Terry v. Ohio and Power of Police to Accost Citizens Absent Probable Cause to Arrest: A Critical Look at the Pennsylvania Experience

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Terry v. Ohio¹ and its companion cases² gave police officials the authority to detain and sometimes search, on less than probable cause, individuals suspected of engaging in or about to engage in criminal activity.³ It has been a decade since Terry paved the way for courts and citizens to see these street encounters for what they really are: a unique species of police activity, serving a variety of crime-related functions.⁴

Terry was the Supreme Court's first foray into stop-and-frisk cases, and the Court understandably made a conscious effort to leave room for development. Thus, few specific guidelines can be distilled from the cases.⁵ Excepting the recent reversal, on certiorari

¹ 392 U.S. 1 (1968).
² Decided the same day as Terry were Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968). The Court disposed of Peters and Sibron together, although the cases had little in common. For an encapsulation of the factual backgrounds of these three cases, as well as the opinions of the Court, see LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 40, 47-50 (1968) [hereinafter cited as LaFave].
³ The Court avoided this issue on at least two prior occasions. See Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959).
⁴ See 392 U.S. at 13 & n.9.
⁵ See note 2 supra.

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papers, of the Pennsylvania Supreme Court in *Commonwealth v. Mimms,* only once has the Supreme Court given any flesh to the bones of *Terry.* State courts, however, including Pennsylvania trial and appellate courts, increasingly have been called on to assay the legality of police responses in a variety of street encounters which usually involve some degree of government encroachment on personal liberties. These police activities come before courts under numerous labels, including “investigatory stop,” “temporary seizure for investigation,” “forcible stop,” “stop-and-frisk,” etc.

In establishing general guidelines for investigatory stops in *Terry,* the Supreme Court did make clear that the fourth amendment is a relevant limitation on the constitutionality of the practices, notwithstanding that police conduct stops short of a “technical arrest” or a “full-blown search.” I am not at all certain that the Pennsylvania courts appreciate the implications of this constitutional limitation.

The fourth amendment, perhaps more than any other specific limitation in the Bill of Rights, is profoundly anti-government. It denies the government desired means, and at times concededly efficient means, to obtain legitimate and laudable objectives. Through the exclusionary rule, the fourth amendment may also interdict a variety of police practices that could prevent incipient crimes or solve completed crimes. The central meaning of the fourth amendment is that “our society puts a premium on the sanctity of individual freedom and security in the face of unwarranted government encroachments.” Thus, some tangible evidence must be suppressed, and possibly some convictions lost, because the framers of our Constitution were willing to pay such a price for “the right to be let alone.” It is the judicial branch of our government which was given the responsibility to safeguard this most fundamental of constitutional liberties.

In reading some of the recent Pennsylvania Supreme and Supe-

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8. 392 U.S. at 19.
rior Court decisions, one learns of a number of police practices which, it seems to me, are in need of fourth amendment regulation. Yet, on the authority of Terry, or Adams v. Williams11 (the United States Supreme Court's second major pronouncement in this area), these practices have gone largely unregulated, at least from a judicial standpoint. Many of these cases go beyond anything the Supreme Court said in Terry or Adams, and some are difficult if not impossible to reconcile with those cases. These questionable extensions of Terry and Adams are a testament to "the powerful hydraulic pressures throughout our history that bear heavily on [courts] to water down constitutional guarantees and give the police the upper hand."12

Through an examination of, for the most part, Terry and Adams, this article will briefly set forth what I believe is constitutionally required to effect a "forcible stop" (seizure) of a citizen, what is constitutionally required to forcibly stop and search (frisk) a citizen, and correlatively, when the Constitution forbids a policeman to do either or both. The article will then review Pennsylvania's experience with forcible street encounters, in light of that constitutional analysis. After identifying the potential problems attending a wholesale acceptance of "stop-and-frisk" or "investigatory seizure for investigation," I suggest a means of fourth amendment regulation that will meaningfully restrain the police who have warmly embraced, and fully utilized, the search and seizure techniques now given judicial blessing.

I. THE SUPREME COURT'S PRONOUNCEMENTS

Stopping suspicious individuals and sometimes frisking them for weapons is not a new police practice; it is a time-honored law enforcement technique,13 quite distinct from police activities such as arrest and full search incident to an arrest.14 For years, however,
these temporary seizures for investigation were argued before and decided by the courts in terms of whether or not there had been a lawful arrest. One explanation for this phenomena was that forcible stops, or stops accompanied by a frisk, did not fit comfortably within any extant legal pigeonhole.

When the stop-and-frisk cases came before the United States Supreme Court in 1967, opponents, believing stop-and-frisk to be no more than a beguiling phrase for oppressive police activity, urged the Court to recognize only two categories of police-citizen street encounters: either a citizen's freedom to walk away from the accosting officer was being restrained—for any length of time, to any degree, or for any purpose—or it was not. If the citizen was being restrained, a fourth amendment "seizure" had taken place, and the seizure was lawful only if the officer had probable cause to believe his suspect was guilty of a crime. If the person was not being restrained, there was no seizure and the officer could talk to the citizen as much as he pleased, upon any grounds or upon no grounds at all—provided the citizen was willing to stop and listen.

Proponents of stop-and-frisk urged the Court to reject such a monolithic model of the fourth amendment. They argued that the police, in dealing with dangerous, rapidly unfolding situations on city streets, "are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." Thus an officer should be permitted to merely question a citizen on the street without cause, he should be permitted to briefly detain a citizen and if need be, pat him down, upon "reasonable suspicion."
that criminal activity is afoot and that the officer’s safety may be endangered. Finally, he should be permitted to arrest and thoroughly search the citizen upon probable cause.  

The Supreme Court essentially adopted this “escalating set of flexible responses.” Its 1968 decisions, and principally Terry, are generally read as recognizing three types of street encounters: mere conversation or nonforcible questioning which the officer may commence without particular reason;  

“stops” or “forcible stops” (seizures in fourth amendment nomenclature) which require reliable indicia of criminal activity, although something short of probable cause; and arrests, which require probable cause. These broad categories, however, are deceptively simple. It was left to determine when these different degrees of restraint were lawful police responses to a given set of circumstances.

Perhaps it is important to note what Terry did say in this regard before turning to what the Court did not say. Terry held that a stop-and-frisk did amount to a search and seizure and therefore was subject to fourth amendment limitations, but, since a stop-and-frisk was less intrusive than an arrest and search incidental thereto, less justification would be required for it. The on-the-spot police response involved in the stop-and-frisk situation is not governed by the probable cause standard of the fourth amendment’s warrant requirement. Rather, the constitutional test is whether the search and seizure is reasonable under all the circumstances.

To give substance to the general limiting criterion of

the accepted nomenclature for the constitutional standard, a lesser standard than probable cause, for police-citizen encounters not amounting to a full search or custodial arrest. See Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973); Commonwealth v. Murray, 460 Pa. 53, 61, 331 A.2d 414, 418 (1975).

21. See text accompanying note 90 infra; note 18 supra.


23. See note 32 infra.

24. The Terry Court recognized that the practicalities of on-the-street law enforcement made it necessary to carve out another exception to the fourth amendment’s presumptive warrant requirement. 392 U.S. at 20. For other exceptions, see Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 980-81 n.221 (1977). For some of the effects of the proliferation of exceptions on the fourth amendment’s warrant requirement, see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 393-94 (1974) [hereinafter cited as Amsterdam].

"reasonableness" in the context of stop-and-frisk, courts must balance the government interest in effective crime prevention against the individual interest in freedom from unnecessary government intrusion.26 The more serious intrusions—there are varying kinds of searches and seizures—require increasing degrees of justification, a point I will return to later.27 Similarly, a less compelling government interest should dictate a more restricted response to a situation which might arouse the "suspicions" of a policeman.

Applying this analysis to the facts before it in Terry, the Supreme Court formulated a constitutional test, often recited in Pennsylvania decisions:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.28

Hence, Terry holds that a police officer may conduct a carefully circumscribed search of a person's outer clothing for weapons only if the officer has a "reasonable suspicion"29 that criminal activity is afoot and a reasonable belief that the suspicious individual is armed and dangerous.30 So much for the unmuddied waters.

The Terry opinion focused only on the legality of a self-protective search. It says very little, and nothing meaningful, about the consti-

27. 392 U.S. at 17-18 n.15.
28. Id. at 30.
29. See note 20 supra.
30. A careful reading of Terry, in light of the evidence available to the Court as to the effectiveness of stop-and-frisk as a crime-preventive measure, indicates that Terry cannot rest on either of these requirements standing alone. The decision makes sense only because both factors are present—the suspicion of criminal activity and reasonable belief that the suspect is armed and dangerous. See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 93, 181-83 (1968). Accord, Adams v. Williams, 407 U.S. 143, 146 (1972); United States v. Martin, 562 F.2d 673, 680 n.15 (D.C. Cir. 1977).
tutionality of the initial stop of a suspicious individual. The Court explicitly declined to rule on the reasonableness of forcibly detaining the suspect, either before or after the frisk, for the additional purpose of investigation or interrogation. Among the unresolved questions were: whether facts not amounting to probable cause could justify an "investigatory seizure" or "forcible stop" short of an arrest; what behavior by the police officer transforms a forcible stop into an arrest requiring probable cause to effectuate it; and perhaps most important, whether the constitutional standard for a forcible stop is different, and if so in what respect, than the standard for a stop-and-frisk.

Determining the proper constitutional test for forcible stops presents several issues. Must there be articulable facts from which it is reasonable to conclude that criminal activity is afoot and that the person is armed and dangerous? Is simply a suspicion that criminal activity is afoot enough or might a policeman forcibly detain any person he pleases so long as the person is not patted down or otherwise searched? It seems the Terry Court avoided these troublesome questions by assuming that a fourth amendment seizure did not arise as long as an individual approached by an officer did not resist detention, or the police officer was not forced to exert his authority in any way.

This assumption was implicitly rejected by Justice Rehnquist in the Supreme Court's next and to date last major opinion addressing police-citizen street encounters, Adams v. Williams. The Adams standard for a self-protective frisk seems faithful to Terry. Adams recognized, however, that any on-the-street investigatory stop by the police inevitably involves a restraint on the citizen's freedom to walk away and therefore is a seizure subject to the fourth amendment's reasonableness requirement. In a notably short opinion, Justice Rehnquist read Terry to hold that a police officer may

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31. 392 U.S. at 19 n.16.
34. See The Supreme Court, 1971 Term, supra note 11, at 174-75 n.17.
35. Compare id. at 171-74, with 407 U.S. at 146.
briefly stop an individual when the officer reasonably believes the individual is engaged in criminal activity and the exigencies of the situation, such as the need to momentarily freeze things or ascertain the suspect's identity, justify the stop.\footnote{36} A fair paraphrase of the Court's language in Adams is that, assuming exigent circumstances, a police officer may lawfully \textit{stop} a suspicious individual when he reasonably believes "criminal activity is afoot"—the first half of the \textit{Terry} stop-and-frisk test.

\textit{Terry}'s additional requirement for a stop-\textit{and-frisk}—that the police reasonably believe the suspect is armed and dangerous—is noticeably missing from at least this portion of Adams.\footnote{37} Neither the United States Supreme Court nor the Pennsylvania Supreme Court, however, has ever squarely held that in the absence of reason to believe a person is armed and dangerous, the police may forcibly stop that person for investigation or interrogation simply because the police believe that person is engaged in criminal activity.\footnote{38} Since Adams purported only to elaborate on and apply Terry, there is no direct Supreme Court authority for interpreting the fourth amendment to permit forcibly restraining citizens on the street, on less than probable cause, if the officer has no reason to believe his own safety or the safety of others is in jeopardy.

That is not to say that such a result does not fit nicely into the reasoned analysis supporting the stop-and-frisk power first sanctioned in Terry. Briefly, that analysis proceeds as follows. The probable cause requirement for any arrest compromises the opposing interests of the public in crime prevention and detection, and of individuals in privacy and security. One factor in fashioning probable cause as the standard is the degree of imposition on the individual, including the full search incident to that arrest and subsequent trip to the station house. Since a brief on-the-street seizure and

\footnote{36}{"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." 407 U.S. at 146.}

\footnote{37}{Adams' "brief stop" discussion, see note 36 supra, has been viewed as dicta by at least one court. Commonwealth v. Benson, 239 Pa. Super. Ct. 100, 107, 361 A.2d 695, 698 (1976). Benson is technically correct. Adams held that under the circumstances, a Terry stop and frisk was permissible. Therefore, language sanctioning a "brief stop" to identify a suspicious individual, termed an "intermediate response," was unnecessary to the Court's holding. What Justice Rehnquist was probably seeking to do was remove some of the sting from Terry's requirement that there be a reasonable suspicion of criminal activity \textit{and} reason to believe the suspect is armed and dangerous.}

\footnote{38}{Cf. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).}
careful pat-down of one's outer clothing for weapons is less intrusive, less information is needed to make such a stop. Similarly, I would argue, simply restraining a suspicious individual's freedom to leave, until the officer can inquire into the suspicious circumstances, is an even slighter intrusion and requires even less justification. Such a stop is far less conspicuous and less humiliating than a frisk. Thus, the officer need not be able to articulate facts which led to his belief that the suspect was armed and dangerous. On the other side of the reasonableness scale, prohibiting police from stopping and merely questioning suspicious individuals when they reasonably suspect a crime is in the offing would greatly hamstring law enforcement forces.

_Terry_ and _Adams_ together seem to establish that in appropriate circumstances the fourth amendment allows a limited "search" or "seizure" on facts that do not constitute probable cause to arrest or conduct a full search. Specifically, to stop and frisk, the police must observe unusual conduct giving rise to a reasonable suspicion—something less than probable cause—that criminal activity is afoot and that the person is both armed and dangerous. Forcible restraint to investigate or interrogate requires that police reasonably believe—again, have a "reasonable suspicion"—that criminal activity is afoot, and exigent circumstances must warrant the stop. Furthermore, where the government interest at stake is not compelling, the intrusion on the freedom protected by the fourth amendment must be commensurately lessened. Although the police in these cases act without probable cause, _i.e._, on less reliable information, these forcible street encounters are deemed reasonable within the commands of the fourth amendment because of the "minimal intrusion" of a forcible stop. The "brief stop" referred to in _Adams_ withstands constitutional muster precisely because it is brief.

With this skeletal framework supplied us by the Supreme Court, Pennsylvania's experience with forcible street encounters can be examined.

39. At least this is how the Supreme Court has viewed its own work. _Id._ at 881.

40. _Id._

41. _See_ United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977); United States v. Jennings, 468 F.2d 111 (9th Cir. 1972).
II. PENNSYLVANIA CASES

A. Stop and Frisk

It was not long before Pennsylvania courts were called on to interpret and apply the Supreme Court's stop-and-frisk decisions. The Pennsylvania Supreme Court was the first to be confronted with the issue in Commonwealth v. Hicks. In what one commentator labeled an "outrageous decision," the Pennsylvania Superior Court upheld Hicks' conviction without having the benefit of Terry or its companion cases. Hicks was stopped and patted-down, similar to the police response in Terry. Hicks, however, was simply walking down the street; he remotely fit the description of a burglar the police were looking for, but he was not acting in an unusual manner. Since Hicks was stopped and frisked, Terry required that the police have a reasonable belief that Hicks was engaged in criminal activity and that he was armed and dangerous. Hicks was an easy case, since obviously the police could harbor no such belief under the facts. Thus, his seizure and the subsequent search were unlawful, and the evidence seized should have been suppressed. The court's standard for the police action under scrutiny followed Terry: A stop-and-frisk—a limited search and seizure—is lawful if the accosting officer observes "unusual and suspicious behavior" which reasonably leads him to conclude that criminal activity is afoot, and that the person with whom he is dealing may be armed and dangerous.

In cases where a suspicious individual is seized and frisked, the Pennsylvania Supreme Court has fairly consistently adhered to Terry as interpreted by Hicks. Like Hicks, many of the cases that reached the Pennsylvania Supreme Court were easy. What I find most disturbing in these decisions is that the Commonwealth argued, and apparently believed, that Terry justified the police action in question. The Commonwealth has raised Terry in cases involving rummaging expeditions for drugs; indiscriminate seizures

43. LaFave, supra note 2, at 81 n.210.
44. See 434 Pa. at 157 n.2, 253 A.2d at 278 n.2.
45. Id. at 158-59, 253 A.2d at 279.
of persons in no way acting unusual or suspicious; stopping and searching a citizen whose only suspicious activity was to drive past a police car giving the officer an "unusual look;" and more typically, stopping and frisking a citizen who purportedly fits a general description the police have of someone involved in a crime. In this latter type of case, the prosecution usually concedes the police acted without probable cause, but argues the police could violate the citizen's privacy because they had a suspicion the person was involved in criminal activity. The ramifications of this frequently posited argument will be discussed later.

At this point, suffice it to say Terry was not meant to be applied in many of these cases. Terry was intended to free the police from the rigid rule that prevented them from doing anything to a person suspected of being about to commit or having committed a dangerous crime, no matter how impelling the need for swift action, unless probable cause existed to arrest the individual. It was a recognition that the realities of on-the-street law enforcement often require an officer to act on information short of probable cause in order to protect property and prevent physical harm to himself and others. My consternation with the Pennsylvania Supreme Court cases applying Terry is not the test formulated to assess the validity of a search or seizure. Rather, it is that Terry has been cavalierly applied to every conceivable police-citizen encounter and more importantly, to every statutory crime, without the slightest discussion by the court of the propriety or wisdom of such an extension.

The seriousness of the offense under investigation is one case-by-case variable which police and our courts cannot ignore. To take into account the seriousness of the offense does not require the use of some new and intricate sliding scale approach to fourth amend-

ment jurisprudence, subjecting each statutory offense to a different probable cause or "reasonable suspicion" standard. Rather, it involves only the common sense recognition, implicit in Terry and its sister cases, that murder, armed robbery, and the like, call for a different police response than gambling or the possession or sale of marijuana. The same police response might be "good police work" in one instance, yet an unreasonable encroachment on personal freedoms in another. Unfortunately, I have not seen even an intimation by the Pennsylvania Supreme Court that it has considered the seriousness of the offense as a possible limitation on the applicability of Terry. This is especially disturbing since stops and "protective searches" are often a pretext to look for drugs or other contraband. The result of ignoring the nature of the offense, including, for example, whether the officer acts to abort a crime risking violence, is clear. The "reasonable suspicion" test, unquestionably a more lenient standard than probable cause, becomes an ever-available investigatory power that can be implemented regardless of the context or type of criminal investigation underway. Terry simply did not countenance such a power and should not be interpreted as doing so.

I am not the first to advocate limiting the stop and search power where probable cause is lacking to investigations of violent crime or crimes involving the deprivation of property. In Adams, however,

52. See LaFave, supra note 2, at 58-59 (author points out that a comparison of Terry and Sibron reveals that the Court was influenced by the nature of the crimes involved in the two cases). See also Amsterdam, supra note 24, at 390-95.

53. See Justice Jackson's famous statement in Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissenting opinion), to the effect that he might uphold a roadblock if it was thrown up to terminate a kidnapping, but not if it was to "salvage a few bottles of bourbon and catch a bootlegger."

Of the Terry Justices, only Justice Harlan directly confronted the "troublesome" question of whether Terry's dictates control in cases involving suspected possession of narcotics. Sibron v. New York, 392 U.S. 40, 74 (1969) (concurring opinion).


56. A number of distinguished commentators and judges have suggested such a limitation. See United States v. Brignoni-Ponce, 422 U.S. 873, 888-90 (1975) (Douglas, J., concurring); Adams v. Williams, 407 U.S. 143, 151-53 (1972) (Brennan, J., dissenting); Williams v.
the United States Supreme Court may have implicitly rejected the view that the stop and frisk should be limited according to the nature of the crime under suspicion. Adams' failure even to address the question, after it had been raised below by Judge Friendly and urged by the dissenters, suggests the Court has no intention of placing such a limitation on this police investigatory tool. Likewise, the Pennsylvania Supreme Court's silence may indicate a similar intent. The possibility of such a limitation, however, is certainly not foreclosed by anything the United States Supreme Court has said, and the issue at least deserves consideration.

My criticism of the Pennsylvania Superior Court's approach to this relatively new area of fourth amendment law is more fundamental. To anyone who believes the amendment can be an effective restraint on arbitrary or oppressive police behavior, a number of the superior court's recent decisions are dismaying. Surely no one will ever mistake the superior court of the seventies with the Warren Court of the sixties. A brief discussion of a few of those disturbing cases follows, not so much to support these conclusory statements, but because the cases show some of the hard realities, and potential for abuse, surrounding this new police authority warmly embraced by law enforcement forces.

Commonwealth v. Stratton involved an individual stopped and frisked on a flimsy hunch that something criminal was afoot; the superior court called it "good police practice." Around midnight, the defendant was standing near the doorway of a laundromat, approximately ten feet from the street. He was not acting furtively in any respect. When a police officer approached, the defendant decided to leave, walking away "at a fast pace." The defendant was stopped and immediately frisked, whereupon the police found an unloaded handgun. The defendant was convicted of carrying a concealed deadly weapon; subsequent investigation showed that the laundromat door had not been tampered with.

Adams, 436 F.2d 30, 38 (2d Cir. 1971) (Friendly, J., dissenting); MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2, Commentary at 118 (Official Draft No. 1, 1972); LaFave, supra note 2, at 65-66; 43 ALI Proceedings 117 (1966) (remarks of Mr. Steinberg). See also The Supreme Court, 1971 Term, supra note 11, at 174-75 n.17 (discussing Justice Harlan's position on this question).

57. See note 56 supra.

58. It is possible the issue has never been presented to the Court by a defendant seeking suppression of certain evidence.

This knee jerk policework, it is asserted, patently violated the fourth amendment, running afoul of police activity sanctioned by Terrv, Adams, or any Pennsylvania Supreme Court decision interpreting those cases. Although the defendant was subjected to a search, the superior court never discussed whether this police officer had, or could have had, a reasonable belief that the defendant was armed and dangerous. Indeed, the officer could harbor no such belief, nor could he harbor a reasonable suspicion, based on articulable facts, that criminal activity was afoot. Every citizen who merely stops near a business establishment after it closes, cannot be stopped and frisked without the slightest opportunity to explain what he was doing there. The defendant might have been looking for a friend, waiting to be picked up by someone, or merely stopping to catch his breath. Of course, the officer could have stopped the defendant and inquired into the defendant’s reason for being where he was; but, it is quite another matter to forcibly stop and search him. This police officer could have had no more than a vague hunch that a crime had taken place or was about to take place—clearly insufficient to justify this serious intrusion upon a fundamental liberty.

Mr. Stratton happened to be carrying a handgun. We do not know how many other citizens this officer accosted on only a hunch that something was wrong; the searches that turn up no weapons or contraband do not reach the courts.

Commonwealth v. Anderson is a case with staggering implications. In Anderson, the police received an anonymous phone call that a black male in a Philadelphia bar, named "Perry," was an escapee from a drug rehabilitation center. A general description was given. The police entered the bar, saw a man they thought fit the description, and asked the man his name. The defendant gave

60. Judge Hoffman, dissenting in Stratton, observed:
Surely, appellant's mere presence near a doorway on a public sidewalk does not give rise to an inference that criminal activity is afoot. To sustain a "stop-and-frisk" on these facts would mean that anyone who stopped to gaze into a store window or door late at night would be susceptible to a search.

Id. at 97, 331 A.2d at 743 (dissenting opinion).


62. Indeed, in Commonwealth v. Jeffries, 454 Pa. 320, 311 A.2d 914 (1973), the Pennsylvania Supreme Court held, on very similar facts, that the police practice under review violated the fourth amendment. Jeffries predated Stratton, and the two cases cannot be meaningfully distinguished.

a name other than Perry, the police officer "told [the defendant] to stand . . . and grabbed the pocket of [the defendant's] inner jacket and felt what he thought to be a gun." Anderson was carrying a small pistol, and was eventually convicted of various firearms offenses. The superior court refused to suppress the gun because "the officer was certainly justified in conducting a quick 'frisk' of the suspect to determine if he was in any physical danger."

To my thinking, the only certainty here was that the police action was a flagrant violation of a citizen's fourth amendment rights. The tip had absolutely no indicia of reliability, and although it has been argued that the Supreme Court in Adams relaxed the informant reliability standard for street encounters, the Adams Court asserted that "[s]ome tips, completely lacking in indicia of reliability, would . . . warrant no police response." Nothing in Adams, Terry, or any case decided by the Pennsylvania Supreme Court justified a forcible stop and search of this citizen. There was nothing to give the police a reasonable suspicion that criminal activity was afoot, let alone reason to believe Anderson was armed and dangerous (the anonymous informant did not say Anderson was armed). Under these circumstances, i.e., absent some indication of criminal activity, police officers in this commonwealth have no authority to encroach on a citizen's bodily integrity as did these police.

Anderson, it would appear, facilitates legal harrassment of one citizen by another. Simply informing the police that an individual has escaped from somewhere, whether or not true, would authorize

64. The defendant did not give the police his correct name. Of course, even if he had given the police his real name (Gregory Anderson), it would have been inconsistent with the name supplied by the anonymous caller (Perry). Nonetheless, President Judge Watkins stated: "[the police] would have been remiss in their duty if they had accepted at face value the defendant's bold assertion that he was a person other than the one for whom they were looking." Id. at 4, 360 A.2d at 741.
65. Id. at 3, 360 A.2d at 740.
66. Id.
67. The Supreme Court, 1971 Term, supra note 11, at 177-80.
68. 407 U.S. at 147.
69. The Anderson court did not cite Terry or Adams. The court never found that the defendant was under arrest, however, nor that there was probable cause to arrest him. Hence, Terry and Adams are the only extant legal precedent, at least as the Supreme Court has interpreted the fourth amendment, for the search and seizure that took place in this case. The court avoided this fact by formulating a "probable cause to 'pat down'" standard, an amalgam of the principles of stop-and-frisk and probable cause to arrest. To my knowledge, this standard, while raising interesting possibilities, is unknown to this country's fourth amendment jurisprudence.
the police to frisk that individual. If the individual happens to carry a handgun for self protection, conviction for a firearm offense may result. In any event, it is alarming to see a court in this commonwealth, whose primary responsibility and duty it is to protect constitutional rights, to countenance this arbitrary police conduct which can only, in the long run, breed contempt for police authority.

Commonwealth v. Mimms presents another example of unfettered police discretion which the superior court allowed to go unchecked, perhaps because of the "pressures" that bear on courts to water down constitutional rights in the name of law enforcement. At nine o'clock in the morning, a black citizen was driving his car with an expired license plate. Police officers stopped the car to issue a traffic summons, and the citizen was "asked" to step out of the car and produce his operator's license. Once the citizen was outside of the car, the police noticed a bulge under his jacket. The citizen was immediately frisked and the bulge turned out to be a handgun. Since the defendant's actions gave the police no reason to believe this was anything more than a routine traffic violation, the question becomes: which drivers will be ordered out of their cars when they commit traffic violations, with their person carefully reconnoitered for so-called "bulges" which purportedly justify a search? The answer seems plain enough. Whether I am subjected to these indignities, or sent on my way with a pink slip or a warning, will often depend on my obsequiousness, the length of my hair, style of my dress, or color of my skin.

This seems to me not only wrong, but intolerable. Such untrammelled discretion to seize and search contravenes the fourth amendment, for arbitrary searches and seizures are unreasonable searches and seizures. The superior court in Mimms asserted that Terry "encouraged" searches such as the one that took place in Mimms, for the protection of law enforcement officers. This is just not so, and moreover, that statement cannot be reconciled with the fourth amendment as I understand it. A police officer cannot search every

71. See Olmstead v. United States, 277 U.S. 438, 469-85 (1928) (Holmes & Brandeis, JJ., dissenting) (uneven and illegal law enforcement breeds contempt for the law).
Terry Encounters citizen he has contact with and who has a bulge somewhere on his or her person. Every bulge is not a gun that is ready to be used on the officer. An officer who approaches a citizen on the street to ask the citizen for a match cannot, upon noticing a lump in the citizen's breast pocket, simply frisk the citizen on the ground his safety may be endangered. Nor does the fourth amendment permit a search if a policeman notices the same bulge while calling a citizen over to reprimand him or her for jaywalking. As Terry makes manifestly clear, one can lawfully be frisked (searched) only when that person's actions give an officer a reasonable belief that the person is armed and dangerous, presenting a danger to the officer whose duty it is to investigate the suspicious conduct he has become aware of. Lip service aside, the superior court does not seem to appreciate the fact that frisks cannot be conducted as a matter of course whenever a police officer, while executing his duties, encounters a citizen. The officer must have reason to believe that his personal safety may be jeopardized unless he conducts a pat-down to disarm the person he is detaining.

Justice Jackson once termed the Bill of Rights "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." I believe Terry's carefully delimited exception to the requirement of probable cause is consistent with that view. However, the Pennsylvania Supreme Court's carte blanche extension of Terry to

74. Although I would have thought this to be an indisputable fourth amendment principle, see Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring); Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891), this may now be open to question. See Pennsylvania v. Mimms, 98 S. Ct. 330, 332 (1978) (Stevens, J., dissenting from per curiam reversal and remand).


the diverse types of encounters between citizen and police and to
every statutory crime, and the superior court's willingness to uphold
increasing varieties of police conduct whose constitutionality is sus-
pect, are testaments to the "powerful hydraulic pressures," identi-
fied by Justice Douglas, weighing on courts to debase the fourth
amendment and not resolutely invoke it to deter unlawful executive
behavior. Recent cases addressing the constitutionality of the initial
investigatory or forcible stop do nothing to allay my uneasiness that
the balance struck in Terry is now heavily weighted in favor of the
government.

B. The Forcible Stop for Investigation or Interrogation

Considering the numerous issues facing the Court in Terry, it is
understandable that the Court chose not to decide whether, and
under what circumstances, facts not amounting to probable cause
could justify an "investigative seizure," short of an arrest, in order
to examine a situation that aroused the officer's suspicions. There
is now little doubt that such a forcible stop can be effectuated on
less than probable cause. Still unclear, however, is when such a
stop is constitutionally permissible, and what limitations the fourth
amendment imposes on the nature of the stop. In other words, un-
like stop-and-frisk, our courts have not articulated standards by
which to judge the constitutionality of an investigatory or forcible
stop. This is troubling when one considers Justice Harlan's correct
observation in Terry that the officer's right to stop should be re-
solved before any other questions are reached.  

80. See 392 U.S. at 19 n.16.
81. See, e.g., United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977); United States v.
82. [If the frisk is justified in order to protect the officer during an encounter with
    a citizen, the officer must first have constitutional grounds to insist on an encounter,
    to make a forcible stop. Any person, including a policeman, is at liberty to avoid a
    person he considers dangerous. If and when a policeman has a right instead to disarm
    such a person for his own protection he must first have a right not to avoid him but to
    be in his presence. That right must be more than the liberty (again, possessed by every
citizen) to address questions to other persons, for ordinarily the person addressed has
an equal right to ignore his interrogator and walk away; he certainly need not submit
    to a frisk for the questioner's protection. I would make it perfectly clear that the right
to frisk in this case depends upon the reasonableness of a forcible stop to investigate a
suspected crime.
392 U.S. at 32-33 (Harlan, J., concurring) (emphasis in original). Justice Harlan's view was
The Pennsylvania Supreme Court's failure to address this threshold issue is unfortunate, since lawyers and police are as much in need of guidance in this area as in the stop-and-frisk cases. And there is much to lend guidance on. One obvious problem I have already mentioned: at what point does the stop turn into an arrest, thus requiring probable cause to make it lawful? For example, does the "stop" become an arrest when the officer has to draw his gun to prevent the citizen from leaving? The court has only told us that whether a forcible stop or an arrest has taken place, does not depend on the actions of the accosting officer but on what a reasonable person would think the officer was doing—forcibly detaining the person or arresting the person. Other questions largely unanswered, and in genuine need of answering, include what weight the officer can give to the suspect's refusal to answer questions, since a citizen has the right to remain silent if he so chooses. At what point does a police response become constitutionally unacceptable because the "brief" stop is no longer brief? And overshadowing these specific trouble spots is a more important question: what potential does this police power have to water down, if not inter, probable cause as an effective (because understood by the police) buffer between citizen and state?

That brings us to the more basic question of standards. There are strong indications, although no direct holdings, that the Pennsylvania Supreme Court has decided to accept, as a constitutional standard for an investigatory stop, the first half of the Terry standard for a stop and frisk. That is, a police officer may forcibly seize a person for purposes of investigation and/or detention if the officer observes unusual conduct which leads him reasonably to conclude that criminal activity is afoot. As I posited earlier, the most per-

83. See note 32 supra.
84. See United States v. Thompson, 558 F.2d 522 (9th Cir. 1977) (no).
86. See, e.g., cases cited at note 41 supra.
87. See, e.g., Commonwealth v. Jones, 378 A.2d 835 (Pa. 1977); Commonwealth v. Murray, 460 Pa. 53, 61-63, 331 A.2d 414, 418-19 (1975); Commonwealth v. Pegram, 450 Pa. 590, 301 A.2d 695 (1973). Pegram probably comes closest to so holding. Pegram had been stopped and frisked, so that both Terry's requirements (suspicion of criminal activity and belief that suspect is armed and dangerous) had to be satisfied. In holding there were no facts from which
suasive rationale for the police power sanctioned in *Terry* is amena-
ble to such a test, discarding the further requirement that the officer
believe the suspect is armed and dangerous. The police must have,
however, at a constitutional minimum, a “reasonable suspicion”88
of impending criminal activity.

Assuming the Pennsylvania Supreme Court has adopted this
standard for reviewing investigatory stops, presumably the court
would give some indication of what constitutes a “reasonable suspi-
cion.” Not so. About all we know is that “reasonable suspicion” is
somewhere between an “inarticulate hunch”89 and the level of infor-
mation that would give an officer probable cause to arrest: facts and
circumstances within the officer’s knowledge, of which he had rea-
sonably trustworthy information, that would be sufficient to war-
rant a prudent man in believing that the suspect had committed or
was committing an offense.90

*Terry* itself is of little help in determining when an officer’s initial
stop of a citizen is constitutionally justified.91 *Terry*’s deficiency in
this regard is not a secret. Soon after the Court’s decision in that

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89. 392 U.S. at 22. See also *United States v. Montgomery*, 561 F.2d 875, 879 (D.C. Cir.
1977).
91. *Terry* again offers only the most general limiting criterion. In reviewing an officer’s
grounds for suspicion, courts are to use an objective standard: “would the facts available to
the officer at the moment of the seizure or the search ‘warrant a [person] of reasonable
cautions in the belief’ that the action taken was appropriate?” 392 U.S. at 21-22. Mere good
faith on the part of the accosting officer is not enough. *Id.* at 22.
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case, Professor LaFave observed that "it is clear that in the years ahead one of the major tasks of the courts will be to flesh out the evidentiary standards for temporary investigative seizures."92 Those of us who would like to see the courts in this jurisdiction do so are still waiting. I cannot overemphasize the necessity of articulating definite standards if police are to have reasonably clear guidelines as to what they may do under what circumstances. Only when that happens will the chances of unconstitutional seizures be diminished. For the Pennsylvania Supreme Court merely to extract half the Terry stop-and-frisk standard as the test for the initial stop, and adopt the legal construct "reasonable suspicion" without giving content to that largely undefined term, is not the kind of handiwork that gives significant protection to fourth amendment rights.

Commonwealth v. Mackie93 presented an excellent vehicle for the supreme court to define the scope of police authority in investigatory stops. In mid-afternoon in a "high crime area,"94 an officer observed the defendant carrying an uncased television set and a pair of field glasses. The officer approached the defendant and asked him a few questions; the officer was dissatisfied with the answers given by the defendant and arrested him. The items proved to be stolen. Four members of the court thought the officer did not have probable cause for the arrest, hence the evidence should have been suppressed. Conceding that the officer's observations may have given rise to "good faith suspicions," Justice Manderino’s majority opinion stated in dicta that such suspicions "may have justified ‘[a] brief stop’ of the citizen ‘in order to determine his identity or to maintain the status quo momentarily . . .’."95

92. LaFave, supra note 2, at 67.
94. To forcibly stop a citizen, a police officer must be able to point to articulable facts which gave rise to a reasonable suspicion that criminal activity was afoot. Yet another unresolved question in Pennsylvania is whether an area’s reputation as a "high crime area" is an articulable fact which, combined with other factors, might justify a forcible stop. See Commonwealth v. Pollard, 450 Pa. 138, 299 A.2d 233 (1973) (if sole reason for stop is area’s reputation as a high crime area, insufficient); Commonwealth v. Galadyna, 375 A.2d 69, 73 n.4 (Pa. Super. Ct. 1977) (area’s reputation for crime can be considered with other factors). See also United States v. Magda, 547 F.2d 756, 758, 763-64 (2d Cir. 1976) (majority and dissenting opinions) (disagreeing on the weight to be accorded this "fact"). Another consideration is that absent empirical data, it is often only the police officer’s word in that an area is one of high crime. This is precisely what occurred in Mackie.

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What the majority apparently overlooked was that the officer's response was a brief stop for detention and interrogation—an investigatory stop. The officer did not decide to arrest the defendant until the defendant's answers proved unsatisfactory. If the court thought that the officer's suspicions, apart from any questioning of the defendant, did not rise to the level of a "reasonable suspicion that criminal activity was afoot," then the dicta that an Adams stop would have been proper is wrong. The emphasis in the court's dicta on the words "brief" and "momentarily" suggests the court might have held that the forcible stop was unacceptably long. Yet the stop was only long enough to allow the officer to address a number of questions to the defendant. I doubt that the supreme court is taking the position that police, during the course of a justified forcible stop, cannot make a valid arrest from information obtained after the initial stop which gives the officer probable cause to believe the suspect was committing or had committed a crime.96

Of course, if the Commonwealth argued only the probable cause question and never raised the forcible stop issue, and it appears from the majority opinion that the forcible stop issue was not raised, the court was correct in not making this bifurcated inquiry. Nonetheless, the police response in this case is best analyzed by such an approach: first, was there justification for the initial stop, and second, if so, did the police then obtain sufficient information to justify an arrest. By not approaching the case from this perspective, the court missed an opportunity to clarify when Pennsylvania police can lawfully stop citizens on the street because of a "reasonable suspicion" that criminal activity is at hand.

The court has had other opportunities to consider the constitutional grounds for the initial seizure, the most recent being Commonwealth v. Jones.97 The Jones opinion, however, focuses on when a forcible stop occurs and thus when the fourth amendment becomes relevant in assaying the legality of the seizure.98 One brief,
unenlightening paragraph addresses the grounds for effectuating the forcible stop, finding that there were no facts to support a reasonable conclusion that criminal activity was afoot.\footnote{99}

I believe that the grounds for the initial stop can be set forth as precisely and objectively as the grounds for a warrantless arrest (probable cause).\footnote{100} Professor LaFave argued convincingly that the courts are capable of such a feat,\footnote{101} and the United States Supreme Court proved him right in \textit{United States v. Brignoni-Ponce}.\footnote{102} In \textit{Brignoni-Ponce}, the Court examined the United States Border Patrol's stopping of automobiles near the Mexican border to check for illegal aliens. The court held that the Border Patrol must have at least a "reasonable suspicion" that a vehicle contains aliens who are illegally in the country.\footnote{103} Anything less would violate the fourth amendment.

The important point is that the Court did not stop there. It did not simply announce that Mexican ancestry alone would not support a reasonable suspicion of illegal entry into the country. The Court carefully canvassed the "factors [that] may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area."\footnote{104} United States Border Patrol officers now have guidelines as to when a reviewing court will find this type of seizure reasonable as required by the fourth amendment.\footnote{105} The result: stops such as the one that occurred in \textit{Brignoni-Ponce}, in which constitutional rights were abridged, will occur less frequently if at all.

\footnote{99} The seizure be reasonable. 392 U.S. at 16. \textit{Jones} determined that this "seizure" occurs when, "considering all the facts and circumstances evidencing an exercise of force, 'a reasonable man, innocent of any crime, would have thought [he was being restrained] had he been in the defendant's shoes.'" 378 A.2d at 840, \textit{citing} United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965).


\footnote{101} \textit{LaFave, supra} note 2, at 62-84.

\footnote{102} 422 U.S. 873 (1975).

\footnote{103} \textit{Id.} at 882. \textit{Cf.} \textit{Almeida-Sanchez v. United States}, 413 U.S. 266 (1973).

\footnote{104} 422 U.S. at 884. \textit{See id.} at 884-85 for the factors a Border Patrol officer may consider in deciding whether there exists sufficient cause to stop a vehicle suspected of transporting illegal aliens.

\footnote{105} Justice Douglas, concurring, was dismayed that the majority specified the factors to be considered without explaining what combination of those factors were necessary to satisfy the suspicion test. \textit{Id.} at 890 (concurring opinion). For an example of a court struggling with the decision in \textit{Brignoni-Ponce}, see \textit{United States v. Escamilla}, 560 F.2d 1129 (5th Cir. 1977).
The need for similar action by our own appellate courts was crystallized by the Pennsylvania Supreme Court's recent decision in Commonwealth v. Hall. What Hall squarely presented to the supreme court justices was the police practice, common in larger cities, of systematic harassment of young nonwhite citizens on only the slightest suspicion of improper conduct. In the words of Professor Amsterdam, "[u]nless one takes a very middle-class white view of life, here is a practice that cries out for some sort of fourth amendment regulation." Five members of our supreme court failed to see the need for fourth amendment regulation and incredibly, the majority never even mentioned the fourth amendment in disposing of the case.

Hall was standing on a corner in Pittsburgh conversing with two male companions when three plainclothes police officers, driving on the opposite side of the street, spotted the three. The officers immediately made a U-turn, double-parked the police car in front of the men and exited the car "with the express intention to confront the [three] individuals." When the three officers got within ten feet of Hall, he allegedly dropped a bag at his feet. The bag contained heroin, and a subsequent search of Hall turned up marijuana. The

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106. 380 A.2d 1238 (Pa. 1977). See also Commonwealth v. Greber & Gullick, 385 A.2d 1313 (Pa. 1978) (plurality opinion), in which Justice Manderino, speaking for only two members of the court, found insufficient basis for a Terry stop, where the appellees were observed exchanging a bag in a bowling alley parking lot. The opinion for the court relied on Commonwealth v. Lawson, 454 Pa. 23, 309 A.2d 391 (1973), a case involving the existence vel non of probable cause, but not expounding on what observations by the police officers would have justified a forcible stop of appellees. The opinion stated only that "[w]hether an officer should briefly detain a citizen for purposes of investigating suspected criminal activity will, of course, depend on the facts and circumstances of each use." 385 A.2d at 1316. Justice Roberts, concurring, saw no need to discuss Terry, since he found sufficient evidence to support the suppression court's finding that appellees were arrested when police officers blocked their egresses from the parking lot. Since the Commonwealth conceded that probable cause was lacking at that time, the arrest was unlawful and the evidence had to be suppressed.

107. See sources cited in Amsterdam, supra note 24, at 457 n.283.

108. Id. at 405 (footnotes omitted).

109. Justice Nix did not participate in Hall. Only Justice Manderino dissented. He interpreted Terry and Adams to permit forcible stops of citizens, on less than probable cause, only when the police have reason to believe the suspect is engaging in criminal activity. In his view, the officers were effectuating a forcible stop, and since Hall's behavior preceding the stop was completely innocent, his seizure was unlawful. 380 A.2d at 1242-43.

110. Id. at 1240.

111. Instances of defendants who allegedly "drop" contraband before they are searched raise serious credibility questions. See Note, Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap, 60 Geo. L.J. 507 (1971).
suppression court, best able to resolve conflicting testimony and
adjudge credibility, determined that the officers, in effect, "surrounded" Hall, and that, because of their threatening actions
which restricted Hall's freedom to walk away, Hall dropped the
bag.\textsuperscript{112} The evidence was suppressed on the ground the police activ-
ity was coercive.

The supreme court was willing to assume Hall could reasonably
have concluded that the men who exited the car to "confront" him
were police officers. The court conceded there was no probable cause
to arrest Hall and there was nothing to give the police reasonable
suspicion that criminal activity was afoot. It is clear, therefore, that
any forcible stop of Hall was illegal. The court nonetheless refused
to invalidate this arbitrary police conduct by rejecting the suppres-
sion court's findings, and stating that Hall could not have reasona-
ably believed the officers were attempting a forcible stop.\textsuperscript{113} Since no
forcible stop had occurred, the fourth amendment was simply not
applicable and Hall's constitutional rights were not violated.

I think Justice Manderino's dissent in unassailable. In his view,
the majority strained reality to find that no forcible stop was taking
place.\textsuperscript{114} A reasonable person who sees three men in a car make a
U-turn in front of him, and who watches the men exit the car and
come within ten feet, intending to confront him, is going to believe
his freedom to walk away is no longer unfettered and he had better
cooperate with these menacing individuals. Under \textit{Commonwealth
v. Jones},\textsuperscript{115} a forcible stop had been effectuated and absent a reason-
able suspicion of criminal activity, the fourth amendment was vio-
lated. So much for the particular facts of \textit{Hall}; the case is alarming
for much more fundamental reasons.

There is little dispute that the fourth amendment's requirements
seek to limit police invasions of privacy to likely criminals, in effect,
separating likely criminals from the rest of society.\textsuperscript{116} Putting aside
exactly when a forcible stop occurs (which depends on the reasona-
ble beliefs of a hypothetical innocent citizen), I think it clear that
the type of police activity involved in \textit{Hall} does nothing to further

\textsuperscript{112} 380 A.2d at 1240, quoting from Judge Spaeth's dissenting opinion in the superior
court which in turn quotes from the notes of the suppression hearing.

(1978).

\textsuperscript{114} 380 A.2d at 1242 (dissenting opinion).


\textsuperscript{116} \textit{See, e.g.}, \textit{Go-Bart Importing Co. v. United States}, 282 U.S. 344, 357 (1931).
that underlying policy. It is inconceivable that the fourth amendment does not even deserve mention in a case like *Hall*. Our courts have the "primary responsibility and duty of giving force and effect to constitutional liberties." 117 Unless the fourth amendment is read as putting a premium on the value of personal privacy and security in the face of unwarranted government encroachment, it is difficult to imagine what the amendment can mean. It is hard to read *Commonwealth v. Hall* as respecting the sanctity of those values. Rather, the decision subverts those interests, not by stressing the safety of the officer or the need to protect private property, but by weighing the societal cost in lost convictions and elevating that interest above the individual's interest in a free society.

The difference in emphasis is significant. At least it makes the United States Supreme Court's disposition of *Commonwealth v. Mimms* 118 more palatable. *Mimms*, as previously discussed, involved the police practice of ordering drivers stopped for routine traffic violations to exit their vehicles. When Mimms was ordered out of his car, a bulge was "noticed" under his jacket. He was frisked, a weapon was discovered, and Mimms was convicted of firearms' offenses.

The Pennsylvania Supreme Court, reversing the superior court, 119 held that this indiscriminate police practice procedure violated the fourth amendment. 120 The court implied that had the officer been able to point to "objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety," this stop and subsequent frisk would have withstood constitutional analysis. 121 Since Mimms had done nothing to arouse the officer's suspicions, the interference with his bodily integrity was unlawful.

On nothing more than certiorari papers, the Supreme Court disa-
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greed with Justice Pomeroy's analysis, and in a per curiam order, reversed and remanded the case to the Pennsylvania court. Important here is the Court's heavy reliance on a perceived threat to police officers' safety, justifying the "de minimus" intrusion of having an already stopped driver get out of the car.\(^{122}\) Largely because of the state interest in the safety of its law enforcement forces, such a procedure was reasonable under all the circumstances and hence did not contravene the fourth amendment.\(^{123}\) There was no indication in *Hall*, however, that these officer's safety was in any way endangered, and the intrusion occasioned by their actions could hardly be termed de minimus.

That *Commonwealth v. Hall* portends a decreased appreciation by the Pennsylvania court of the central meaning of the fourth amendment is perhaps demonstrated by the two concluding sentences in the majority opinion: "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. *A fortiori*, a policeman may approach a citizen on the streets in order to put himself in a position to address those questions to the citizen."\(^{124}\) That tidy little syllogism, while no doubt

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122. 98 S. Ct. at 333. One of the points of Justice Stevens' dissent was his belief that the majority's factual assumption about police safety was "dubious at best." *Id.* at 337 (dissenting opinion).

123. I do not mean to imply that I agree with the result in *Mimms*, for the case has portentous implications. The police officer in *Mimms* had no reason to suspect foul play from *Mimms* at the time of this particular stop (he was nonetheless frisked when the officer noticed a bulge). Ordinarily, then, *Mimms*' seizure (there was no question that ordering someone to get out of his or her car constitutes a fourth amendment seizure) would be an unlawful one. Arguably, the danger engendered when the police stop a driver who forgot to renew his automobile registration is not greater than any other seemingly innocuous police-citizen encounter. *Mimms* may be authority for allowing police officers, whenever their duties require them to be face-to-face with a citizen, to frisk that person, notwithstanding the absence of suspicious behavior, whenever the officer notices a "bulge" anywhere on the citizen's person. It is not a big step to allow a frisk of a citizen conversing with the officer who has a hand in his or her coat pocket, or to allow the quick search of a woman's purse which the officer believes is inordinately bulky. I have already expressed the view that such a result cannot be reconciled with the fourth amendment. See text accompanying notes 73-76 *supra*. Cf. *Terry v. Ohio*, 392 U.S. 1, 33-34 (1968) (Harlan, J., concurring) (relevant portion appears at note 82 *supra*).

Of course, there remains the issue of the initial order to exit the vehicle. Again, whether or not a person is ordered to get out of the car will depend on the length of one's hair, the color of one's skin, the style and cost of one's car, or the mode of one's dress. I am not persuaded that the rules applicable to all street encounters should not be applicable to the situation in *Mimms*. It is enough that if a driver gives a policeman any reason to believe something is afoot, or that the officer's safety may in any way be endangered, that person can be ordered out of the car so as to be in the full view of the officer. See *Dow*, *supra* note 118, at 267.

124. 380 A.2d at 1241-42 (quotations and footnotes omitted).
true in certain situations, requires some significant qualification. A police officer cannot approach any citizen with revolver drawn or night stick brandished in order to freeze the situation so that questions can be addressed to a citizen. A police officer would put himself in a position to direct questions to a citizen sitting in a car by blocking the car's egress with the police vehicle; yet such a seizure, without some legally cognizable basis for it, would violate the fourth amendment. Likewise a police officer cannot order a citizen simply walking across the street to "stand where you are" until the officer "put[s] himself in a position" to interrogate the citizen. The fourth amendment withholds such authority from police officers. The concluding sentences of Hall are only correct where the citizen is not subjected to a show of authority and is willing to listen to the officer, or, where the citizen is engaging in unusual behavior which gives the officer reason to believe the citizen was engaged in criminal behavior. The principle was ignored in Hall solely to uphold his conviction, and more alarmingly, in a case which portrayed a police practice totally repugnant to the fourth amendment proscription of arbitrary and unreasonable seizures and searches.

III. LOOKING AHEAD

Constitutional limitations on police invasions of personal privacy, on less than probable cause, have had ten years to develop. We have held the line fairly well when the challenged police response to a situation is a stop-and-frisk which uncovers some evidence of illegality. Although the quantum of information that rises to the level of a reasonable suspicion remains largely undefined, it is clear there must be unusual behavior on the part of a suspect that gives the police reason to believe criminal activity is afoot and that the person is armed and dangerous. If the courts remain unwilling to limit Terry to violent crimes and crimes involving property rights, they

125. But see note 123 supra.
127. See 392 U.S. at 19 n.16.
128. See cases cited at note 73 supra.
should nonetheless remain faithful to this standard; even *Sibron v. New York,*\(^{130}\) a case involving the suspected possession of narcotics, requires that the officer have reason to believe the suspect is armed and dangerous.

The battles that are still to be fought will involve the initial investigatory seizure. A wholesale acceptance of such a general police power would, admittedly, provide for those charged with overseeing our criminal laws, an efficient means of crime detection and law enforcement. That, however, should not be the only consideration.\(^{131}\) Our courts must be careful in countenancing such a power and structuring its limitations; its potential to erode fourth amendment liberties is, I hope at this point, obvious. Less and less frequently will the police need to justify warrantless searches and seizures by establishing probable cause for the arrest and the search will thus be incident to the lawful arrest.\(^{132}\) When probable cause is doubtful, or it is clear there was no probable cause to seize or arrest, the argument will be that there was at least a "reasonable suspicion" to forcibly stop the individual and investigate further. At this point, the police will argue that the officer observed circumstances that gave him probable cause to effectuate a graduated response, an arrest.\(^{133}\) Forcible stops will not be confined to those situations where exigent circumstances impelled such a stop. In short, "investigatory seizure" has enormous potential to circumvent indirectly the concept of probable cause that has been deeply imbedded in this country's fourth amendment jurisprudence as an insulator against unwarranted government invasion of personal privacy.\(^{134}\) The contexts in which this power is available should therefore be carefully cabin-ed, with the utmost solicitude for this interest.

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130. 392 U.S. 40 (1968). Federal courts are uniform that *Sibron,* no less than *Terry,* requires that there exist facts which give rise to a reasonable belief that the individual confronted is armed and dangerous. *See, e.g.*, United States v. Thorpe, 526 F.2d 326, 328 (5th Cir. 1976). *See also* United States v. Rosario, 543 F.2d 6, 8 n.2 (2d Cir. 1976); United States v. Davis, 482 F.2d 893, 906 (9th Cir. 1973); Adams v. Williams, 407 U.S. 143, 155-56, 158 & n.4 (1972) (Marshall, J., dissenting).

131. *See Commonwealth v. Davis,* 462 Pa. 27, 32-33 n.1, 336 A.2d 888, 890 n.1 (Roberts & Manderino, JJ., dissenting), cert. denied, 423 U.S. 1019 (1975), discussing some of the implications of judicial concern limited to ensuring that the police have efficient methods of investigating crime.


133. *See* note 96 supra.

At the same time, there are obviously circumstances falling short of probable cause that nonetheless warrant a police response, including forcibly stopping a citizen to freeze the situation briefly. These cases will be hard ones, especially in light of the precipitous increase in crime today; the courts must balance fourth amendment rights against this important societal interest. I fear, however, that a number of recent cases decided by our appellate courts indicates that the accommodation of societal interests in hard cases results in weaker and weaker restraints on executive behavior. It may well be that the delicate balance *Terry* struck between these interests is simply too delicate, and too susceptible to the "hydraulic pressures" of the times.\(^{135}\)

**IV. Conclusion**

Police power exercised without probable cause is, to a large extent, arbitrarily exercised. We must keep this in mind when our courts give imprimatur to the power to forcibly stop citizens based on the more lenient "reasonable suspicion" test. The reasonable suspicion test unquestionably places severe strains on the fourth amendment's underlying policy: to strictly confine police intrusions into the personal privacy of individuals likely to be involved in criminal conduct. The test perforce will allow the police to interfere with the freedom of a greater number of law-abiding citizens whose only vulnerability may be that they look or dress peculiarly, act in some unusual way, like to go out late at night, or happen to live in a purported high crime area.

If, in the future, this less-than-probable-cause standard is to provide any meaningful restraint on executive behavior, our courts must articulate reasonably definite standards for effectuating a forcible stop, and vigorously review the application of the those standards. Finally, courts must also keep in mind that there is more at stake than the needs or convenience of law enforcement forces. What Justice Stewart said five years ago, speaking for a majority of the United States Supreme Court, bears repeating here. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures

\(^{135}\text{See Adams v. Williams, 407 U.S. 143, 162 (1972) (Marshall, J., dissenting).}\)
that counsels a resolute loyalty to constitutional safeguards."\textsuperscript{136} Terry's recognition of the power of police to stop and sometimes search citizens on less than probable cause could not help but exacerbate that tension. Hopefully, future Pennsylvania decisions addressing the permissible scope of forcible police-citizen encounters will reflect a firm intent to protect the fundamental notions embodied in the fourth amendment, values which Terry unavoidably placed in even greater need of that protection.
