The Court purports to leave the question open, but it seems to me, my Brother Rehnquist notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion.

*Id.* at 914-15.



thrust of the decision, as well as this limiting language of the Court, indicates that the policies of *Brignoni-Ponce* would be negated by limiting its holding to the specific facts of the case.

Moreover, the Court was concerned with powers and policies different from those previously considered, and hence different weights may have been attached to these various factors.<sup>105</sup> Under the state vehicle and traffic laws, the legislature attempts to insure public safety on the roads and to detect violations of the statutes. Under the Immigration and Nationality Act,<sup>106</sup> the Border Patrol attempts to control the flow of illegal aliens. The difference of degree between these two policies is evident. The federal government is attempting to prevent the furtherance of an already serious problem in the country, which causes marked hardships in areas such as employment, housing, and welfare.<sup>107</sup> The states, however, are merely attempting to compel obedience to a statutory determination of highway safety.<sup>108</sup>

Additionally, the powers of the agents under each enactment are different. Many state statutes do not specifically authorize the officer to stop automobiles in order to determine compliance, although this power is often considered necessarily implicit in the operation of the system.<sup>109</sup> Under the Immigration and Nationality Act, however, the agents are given the explicit power to "board and search" motor vehicles.<sup>110</sup>

Thus, the Supreme Court faced federal governmental interests more important than those of the state, and a Congressional grant of power which was much broader in its scope. Nevertheless, the Court still held that personal freedoms outweighed these factors in the balancing process.

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105. For a discussion of the practices and duties of state officers as opposed to federal agents, see *Cady v. Dombrowski*, 413 U.S. 433 (1973).

106. See note 94 *supra*. The Court specifically stated that it was limiting the authority of the Border Patrol in situations away from the border and its functional equivalents. In those areas, the officers are also effectively subjected to the *Terry* standards of specific and articulable facts. 422 U.S. at 884. See text accompanying note 15 *supra*.

107. See note 103 *supra*.

108. Although this comparison is in no way attempting to demean the significance of such provisions, when viewed against the recognized national problems created by illegal aliens, they must surely be subordinated. See, e.g., *State v. Holmberg*, 194 Neb. 337, —, 231 N.W.2d 672, 680 (1975) (McCown, J., dissenting).

109. See statutes and cases cited in notes 25-27 *supra*.

110. See note 94 *supra*.

### V. Qualifications on the Evolving Law

Although *Brignoni-Ponce* is in agreement with the trend demonstrated by *Nicholas*, *Swanger*, *Ingle*, and *Almeida-Sanchez*, it has thus far been limited to Border Patrol and related stops.<sup>111</sup> Some decisions continue to allow arbitrary stops in enforcing vehicle and traffic laws.

In *State v. Holmberg*,<sup>112</sup> defendant, stopped by a state trooper solely for a license and registration check, was arrested after discovery of drugs in his camper.<sup>113</sup> In affirming the conviction,<sup>114</sup> the Nebraska Supreme Court rejected<sup>115</sup> the argument that a "reasonable cause" requirement<sup>116</sup> be read into the Nebraska statute.<sup>117</sup> Rather, the court interpreted the statute as giving officers authority to enforce the vehicle and traffic laws<sup>118</sup> without any limitation save that of using it as a pretext for other purposes.<sup>119</sup> The Court specifically

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111. However, other cases following *Brignoni-Ponce* have demonstrated that the rationale of the Court expressed therein will be followed. See, e.g., *United States v. Ogilvie*, No. 74-3487 (9th Cir., Sept. 15, 1975) where, treating the stop of defendant's car as one of "roving patrol," the court held that the "reasonable suspicion, founded on articulable facts" standard enunciated in *Brignoni-Ponce* was applicable, and it had not been met; and *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975) where the court issued the requested preliminary injunction, holding a fortiori from *Brignoni-Ponce* that agents of the Immigration and Naturalization Service could not constitutionally stop an automobile merely because its occupants appeared to be of Mexican ancestry. Cf. *United States v. Soria*, 519 F.2d 1060 (5th Cir. 1975) which held, aside from the border search decisions of the Supreme Court, that Customs Agents also do not have unfettered discretion. See also *United States v. Rocha-Lopez*, No. 74-2601 (9th Cir., Dec. 8, 1975); *United States v. Lara*, 517 F.2d 209 (5th Cir. 1975) (there existed reasonable suspicion for the stop, under the factors noted by the Supreme Court) *United States v. Byrd*, 520 F.2d 1101 (5th Cir. 1975) (speaking in relation to permanent checkpoints).

112. 194 Neb. 337, 231 N.W.2d 672 (1975).

113. *Id.* at \_\_\_, 231 N.W.2d at 674.

114. *Id.* at \_\_\_, 231 N.W.2d at 674-75.

115. *Id.* at \_\_\_, 231 N.W.2d at 675.

116. See, e.g. CALIF. VEHICLE CODE § 2806 (West 1971).

117. See, e.g., NEB. REV. STAT. 60-435(4) (1974).

118. 194 Neb. at \_\_\_, 231 N.W.2d at 675.

119. *Id.* at \_\_\_, 231 N.W.2d at 678. The court also had an interesting philosophy concerning such random stops. It felt spot checks were less inconvenient to motorists, and also were more advantageous due to their element of surprise. Hence, the court concluded that that they were "not only more practical but can have a salutary effect on the enforcement of our traffic laws and serve to promote the safety of the travelling public." *Id.* at \_\_\_, 231 N.W.2d at 675. But cf., *United States v. Ortiz*, 422 U.S. 891, 895 (1975), where the Court stated that the reasonableness requirement of the fourth amendment "also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation."; accord, *United States v. Hart*, 506 F.2d 887, 895 (5th Cir.), vacated, 422 U.S. 1053

ruled out the applicability of *Brignoni-Ponce* due to the Court's apparently limiting language.<sup>120</sup>

The dissent, however, interpreted *Brignoni-Ponce* as controlling<sup>121</sup> and noted the total abrogation of constitutional rights that the majority's decision necessarily implies.<sup>122</sup> In effect, the decision makes the

mere pronouncement of the magic words "I wanted to check the registration and driver's license" . . . the "open sesame" which removes all constitutional barriers to a random investigative stop of any motor vehicle at any time, any place, at the arbitrary whim of any police officer.<sup>123</sup>

A recent Tenth Circuit case, *United States v. Jenkins*,<sup>124</sup> also ignores the thrust of *Brignoni-Ponce*. In *Jenkins*, defendant was randomly stopped<sup>125</sup> for a routine check<sup>126</sup> while driving in New Mexico with out of state plates. The officer, upon learning that the automobile was stolen, arrested the defendant who was subsequently found guilty of interstate transportation of a stolen motor vehicle. The court of appeals affirmed the conviction.<sup>127</sup>

The court stated<sup>128</sup> that this case was governed by *United States*

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(1975). Hence, unless the court in *Holmberg* is consciously advocating some form of unconstitutional ubiquitous intimidation of its own citizens, the practical application of such a policy is questionable.

120. 194 Neb. at \_\_\_, 231 N.W.2d at 678; see note 104 *supra* and accompanying text.

121. 194 Neb. at \_\_\_, 231 N.W.2d at 680-81 (McCown, J., dissenting).

122. Permitting such stops without any standard of articulable suspicion effectively "repeals the Fourth Amendment by statutory fiat." *Id.* at \_\_\_, 231 N.W.2d at 679.

123. *Id.* at \_\_\_, 231 N.W.2d at 679-80. The dissent also discussed the relevancy of *United States v. Bell*, 383 F. Supp. 1298 (D. Neb. 1974), which the majority opinion apparently disregards. 194 Neb. at \_\_\_, 231 N.W.2d at 679-80. In *Bell* the defendant was stopped for an allegedly defective front license plate (which was later determined not to be faulty), and he produced his license and registration. The officer smelled marijuana, and a subsequent search uncovered 904 pounds. In granting defendant's motion to suppress this evidence, the court found this practice of stopping vehicles pursuant to the statute, NEB. REV. STAT. § 60-435 (1974), "intolerable and unreasonable." 383 F. Supp. at 1302. The court, however, declined to rule on the constitutionality of this statute in deference to the Nebraska Supreme Court, although it specifically noted that it would "narrowly construe" the statute, so as to require a "founded and reasonable suspicion" on the part of the officer, in order to justify such stops. *Id.* at 1303.

124. No. 74-1567 (10th Cir., Aug. 14, 1975).

125. The officer stated that there was nothing unusual or suspicious about the vehicle or its driver, and it was customary for him to make fifteen to twenty such stops daily. *Id.* at 2.

126. *Id.* See N.M. STAT. ANN. 64-3-11, 64-13-49 (1972).

127. No. 74-1567, at 7.

128. *Id.* at 4.

*v. Lepinski*<sup>129</sup> which affirmed defendant's conviction for interstate transportation of a firearm, discovered after he was stopped for a routine traffic check. The court attempted to distinguish<sup>130</sup> the later case of *United States v. McDevitt*.<sup>131</sup> That decision reversed a marijuana conviction because of the circumstances of the arrest which included a random stop.<sup>132</sup> *Jenkins* noted that in *McDevitt* the police inquiry continued even after defendant had correctly produced the required papers, while in both *Jenkins* and *Lepinski* such documents were not offered.<sup>133</sup> This distinction is questionable since *McDevitt* did direct its attention to the justification for the initial stop. Although it did not specifically overrule *Lepinski*, *McDevitt* held that an automobile could not be arbitrarily stopped; rather, a basis must exist for the suspicion that the motorist violated the law.<sup>134</sup>

Furthermore, in *Lepinski* it was held that the State of New Mexico could detail its own standards for such conduct, but only if constitutional requirements were satisfied.<sup>135</sup> In light of *Brignoni-Ponce*, therefore, the *Jenkins* decision would appear to be in error. Although *Brignoni-Ponce* noted that local enforcement agencies did have power to enforce laws regulating vehicle and traffic provisions,<sup>136</sup> this was not a blanket prescription to violate constitutional rights. The Court granted to local enforcement agencies the authority "to conduct such limited stops as are necessary"<sup>137</sup> to enforce their laws. Since the Court was concerned with random stops of vehicles, and required that they not be arbitrary, *Brignoni-Ponce* is clearly applicable.<sup>138</sup>

## VI. Further Considerations

Apart from the effect of *Brignoni-Ponce*, some of those same state

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129. 460 F.2d 234, 236-37 (10th Cir. 1972).

130. No. 74-1567, at 5-6.

131. 508 F.2d 8 (10th Cir. 1974).

132. *Id.* at 10.

133. No. 74-1567, at 5-6.

134. 508 F.2d at 10-11; *accord*, *State v. Holmberg*, 194 Neb. 337, \_\_\_, 231 N.W.2d 672, 681 (1975) (McCown, J., dissenting); *see note 122 supra*.

135. 460 F.2d at 237; *accord*, *Ker v. California*, 374 U.S. 23, 37 (1963); *cf.* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

136. 422 U.S. 873, 883 n.8.

137. *Id.*; *see note 104 supra*.

138. *See text accompanying notes 104-10 supra*.

courts that have mandated proscriptions against arbitrary stops seem unwilling to apply them universally.

In *Glass v. Commonwealth*,<sup>139</sup> defendant was involved in an automobile accident and was placed under arrest for driving under the influence of alcohol. He subsequently refused to submit to a breathalyzer test and his motor vehicle operating privileges were suspended.<sup>140</sup> Defendant argued that since he had not been legally arrested at that time,<sup>141</sup> the statute was not applicable to him.<sup>142</sup> Although the Commonwealth admitted that no lawful arrest had occurred,<sup>143</sup> the Pennsylvania Supreme Court nonetheless affirmed the suspension stating that there was no statutory indication that the licensing suspension powers of the Secretary of Transportation were dependent upon the legality of the arrest.<sup>144</sup>

In his dissent, Justice Eagan pointed out that such a procedure was exactly what *Swanger* was trying to avoid.<sup>145</sup> The majority's holding, in light of the admittedly unlawful arrest, "effectively grant[s] the police unfettered discretion to stop any vehicle."<sup>146</sup> Although factual differences may be seen between *Glass* and *Swanger*, the fact remains that the results reached in them are inconsistent.

In *People v. Martinez*,<sup>147</sup> defendant was a passenger in an automobile stopped<sup>148</sup> with its motor running in front of a liquor store. Police officers requested the license and registration<sup>149</sup> from the driver;<sup>150</sup> and following a "quick" move to the glove compart-

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139. 333 A.2d 768 (Pa. 1975).

140. *Id.* at 769.

141. This contention was made inasmuch as the officer had not obtained an arrest warrant, nor had he seen the offense committed in his presence. *Id.* at 769-70. See PA. STAT. ANN. tit. 75 § 1204 (1971), as amended, (Supp. 1975).

142. See PA. STAT. ANN. tit. 75 § 624.1(a) (1971) which predicates this license suspension power upon the motorist being "placed under arrest."

143. 333 A.2d at 769.

144. *Id.* at 770.

145. *Id.* at 772 (Eagan, J., dissenting).

146. *Id.*

147. 37 N.Y.2d 662, 339 N.E.2d 162, 376 N.Y.S.2d 469 (1975).

148. Although this case did not involve a "stop" in the meaning generally used in this comment, the court nevertheless treated the case as sufficiently analogous to *Ingle*. *Id.* at 668, 339 N.E.2d at 166, 376 N.Y.S.2d at 474.

149. See N.Y. VEH. & TRAF. LAW §§ 401(4), 501(1)(e) (McKinney 1970).

150. The officer stated that this was done "because he suspected 'there was something going on in reference to the liquor store,'" especially since this occurred in a "high crime" area. 37 N.Y.2d at 664, 339 N.E.2d at 163, 376 N.Y.S.2d at 471.

ment, opened the door, saw a gun, and arrested the occupants. Based on information provided by defendant<sup>151</sup> and further police investigation, Martinez was convicted of felony-murder.<sup>152</sup>

The New York Court of Appeals affirmed,<sup>153</sup> finding that the stop was invalid,<sup>154</sup> but that it did not so taint the other evidence as to require reversal.<sup>155</sup> The court found that the officers had acted in "good faith" in arresting the occupants after seeing the gun.<sup>156</sup> Having determined this, "the propriety of the stop [became] irrelevant for purposes of the admissibility of defendant's custodial statements."<sup>157</sup>

In a concurring opinion,<sup>158</sup> Judge Wachtler<sup>159</sup> criticized the "good faith" approach of the majority<sup>160</sup> which, taken to its logical conclusion, would encourage disregard of constitutional safeguards on the part of officers who may then claim "good faith" as a justification for their conduct.<sup>161</sup> Instead, he sustained the conviction on the basis "that the evidence objected to was not . . . the 'fruit' of the arrest

151. The court discussed the other constitutional issues involved, such as the necessity of *Miranda* warnings, the "fruits of the poisonous tree," tainting, and the exclusionary rule. Since it found that these regulations had been complied with, and affirmed defendant's conviction, such doctrines will only be discussed here to the extent necessary for this Comment. *Id.* at 666-71, 339 N.E.2d at 164-67, 376 N.Y.S.2d at 472-76.

152. *Id.* at 664-66, 339 N.E.2d at 162-64, 376 N.Y.S.2d at 470-72.

153. *Id.* at 671, 339 N.E.2d at 167, 376 N.Y.S.2d at 476.

154. *Id.* at 666 n.2, 668, 339 N.E.2d at 164 n.2, 166, 376 N.Y.S.2d at 472 n.2, 474.

155. *Id.* at 669, 339 N.E.2d at 166, 376 N.Y.S.2d at 475.

156. We hold today that in addition to the dictates of *Miranda* and the standard of voluntariness, the controlling consideration for determining the admissibility of 'verbal' evidence obtained pursuant to claimed illegal police conduct is *whether law enforcement officers acted in good faith* and with a fair basis for belief that probable cause existed for an arrest.

*Id.* at 668, 339 N.E.2d at 165, 376 N.Y.S.2d at 473-74.

157. *Id.* at 669, 339 N.E.2d at 166, 376 N.Y.S.2d at 475.

158. The majority opinion was concurred in by three of the seven member New York Court of Appeals. Two other concurring opinions were filed, expressing the opinions of the remaining three justices, wherein the majority's reliance upon the good faith of the police officers was criticized. *Id.* at 671-74, 339 N.E.2d at 167-69, 376 N.Y.S.2d at 477-79 (Wachtler, J., concurring); *id.* at 674, 339 N.E.2d at 170, 376 N.Y.S.2d at 479-80 (Fuchsberg, J., concurring).

159. Judge Wachtler wrote the opinion of the court in *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975); see text accompanying notes 78-87 *supra*.

160. The Supreme Court has stated that fourth amendment rights do not depend on the mere "good faith" of the police. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *accord*, *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting); *Jones v. United States*, 362 U.S. 257, 273 (1960) (Douglas, J., concurring and dissenting).

161. 37 N.Y.2d at 672, 339 N.E.2d at 168, 376 N.Y.S.2d at 478 (Wachtler, J., concurring).

...<sup>162</sup> Though the majority also reached the correct result,<sup>163</sup> its reliance on "good faith" appears to be inconsistent with the thrust of *Ingle*, if not a negation of the effectiveness of *Ingle*'s requirement of non-arbitrariness.<sup>164</sup>

In sum, the Pennsylvania and New York courts do not appear willing to apply universally their standards of reasonableness to police actions. Where situations are somewhat different from those existing in their respective seminal cases, such criteria may be circumvented. However, the policy attempted to be furthered by those decisions would be seriously curtailed, if not totally destroyed, by such a technical application of their holdings.

## VII. Conclusion

Without consideration of any additional elements, the decision that the right to remain free from unreasonable seizures clearly outweighs the interest of the government in advancing public safety indicates a definite shift in the fundamental balancing process utilized by the courts. The adoption of "suspicious circumstances,"<sup>165</sup> "probable cause based on specific facts,"<sup>166</sup> "non-arbitrariness,"<sup>167</sup> "specific and articulable facts,"<sup>168</sup> or any other test, however, will

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162. *Id.*, 339 N.E.2d at 168, 376 N.Y.S.2d at 477 (Wachtler, J., concurring).

163. Note that in his concurring opinion, Judge Wachtler is able to reach the same result without the practical invalidation of the policies attempted to be furthered by *Ingle*. Since the detectives had no idea of the defendant's possible involvement with the homicide at the time they questioned him, and he had been advised of his *Miranda* rights, then any existing taint was attenuated. Therefore, the statement could properly be admitted into evidence as being consistent with the philosophy of the exclusionary rule without consideration of the "good faith" of the police officers. *Id.* at 673-74, 339 N.E.2d at 169, 376 N.Y.S.2d at 479. For a brief discussion of the exclusionary rule, see note 177 *infra*.

164. *Ingle* was designed to prevent arbitrary stops; here, however, by equating "good faith" with the police officer's knowledge of constitutional law, the court is effectively prescribing arbitrariness. Judge Wachtler's premonition that the decision of the majority would "encourage a studied ignorance of constitutional guarantees" is well founded. Under this test, the officer who has some knowledge of basic constitutional principles will be more restricted, as his actions could not then be classified as being in "good faith." His counterpart, however, who knows little of the constitution, would be less limited in his scope of activity, as he would be acting in "good faith" under the *Martinez* test. Hence, with practical protection of constitutional rights being predicated on such a subjective basis, citizens would surely be subjected to arbitrary intrusions. See cases cited in note 160 *supra*.

165. *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971).

166. *Commonwealth v. Swanger*, 300 A.2d 66 (Pa.), *aff'd on rehearing*, 453 Pa. 107, 307 A.2d 875 (1973).

167. *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975).

168. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

not engender the advantages<sup>169</sup> sought by these respective courts unless some procedural restrictions are developed to guarantee their employment.<sup>170</sup>

The import of the decisions discussed herein has generally been to require reasonableness in the actions of the law enforcement officers. However, no practical definition of "reasonableness" has been offered, and without one, it is realistic to assume that similar abridgements of constitutional rights may reoccur in the future.<sup>171</sup> It is evident that lesser justifications are necessary for an automobile stop than those to validate a search,<sup>172</sup> but it is not clear what they are. An allegedly faulty, but in fact functionally operable tail-light was held sufficient to justify a stop in one jurisdiction,<sup>173</sup> but the same circumstances may well be inadequate in another. Whatever advances may have been made, they are of questionable practical worth.

Uncertainty followed the holding of the Supreme Court in *Brignoni-Ponce*. Some courts subsequently attempted to limit the case to its factual situation,<sup>174</sup> and refused to extend its policy to other automobile stop cases. This result may be attributed to the ostensibly limiting language of the Court,<sup>175</sup> as well as the other opinions filed,<sup>176</sup> which created ambiguity as to the scope of the decision. However, insofar as the New York and Pennsylvania cases are concerned, the divergence stems from an apparent refusal to

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169. This refers to the guaranteed protection of the fourth amendment rights of the individual involved, without at the same time obviating the effective performance of the police.

170. The only practical way would be to establish such standards as are now used in other similar situations, such as warrantless stops and frisks, wherein the "specific and articulable facts" of *Terry* are applicable. See *Terry v. Ohio*, 392 U.S. 1 (1968).

171. As one commentator has suggested:

Courts should carefully scrutinize for both probative value and veracity the evidence presented to justify stops, and should find a founded suspicion only if there are 'critical' facts which affirmatively suggest the presence of particular criminal activity. Otherwise, an officer's suspicion to stop may become 'founded' after the stop rather than before, thus making the stop a violation of the detainee's constitutional rights as guaranteed by the fourth amendment.

Weisgall, *supra* note 16, at 258 (footnote omitted) (emphasis added).

172. See, e.g., *United States v. Ortiz*, 422 U.S. 891, 895-96 (1975); accord, *Henry v. United States*, 361 U.S. 98 (1959); *Carroll v. United States*, 267 U.S. 132 (1925).

173. *United States v. Bell*, 383 F. Supp. 1298 (D. Neb. 1974); see note 125 *supra*.

174. See note 104 *supra*.

175. *Id.*

176. *Id.*



apply universally their own self-engendered proscriptions in this area.

Although specifying a requirement of probable cause in these situations may be unduly harsh, the "specific and articulable facts" of *Terry* and *Brignoni-Ponce* appear custom made. However, in order to implement these criteria, the courts would be required to delineate a test in much the same manner as the Court did in *Terry*. Without the statement of some relatively specific standards to be followed, this desired requirement of reasonableness to police actions may be vacuous.<sup>177</sup> Therefore, although these decisions have considerably increased the weight of the individual interest in privacy to preclude these arbitrary intrusions, and although the Supreme Court has recognized that fourth amendment rights may not simply be based on the "good faith" of the officer involved,<sup>178</sup> these existing standards may easily be circumvented in practice.<sup>179</sup>

Thus, despite the theoretical trend towards increasing individual rights which appears in these confusing if not contradictory decisions, constitutional rights may in fact be predicated not only on geographic location, but also on the temporal mood of the respective court.<sup>180</sup>

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177. Note the piecemeal extension of the exclusionary rule to the states. In *Weeks v. United States*, 232 U.S. 383 (1914) the Court held that the fourth amendment proscription against unreasonable searches and seizures was made applicable to the federal courts through the exclusion of any evidence obtained in such a manner. Subsequently, in *Wolf v. Colorado*, 338 U.S. 25 (1949) the Court held this fourth amendment protection was incorporated through the due process clause of the fourteenth amendment and was hence binding on the states. At the same time, however, the exclusionary rule was not made so effective. So the situation existing then was that local police were not permitted to secure evidence through violations of the fourth amendment, but if they did so it was still admissible against the defendant. Although this situation was later remedied in *Mapp v. Ohio*, 367 U.S. 643 (1961) which enforced the exclusionary rule against the states, the practically vacuous protection offered by the *Wolf* doctrine in state prosecutions is evident.

178. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

179. For an example of how easily such safeguards may be thwarted, see *Ortiz v. United States*, 317 F.2d 277, 278 (5th Cir. 1963).

180. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). "Each case must turn on the totality of the particular circumstances." *Id.* at 885 n.10.