James Otis, Paul Revere, a Routine Traffic Stop and the Massachusetts Supreme Judicial Court: When It Comes to Drug-Detection, It's Not Who Let the Dogs out, It's Who Wouldn't

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The British are Coming! The British are Coming!¹

I. INTRODUCTION

James Otis once proclaimed that the greatest threat to freedom comes from placing "the liberty of every man in the hands of every petty officer."² From the trepidation of these words, our revolutionary forefathers predicated the most basic principles that underlie the Fourth Amendment to the nation's constitution — the principles that protect an individual's right in his person and property against unreasonable searches and seizures at the hands of the government.³ Though much has changed in our nation’s history since the last British solder stormed the privacy of a colonial home, the desire to protect against unfettered government power and unchecked police discretion remains keen to our present sense of freedom and independence.⁴ Fueled by rising fears of crime and terrorism,

¹ Attributed to Paul Revere. April 18, 1775.
³ See Frank v. Maryland, 359 U.S. 360, 363 (1959) (citing historic events underlying principles of Fourth Amendment protection against unreasonable search and seizure), overruled on other grounds by Camara v. Mun. Court of S.F., 387 U.S. 523 (1967); see also United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 313 (1972) (referring to warrantless entry and search of home as "[t]he chief evil against which the ... Fourth Amendment is directed").
⁴ Chimel v. California, 395 U.S. 752, 766 n.12 (1969) (contending Fourth Amendment intended to prevent unlawful police action); Weeks v. United States, 232 U.S. 383, 392-93 (1914) (recounting colonial struggles as source of Fourth and Fifth Amendment protection); Boyd v. United States, 116 U.S. 616, 624 (1886) (rooting Fourth Amendment protection in
however, modern courts have begun to whittle away at the protective coat of the Fourth Amendment.\(^5\)

Practicality suggests that certain government intrusions are necessary to ensure that law enforcement officers are afforded an adequate opportunity to meet their challenging goals.\(^6\) Contemporary decisions, however, reflect an unprecedented expansion of the discretionary power of police officers, bringing new relevance to James Otis' historic bellow.\(^7\) Supreme Court sanctioned suspicion-based intrusions again subject individual freedom to the powerful discretion of individual law enforcement personnel.\(^8\) The last vestige of protection against arbitrary police conduct is the simple required correlation between the officer's suspicion and his subsequent conduct.\(^9\) In *Commonwealth v. Feyenord*,\(^10\) the Massachusetts Supreme Judicial Court effectively eliminated even this correlative requirement by upholding a police officer's decision to summons and await the arrival of a drug-detection canine unit during a routine motor vehicle stop, despite lacking any specific drug-related suspicion. Perhaps now, in the wake of rising police power, the illustrious warnings of Paul Revere as he echoed the fears of his contemporaries on the eve of the revolution appear more prophetic than pragmatic. Perhaps, taken metaphorically, they can be applied any time the "blue and whites" flash incessantly in the rear view mirror.\(^11\)

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\(^5\) See infra note 19 and accompanying text.

\(^6\) See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (recognizing practical law enforcement need to "stop and frisk" suspect without probable cause to arrest). The *Terry* court recognized the practical need of law enforcement officials to protect themselves against the "rapidly unfolding and often dangerous" situations they encounter. *Id.* at 10; *New York v. Belton*, 453 U.S. 454 (1981) (allowing search incident to arrest of areas not accessible by arrestee). Despite the apparent impossibility of an already detained motorist to re-enter his vehicle, as a practical matter, the court in *Belton* established a general rule allowing law enforcement officers to search the passenger compartment of a motor vehicle even after the motorist is in custody. *Belton*, 453 U.S. at 460; *Chimel v. California*, 395 U.S. 752, 773 (1969) (recognizing search incident to arrest of area in immediate control of arrestee as necessity for officers' protection). See also *Whren v. United States*, 517 U.S. 806 (1996) (upholding officer's decision to detain motorist upon probable cause of traffic violation regardless of whether reasonable officer would have done the same).


\(^8\) See *United States v. Orsolini*, 300 F.3d 724 (6th Cir. 2002) (holding thirty-five minute detention of motorist not unreasonable); *United States v. McCarthy*, 77 F.3d 522 (1st Cir. 1996) (affirming constitutionality of seventy-five minute temporary detention); *State v. Moffatt*, 450 N.W.2d 116 (Minn. 1990) (holding sixty-one minute detention of motorist constitutional).


\(^10\) 833 N.E.2d 590 (Mass. 2005).

\(^11\) See *Terry*, 392 U.S. at 16-17 (recognizing potential for abuse when law enforcement
This note explores the erosion of the Fourth Amendment as it pertains to the detention of motorists during routine traffic stops. Part II of this note examines the history and evolution of the Fourth Amendment’s protection against unreasonable seizures. Part III focuses on the courts’ treatment of special exceptions to the general requirement of probable cause, paying particular attention to the *Terry* analysis of investigatory detentions. Part IV examines the application of the *Terry* analysis to motor vehicle stops. Part V differentiates between the alternative standards of suspicion used by courts to justify a police officer’s decision to summons and use a narcotics-detection canine during a motor vehicle stop. Finally, Part VI articulates that the Massachusetts Supreme Judicial Court has forgone the constitutional principles that govern the Fourth Amendment. Specifically, it concludes that the proper constitutional standard for summoning and using a narcotics-detecting dog is one of specific drug-related suspicion and that by lowering the standard, the Massachusetts Supreme Judicial Court effectively undermines the constitutional protection against arbitrary seizures.

II. THE FOURTH AMENDMENT AND THE BALANCE OF REASONABLE INTRUSIONS

The Fourth Amendment protects individuals from arbitrary searches and seizures carried out by agents of the government.\(^{12}\) The amendment’s paramount protection is the assurance that government intrusions, and the way in which they are conducted, will be reasonable.\(^{13}\) American courts have long struggled to define this “so-called” standard of reasonableness by balancing the government’s legitimate interest as a law enforcement entity against the nature and extent to which such interest intrudes upon an individual’s right to privacy.\(^{14}\) Early case law reconciled officials given broad discretion).

\(^{12}\) U.S. *Const.* amend. IV; *Wolf* v. Colorado, 338 U.S. 25, 27 (1949) (recognizing individual’s right to privacy against arbitrary police intrusion as “core of the Fourth Amendment”); *see* Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967) (citing basic purpose of Fourth Amendment to safeguard individual’s against arbitrary invasions by government officials); Schmerber v. California, 384 U.S. 757, 767 (1966) (reaffirming Fourth Amendment function as protecting against unwarranted state intrusion).


\(^{14}\) Delaware v. Prouse, 440 U.S. 648, 654 (1979) (premising lawfulness on balance between law enforcement rights and privacy); *see* Illinois v. McArthur, 531 U.S. 326, 332 (2001) (recognizing reasonable efforts by police to reconcile law enforcement needs with personal privacy); *Terry* v. Ohio, 392 U.S 1, 26-28 (1968) (balancing safety needs of law
these competing interests by subjecting all government searches and seizures to strict constitutional parameters. The reasonableness of the government's invasive conduct, in all but extremely limited circumstances, was predicated upon the proper issuance of a warrant supported by probable cause.

The warrant requirement served a two-fold purpose. First, it ensured that invasive government action would be supported by inferences of probable cause drawn by a neutral magistrate or judge. Second, the warrant requirement limited the scope of the invasive action to that which was no more intrusive than deemed necessary. Even in the limited situations in which a warrant was not required, an officer's conduct was proscribed to the extent that his or her objective interpretation of the facts failed to yield a determination of probable cause.

The impracticality of such rigid standards became apparent, however, and amidst growing concerns regarding crime and public safety, the balance of competing interests shifted in favor of a more pragmatic approach toward law enforcement. The Supreme Court acknowledged that

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15 See Gouled v. United States, 255 U.S. 298, 304 (1921) (emphasizing liberal construction of Fourth Amendment rights); Boyd v. United States, 116 U.S. 616, 630 (1886) (construing constitutional protections liberally); see also Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (citing protection afforded by warrant).

16 Terry 392 U.S. at 20 (stating that police must obtain warrant wherever practical); see also United States v. Place, 462 U.S. 696, 701 (1983) (requiring warrant in ordinary seizure case). Under Article IV of the Constitution, a warrant may be issued only upon a showing of probable cause. U.S. CONST. amend. IV. Probable cause is defined as specific articulable facts giving rise to a high probability that invading the privacy interest of an individual will yield evidence of criminal conduct. See Schmerber v. California, 384 U.S. 757, 769-70 (1966).

17 Aguilar v. Texas, 378 U.S. 108, 110-11 (1964) (explaining protective importance of neutral magistrate in making inferences as officers); see also United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (indicating that "informed and deliberate determinations of magistrates" are more protective than "hurried" decisions of police).


the practical and realistic needs of modern law enforcement agencies could not be met by stern and inflexible guidelines. To accommodate those needs the Court carved out a series of limited exceptions to its rigid doctrinal precedent. These exceptions enabled law enforcement officials to more readily engage individuals in the absence of a warrant or even probable cause.

The exceptions, however, were not without boundaries. The principal concerns addressed by the Court in its earlier years continued to linger. The continued emphasis placed on warrants and probable cause in all but extraordinary circumstances illustrated the Court's reluctance to rely upon an officer's own judgment and discretion. Thus, despite the Court's increased recognition of police officers' special training and experience, it refused to grant officers any more discretionary power than absolutely necessary under the circumstances.

21 See, e.g., Terry v. Ohio, 392 U.S. 1, 23 (1968) (acknowledging unreasonableness of subjecting police officers to unnecessary risk of injury).


23 Florida v. Royer, 460 U.S. 491, 498 (1983) (noting that prior to Terry all seizures required probable cause basis); see supra note 11 and accompanying text (illustrating circumstances in which police may implicate Fourth Amendment rights despite lacking probable cause or warrant).


25 See Chimel v. California, 395 U.S. 752, 766 n.12 (1969) (contending Fourth Amendment protections intended to prevent unlawful police action); see also supra note 23 and accompanying text (noting Supreme Court's refusal to disregard Fourth Amendment rights for improved police efficiency).


27 See Terry, 392 U.S. at 14-15 (acknowledging that stricter requirements would not
III. ERODING THE DOCTRINE OF PROBABLE CAUSE: TEMPORARY DETENTIONS AND SUSPICION BASED POLICE CONDUCT

The Supreme Court articulates circumstances in which the practical needs of law enforcement outweigh the Fourth Amendment privacy interests of an individual. In many cases, the inquiry turns upon whether the specific law enforcement needs can be achieved in a less intrusive manner. In other cases, the inquiry turns upon whether the individual's privacy interest under the circumstances are diminished due to a lesser expectation of privacy.

A. Temporary Detentions

A police officer may temporarily detain an individual without a warrant and without probable cause if the officer reasonably believes that the individual is, or is about to be, engaged in criminal activity. The idea that certain government seizures can be supported by less than probable cause was most notably articulated by the Supreme Court in Terry v. Ohio. In response to the legitimate safety concerns of police officers in the field, the Court upheld the constitutionality of limited weapons searches and incidental detentions on facts insufficient to give rise to probable cause. Although Terry was premised on safety concerns, the pur-

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28 See, e.g., Terry, 392 U.S. 1, 30 (recognizing safety concerns of officers as justification for "stop and frisk").
31 See, e.g., Royer, 460 U.S. at 502 (acknowledging right of law enforcement to detain suspected drug smuggler). These seizures, commonly referred to as "Terry stops," authorize a police officer to temporarily detain an individual in order to investigate the suspicion that the individual is engaged in criminal activity. Id. at 498-99.
32 392 U.S. 1 (1968).
33 See Terry, 392 U.S. at 23-25 (recognizing legitimate safety concerns of police officers); Royer, 460 U.S. at 504-05 (articulating safety reasons as justification for moving temporarily detained suspect into interrogation room). In upholding the limited weapons search and incidental detention in Terry, the Supreme Court relied heavily upon the legitimate safety issues faced by police officers while engaged in close range investigation. Terry, 392 U.S. at 23-25. It noted the violent propensity of criminals and that "virtually all deaths and a substantial portion of injuries" to police officers are caused by weapons. Id.; see United States v. Rabinowitz, 339 U.S. 56 (1950) (upholding warrantless search incident to lawful arrest of area under arrested person's control), overruled in part by Chimel v.
view of its holding has since expanded to cover limited temporary detentions based on less than probable cause for purposes of investigation.\textsuperscript{34} In recognizing the constitutionality of a suspicion based detention as an exception to the traditional doctrine of probable cause, the Supreme Court conceded that the amount of objective evidence required to justify a citizen-police interaction need only be proportionate to the nature and degree of the intrusiveness of that action.\textsuperscript{35} To ensure that such detentions comply with the reasonableness standard of the Fourth Amendment, the Court established a two prong test.\textsuperscript{36} The first prong requires that the detention be reasonable at its inception.\textsuperscript{37} The second prong requires that the scope of the detention be reasonably related to the underlying circumstances that justified it.\textsuperscript{38} Both prongs of this analysis are evaluated on a case by case basis under the “totality of the circumstances” test.\textsuperscript{39}

An investigative detention is reasonable at its inception if, at minimum, the detaining police officer has a reasonable suspicion that a suspected individual is, or is about to be, engaged in criminal activity.\textsuperscript{40} Reasonable suspicion requires an objective determination of criminal activity based on specific facts.\textsuperscript{41} Under the “totality of the circumstances” test, the

\textsuperscript{34} United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (upholding temporary seizure of individual suspected of smuggling illegal immigrants). In \textit{Brignoni-Ponce}, the Supreme Court held that an individual may be seized on the basis of reasonable suspicion for the purpose of investigative questioning. \textit{Id.} Similarly, in \textit{Florida v. Royer}, the Court found reasonable the temporary seizure of an individual’s property for the purpose of investigating that individual’s involvement in drug trafficking. \textit{Royer}, 460 U.S. at 501 (expanding grounds for temporary detention to suspicion of drugs trafficking). Temporary seizures have also been upheld as a supplement to an investigation whereby officers sought merely to preserve evidence for investigation. \textit{See} \textit{Michigan v. Summers}, 452 U.S. 692, 705 (1981) (upholding temporary detention of house occupant while search warrant was being executed).

\textsuperscript{35} \textit{See} \textit{Florida v. Royer}, 460 U.S. 491, 504-05 (1983) (finding police conduct more intrusive than necessary); \textit{see also infra} note 40 and accompanying text (describing limits to police conduct). In \textit{Royer}, the Court held that the limits of the \textit{Terry} stop were exceeded when the suspect was removed to an interrogation room. \textit{Royer}, 460 U.S. at 504. In concluding that the detention was unreasonable, the Court emphasized that less intrusive means were available for the officers to investigate their suspicion. \textit{Id.} at 505.

\textsuperscript{36} \textit{Terry} v. \textit{Ohio}, 392 U.S. 1, 19-20 (1968) (establishing two prong test for temporary detention).

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}


\textsuperscript{40} \textit{See} \textit{State v. Belcher}, 725 N.E.2d 92, 94 (Ind. Ct. App. 2000) (defining reasonable suspicion as a “minimal level of objective justification for making a stop” more than a mere “hunch”).

\textsuperscript{41} \textit{Arvizu}, 534 U.S. at 273-74; \textit{Florida v. J.L.} 529 U.S. 266, 268 (2000) (holding “stop
requisite level of suspicion is established or negated by the combined propensity of the facts.\textsuperscript{42} This propensity may be established from facts that, when viewed independently, suggest completely lawful conduct.\textsuperscript{43} In the absence of explicit illegal behavior, courts will consider the probability that each lawful fact will yield an unlawful act.\textsuperscript{44} That the totality of facts yield a general propensity of criminality is insufficient to establish a reasonable basis for the detention.\textsuperscript{45} Thus, while a police officer may draw inferences of criminal behavior from her training and experiences, she may not rely solely upon a mere hunch or inclination.\textsuperscript{46}

The second prong of the test requires that the investigatory stop be carried out in a reasonable manner.\textsuperscript{47} It maintains that the detention must be "reasonably related in scope to the circumstances that justified the interference in the first place."\textsuperscript{48} Again, courts rely on the "totality of the cir-

\begin{footnotesize}
\textsuperscript{42} See, e.g., Florida v. Royer, 460 U.S. 491, 502-03 (1983) (applying totality of circumstances test to detention of suspected drug trafficker). In Royer, the defendant and his luggage were detained at an airport following suspicion that he was involved in drug trafficking. Id. at 493-95. The police officers discovered that he was traveling under a false name, used cash to pay for a one way ticket, and concluded that his general appearance and behavior were suspicious. Id. at 493. Applying the totality of the circumstances test, the Court concluded that the suspect's initial detention was reasonable. Id. at 502. It ultimately held, however, that the detention became overly intrusive and equivalent to an arrest, thereby making it unreasonable. Id. at 502-04.

\textsuperscript{43} Royer, 460 U.S. at 502 (1983) (noting lawfulness of objective facts when independently viewed).

\textsuperscript{44} United States v. Townsend, 305 F.3d 537, 543-44 (6th Cir. 2002) (differentiating between traveling on major road between big cities and traveling on infrequently used road from Mexican border); see United States v. Dixon, 51 F.3d 1376, 1383 (8th Cir. 1995) (upholding detention based on propensity inference of lawful conduct). The temporary detention of the defendant in Dixon was based upon the fact that the defendant arrived at an airport from a city known to be a drug source, purchased ticket with cash, flew on a flight in which drug arrests had been made in the past, and exhibited nervous behavior. Dixon, 51 F.3d at 1382.

\textsuperscript{45} See, e.g., United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006) (stating prior criminal record insufficient).

\textsuperscript{46} United States v. Arvizu, 534 U.S. 266 (2002); see also Brown v. Texas, 443 U.S. 47, 51 (1979) (noting officer's observation that alley "looked suspicious" insufficient for seizure without facts supporting his conclusion); United States v. Manzo-Jurado, 457 F.3d 928, 935 (9th Cir. 2006) (stating that "innocuous behavior" alone insufficient to establish reasonable suspicion).

\textsuperscript{47} See Terry v. Ohio, 392 U.S. 1, 19-20 (1968) (setting forth parameters of detention once initiated).

\textsuperscript{48} Terry, 392 U.S. at 19-20; see also Florida v. Royer, 460 U.S. 491, 501 (stating that "scope of detention must be carefully tailored to its underlying justification"); United States v. Soto, 988 F.2d 1548, 1555 (10th Cir. 1993) (requiring additional reasonable suspicion to further detain motorist for questioning).
\end{footnotesize}
In applying this test, courts will consider whether the police "diligently pursued their investigation." Overly intrusive investigatory means or prolonged detention will turn a reasonable detention into an arrest that, in the absence of probable cause, is unreasonable under the Fourth Amendment. An officer, therefore, may not rely solely upon her discretion in applying a particular method of investigation. If lesser intrusive means are reasonably available to verify or dispel the officer's suspicion, the officer must use them or the detention will be deemed unreasonable. Moreover, an officer is precluded from detaining an individual in order to exhaust all possible avenues of inquiry.

IV. THE MOTOR VEHICLE STOP: APPLICATION OF THE TERRY STOP ANALYSIS

It is well settled that a police initiated motor vehicle stop falls under the purview of Terry v. Ohio. In most instances, the underlying stop is justified by an officer's direct observation of a traffic violation. At

49 See supra note 39 and accompanying text (discussing totality of circumstances test). 50 United States v. Place, 462 U.S. 696, 709 (1983) (noting brevity of investigation as significant but declining to adopt per se time limit); see also United States v. Sharpe, 470 U.S. 675, 686 (1985) (considering unpredictability of situation in determining diligence of investigation). The Court in Sharpe emphasized that in considering whether police officers acted diligently, lower courts should assess whether those officers were acting in a "swiftly developing situation." Sharpe, 470 U.S. at 686-87; see also Florida v. Royer, 460 U.S. 491, 505-06 (1983). Despite such consideration, however, officers may not be acting diligently if they fail to consider alternative means of verifying their suspicions that would have proved quicker. Royer, 460 U.S. at 505-06. In Royer, the Court emphasized that a more diligent means of investigation would have significantly shortened the required length of the seizure. Id.
51 See Royer, 460 U.S. at 501 (stating that "scope of detention must be carefully tailored to its underlying justification"); Dunaway v. New York, 442 U.S. 200, 211-12 (1979) (holding non-arrest detention of individual taken from home to police station unreasonable).
52 Royer, 460 U.S. at 505-06 (emphasizing failure of police to consider faster means of investigation); see also United States v. Place, 462 U.S. 696, 709 (1983) (noting agents' failure to prepare for investigation unreasonably prolonged investigation); United States v. Monterro Carnargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (cautioning against "unbridled" police discretion in effectuating a motor vehicle stop).
53 Royer, 460 U.S. at 505-06 (requiring least intrusive means reasonably available be used).
54 See supra note 47 and accompanying text (setting forth parameters of reasonable police investigation).
55 See Knowles v. Iowa, 525 U.S. 113 (1998) (analogizing motor vehicle stop to Terry stop); Wren v. U.S., 517 U.S. 806, 809-10 (1996); State v. Thomas, 909 A.2d 969, 976 (Conn. 2006) (applying Terry analysis to motor vehicle stop and requiring reasonable suspicion).
56 See, e.g., State v. Thomas, 909 A.2d 969, 976 (Conn. 2006) (allowing reasonable
minimum, however, the stop must be justified by a reasonable suspicion of criminal activity. The critical aspect of motor vehicle cases, especially those that initiate as routine traffic violation stops, often turns upon the second prong of the *Terry* analysis – whether the scope of the officer’s actions were reasonably related to the underlying premise of the stop.

A routine motor vehicle stop is classified as a stop based on the violation of a specific traffic law. Such stops must ordinarily be limited to the duration and conduct necessary to enforce the applicable traffic law. Justified conduct includes checking the motorists’ license and registration and issuing a ticket or a warning. Modest questioning may also be appropriate if limited in nature to the underlying violation.

A detention is unreasonable if it extends beyond the amount of time it takes to accomplish those actions necessary to enforce the law. Once the purpose of the stop is achieved, a motorist must be permitted to proceed. Absent reasonable suspicion of further criminal activity, the officer may neither expand her investigation into any matter unrelated to the original violation nor extend the duration of the stop.

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60 *See*, e.g., *Commonwealth v. Torres*, 674 N.E.2d 638, 642 (Mass. 1997) (noting that absent other suspicion, police inquiry must end upon production of valid license and registration); *State v. Dominguez Martinez*, 895 P.2d 306, 309 (Or. 1995) (limiting police investigation to traffic violation only). The underlying restrictions on a police officer’s investigation during a routine traffic stop are controlled by the second prong of the *Terry* analysis. *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968) (restricting scope of temporary detention). The Court emphasized that evidence obtained as a result of an unreasonable scope of investigation would be excluded. *Id.* at 29.

61 *See* *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (requesting license and registration constitute reasonable investigation); *People v. Cox* 782 N.E.2d 275 (Ill. 2002) (describing components of acceptable inquiry).

62 *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (allowing questions reasonably related to traffic stop). For example, a police officer may ask questions regarding the motorist’s destination and purpose. *Id.*


64 *See* *supra* note 53 (requiring officer to allow motorist to proceed if no new suspicion after initial inquiry).

65 *See*, e.g., *People v. Cox*, 728 N.E.2d 775 (Ill. 2002).
A. Extending the Routine Traffic Stop

A police officer may expand the scope of a routine traffic stop if, during the course of the stop, she uncovers new facts giving rise to a new suspicion of criminal activity. Once again, the basic components of the Terry analysis must be applied. The court must first determine whether the specific facts offered by the detaining officer suffice to establish a reasonable suspicion of further criminal activity. It must then determine whether the extended stop at any point became unreasonable due to overly intrusive investigatory techniques or prolonged duration.

To satisfy the first component of the test, the officer must present facts independent of those she relied upon to initiate the traffic stop. In this context, courts extend significant weight to inferences of specific crimes drawn by an officer upon her own experience. If the court concludes that the officer's inference of further criminal conduct was justified, it must then continue to determine whether the investigatory means used by the officer were reasonable.

B. The Reasonableness of the Investigation

The second prong of the Terry analysis makes clear that the detaining officer must use the least intrusive means reasonably available to her to verify or dispel her newfound suspicion. If no such means exist, or if the means used fail to yield the desired results, the officer must permit the motorist to end the encounter. The Supreme Court, however, fails to of-

67 See supra notes 55-59 and accompanying text (recounting Supreme Court's application of Terry analysis to routine motor vehicle stops).
68 See supra notes 32-41 and accompanying text (establishing grounds for reasonable suspicion).
69 See supra note 44 and accompanying text.
70 See People v. Ellis, 62 N.Y.2d 393, 397 (N.Y. 1984) (finding bullets in car during traffic stop sufficient to initiate new investigation); Herrera v. State, 80 S.W.3d 283, 292 (Tex. 2002) (requiring facts other than those relied upon to effectuate initial traffic stops).
72 See supra notes 44-47 and accompanying text (describing limits of investigatory scope).
73 Id.
74 See supra notes 53-56 and accompanying text (describing limits on extending duration of routine traffic stop); People v. Cox, 782 N.E.2d 175, 179-80 (Ill. 2002) (requiring detention to end if no new suspicion after initial inquiry); State v. Jones, 204 S.W.3d 287, 292 (Mo. Ct. App. 2006) (requiring officer to permit motorist to proceed absent new rea-
fer clear guidance from which to discern the reasonableness of choosing one particular investigative method over another.\textsuperscript{75}

In \textit{Illinois v. Caballes},\textsuperscript{76} the Supreme Court sanctioned the use of drug sniffing dogs as a reasonable means of investigating a suspicion of narcotics.\textsuperscript{77} Despite objections, the Court held that a narcotics-detection canine's sniff of the exterior of a car does not constitute a "search" under the Fourth Amendment, and therefore does not implicate the need for any qualified level of suspicion.\textsuperscript{78} It cautioned, however, that when the use of the canine unit prolongs the duration of the stop beyond the time needed to either issue a traffic citation or perform other related tasks, the amendment's provision against unreasonable seizure would be triggered.\textsuperscript{79}

In \textit{Caballes}, the canine unit arrived independent of any motive to investigate the suspicion of narcotics. Because allowing the canine unit to sniff the exterior of the vehicle neither extended the investigative portion of the initial traffic stop, nor constituted a government "search," the Court did not have occasion to address the proper context for when an officer may justifiably make the decision to prolong an encounter to call such a unit.\textsuperscript{80} In a variety of lower court decisions, the decision to call for a drug-detection canine unit has been upheld despite prolonging the encounter by awaiting its arrival.\textsuperscript{81} However, the issue of whether the decision to call a canine unit must be supported by individualized suspicion of drug possession or whether a generalized suspicion of criminal activity suffices continues to present itself to lower courts.\textsuperscript{82}

\textsuperscript{75} See infra note 82 (citing varying approaches taken by state courts).
\textsuperscript{76} 543 U.S. 405 (2005).
\textsuperscript{77} Id. at 409.
\textsuperscript{78} Id.
\textsuperscript{79} Id. (emphasizing that defendant's car lawfully seized at time of search).
\textsuperscript{80} See \textit{Illinois v. Caballes}, 543 U.S. 405, 421 (2005) (Ginsberg, J., dissenting) (citing Court's reluctance to determine whether detention was prolonged).
\textsuperscript{81} United States v. Sanchez, 417 F.3d 971 (8th Cir. 2005) (finding forty-five minute detention reasonable); United States v. Hernandez, 418 F.3d 1206 (11th Cir. 2005) (holding seventeen minute duration not unreasonable); United States v. Orsolini, 300 F.3d 724 (6th Cir. 2002) (holding thirty-five minute detention not unreasonable; United States v. McCarthy, 77 F.3d 522 (1st Cir. 1996) (affirming constitutionality of seventy-five minute temporary detention); State v. Moffatt, 450 N.W.2d 116 (Minn. 1990) (holding sixty-one minute detention of motorist constitutional). \textit{But see} United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1999) (holding two-minute delay to conduct canine sniff is "de minimis" intrusion). Some courts have held that a prolonged wait for a drug-detection unit is unreasonable. \textit{See} United States v. Place, 462 U.S. 696 (1983) (holding ninety minute detention unreasonable); State v. Ofori, 906 A.2d 1089 (Md. Ct. Spec. App. 2006) (holding twenty four minute detention unreasonable).
\textsuperscript{82} Compare State v. Wigginton, 125 P.3d 536 (Idaho Ct. App. 2005) (requiring reasonable suspicion of drug activity to lengthen motor vehicle stop for use of drug dog), and Commonwealth v. Feyenord, 815 N.E.2d 628 (Mass. App. Ct. 2004) (Greenberg, J., dissenting), and State v. Weigand, 645 N.W.2d 125 (Minn. 2002) (noting officer had no rea-
V. GENERAL VERSUS DRUG-RELATED SUSPICION: A COMPARISON OF MASSACHUSETTS AND OTHER JURISDICTIONS

Since the Supreme Court upheld the use of drug-detecting dogs during a routine motor vehicle stop, lower courts have reluctantly struggled to define the necessary standard of suspicion needed to prolong a stop in order to effectuate their use. 83

In Commonwealth v. Feyenord, 84 the Massachusetts Supreme Judicial Court addressed for the first time the constitutionality of calling a drug sniffing canine unit to the scene of a motor vehicle stop. 85 In Feyenord, Massachusetts State Trooper Pinkes pulled over the defendant Feyenord for driving with a broken headlight. 86 After being pulled over, Feyenord appeared nervous and was unable, upon request, to produce a driver's license or registration that was in his name. 87 Based on these observations, officer Pinkes summoned a drug-detection canine unit and further detained Feyenord for twenty-five to thirty-five minutes until the unit arrived. 88 Concluding that officer Pinkes was justified in prolonging the initial detention, the Massachusetts Supreme Judicial Court then concluded that he was justified in his decision to call in a canine unit. 89 In doing so, the Court held that the decision to call for and use a drug-detection canine unit does not require facts specifically indicative of drug-related activity. 90

In its decision, the Massachusetts Supreme Judicial Court conceded that the suspicion relied upon by officer Pinkes when he summoned the drug-detection unit was suggestive of any number of criminal possibilities. 91 Moreover, it conceded that officer Pinkes himself did not suspect that the defendant was engaged in drug-related activity any more than any other type of unlawful behavior. 92 Declining to articulate a rule prioritizing one manner of conduct over another, and emphasizing an individual offi-
cer's judgment regarding available resources, the court concluded that the officer's decision to arbitrarily verify or dispel one suspicion over another was reasonable.\textsuperscript{93}

Other jurisdictions require that before a police officer may justifiably summons and employ a drug-detection canine unit, he must have a reasonable suspicion of drug related activity.\textsuperscript{94} The Supreme Court of Illinois cited a lack of specific drug related suspicion in holding an officer's summons and use of a drug-detection canine unit unreasonable.\textsuperscript{95} Prior to being overturned by the Supreme Court of the United States, its decision in \textit{People v. Caballes} relied in part on the alternative theories of conduct that could be deduced from the articulated suspicious facts.\textsuperscript{96} For example, the court noted that while an air freshener can be used to mask the odor of marijuana, it could alternatively be used to mask the smell of other odors such as cigarette smoke.\textsuperscript{97}

Similarly, in \textit{United States v. Perkins}, the Court of Appeals for the Eleventh Circuit held that an officer's summons of a drug-detecting canine unit was unreasonable despite the defendant's nervousness, "odd behavior," and inconsistent statements.\textsuperscript{98} Notably, both the Eleventh Circuit and the Supreme Court of Illinois refused to uphold the decision to summons a canine unit, despite facts strikingly similar to those of \textit{Commonwealth v. Feyenord}. In \textit{State v. Wiegand},\textsuperscript{99} the Supreme Court of Minnesota held that the reasonableness of an officer's decision to summons a canine unit turned upon whether the officer predicated his action on a subjective belief that the facts suggested that the defendant was engaged in drug related activity.\textsuperscript{100} In concluding that the officer did not have a reasonable suspi-

\textsuperscript{93} \textit{Id.} (upholding further detention of suspect until canine unit arrival despite plausible alternative avenues of investigation). The court acknowledged that officer Pinkes had other plausible avenues of investigation other than summoning a canine unit. \textit{Id.} at 599 n.10. The court noted that officer Pinkes did not conduct a records check of Feyenord's false name nor did he run the vehicles registration or license plate number. \textit{Id.}


\textsuperscript{95} \textit{Caballes}, 802 N.E.2d at 204-05 (finding insufficient justification to warrant summons and use of drug dog despite generalized suspicion of criminal activity).

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at 205 (noting drug related and alternative use of air freshener in car).

\textsuperscript{98} \textit{United States v. Perkins}, 348 F.3d 965, 970 (11th Cir. 2003) (finding nervousness, strange behavior, and inconsistent statements insufficient to justify summons and use of canine unit).

\textsuperscript{99} 645 N.W.2d 125 (Minn. 2002).

\textsuperscript{100} \textit{Id.} at 137 (requiring objective determination of drug related activity).
tion of drug related activity, it dismissed the officer's testimony that the defendant was "evasive, nervous and had glossy eyes." \textsuperscript{101}

VI. BEYOND THE SUSPICION: THE CONSEQUENCES OF ARBITRARY DECISION MAKING

The generalized suspicion standard articulated in Commonwealh v. Feyenord improperly broadens the scope of an individual police officer's authority. \textsuperscript{102} It is well settled that certain situations warrant, if not demand, that police officers rely instinctively upon their background training and experience. \textsuperscript{103} It is likewise accepted that an officer's split-second decisions may often serve important functions, protecting at times the interests of both police officers and the general public. \textsuperscript{104} Nevertheless, traditional skepticism cautions that over-reliance upon such personal judgment calls threatens to undermine the very nature of the individual interests sought to be preserved. \textsuperscript{105} By applying a generalized suspicion standard to motor vehicle stops, the Massachusetts Supreme Judicial Court parts from these traditional concerns and opens the door to arbitrary police conduct and subversive official behavior. \textsuperscript{106}

By allowing a canine unit to be summonsed to a motor vehicle stop absent specific drug-related suspicion, the Massachusetts Supreme Judicial Court essentially grants individual police officers carte blanche authority to extend the length of the motor vehicle encounter. Its decision in Feyenord effectively permits an individual police officer to intentionally circumvent the second prong of the Terry analysis by ignoring one possible means of investigation in favor of another, for the sole purpose of pro-

\textsuperscript{101} Id.
\textsuperscript{102} See supra notes 82, 94 and accompanying text (comparing Massachusetts with other jurisdictions).
\textsuperscript{103} See supra note 33 and accompanying text (recognizing safety concerns of police officers and allowing officers to respond accordingly).
\textsuperscript{104} See supra note 33 and accompanying text (recognizing safety concerns of police officers).
\textsuperscript{105} See Illinois v. Caballes, 543 U.S. 405 (2005) (Souter, J., dissenting) (emphasizing restrictive nature of Terry stop). In his dissenting opinion, Justice Souter asserted the unwillingness of the Supreme Court to allow a Terry stop to become a "foot in the door for all investigative purposes"). Id. at 415. See also Brown v. Texas, 443 U.S. 47, 51 (1979) (citing constitutional protection against arbitrary police conduct). Specifically, by imposing "neutral limitations" on acceptable police conduct, the Fourth Amendment is intended to protect against arbitrary decisions drawn from an individual officer's unrestrained discretion. Id.
\textsuperscript{106} See supra notes 94-97 and accompanying text (noting rejections to generalized suspicion standard); see also supra note 106 (citing implicit danger of expanding reliance upon individual police officer's discretion).
longing the overall investigation. The ordinary regard for objectivity is therefore surpassed by an individual officer’s mere intuition that a prolonged investigation will yield desired law enforcement results.

The potential problem with the generalized suspicion standard is that it allows a police officer to unilaterally prolong a citizen-police encounter by choosing an investigatory approach likely to forestall the encounter the longest. Since drug-detection canine units are seldom in close proximity to the site of a motor vehicle stop, it is likely that summoning the unit will prolong the detention. During the time it takes for the unit to arrive, the summoning officer can continue to investigate the motorist’s alleged suspicious activities. Arguably, he would be no more precluded from inquiring into an avenue unrelated to drug activity than he was from summoning the drug-detection unit in the first place. Moreover, had the unit not been summoned and the detention not prolonged to await its arrival, it is possible that the officer would have exhausted his opportunity for reasonable inquiry and been required to allow the motorist to proceed. Thus, by summoning the unit and prolonging the investigation, the officer may unilaterally extend his opportunity to investigate non-drug related-activity for a longer period of time than she otherwise would have been afforded.

The Massachusetts Supreme Judicial Court mistakenly assumes that the propriety of an officer’s decision to summons a canine unit will be properly guided by his training and experience. Consider, for example, a routine traffic stop in which the motorist exhibits signs of generalized suspicious behavior. Without more, the detaining officer may consciously elect to pursue any number of alternative courses of action. Had her suspicion been particularized, the officer’s discretion would have been limited and she would be restricted to using only an investigative method that would verify or dispel that particularized suspicion. Thus, while an

107 See supra notes 37, 51-53 and accompanying text.
108 See supra note 106 and accompanying text (recognizing Fourth Amendment’s objective standard as restriction upon discretionary police conduct).
109 See supra note 80 and accompanying text (emphasizing wait time for canine unit arrival).
110 Id.
111 See supra note 92 and accompanying text (emphasizing alternative routes of investigation).
112 See supra note 50 (assessing reasonableness of seizure based on brevity).
113 See supra notes 107-110 and accompanying text.
114 See Commonwealth v. Feyenord, 833 N.E.2d 590, 598 (Mass. 2005) (citing reliance upon police judgment to recognize readily available resources and react to changing situations).
115 See supra notes 50, 60-64 and accompanying text (confining duration of seizure to reasonable length of diligent investigation).
116 See supra notes 60-64 and accompanying text (describing limits of police investiga-
officer's experience can cause her to infer facts suggestive of one particular offense, the officer's lack of experience can cause her to overlook those same facts. Ultimately, under this scenario, the generalized suspicion approach extends greater discretionary powers to inexperienced police officers. Similarly, this approach affords a greater protection to a criminal motorist who has the presence of mind to manifest behavior associated with a particular offense that he is not engaged in, thus restricting the officer's potential investigation to means intended to verify only that particular offense.

VII. CONCLUSION

On the dawn of revolution, Paul Revere warned of an ominous presence. Almost two hundred and thirty years later the ominous presence returns. In upholding the adequacy of a generalized suspicion as a basis for detaining a motorist to await the arrival of a narcotics-detection canine unit, the Massachusetts Supreme Judicial Court effectively eliminated the assurance that an individual will be protected against arbitrary acts of intrusion by the government. While practicality necessitates a threshold tolerance of police discretion it warns just as well of the consequences of too much tolerance. The result of the Massachusetts decision in *Feyenord* is to legitimize the arbitrary decisions of individual police officers by shifting the inquiry of reasonableness from an objective based standard of police conduct to a subjective based standard of conduct. Ultimately, the Massachusetts case suggests the pressing need for more pronounced Supreme Court guidelines. Until that time, the transmuted warning of a once illustrious man will sound... "The Police are coming!!! The Police are coming!!!"

Ronen Morris