The Elephant in the Seventh Circuit: A Modified Approach to the Minimal Suspicion Standard

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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.

I. Introduction

Few portions of the Constitution have spawned the amount of litigation—or scholarship—as the Fourth Amendment. Suppression hearings are a staple in criminal trials, involving the Fourth Amendment in most prosecutions. Because of the prevalence of Fourth Amendment litigation, developing a clear understanding of the Amendment is necessary.

1. U.S. CONST. amend. IV.
2. It is worth noting that the "Exclusionary Rule" has no basis in the text or history of the Fourth Amendment; it is a judicially created remedy. See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 785 (1994) ("The Court has . . . concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt . . . ").
The Fourth Amendment consists of two clauses, the "Reasonableness Clause" and the "Warrant Clause."\(^3\) It is this division that has caused much confusion in the Supreme Court's jurisprudence. If one reads the two clauses independently, the Amendment protects citizens against only "unreasonable searches and seizures" and provides no guidance in determining reasonableness.\(^4\) Thus, the courts would determine, on a case-by-case basis, what constitutes a reasonable search or seizure.\(^5\) Under this reading, probable cause would be relevant only in determining the validity of warrants.

On the other hand, if one reads the two clauses in conjunction, probable cause becomes a cornerstone of a search's reasonableness. Absent probable cause, a search or seizure would be presumptively unreasonable; indeed, under a strict conjunctive reading, the Amendment would require warrants absent special circumstances.\(^6\) The Supreme Court followed this latter approach until the middle of the twentieth century.\(^7\) As the century progressed, however, the Warrant Clause's dominance fell away, and the Court read the two clauses as being distinct when analyzing searches and seizures in most circumstances.\(^8\)

Of particular interest to this Note is the relevance of the Reasonableness Clause in street encounters between police and citizens. Although the Court does not require probable cause for a street stop or search,\(^9\) the Justices have never sanctioned an involuntary street search or seizure absent "reasonable suspicion" of the person's involvement in criminal activity.\(^10\) Indeed,

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3. U.S. Const. amend. IV.

4. See Ricardo J. Bascuas, Property and Probable Cause: The Fourth Amendment's Principle Protection of Privacy, 60 Rutgers L. Rev. 575, 596 (2008) ("The 'reasonableness' theory, on the other hand, postulates that the Reasonableness Clause is grammatically independent of the Warrant Clause. Under this reading, the Fourth Amendment requires only that all searches and seizures be reasonable.").

5. See Amar, supra note 2, at 801–11 (discussing the analysis involved in determining whether a search is reasonable under the Fourth Amendment).

6. See id. at 770–71 (stating the foundations of the "modified per se" warrant requirement approach).

7. See infra Part II.A.1 (noting the Court's adherence to the Warrant Clause).

8. See infra Part II.A (discussing the development of the Court's Fourth Amendment jurisprudence).

9. See Terry v. Ohio, 392 U.S. 1, 30 (1968) (concluding that police having "reasonable grounds to believe" criminal activity was afooted a stop and frisk).

10. Generally, Terry is credited as the case in which the Supreme Court announced a reasonable suspicion standard for "stop and frisks." See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (noting that reasonable suspicion was an adequate basis for the stop in Terry); Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 Minn. L. Rev. 383, 397 (1988) (stating that the Court allowed the search based upon reasonable suspicion). The majority opinion in Terry, however, does not use the phrase "reasonable suspicion."
subsequent to Terry v. Ohio,11 the circuit courts recognized three levels of police-citizen encounters: a voluntary meeting, a Terry stop, and an arrest.12 Each category has its own distinct level of particularized suspicion necessary to validate the police action involved.13 This framework has been stable and generally unquestioned by the lower courts; however, United States v. Burton14 changed this.

In an opinion by Judge Posner, the Burton court upheld an involuntary street seizure despite the absence of reasonable suspicion.15 Given that the police seized Mr. Burton’s car before Burton completed a transaction with another man, Judge Posner concluded that the seizure was, at most, minimally intrusive.16 Because the stop was only minimally intrusive, only "minimal suspicion" was necessary to justify it.17

Grave consequences follow from the court’s adoption of a standard lower than reasonable suspicion. Such a standard could open the door for police stops based entirely upon inarticulate hunches, a position the Supreme Court squarely rejected in Terry.18 Adding further difficulty, many of these hunches could have invidious bases, such as race.

Of course, there are advantages to Judge Posner’s approach. To start, such a standard would allow the police to preemptively interject themselves into suspicious situations. Furthermore, due to the limited invasiveness of "minimally intrusive" searches, there may not be any significant infringement on individual rights.

This Note explores the competing aspects of the minimal suspicion standard. It concludes that the problems with the minimal suspicion standard outweigh its usefulness in the context of ordinary police-citizen encounters. Yet, allowing the police to investigate and stop individuals based on a minimal level of suspicion could be appropriate when there are extraordinary, uncommon governmental interests at stake. Given the importance of the

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11. See Terry, 392 U.S. at 27 (allowing a police search of an individual when a reasonably prudent officer would believe he may be in danger regardless of probable cause).
12. See cases cited infra note 91 (discussing the police-citizen encounter framework).
13. Infra note 91 and accompanying text.
15. See id. (affirming the district court’s denial of the suppression motion despite an absence of reasonable suspicion).
16. See id. at 511 (discussing when the police seized Burton’s car).
17. Id. at 513.
18. See Terry v. Ohio, 392 U.S. 1, 22 (1968) ("[I]ntrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches[] is a result this Court has consistently refused to sanction.").
Court’s evolving interpretation of the Reasonableness Clause, Part II discusses the Fourth Amendment background that set the stage for \textit{Burton}. This Part pays particular attention to the circumstances surrounding \textit{Terry}, as it helps justify the Court’s radical departure from then existing law. If an equally radical departure from precedent is warranted today, there should be equally compelling circumstances. No such justification existed in \textit{Burton}.

In Part III, this Note examines \textit{Burton}, including the benefits and problems that flow from the adoption of a minimal suspicion standard. Next, Part IV proposes and discusses a solution to the problems raised by \textit{Burton}—allowing minimal suspicion to be employed when there are extraordinary governmental interests not typically present in ordinary police-citizen encounters. It also undertakes a discussion of the Court’s modern jurisprudence, which employs a generalized balancing test, to provide jurisprudential support. Finally, Part V concludes that adoption of the minimal suspicion standard in these limited circumstances is the appropriate balance between protecting the privacy of the individual from arbitrary governmental intrusion and aiding law enforcement during particularly perilous times.

\textbf{II. The Development of the Fourth Amendment in History and Practice}

\textbf{A. The Court’s Jurisprudence Prior to \textit{Terry}}

The Supreme Court’s early Fourth Amendment jurisprudence mandated that a warrant was required for all searches. This was true even in the presence of conclusive evidence that illegal activity was taking place. Yet, strict adherence to the mandate waivered over time, as the Court recognized the need for flexibility. Though not completely abandoning the warrant requirement, the Court, prior to \textit{Terry}, began applying more flexible standards to the requirements of warrants and probable cause.

\textit{1. The Early Dominance of the Warrant Clause}

In the early part of the twentieth century, the Court’s requirement of a warrant was all but absolute, as it repeatedly struck down searches that undoubtedly were based upon probable cause but had been made without warrants.\textsuperscript{19} The Court feared that, without a warrant requirement, the police

\footnotesize{\textsuperscript{19} See, e.g., Johnson v. United States, 333 U.S. 10, 12, 13–15 (1948) (reversing the conviction of a woman after police searched her hotel room without a warrant, despite the fact that police had probable cause); Taylor v. United States, 286 U.S. 1, 6 (1932) (suppressing
would run rampant over the rights of innocent citizens "in the often competitive
enterprise of ferreting out crime."\(^{20}\) Indeed, the Court went so far as to state
that warrantless searches, even those made with evidence sufficient to establish
probable cause, "would reduce the Amendment to a nullity and leave the
people’s homes secure only in the discretion of police officers."\(^{21}\)

*Trupiano v. United States*\(^{22}\) best illustrates the attitude of the Court during
this period. In *Trupiano*, the government placed an undercover agent at a farm
where the defendants were making moonshine.\(^{23}\) With the aid of a two-way
radio, the agent informed the government of a shipment of moonshine that the
defendants were preparing for delivery.\(^{24}\) Government agents entered the
grounds, arrested those on the premises, and seized the still and whiskey.\(^{25}\)
Despite the fact that the government agents knew with absolute certainty that
the defendants were engaged in illegal activity, the Court declared the search
invalid.\(^{26}\) Justice Murphy, for the Court, stated that "to provide the necessary
security against unreasonable intrusions upon the private lives of individuals,
the framers of the Fourth Amendment required adherence to judicial processes
wherever possible," because "[officers] are less likely to possess the detachment
and neutrality with which the constitutional rights of the suspect must be
viewed."\(^{27}\) Because the government had not obtained a warrant, these basic
mandates, along with the rights of the defendants, had been violated.\(^{28}\)

Despite the strong rhetoric in *Trupiano*, the Court had already recognized
that it would be impossible to obtain a warrant in certain exigent circumstances.
From cases involving automobiles to cases involving contraband, the Court

evidence, illegal liquor, obtained without a warrant, despite a strong smell of whiskey emanating
from the garage in which it was found); Agnello v. United States, 269 U.S. 20, 33 (1925)
("Belief, however well founded, that an article sought is concealed in a dwelling house[,] furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.").

21. *Id.*
22. See *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (requiring a warrant
23. See *id.* at 701 ("Nilsen, one of the agents, was assigned in February to work on the
farm in the disguise of a ‘dumb farm hand’ and to accept work at the still if petitioners should
offer it.").
24. See *id.* at 701–02 (discussing background to the search).
25. See *id.* at 702–03 (detailing the government’s raid of the farm).
26. See *id.* at 710 (reversing the denial of the suppression motion).
27. *Id.* at 705.
28. See *id.* at 706 (discussing the shortcomings of the agents’ actions).
began to recede from the hard line established in *Trupiano*. The Reasonableness Clause provided the Court with its justification.

2. *The Move to the Reasonableness Clause*

A salient example of the chipping away at the Court’s strict interpretation of the Warrant Clause is the search of automobiles during Prohibition. The Court, relying on legislative history surrounding the National Prohibition Act, recognized that it would be impractical, if not impossible, to obtain warrants for moving automobiles. Accordingly, the Court found that the police did not need to obtain a warrant in these circumstances. Although the Court moved away from the warrant requirement in this instance, it required the officers to have probable cause of illegal activity prior to searching.

In *United States v. Rabinowitz*, the Court took another step away from the warrant requirement—this time in a situation where no exigent circumstances existed. Officers obtained a valid arrest warrant for Rabinowitz and, after making the arrest, searched his office. The Court concluded that a search for contraband in proximity to where a person is found, especially where he resides or conducts business, is reasonable. Indeed, the majority explicitly rejected the requirement that a warrant be obtained whenever practical because "[the Court] cannot agree that [the warrant] requirement should be crystallized into a *sine qua non* to the reasonableness of a search."

Although the stage had been set to read the reasonableness requirement of the Fourth Amendment independently, the Court, in *Camara v. Municipal...*

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29. See *Carroll v. United States*, 267 U.S. 132, 153 (1925) (recognizing that a car could easily be moved, rendering a warrant impractical).
30. See id. at 147 (noting that Congress’s determination that a warrant was not required to search a car was consistent with the Fourth Amendment).
31. See id. at 149 ("[T]he true rule is that if the search and seizure without a warrant are made upon probable cause . . . the search and seizure are valid."); *see also* *Husty v. United States*, 282 U.S. 694, 701 (1931) (upholding a warrantless search of a bootlegger’s car based upon probable cause).
33. *Id.* at 58–59 (describing the events leading to the seizure of evidence from the defendant).
34. See *id.* at 63–64 (upholding the district court’s determination that the search was reasonable).
35. *Id.* at 65.
Court, clung to the probable cause requirement. Police charged Camara for failing to allow the authorities from the San Francisco Housing Authority to search his home to determine if it complied with the housing code. The ordinance authorizing the search of dwellings for sub-code conditions did not require city officials to obtain a search warrant prior to entering the premises. Justice White, writing the majority opinion, realized that the government would have a difficult time obtaining warrants or probable cause for particular buildings. He also noted that a housing search must ordinarily be accompanied by a warrant absent consent.

The Court, therefore, placed itself between a rock and a hard place: The governmental interests involved were significant and difficult to fit within the warrant/probable cause framework, but this framework was undoubtedly central to Fourth Amendment jurisprudence. Rather than resolving this problem through the Reasonableness Clause, the Court instead "recast" the probable cause standard. The Court allowed for "weighing of the governmental interests involved to determine probable cause; this additional consideration added a level of flexibility to the usually rigid requirement. Indeed, as one professor acknowledged: "Reasonableness, in the form of a balancing test, had finally gained entrance into Fourth Amendment analysis, albeit through the back door of the warrant clause."

B. Terry v. Ohio: The Reasonableness Clause Stands on Its Own

Before considering the Court’s opinion in Terry, it is important to consider the historical context surrounding the opinion, as this undoubtedly affected the

36. See Camara v. Municipal Court, 387 U.S. 523, 540 (1967) (concluding that a house inspection violated the appellant’s Fourth Amendment rights when performed without a warrant).

37. See id. at 525–27 (describing the factual background).

38. See id at 526 ("[E]mployees of the City departments or City agencies . . . shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.").

39. See id. at 536 ("[T]he agency’s decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.").

40. See id. at 528–29 ("[O]ne governing principle . . . has consistently been followed: [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.").

41. Sundby, supra note 10, at 393.

42. Id. at 394.
Court. The effect of the decade’s events is particularly significant because Terry’s dramatic change in the law was necessary because of widespread violence. If a corresponding change in the law were to occur now, like that proposed in Burton, a similar justification should be present.

1. The Turmoil of the 1960s

The 1960s was a turbulent decade. Civil rights protests, initially peaceful, became violent. Leaders of the civil rights movement advocated the use of civil disobedience—a refusal to follow laws that one determined were unjust—as a means of achieving their ends. Similar tactics were being used by the Vietnam protest community, which staged massive “conferences” where, according to one observer, “[t]he dominant themes . . . [were] hatred of fellow Americans and contempt for our institutions.” The riots in many large cities provided further evidence of the attitudes of disgruntled citizens.

The 1960s also witnessed a dramatic increase in violence from prior decades. From 1960 to 1967, the murder rate in the United States rose twenty-two percent, which made the murder rate higher than it had been in the previous two decades. In fact, violence in the cities had become so prevalent that "a person living in a large American city ran a higher statistical risk of being murdered than a World War II infantryman had of being killed on the battlefield." Not surprisingly, these national trends were mirrored on the local level. In New York City, for example, the crime rate "set a record in 1962 and climbed steadily in 1963." By 1964, the situation in the city was so desperate that residents were writing to Governor Rockefeller about the “[v]iolence,

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45. Id. at 68.
46. See Katz, supra note 43, at 437 (noting the occurrence of urban riots).
47. See Michael W. Flamm, Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s 128 (2005) (describing the FBI Uniform Crime Report data); see also Katz, supra note 43, at 437 n.79 (noting that the increase in violent crimes was greater in the two years prior to Terry than in any other period in the 1960s).
48. See Flamm, supra note 47, at 152 (stating that the murder rate in the 1960s was "lower than in the 1930s (though not the 1940s or 1950s")
50. Flamm, supra note 47, at 215 n.40.
horror, looting, rioting, stabbing, raping, [and] purse-snatching [which] are all around. . . . It is not safe walking in the streets and parks and riding in the elevators."51 Given the alarming prevalence of violence and social instability, "[w]hen [Terry] was docketed . . . the country seemed to be coming apart at the seams."52

As a result of these conditions, a number of prominent citizens began speaking out. For example, Justice Hugo Black warned: "I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now."53 Lewis Powell, soon to be a Justice on the Supreme Court, felt that "the symptoms of incipient revolution [were] all too evident."54 Accordingly, he strongly condemned the attitudes of those who attempted to justify the use of civil disobedience and announced a number of measures, some oppressive, that he believed were necessary to save the country from total chaos.55

The tension and turmoil reached an apex in 1968 after the assassination of Martin Luther King, Jr., which occurred during the Court’s deliberation in Terry. The riot in Washington lasted for three long days: Rioters set over 1,000 fires and, due to the mass discord, the government brought in approximately 13,600 Army, Marine, and D.C. National Guard troops to halt the mayhem.56 As a result of the riots, twelve people lost their lives, and the police arrested over 7,600 individuals.57 After the troops halted the carnage, one soldier stated that the city appeared "how I always imagined Berlin must have looked after World War II . . . . Everything was burned, gutted and crumbling."58

Of course, it was not just property that was harmed; the rioters took out their anger and lawlessness on innocent bystanders. In one example of the senseless violence, rioters removed a man from his car, without provocation, as he stopped at a light and beat him.59 Similar acts of aggression were directed at

51. Id. at 216 n.48 (quoting a letter from Charles Shamoon to Nelson Rockefeller of July 24, 1964) (omissions in original).
54. Powell, supra note 44, at 66.
55. See id. at 69 (listing steps to halt the social discord).
57. Id.
58. Id. at 98.
59. See id. at 48–49 ("A white youth was pulled out of a Volkswagen and beaten, until a neighborhood Catholic priest . . . intervened.").
firemen called to put out the blazes. Shouts, such as "[w]e didn’t build the goddamned fire for any white people to put out . . . you will all be dead before the night is over" could be heard from the crowd.\(^6\) In fact, ordinary citizens began taking the law into their own hands, as the police were unable to provide adequate protection.\(^6\) One storeowner confronted would-be looters and threatened to shoot them if they robbed his store.\(^6\)

Against this backdrop, the Court handed down its opinion in *Terry*.

### 2. The Court’s Opinion

John Terry was arrested and convicted for carrying a concealed weapon.\(^6\) The events that led to his arrest began when Officer McFadden spotted Terry and another man acting suspiciously.\(^6\) After observing the men for a short period of time, McFadden concluded that they were likely "casing" a local store prior to robbing it.\(^6\) McFadden approached the two men, who had been joined by a third, and asked their names.\(^6\) When he did not receive satisfactory responses, he turned Terry around, patted his pockets, and discovered a gun.\(^6\)

In the trial court, Terry moved to have the gun suppressed. Terry argued that McFadden lacked probable cause to believe that Terry or the others were engaging in criminal conduct.\(^6\) The court agreed that the officer did not have probable cause but found that because he had reasonable suspicion of wrongdoing, the officer’s fear for his own safety justified an initial investigatory search.\(^6\)

The Supreme Court, in an opinion by Chief Justice Warren, affirmed the ruling of the Ohio court on the ground that a protective search made with

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60. Id. at 51.
61. See id. at 76 ("[T]he police] were standing by helplessly—outnumbered and overwhelmed, some seemingly frozen by the futility of arresting one looter, while hundreds of others milled around them.").
62. See id. at 73 ("I put a pistol in [the looter’s] face and I said, ‘If you touch anything in that store, I’m gonna shoot you in the face.’ When he saw my gun he started running, and he’s probably still running.").
64. See id. at 5 (reciting the circumstances giving rise to McFadden’s investigation).
65. See id. at 5–6 (describing the background leading to the search).
66. See id. at 6–7 (detailing McFadden’s encounter).
67. See id. at 7 ("[Officer McFadden] spun [Terry] around . . . and patted down the outside of his clothing . . . Officer McFadden felt a pistol [in Terry’s pocket].").
68. See id. at 7–8 (discussing Terry’s position).
69. See id. (reciting the history of the suppression motion).
"reasonable grounds to believe" the person is armed or dangerous does not violate the Fourth Amendment. Rather than reach this conclusion via an exigent circumstances argument, the Court instead relied on a general balancing of interests under the Reasonableness Clause. Central to this reasonableness inquiry was a balance between the nature and extent of the intrusion that the individual suffered and the government interest at stake. The search implicated Terry’s interest in bodily integrity, as "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." On the other hand, there were substantial government interests in detecting and preventing crime and, more importantly, protecting Officer McFadden from injury while performing his duties. These interests were particularly important given the recent increase in violence and the increased number of police officers killed or injured in the line of duty. Not surprisingly, the interest in protecting life and limb trumped the indignity of a search of one’s person. Hence, the Court permitted a brief search for weapons when an officer had a reasonable belief that his safety might be in danger.

For the first time, the Terry decision allowed the police to take action without a warrant or probable cause and gave the Reasonableness Clause an independent place in Fourth Amendment jurisprudence. Justice Harlan penned a short concurrence primarily to note that the right to search was necessarily incidental to the ability to seize Terry. This concurrence

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70. Id. at 30–31.
71. Supra notes 29–30 and accompanying text.
73. See Terry, 392 U.S. at 17 n.15 ("[T]he scope of the particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness.").
74. Id. at 24–25.
75. See id. at 22–24 (describing the governmental interests involved).
76. See supra notes 47–51 and accompanying text (detailing crime statistics).
77. See Terry, 392 U.S. at 24 n.21 (reciting FBI statistics on officers harmed).
78. See id. at 27 ("[A] reasonable search for weapons for the protection of the police officer [is permitted], where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").
79. See id. at 34 (Harlan, J., concurring) ("Officer McFadden’s right to interrupt Terry’s . . . movement and invade his privacy arose only because circumstances warranted
explicitly stated that the reasonable suspicion standard would govern seizures as well as searches.  

3. Linking the Decision to the Surrounding Events

The Court must have been aware of the events of the 1960s; after all, the news was constantly covering the social instability and protests. The connection, however, is stronger than mere conjecture. To start, as previously noted, the Court expressed concern with the ability of the police to protect themselves from armed criminals and, indeed, this was the primary reason the Court allowed stop and frisks absent probable cause. Furthermore, the opinion of Justice Douglas recognized that "[t]here have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today."  

Furthermore, those involved in the decisionmaking process acknowledged the importance of the social situation. Justice Brennan sent a letter to Chief Justice Warren noting his fear that an affirmance would be seen as giving police too much power and an acquiescence to the "crime in the streets’ alarums being sounded" by politicians. Additionally, one of Chief Justice Warren’s clerks during the term felt that the outcome of Terry derived from the surrounding circumstances. He stated that although "[i]ndividually, the Justices . . . may have felt differing degrees of sympathy with the arguments of forcing an encounter with Terry in an effort to prevent . . . crime. Once that forced encounter was justified, however, the officer’s right to take suitable measures for his own safety followed automatically."  

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80. See, e.g., United States v. Place, 462 U.S. 696, 703 (1983) (characterizing Terry as providing an exception to probable cause for limited seizures).


82. See supra note 75 and accompanying text. Of course this concern would exist regardless of the decade, but the drastic increase in violence made the concern even more pronounced. See supra notes 47–51 and accompanying text (discussing the increase in violence during the decade).


the police [for increased power], . . . collectively they were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets.86

C. Police-Citizen Encounters After Terry

Following Terry, the doctrine of reasonable suspicion became solidified in the lower courts. As implied in Terry, the appropriate standard of suspicion is based on the degree of intrusion each encounter causes.87 Rather than using a sliding scale approach, courts have acknowledged three distinct levels of intrusion, each of which requires a separate level of suspicion to support it. The first level is a consensual encounter between an officer and a citizen. Because the conduct involves no pressure or coercion and the individual consents to the stop or search, the Fourth Amendment does not apply.88 The second level is the Terry stop and frisk, which involves a relatively short intrusion on the individual’s freedom of movement; this must be supported by reasonable suspicion.89 The last category is an arrest; given the disruption involved, arrests require probable cause.90 All of the courts of appeals have explicitly recognized that police encounters must fall within one of the three categories listed above.91 This analytical framework has been solidly in place,

86. Id. at 893.
87. Terry, 392 U.S. at 21 ("[T]here is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.") (internal quotations omitted) (alterations in the original).
88. See, e.g., United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002) (defining consensual encounters as "brief encounters between police and citizens, which require no objective justification"); United States v. Berry, 670 F.2d 583, 591 (5th Cir. Unit B 1982) (en banc) (recognizing that encounters that may be freely broken off by the citizen fall outside of the Fourth Amendment).
89. See, e.g., United States v. Tyler, 512 F.3d 405, 412 (7th Cir. 2008) ("The absence of reasonable suspicion to justify the officers’ initial Terry stop decides this case . . . ."); United States v. Hernandez, 854 F.2d 295, 297 (8th Cir. 1988) (describing a Terry stop and the circumstances justifying it).
90. See, e.g., Hernandez, 854 F.2d at 297 ("The final category is a full-scale arrest, which must be based on probable cause.").
91. See, e.g., Weaver, 282 F.3d at 309 (recognizing the three categories of police-citizen encounters); Brown v. City of Oneonta, 235 F.3d 769, 775 (2d Cir. 2000) (same); Morgen v. Woessner, 997 F.2d 1244, 1252 (9th Cir. 1993) (same); United States v. Bloom, 975 F.2d 1447, 1450–51 (10th Cir. 1992) (same), overruled on other grounds by United States v. Little, 18 F.3d 1499, 1504 (10th Cir. 1994); United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990) (same); United States v. Flowers, 909 F.2d 145, 147 (6th Cir. 1990) (same); Hernandez, 854 F.2d at 297 (same); United States v. Espinosa-Guerra, 805 F.2d 1502, 1506 (11th Cir. 1986) (recognizing that the Eleventh Circuit adopted the precedents of the former Fifth Circuit); Berry,
and, while there is variation based on the facts of each case, there has been little doubt about the standards that should be applied: Until Burton.

III. United States v. Burton, Judge Posner, and the Sliding Scale

A. The Burton Decision

Acting on an informant’s tip about alleged drug transactions, three bicycle officers began a stakeout of a home. While waiting, they saw a car, driven by Mr. Burton, arrive near the house. A man, later identified as Johnson, came out of the house adjacent to the one under surveillance and engaged Burton, who remained in the car, in conversation. Because Johnson was standing in the street, this forced cars to swerve into the opposite lane to avoid him. In light of this danger, the police surrounded Burton’s car, with one officer placing his bike in front of the car, and the other two officers positioning their bikes on either side. This was done to prevent Burton from leaving the scene, and he was, therefore, seized at this time. After Johnson failed to explain his presence, the officers learned that Burton was not carrying a driver’s license. The officers ordered him out of the car after noticing him repeatedly touching something in his pocket, which the police discovered was a gun. A jury convicted Burton for being a felon in possession of a firearm. Burton sought to suppress the evidence of the gun, arguing that his seizure contravened the Fourth Amendment. In fact, the government admitted that, at the time the

670 F.2d at 591 (stating the three points of analysis for on-the-street encounters).
93. Id.
94. Id.
95. Id.
96. Id.
97. See id. at 511 ("It is . . . a compelling[] inference that the police placed their bikes where they did in order to make sure that Burton didn’t drive away before they satisfied themselves that there was no criminal activity afoot.").
98. Id. at 510.
99. Id. at 510–11.
100. Id. at 510; see also 18 U.S.C. § 922(g)(1) (2000) (making it illegal for a felon to possess firearms).
officers surrounded Burton’s car, they lacked the reasonable suspicion required
to stop and frisk him.\footnote{See id. at 512 (“The government doesn’t argue that the mounting suspicion of illegal
activity had yet reached a point at which they could have ordered Burton out of his car so that
they could frisk him.”).}

Judge Posner wrote the majority opinion for the court of appeals. He
began by analyzing the level of intrusion that the officers’ seizure of Burton
(surrounding his car) caused. The extent of the delay was the analytical starting
point because "[t]he principle that emerges from the [case law] is that the less
protracted and intrusive a search is, the less suspicion the police need in order
to be authorized . . . to conduct it."\footnote{Id. at 511.} Because Johnson was leaning in the
window of the car when the officers surrounded it, there was little likelihood
that Burton planned on leaving the scene until the two men completed their
business.\footnote{See id. (discussing the situation when the officers surrounded the car).} The court reasoned that any delay to Burton between the seizure
and the "concatenation of suspicious circumstances that justified . . . ordering
him out of the car and frisking him" was negligible.\footnote{Id.} According to Judge
Posner, this seizure fell between a "consensual encounter" and a "stop and
frisk."\footnote{See id. at 512 (discussing the continuum of particularized suspicion).} Therefore, the level of suspicion required could also fall outside the
recognized standards.\footnote{See id. (“[The] cases describe a continuum in which the necessary degree of
confidence increases with the degree of intrusion.”).} Because Burton only suffered a minimal intrusion
from the seizure, the officers only needed minimal suspicion.\footnote{See id. at 513 ("[This] was a minimal stop, requiring only minimal suspicion; and that
the police had.”).}

Importantly, Judge Posner did not indicate how minimal suspicion differs
from the usual reasonable suspicion standard. Johnson’s emergence from the
house adjacent to the one under surveillance and his positioning in the street
formed the basis for Judge Posner’s conclusion that minimal suspicion
existed.\footnote{See id. at 512 (describing the situation prior to the police surrounding the car).} While this may provide guidance under similar facts, the opinion is
devoid of any discussion of how much suspicion is "minimal" and how much
lower this standard is than reasonable suspicion.

With the reasonable suspicion standard, the officer "must be able to point
to specific and articulable facts" of wrongdoing before a stop is allowed.\footnote{Terry v. Ohio, 392 U.S. 1, 21 (1968).} If
the minimal suspicion standard does not require this same level of articulation,
are the hunches or gut feelings of officers sufficient to warrant a minimally
intrusive stop? The Supreme Court has squarely rejected this proposition.\textsuperscript{111} Hence, somewhere between specific, articulable facts and mere hunches, the foundation of the minimal suspicion standard rests; exactly where, however, is unclear.

\textbf{B. The Problems with Using the Sliding Scale}

Many problems result from Judge Posner’s approach. These dangers include the following: (1) fears of greater discrimination against minorities; (2) difficulty in determining, for both police and courts, what constitutes minimal suspicion; (3) increased confusion in an area of law that was relatively stable; and (4) the consequences of only taking into account intrusion, and not the governmental interest involved, when determining the level of suspicion required. Perhaps realizing these dangers, Judge Rovner concurred only in the judgment in \textit{Burton}.\textsuperscript{112} Although she would have affirmed the conviction, she "would say no more about whether seizures that are unsupported by either probable cause or reasonable suspicion may nonetheless be sustained as reasonable based on their relative brevity and minimal degree of intrusiveness."\textsuperscript{113}

\textit{1. Greater Police Discretion Causes Greater Discrimination}

One result of the minimal suspicion standard is that it will provide the police with greater discretion. This follows from the lower level of suspicion the standard demands. The police, therefore, will be able to act in a greater number of situations, and officers will have to exercise their considered judgment when deciding what situations require investigation. The danger from greater discretion is that there will be increased intrusion on the privacy of innocent citizens. This is problematic because any search or seizure, no matter how minimal, "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item[111.] See \textit{id.} at 22 ("[Allowing] intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, [is] a result this Court has consistently refused to sanction.").
\item[112.] See United States v. Burton, 441 F.3d 509, 513 (7th Cir. 2006) (Rovner, J., concurring) (affirming conviction based on police necessity to secure the scene long enough to investigate Johnson’s breach of traffic laws), \textit{cert. denied}, 127 S. Ct. 1276 (2007).
\item[113.] \textit{Id.} (Rovner, J., concurring).
\item[114.] \textit{Terry v. Ohio}, 392 U.S. 1, 17 (1968).
\end{enumerate}
\end{footnotesize}
Tied in with the concern that police will abuse their discretion is the fear that blacks and other minorities will bear a disproportionate burden under the new standard. According to the census, approximately 12.8% of the population identifies themselves as black. But in many urban areas, particularly inner cities, blacks make up a disproportionate part of the population. Additionally, core sections of cities are generally areas with high crime rates. Given this fact, it is not surprising that inner cities are subject to greater police presence than other areas. Because there will be more police in the inner cities and more minorities there generally, these individuals will be the subject of the greater police discretion that the minimal suspicion standard allows.

Finally, if Terry is any indication, racially discriminatory practices by police officers are likely to become more frequent. Critics argue that "[t]he Terry decision has expanded into multifaceted and discriminatorily imposed obscure standards where the reasonable person would feel in custody rather than briefly detained." In particular, police have expanded Terry stops from...
relatively minor and brief intrusions to prolonged and invasive encounters. One example centers around a police practice in Florida in which officers made young black men take off their shoes and turn their pockets inside-out during otherwise routine traffic stops. If a lower standard is adopted, these practices will not only continue, but will become more pervasive as officers are given greater discretion.

2. Judge Posner’s Minimal Suspicion Standard Will Prove Difficult to Implement

Another key difficulty with the Burton approach is the difficulty of deciding what actions arouse minimal suspicion. While it may sound appealing to give law enforcement greater discretion, exactly how much suspicion is required under the minimal suspicion standard? If police saw two men sitting in a car outside a business would that constitute minimal suspicion that the men were casing it for a robbery? What if the men were wearing bulky clothing on a warm day? The police will make this determination often without judicial oversight because charges will not result from a great majority of cases. Even if the courts have a chance to review the actions of police acting on minimal suspicion, it would be difficult to create clear rules. What may constitute minimal suspicion to one judge, or in one set of circumstances, may seem insufficient to another judge or in a different context. The likely result will be disparate case law between jurisdictions, causing even greater confusion to both the police and lawyers applying this standard. This conclusion is supported by the existing confusion under the reasonable suspicion standard.

Under the reasonable suspicion standard, the courts have struggled to define what justifies an officer’s brief intrusion on a person’s space and dignity. The cases vary in terms of what conditions constitute reasonable suspicion and thus fail to provide definite answers as to what field procedures are appropriate in many circumstances. Part of this difficulty stems from the inability of the

121. See id. at 474–75 (describing a practice of Miami police in primarily minority communities of forcing individuals to remove their shoes and pull their pants down during ordinary stops).

122. See infra Part III.C (discussing the benefits of the Posner approach).

123. Individuals could bring a challenge under 42 U.S.C. § 1983 (2000). It is unlikely, though, that citizens would bother suing over a situation similar to that posited.

124. See, e.g., Ira Cure, Case Comment, Terry: Will It Ever Stop?, 48 BROOK. L. REV. 911, 914 n.8 (1982) (comparing many cases to note the “blur[ring]” between factors found to support investigatory stops and those that were insufficient).
Supreme Court to announce a definite standard—must an officer be twenty percent sure of wrongdoing? Forty percent?

Identical problems will occur with the adoption of a minimal suspicion standard. Undoubtedly, less suspicion is required, but there is no reason to think a court would announce a range within which the officer’s suspicion must fall. If courts fail to provide a range, they could provide a floor, as a numeric percentage below which minimal suspicion does not exist. For instance, if a court determined that the minimal suspicion floor was twenty percent, then an officer who was nineteen percent sure a crime was being committed would not satisfy the standard. Furthermore, the courts would likely arrive at different floor numbers, leading to further confusion in application of the standard. Even if courts could technically define this floor numerically, it is not practical or workable. Conduct does not lend itself to numeric translation—how do you estimate likelihood of wrongdoing based on a mixture of observations, instinct, and context? The results would vary based on the contexts and the weighting of the particular officer or judge making the determination. This inconsistency across jurisdictions is undesirable. Finally, the confusion in the case law would only worsen as situations, which were rejected under the reasonable suspicion approach, would be tested under the minimal suspicion standard.

3. Judge Posner’s Approach Fails to Consider Governmental Interests

Lastly, the Burton analysis only examines the level of intrusion the individual will face, ignoring the government’s purpose for the intrusion. The Supreme Court has suggested that governmental purposes should be considered in various Fourth Amendment analyses. The Terry Court stated that courts should determine reasonableness by balancing the individual’s interest in bodily integrity on one side and the interest of the government in performing the search on the other. Additionally, the Supreme Court has used this as a principal factor in deciding the reasonableness of administrative searches. Judge Posner, however, indicated that courts should only consider the level of

125. See Tracey L. Meares & Bernard E. Harcourt, Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 J. CRIM. L. & CRIMINOLOGY 733, 781 (2000) (“[T]he Supreme Court has never used exact proportions to explain the level of certainty a police officer must possess under the reasonableness approach.”).
126. Supra note 103 and accompanying text.
127. Supra notes 73–75, 87 and accompanying text.
128. See infra Part IV.C (discussing the use of generalized balancing in the Court’s jurisprudence).
suspicion and level of intrusion, which overlooks the discussed Supreme Court precedent and governmental interests.

Simply dropping this factor seems overly simplistic and likely to lead to unsound results. For example, under the Burton approach, the police would be able to detain an individual suspected of shoplifting for the same duration that they would be able to detain a suspected murderer, assuming the police possessed minimal suspicion in both instances. It seems apparent that the public interest in preventing shoplifting is much lower than capturing a murderer, and yet, under Burton, the level of allowable intrusion is the same. This does not fit with a common sense approach to reasonableness. Surely the detention of a potential killer is more justifiable than that of the shoplifter, and the level of suspicion necessary to intrude should reflect this fact.

4. The Circumstances of Burton Do Not Justify a Departure from the Current Framework

Furthermore, the governmental interests involved in Burton were not sufficient to justify a departure from the reasonable suspicion standard. One of the central elements of the Terry decision was the context in which it was decided. The turmoil of the time and the danger to officers trying to control volatile situations justified giving police additional discretion. In contrast, no such justification is apparent in Burton. There was no apparent risk to the lives of the police officers or danger to the general public. The only government interest present was the ability to stop street-level drug deals. Whatever the value of the war on drugs, preventing low-level drug deals does not rise to the same level of importance as ensuring a police officer’s safety.

129. See United States v. Burton, 441 F.3d 509, 511–12 (7th Cir. 2006) (noting that the less intrusive a search, the less suspicion the police must possess to support the search), cert. denied, 127 S. Ct. 1276 (2007).
130. See Florida v. J.L., 529 U.S. 266, 273–74 (2000) ("We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."); Mora v. City of Gaithersburg, 519 F.3d 216, 224 (4th Cir. 2008) ("The principal, then, is this: As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventative action.") (emphasis added).
131. See supra Parts II.B.1, II.B.3 (discussing the background of Terry and linking the background with the decision).
132. Supra notes 75–77 and accompanying text.
133. See Burton, 441 F.3d at 510 (discussing the cause of police presence), cert. denied, 127 S. Ct. 1276 (2007).
C. The Benefits of a Minimal Suspicion Standard and the Sliding Scale

This author believes that use of a minimal suspicion standard has two primary benefits. First, it would allow the police to act in a greater number of cases, leading to greater crime prevention.134 Second, the standard, combined with a sliding scale approach to police-citizen encounters, would increase uniformity in analysis across the Fourth Amendment.135

The first justification assumes that the minimal suspicion standard would allow more effective police intervention in more cases than under the reasonable suspicion standard.136 This follows from the greater discretion police would have to intervene in more circumstances. This could prove tremendously beneficial given the nation’s crime statistics—more than 1.4 million violent crimes were committed in 2006, a 1.9% increase from 2005.137 If police were given a greater ability to investigate situations, which they felt were minimally suspicious, a greater percentage of such crimes could be prevented. This is particularly true in cases of drug sales and burglaries; the police, on street patrol, could more easily discover these crimes. Indeed, the Burton case itself is an example of this concept in action. Without the use of this standard, the initial police action, in surrounding Burton’s car, would have rendered the subsequent search invalid.138 This would have resulted in the release of a potentially dangerous felon back onto the streets where he could commit further crimes.

Now imagine an officer spots a group of people congregating in a parking lot where muggings recently occurred.139 Certainly the police would be remiss in their duties if they did not investigate, but under the Terry reasonable suspicion standard, an intrusion by show of force or coercion would require a

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134. This is based on the assumption that the police are not currently able to act to prevent crime in certain situations where a level of suspicion lower than reasonable exists.

135. See infra Part III.C (discussing the benefits of the minimal suspicion standard).

136. See Note, Orders to Move On and the Prevention of Crime, 87 YALE L.J. 603, 606–07 (1978) (discussing the fact that after the abandonment of vagrancy laws the police do not have the weapons to adequately prevent crime including the ineffectiveness of the reasonable suspicion standard).


138. See, e.g., Terry v. Ohio, 392 U.S. 1, 18 (1968) (indicating that a search can become invalid based upon its "scope and intensity" going beyond what was originally permissible).

139. See Note, supra note 136, at 605 (laying out this and other hypotheticals).
reasonable belief that this particular group participated in the earlier muggings. The minimal suspicion standard, however, would provide the necessary tool for the police to engage in an investigation of these individuals. Although the exact requirements have not been established, a group of people congregating in an area known for muggings would seem to provide the officers with the minimal suspicion necessary to undertake a minimally intrusive stop.

Additionally, the minimal suspicion standard, coupled with the underlying sliding scale approach to police-citizen encounters, would create a greater level of consistency in Fourth Amendment analyses. As discussed in Part II, the Supreme Court has transitioned from a focus on the Warrant Clause to one centered on the Reasonableness Clause. The Court’s early jurisprudence required a warrant in most circumstances. With the increase in crime and government intervention for both criminal and administrative searches, the Court recognized a need for balancing. In fact, the modern Court’s Fourth Amendment analysis is unrelated to the balancing of interests in only a few circumstances, and warrants are required for housing searches only. Instead of a formalistic warrant requirement, the Court now only requires reasonableness as generally determined through a balancing of the individual’s privacy interests with the interests of the government in intruding and the level of intrusion that is caused. In the area of police-citizen encounters, this is

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140. See United States v. Mendenhall, 446 U.S. 544, 571 (1980) (White, J., dissenting) (“To establish that there was reasonable suspicion for the stop, it was necessary for the police at least to ‘be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968))).
141. See supra Part III.A (describing the standard’s lack of clarity).
142. See supra Parts II.A–B (discussing the transition to the Reasonableness Clause).
143. See supra Part II.A (discussing the Court’s adherence to a warrant requirement).
144. See supra Parts II.B, II.C.2 (reviewing Camara and Terry).
145. See, e.g., Georgia v. Randolph, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) (“At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a ‘house’ or ‘castle’ unless authorized to do so by a valid warrant.”); Steagald v. United States, 451 U.S. 204, 211 (1981) (“[W]e have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.”).
146. See, e.g., Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990) (validating suspicion-less seizures at sobriety checkpoints due to the importance of stopping drunk driving, as compared to an individual’s interest in avoiding brief intrusion); Nat’l Treasury Employees’ Union v. Von Raab, 489 U.S. 656, 668–77 (1989) (weighing the interests of the government in suspicion-less searches of certain Department of Treasury employees with the privacy interests of employees to determine the reasonableness of administrative drug testing); United States v. Martinez-Fuerte, 428 U.S. 543, 561–62 (1976) (affirming the validity of checkpoints to search
also true, as the Court has indicated that the balancing of interests is necessary to determine the reasonableness of police conduct.\textsuperscript{147} With the Court’s on-the-street encounter jurisprudence, this balancing of interests has resulted in a three-tiered system for determining the intrusion’s validity.\textsuperscript{148}

Instead of using this three-tiered system, a balancing approach to police-citizen encounters would further uniformity in the Fourth Amendment. Police intervention would become more like other areas of Fourth Amendment jurisprudence where rigid requirements have been abandoned and courts look at all the circumstances. Finally, the proportionality approach prevents courts from needing to develop somewhat contrived justifications for why a seemingly reasonable police action does not neatly fall into one of the currently recognized categories.\textsuperscript{149}

\textbf{IV. A Modified Approach: Allowing "Minimal Suspicion" When Justified by Extraordinary Governmental Interests}

As the foregoing review of the \textit{Burton} decision indicates, there are numerous problems with adopting the minimal suspicion standard and only a few offsetting benefits. A balancing of risks and benefits indicates that a new look at Posner’s approach is necessary. Instead of adopting the minimal suspicion standard in all circumstances, a better approach is to incorporate the weight of governmental interests involved in a particular police-citizen encounter. This Note proposes a "Modified Approach" for searches and seizures based on minimal suspicion. The Modified Approach argues that police may use the minimal suspicion standard only when an extraordinary governmental interest is involved.

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\item for illegal aliens well north of the Mexican border using a general balancing of interests); United States v. Aukai, 497 F.3d 955, 959 (9th Cir. 2007) (en banc) (discussing the Supreme Court’s use of generalized interest balancing when determining the reasonableness of suspicion-less administrative searches).
\item \textsuperscript{147} See \textit{Brown v. Texas}, 443 U.S. 47, 50 (1979) ("The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends on ‘a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’" (quoting \textit{Pennsylvania v. Mimms}, 434 U.S. 106, 109 (1977))).
\item \textsuperscript{148} \textit{Supra} note 91 and accompanying text.
\item \textsuperscript{149} \textit{Supra} notes 88–90 and accompanying text.
\end{itemize}
A. The Modified Approach and Its Current Usefulness

1. What Is an Extraordinary Governmental Interest?

Any discussion of the Modified Approach must involve consideration of the governmental interests that would justify such searches or seizures. When considering what should classify as an extraordinary governmental interest, it is helpful to consider that the purpose of the Modified Approach is designed to limit the problems discussed in Part III.B by capturing only those situations that are of paramount importance. Thus, an extraordinary governmental interest is present in those rare cases where the would-be criminal’s objective is to cause substantial harm such as mass casualties, property destruction, or widespread and debilitating panic in the populace. Admittedly, this definition is designed to apply primarily to potential terrorist attacks, but it could be implicated in other circumstances. That said, the standard would apply only to police-citizen street encounters and therefore some situations, like computer infrastructure attacks or financial fraud that would otherwise fall within this definition, would not be covered.

Of course, the above definition is extremely narrow. This is, however, in keeping with Terry, where the governmental interest justifying a departure from the ordinary probable cause standard was the pervasive risk of bodily harm or death to police officers, which was a particularly acute risk given the violence of the era. Furthermore, this approach is consistent with the Court’s jurisprudence in cases applying strict scrutiny. To survive strict scrutiny, the government must have a compelling interest that is being furthered by the regulation in question. The government has a "heavy burden" in these cases, one that is very difficult to meet. For example, in cases involving racial classifications in schools the Court has found only two types of governmental interests compelling. Finally, defining the scope of "extraordinary

150. Such a definition will exclude ordinary crimes such as theft, mugging, drug dealing, arson, etc., even though they may lead to deaths.
151. See infra Part IV.A.2 (discussing hypothetical uses of the standard).
152. See Terry v. Ohio, 392 U.S. 1, 23–24 (1968) (weighing the interest of the government in protecting the lives of its officers); supra Part II.B.1 (addressing the historical background of Terry).
155. See, e.g., Parents Involved in Cnty. Sch., 127 S. Ct. at 2752–53 (recognizing remediying past intentional discrimination and promoting benefits of diversity as compelling interests).
governmental interest” narrowly is necessary to retain the benefits of the minimal suspicion standard without risking some of the standard’s negative effects, including the danger that police will abuse the additional discretion the Burton standard provides and the confusion that the standard would cause if implemented in all situations.\footnote{156}{See infra Part IV.B (discussing the benefits of adopting the modified approach).}

One difficulty with the Modified Approach is that it will require an ex ante determination of the risk of the situation prior to police action. Under the Terry reasonable suspicion standard, it is difficult for police to predict wrongdoing. This could continue to be a problem under the Modified Approach, raising the possibility that a would-be offender could carry out his attack prior to police action. That said, under the Modified Approach, at least greater discretion is available to law enforcement when the officers are aware that an extraordinary interest is present. For instance, if the government received information about a potential attack or knew that a serial killer were on the loose, police would recognize the danger and have greater discretion to act.

Finally, the Modified Approach is not intended to change rules disallowing post hoc justifications for searches or seizures. In Fourth Amendment jurisprudence, “[n]either evidence uncovered in the course of a search nor the scope of the search conducted can be used to provide post hoc justification for a search unsupported . . . at its inception.”\footnote{157}{California v. Acevedo, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting) (emphasis in original).} Hence, if the police were to act based on minimal suspicion but without an ex ante belief that an extraordinary governmental interest was involved, and they subsequently uncovered that the individual was preparing to stage an attack causing significant damage, the search would not be justified because the appropriate governmental interest failed to precede the search.

2. The Modified Approach in Action—Present Day Examples

The strongest justification for the Modified Approach is rooted in preventing certain types of terrorist attacks. It is not hard to imagine a situation when the police would be required to act to prevent a suicide bombing. For example, the police receive an anonymous phone tip that an individual is planning to detonate a bomb in a crowded place. Regardless of whether the tipster gives the police the name and exact description, this phone call by itself would be insufficient under Terry to establish the ordinarily requisite
reasonable suspicion. Nonetheless, law enforcement would undoubtedly arrive at the scene in an attempt to prevent the catastrophe. Once at the scene, the officers would try to corroborate the tip, observe passer-bys, and seek more information in order to piece together enough suspicion to meet the Terry standard and remove the potential threat. Of course, the very nature of the threat means that taking the time for extended observation could result in a large cost in human life. Such a situation is, therefore, ripe for use of the minimal suspicion standard: The governmental interest is paramount when lives are in imminent danger, particularly when the use of explosives or other deadly agents could kill many people. This is not to say that police should unduly harass citizens, but in the above case, the police should be able to take action on less information than normally required.

A further example implicating an extraordinary governmental interest can be found in police efforts to stop a killing spree. The relatively recent D.C. sniper killings provides an example of one such situation. There, ten people were killed, and others injured, when two shooters went on a random killing spree in the Washington D.C. metro area. While the minimal suspicion standard and Modified Approach would not be available in the early stages of the investigation, such as when just one shooting occurred, once it became apparent that it was serial and more shootings were likely, officers would be justified in employing the standard given the cost in lives.

B. Analyzing the Modified Approach

1. The Positive Aspects of the Modified Approach

First and foremost, the Modified Approach has the benefits of the Posner opinion. As discussed above in Part III.C, the use of proportionality review for on-the-street encounters benefits the public. If the police have improved tools to ferret out crime, the public could see a reduction in crime rates. Because the standard would be available only in those situations where there is

158. See Alabama v. White, 496 U.S. 325, 330–31 (1990) (requiring corroboration beyond the mere anonymous phone call in order to meet the reasonable suspicion standard).

159. See id. at 332 ("[W]e conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop . . . .") (emphasis added).

160. Linell Smith, Wounds Heal, Memories Linger! Three Years Later, Every Day is a Good Day for the Man Believed to be the First Maryland Victim of the Washington-Area Snipers, BALTIMORE SUN, Aug. 30, 2005, at 1C.

161. See supra Part III.C (discussing the benefits of the Burton approach).
an extraordinary governmental interest, such as lives at stake, it could be particularly beneficial.

As discussed previously, the Modified Approach could be invoked if the police had information regarding a possible terrorist attack.\textsuperscript{162} It is instructive to consider the damages that have resulted from past attacks in order to fully appreciate the benefits of preventing future attacks by increasing police discretion. While this Note does not contend that the September 11th attacks could have been prevented by the Modified Approach, the events of that day provide an example of the harms that could result from future attacks of similar magnitude.

The attacks on September 11, 2001, had a devastating effect on the United States. The toll in human life alone totaled approximately 3,000.\textsuperscript{163} These deaths combined with the emotional pain for survivors, friends, and families were undoubtedly the greatest cost from the attack. There was also an economic impact, however. Following the attacks on September 11, the airline industry lost approximately $18 billion in the 2001–2002 fiscal year alone.\textsuperscript{164} This, in turn, prompted a Congressional "bail out" of the industry in the form of "billions of dollars\textsuperscript{165} in subsidies."\textsuperscript{166} Finally, the government established a fund to compensate the families of the September 11th victims, resulting in a payout of approximately $7 billion.\textsuperscript{167}

An attack of smaller magnitude also has substantial costs. If there were a suicide bombing, as discussed hypothetically above, countless lives could be lost and economic harm unleashed. Previous attacks in Israel illustrate the

\textsuperscript{162} See supra Part IV.A.2 (presenting the suicide bomber hypothetical).

\textsuperscript{163} See Dennis Cauchon, NYC Removes 40 Names from 9/11 Victim List, USA TODAY, Oct. 30, 2004, at 7A ("[O]ne hundred eighty-four] died when American Airlines Flight 77 crashed into the Pentagon, and 40 died when United Airlines Flight 93 crashed in rural Pennsylvania."); Matthew Chayes, 2 More Die at Ground Zero, NEWSDAY, Aug. 19, 2007, at A2 ("[T]he city puts the official Sept. 11 death count at 2,750, civilian and first responders, and includes only those who died that day.").


\textsuperscript{165} Abeyratne, supra note 164, at 4.


human costs involved. Additionally, such attacks, at least in the aggregate, could have economic effects, as people may be less willing to travel or go to high-risk locations out of fear. Indeed, this was apparent in the wake of the D.C. sniper attacks.

The Modified Approach seeks to provide police with the discretion they need to hamper significant attacks. As discussed above, past attacks have imposed a devastating cost here and abroad. If police can prevent even one future attack of the same sort, lives will be saved and economic harm deterred. This Note argues that the Modified Approach is one tool that can help police achieve this goal.

2. The Risks Associated with the Modified Approach

Judge Posner’s Burton opinion raised a number of potential problems, as discussed in Part III.B. Some of those problems are inherent to all law enforcement searches and will, therefore, remain under the Modified Approach. The Modified Approach, however, mitigates many of these problems by virtue of the extraordinary governmental interest requirement.

Every search of an individual by a police officer is likely to cause feelings of discomfort, embarrassment, and invasion. Inevitably, this will be true even when the intrusion is "minimal." No matter how brief the intrusion or how great the governmental interest, the individual may feel that the search impinged upon his personal dignity to some degree. Additionally, some might

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168. See, e.g., Owen Fiss, Law is Everywhere, 117 Yale L.J. 256, 271 (2007) ("The suicide bombings in Israel . . . may not have the same quality of spectacle as the September 11 terrorist attacks on the United States, but they have been more pervasive and have wrought death and destruction on an enormous scale . . . "); Andres Oppenheimer, U.S. May Have to Include Itself in "Travel Warnings," Orlando Sentinel, Apr. 23, 2007, at A13 (noting the 2004 bombings that left thirty-two dead at two Sinai resorts).


170. See Bill Atkinson, Maryland Tourism Decreased Last Year: Sniper Killings Played a Role, State Figures Show, Balt. Sun, May 14, 2003, at 1C (discussing the negative impact on tourism in Maryland because of the sniper attacks); Zoe Heller, The Lone Lunatic Sniper was Strangely Reassuring, Daily Telegraph (U.K.), Oct. 26, 2002, at 27 (reviewing the behavioral modifications that residents made).

171. See Terry v. Ohio, 392 U.S. 1, 17 (1968) (noting that police frisks are a "serious intrusion upon the sanctity of the person").

172. Id.
fear that the minimal suspicion standard would limit freedom of movement or autonomy because law enforcement would arbitrarily use its greater discretion. This could impose a net cost on the civil rights and liberties of all citizens.

While the risks discussed above should not be discounted, the Modified Approach would reduce their impact, as compared to the Burton minimal suspicion standard.\textsuperscript{173} Under Burton, police could use the minimal suspicion standard in situations involving drugs, robbery, and even shoplifting. The Modified Approach, on the other hand, would be rarely employed because it requires a showing of an exceptional governmental interest. Accordingly, the Modified Approach ensures that most on-the-street encounters would be based on the Terry reasonable suspicion standard. Because the police will need reasonable suspicion in the vast majority of circumstances, the Modified Approach provides better protection to civil liberties.

The Modified Approach also is easier to implement than Burton. Burton could be applied to nearly every crime and circumstance.\textsuperscript{174} Under Burton, courts will be forced to review police action to determine whether the intrusion was minimal and whether it was based on minimal suspicion. With the Modified Approach, however, the test is far clearer—minimal suspicion is only available when there is a known extraordinary governmental interest involved. Therefore, in the vast majority of circumstances, police need only consider whether Terry applies. Courts, in turn, will have fewer cases to review and fewer possibilities to consider. The Modified Approach provides clearer rules and reduces litigation.

3. The Benefits of the Modified Approach Outweigh the Risks

Fourth Amendment problems inevitably involve a balancing of interests. On one side of the equation there is the potential for large-scale harm to human life, property, and the economy. This subsection has explored the damage caused by suicide bombings and events like the D.C. sniper attacks, and it recognizes that similar harms would manifest in future attacks. On the opposite side is the cost to civil liberties from the use of a minimal suspicion standard. As has been noted, increased police discretion could infringe upon personal autonomy and liberty.\textsuperscript{175} On balance, though, the benefits of the Modified Approach outweigh the harms.

\textsuperscript{173} See supra Part IV.A.1 (discussing what sorts of events would qualify as “exceptional”).
\textsuperscript{174} See supra Part III.B (noting the problems with the minimal suspicion standard).
\textsuperscript{175} See supra Part III.B (describing the cons of the minimal suspicion standard).
When we compare the individual’s concededly important interest in privacy and dignity, which "is at the core of the Fourth Amendment,"\textsuperscript{176} to the devastation caused by crimes involving extraordinary governmental interests, the privacy interests must yield. A terrorist attack would have a definite and permanent cost to human life. Even if a minimal investigatory stop is deeply offensive, this ephemeral emotional cost cannot outweigh the value of life. Additionally, the mental distress caused by unwanted police action, while significant, becomes less so when balanced against the despair and emotional trauma associated with the violent and premature loss of loved ones. Add into this equation the potential impact on the economy and property damage that may result, and the scales are even more heavily tilted in favor of the use of the Modified Approach.

Arguably, in the aggregate, the infringement upon civil liberties caused by the minimal suspicion standard could be more costly to society than a single terrorist attack. Yet, the principal purpose of the Modified Approach is to limit the number of instances in which police may act based upon less than reasonable suspicion. The number of opportunities police would have to act based upon minimal suspicion would itself be minimal and civil liberties would be infringed only in rare circumstances.

4. Failing to Allow Minimal, but Rare, Police Action Now Will Result in a Greater Infringement of Liberties Later

Finally, allowing the police greater discretion in the limited circumstances discussed above will protect against legislative and regulatory overreactions, which risk greater incursions on civil liberties in the future. Not surprisingly, the best illustration of the impact of a successful attack on civil liberties comes from the September 11th attacks. The reaction of the government following the attacks was severe, and similar reactions may not occur in the future. An examination of the response, however, is useful in illustrating the attractiveness of using a limited preventative tool before the attack occurs.

Following the September 11th attacks, Congress acted to give the Executive Branch greater power to prevent terrorist acts. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act was the primary tool created to aid law enforcement.\textsuperscript{177} The PATRIOT Act "greatly expand[ed] . . . power [for] the


\textsuperscript{177} Uniting and Strengthening America by Providing Appropriate Tools Required to
Executive Branch such that many contend that it violates the structure of the Constitution and significantly infringes on individual privacy. \(^{179}\) The Executive Branch also leapt into action following the attacks. Within a few weeks, the federal government compiled a list of approximately 5,000 aliens of Middle Eastern descent to be "voluntarily" interviewed by law enforcement. \(^{180}\) No one would dispute that if there were a link between the listed aliens and the attacks, there would not be a problem. This was not the case, however, and ultimately the government infringed on the privacy interests of many people in the name of freedom and security. \(^{181}\)

The above is just an example of how the government has aggressively responded following the type of attack that the Modified Approach contemplates. \(^{182}\) One can imagine local and national authorities taking drastic action after a terrorist kills its citizens, regardless of the magnitude of the attack. If the government had the ability to take limited steps that would prevent the attack in the first place, this would reduce the need for overly aggressive after-the-fact action. Generally, government officials will act when public pressure is placed on them. \(^{183}\) Following an unsuccessful attack there will be less public outcry than when an attack is successful. The lack of additional legislation, and the minimal media coverage, following government thwarting of attempted suicide bombings supports this. \(^{184}\)

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179. See, e.g., id. at 289–95 (discussing the PATRIOT Act, its expansion of executive powers, and the subsequent costs to civil liberties); Erwin Chemerinsky, Civil Liberties and the War on Terrorism, 45 Washburn L.J. 1, 14–19 (2005) (discussing the loss of privacy suffered as a result of the PATRIOT Act).


181. See id. at 486 ("The Justice Department lacked even a reasonable suspicion to believe that any of the men selected for interrogation had . . . a connection with known terrorists or the September 11 attacks. The bottom line is that the Justice Department was engaged in a fishing expedition . . . .").

182. I acknowledge that it is unlikely that drastic measures would be taken following serial murders and, therefore, this discussion addresses more catastrophic attacks.


184. See, e.g., Pat Milton, Suicide Bombers Still a Big Concern, FBI Official Says,
C. The Court’s Current Jurisprudence Provides a Foundation for the Modified Approach

Although the Modified Approach is a departure from the Court’s current framework,\textsuperscript{185} other areas of Fourth Amendment jurisprudence provide a foundation for the proposal. Two situations in which the courts do not require individualized suspicion are border and mass transit searches. The risks that each of these situations present, as well as the impracticality of requiring individualized suspicion, justify the government’s intrusion.

The Supreme Court has long recognized that searches and seizures at international borders are different than the usual police-citizen encounter.\textsuperscript{186} Authorities at the border have a strong interest in proper law enforcement, and the sovereign has an interest in protecting itself from threats.\textsuperscript{187} The government has identified the influx of illegal aliens and the smuggling of contraband, most notably narcotics, as two threats to sovereignty.\textsuperscript{188} In light of these dangers, the Supreme Court has repeatedly sanctioned suspicionless searches and seizures to allow the government to protect itself.\textsuperscript{189}

Importantly, a search or seizure need not be within a specific distance of the border to be analyzed using the border search regime. In \textit{United States v. Villamonte-Marquez},\textsuperscript{190} for example, customs officials boarded a ship, located on inland waters with easy access to international waters, without any suspicion

\textsuperscript{185}. See supra Part II.C (discussing the current approach to police-citizen encounters).


\textsuperscript{187}. See, e.g., United States v. Ramsey, 431 U.S. 606, 616 (1977) ("[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself . . . are reasonable simply by virtue of the fact that they occur at the border . . . ."); United States v. Carroll, 267 U.S. 132, 154 (1925) ("Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.").

\textsuperscript{188}. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 293–94 (1973) (White, J., dissenting) (discussing the importance of protecting the country from illegal immigrants and smuggling).


\textsuperscript{190}. See United States v. Villamonte-Marquez, 462 U.S. 579, 593 (1983) (upholding the suspicionless search of a vessel on a waterway with easy access to the ocean).
of criminal activity and found a large quantity of drugs.\textsuperscript{191} The Court validated the search based, inter alia, on the rationale that applied in border searches.\textsuperscript{192} That is, the Court relied on the effectiveness of the authorizing statute in the "regulation of imports and exports assisting, for example, Government officials in the prevention of entry into this country of controlled substances, [and] illegal aliens."\textsuperscript{193}

Another salient example is \textit{United States v. Martinez-Fuerte}.\textsuperscript{194} In that case, two highway checkpoints were set up away from the border to enable the government to catch illegal immigrants and smugglers—one checkpoint was sixty-six miles from the border and the other ninety miles.\textsuperscript{195} Despite this distance inland, the Court upheld the brief seizures and eventual searches of the defendants’ cars absent reasonable suspicion. The Court did so because border searches serve important governmental interests and are an effective method of border control.\textsuperscript{196}

Additionally, the courts of appeals have upheld suspicionless searches in airports and other forms of mass transit because of the significant governmental interest in preventing wide-scale harm from hijackings or bombings.\textsuperscript{197} Government officials search individuals’ luggage prior to boarding planes and few question this practice. Yet, this was controversial at one time. In one challenge to a routine luggage search, the Second Circuit upheld the practice because "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large..."
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airplane, the danger alone meets the test of reasonableness.198 Along the same line, the Ninth Circuit recently recognized that the increased threat of terrorism and the subsequent risk of mass destruction after September 11th were relevant to determining whether a person could be searched at an airport absent consent.199 Other circuits have considered these factors significant in assessing the reasonableness of suspicionless searches in other areas of public transportation.200

The Modified Approach is consistent with the courts’ jurisprudence in the aforementioned areas. A terrorist attack, in whatever form, implicates the same sovereignty concerns that the border search regime addresses. The danger to the country and impact on the nation’s sovereignty is present both in the murder of people within the nation and in illegal immigration or smuggling. After all, one of the primary attributes of sovereignty is the ability of the sovereign to protect those within its borders.201 If the concerns both situations raise are similar, the methods of analysis should parallel one another.

Similarly, under the current approach to airport and transportation searches, the Modified Approach to minimal suspicion is appropriate. Courts may also consider the prevention of a terrorist attack to be a special government need beyond ordinary law enforcement. The primary purpose of preventing an attack is to avoid the loss of lives and mass destruction of property.202 Although important, criminal prosecution should be secondary to stopping death or destruction. The primary purpose would, therefore, extend beyond the ordinary detection and prosecution of crime. Furthermore, the Supreme Court has indicated that the prevention of a damaging attack would satisfy the special

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199. See Aukai, 497 F.3d at 960 n.6 (noting that decisions on the reasonableness of searches cannot ignore recent events).

200. See, e.g., Cassidy v. Chertoff, 471 F.3d 67, 80–81 (2d Cir. 2006) (considering the threat of terrorism when assessing the governmental interest involved); MacWade v. Kelly, 460 F.3d 260, 272 (2d Cir. 2006) (“In light of the thwarted plots to bomb New York City’s subway system, its continued desirability as a target, and the recent bombings of public transportation systems . . . the risk to public safety is substantial and real.”).

201. See State v. Mountain Timber Co., 135 P. 645, 648 (Wash. 1913) (“The police power which may be invoked to protect the health . . . of citizens is an inherent attribute of sovereignty . . . .”)) (internal quotations and citations omitted); In re Booth, 3 Wis. 144, 160–61 (1854) (Whiton, C.J.) (“[O]ne of the most essential attributes of sovereignty . . . [is the] power to protect [its citizens] in the enjoyment of their personal liberty upon its own soil.”).

202. See United States v. Marquez, 410 F.3d 612, 618 (9th Cir. 2005) (“It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous.”).
needs. If a lack of particularized suspicion for a search or seizure under such circumstances were justified, the use of a minimal suspicion standard should be also.

V. Conclusion

The Fourth Amendment’s mandate is that all searches and seizures must be reasonable. One of the central purposes of the reasonableness requirement is to prevent unwarranted government intrusions that infringe on an individual’s privacy, autonomy, or dignity. Because there is a risk of violating this principle every time a law enforcement officer and a citizen interact, the courts have recognized three distinct scenarios and accorded each a unique level of suspicion necessary to make the intrusion reasonable. Judge Posner’s opinion in Burton went outside of these well-defined categories by allowing a minimally intrusive seizure based on minimal suspicion, and in doing so, he opened a Pandora’s box. Burton will cause a number of problems in the Seventh Circuit, and it has also created a conflict with the purpose of the Fourth Amendment. Judge Posner’s adoption of minimal suspicion also fails to consider Terry and the context in which it was passed: A large reason for allowing the lower standard in Terry was the governmental interests in protecting the life of police officers in extraordinarily dangerous times. In Burton, there was no correspondingly important risk.

In the interests of protecting the individual, and still providing law enforcement with the tools it needs to do its job, the minimal suspicion standard should be used only when extraordinary governmental interests are involved. It is intuitively appealing, and reasonable, to consider the purpose of the

203. See City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) ("[T]here are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock . . . to thwart an imminent terrorist attack . . . .").

204. See Amar, supra note 2, at 801 ("The core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness.").

205. See, e.g., Brendlin v. California, 127 S. Ct. 2400, 2410 (2007) ("[A]rbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals' [is what] . . . the Fourth Amendment was intended to limit" (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)) (first alteration in original)).

206. See supra Part II.C (discussing police-citizen encounters after Terry).

207. See supra Part III.A (detailing the opinion in Burton).

208. See supra Part III.B (reviewing the problems with adopting minimal suspicion).

209. See supra Part II.B.3 (linking the danger of the 1960s with the Terry opinion).
government’s intrusion when determining whether the action taken is reasonable. Most of us engage in this type of analysis throughout our everyday lives: We believe it is reasonable to miss work due to illness or a death in the family, but we are less sympathetic if the absence is to go to a concert or similar event. There is no reason why judges should be forced to abandon this common-sense approach to balancing. The Modified Approach retains reasonableness and gives judges flexibility when compelling governmental interests are at stake. By allowing minimal suspicion to be used only in extraordinary cases, the burden it places on civil liberties and the risks associated with its aggressive use, such as the disproportionate impact on minorities, are minimized. At the same time, the Modified Approach provides discretion and could prevent catastrophic events, ultimately saving lives.