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THE FOURTH AMENDMENT: ELUSIVE STANDARDS; ELUSIVE REVIEW

Anne Bowen Poulin*

I. INTRODUCTION

In *United States v. Chaidez*,1 the Court of Appeals for the Seventh Circuit opts for a flexible standard to determine whether a seizure more intrusive than a stop but less intrusive than a full arrest comports with the fourth amendment. *Chaidez* builds on the court's earlier decision in *Llaguno v. Mingey*.2 In *Llaguno*, a plurality of the en banc court determined that the standard of probable cause is flexible, adjusting to the severity of the offense.

In these two cases, the court is charting new territory. It has moved beyond the rules established by the United States Supreme Court for evaluating seizures of the person. The Supreme Court has established a clear framework: seizures for the purpose of criminal investigation fall into two categories, less intrusive seizures, which can be justified by reasonable suspicion,3 and seizures approaching arrest in their intrusiveness, which require probable cause.4 As employed by the Supreme Court, the terms reasonable suspicion and probable cause are flexible but each designates a determinable quantity of information; the Court does not treat them as incapable of definition.5 Nevertheless, the Supreme Court's standards for determining whether a seizure is a stop or an arrest and whether there is reasonable suspicion or probable cause have some flexibility.

The Seventh Circuit appears to be injecting into fourth amendment jurisprudence new extremes of flexibility in defining standards. Conceivably, there are not necessarily right and wrong standards under the fourth amendment. The language of the amendment is general.6 Courts

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1. 919 F.2d 1195, 1196 (7th Cir. 1990).
2. 763 F.2d 1560 (7th Cir. 1985).
3. 3 Wayne R. LaFave, Search and Seizure §§ 9.2 and 9.3 (1985); Charles H. Whitebread & Christopher Slobogin, Criminal Procedure § 3.02 (1986).
4. LaFave, supra note 3, § 5.1; Whitebread & Slobogin, supra note 3, §§ 3.02 and 3.03.
5. LaFave, supra note 3, §§ 3.2, 9.3; Whitebread & Slobogin, supra note 3, § 3.03.
6. Amendment IV of the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches
have had to determine the content of that general language and translate
the protection into specific standards governing specific governmental
conduct. *Chaidez* and *Llaguno* opt for flexible, sliding scale standards,
adaptable to the needs of the situation. These decisions therefore prompt
a discussion of the benefits and hazards of such standards.

The Court of Appeals for the Seventh Circuit reasons that the present
framework of analysis, based on defined standards, rests on artificial
distinctions and requires inappropriate pigeonholing.\(^7\) Its new approach,
concludes the court, offers precision of analysis and of fourth amendment
protection.\(^8\) Unfortunately, the new approach assaults fourth amend-
ment protection. Claiming to seek precision, the court threatens to im-
plement standards that reduce the effective protection against unreason-
able searches and seizures. The standards adopted in *Chaidez*
and *Llaguno* are so flexible that the protection they afford will be too
elusive to be effective.

Standards as flexible as those adopted in *Chaidez* and *Llaguno* present
a number of problems that reduce the effectiveness of fourth amend-
ment protection. First, they can be expected to reduce the consistency of
results. Second, such flexible standard provide a less effective guide to
the "on-the-street" conduct of the police. Third, they create increased
likelihood of injury to individual rights through error and abuse.

Fourth and last, more flexible standards are difficult to supervise.
Judicial supervision of fourth amendment rights has always been prob-
lematic. Increasing the flexibility of the governing standards compounds
the difficulty. At the same time, standard of review in fourth amend-
ment cases is being relaxed.\(^9\) Even under the prevailing standard of re-
view, and certainly under a relaxed standard, the court may not ensure
that such flexible standards are enforced.

The court’s action is particularly troublesome because it diminishes
fourth amendment protection against investigative detentions less intru-
sive than arrests. The police-individual encounters falling in this cate-
gory have a significant impact on daily life and affect the individual’s
sense of personal security from arbitrary government intrusion. Yet the
mechanisms adopted by the Seventh Circuit for monitoring fourth amend-
ment intrusions are less likely than the traditional approach to be
effective means of supervising such encounters.

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .” U.S.
CONST. amend. IV.
\(^7\) 919 F.2d at 1197-98.
\(^8\) 919 F.2d at 1198.
\(^9\) See Chaidez, 919 F.2d at 1196 (7th Cir. 1990). See discussion *infra* at notes 25, 42, and 43.
II. THE SEVENTH CIRCUIT APPROACH

A. United States v. Chaidez

In Chaidez, after a period of surveillance, government agents seized the defendants and asked defendant Silva for consent to search the house recently visited by the defendants. When they searched, the agents found a stash of drugs. The outcome of the defendants' motion to suppress therefore turned on whether the detention of the defendant Silva leading to the seizure of the drugs was reasonable under the fourth amendment. The court concluded that the seizure "was more intrusive than an ordinary Terry stop." To seize the defendants, the agents used their cars to block the defendants' two cars and then approached the defendants' cars with their guns drawn. The agents then interrogated the defendants, searched the cars, and obtained Silva's consent to search the house.

What did the agents know when they took this action? Acting on a tip from a reliable informant that Chaidez was "large-scale heroin dealer," the agents started surveillance of Chaidez at 8:30 a.m. Chaidez left his house carrying a small plastic bag. He was driven to a restaurant, where he picked up his car. Chaidez made brief stops, meeting his codefendants Chavira and Silva at one of his stops. After a brief conversation with the two codefendants, they left in their car and Chaidez left in his car, driving evasively. When Chaidez got off the expressway north, he was rejoined by the codefendants in their car. All three went to a house, where they stayed for half an hour. Chaidez had the plastic bag when he entered the house, but was not carrying it when he left. The codefendants left the house five minutes after Chaidez and met him in a parking lot. After Chaidez made a phone call, the three got into their respective cars and "drove off again at a high rate of speed." Their speed caused the police to think the defendants had detected the surveillance, so they stopped the defendants in the manner described above.

The information on which the agents acted comfortably met and even exceeded reasonable suspicion but did not amount to probable cause. The Chaidez court therefore had to determine whether a seizure

10. 919 F.2d 1193 (7th Cir. 1990).
11. Id.
12. Id. at 1198.
13. Id. at 1195.
14. Id. at 1195-96. The district court had held that the seizure was justified under Terry based on reasonable suspicion. Id. at 1196. The Court of Appeals determined that the seizure was more intrusive than "an ordinary Terry stop." Id. at 1198. The ensuing discussion reveals that the court saw the information known to the agents as more than reasonable suspicion but less than probable cause.
more intrusive than a *Terry* stop could be justified by less than probable cause. The court concluded that it could. The *Chaidez* court rejected the argument that once a seizure exceeded a *Terry* stop, it must be treated as an arrest requiring probable cause. The court stated: [t]rying to force a continuous world into two categories is not only impossible but also unnecessary when the text of the Constitution calls for inquiry into 'reasonableness.' The court adopted a "sliding scale approach to the relation between the level of suspicion and the degree of intrusion." Judged on a sliding scale, the information known to the police was sufficient to justify the fourth amendment seizure.

*Chaidez* injects additional flexibility into the already flexible analysis of fourth amendment rights in "on-the-street" interactions. There was already flexibility in the definition of a seizure and the line between a *Terry* seizure and an arrest. In addition, the concept of reasonable suspicion—the level of information that justifies a *Terry* seizure—is flexible. *Chaidez* permits an extremely flexible analysis of seizures that are more intrusive than *Terry* stops but still fall short of full-fledged arrests.

**B. Llaguno v. Mingey**

*Chaidez* built on *Llaguno v. Mingey* in which the court also used a sliding scale. In *Llaguno*, the court, sitting en banc, considered an appeal from a judgment in favor of the police officer defendants in a civil suit. The divided court ordered a new trial, but the plurality's discussion of probable cause introduced the sliding scale concept further developed in *Chaidez*. In *Llaguno*, the plurality adopted a standard for gauging probable cause defined by balancing and, that consequently, was flexible.

David Llaguno, the plaintiff, had been arrested and held for 42 hours without being charged before the police discovered that the killer they sought was actually the plaintiff's brother. When they entered the house, the police were seeking a killer who had fled on foot after the car in which he was riding crashed. The entry was lawful only if the police had probable cause to believe the killer was there. The killer was proba-

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15. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court upheld a limited seizure of the person for investigative inquiry. See generally LAFAYE, supra note 3, § 9.1.
16. 919 F.2d 1201.
17. *Id.* at 1197.
18. *Id.*
19. *Id.* at 1199.
20. 763 F.2d 1560 (7th Cir. 1985).
21. *Id.*
22. Although *Llaguno* was a plurality decision, it has since been cited as standing for the application of a sliding scale to probable cause determinations. See BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986).
bly Hispanic. The car from which he fled had not been reported stolen and was registered to Vilma Llaguno at the address of the challenged entry, two miles from the crash site.

Among other questions, the court determined whether the police had probable cause to enter the Llaguno house. Whether the entry of the house was reasonable thus rested on the theory that the police had probable cause to believe that the missing killer not only lived at the address to which the car was registered but had traveled the two miles to the house to seek refuge.

The plurality explained its view of probable cause in the following words: "Probable cause—the area between bare suspicion and virtual certainty—describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed."

The plurality concluded:

Given the gravity of the crimes they were investigating, the possibility that there would be more shootings unless the killer was seized immediately, and the information (limited as it was) that made it seem that he might well have fled to the Llaguno home, we cannot say, as a matter of law, that the police did not have probable cause to enter and search the house as they did.

Thus, the plurality employed a flexible definition of probable cause, requiring a greater quantity of information to search when the crime is less serious and a lesser quantity when the crime is more serious.

III. THE CONSTITUTIONAL STATUS OF A FLEXIBLE STANDARD

Fourth amendment jurisprudence, particularly since Terry v. Ohio, is confused. At one time, analysis of government conduct proceeded from the starting point that a seizure of the person normally required probable cause and that the requirement of probable cause was subject only to enumerated, defined exceptions. However, the Supreme Court

23. It turned out that Vilma was the daughter-in-law of Gloria Llaguno, the mother of both the plaintiff and the killer. 763 F.2d at 1563.
24. Id. at 1566.
25. Id. at 1565.
26. Id. at 1567.
27. 392 U.S. 1 (1968).
29. LAFAVE, supra note 3, § 9.1.
has recognized a number of exceptions to the probable cause requirement.\(^\text{30}\) It is therefore harder to argue that the standards assaulted by the court in \textit{Chaidez} and \textit{Llaguno} are constitutionally mandated. \textit{Chaidez} evaluates the decisions since \textit{Terry} and reads the Supreme Court's willingness to recognize exceptions as a signal that the focus in each case is the reasonableness of the government conduct, to be determined by a balancing test.

Nevertheless, even though the fourth amendment speaks of unreasonable searches and seizures, it does not leave the courts to define what is unreasonable with the latitude of a jury in a negligence action.\(^\text{31}\) The core of the fourth amendment is the preference for warrants in most instances and the requirement of probable cause to justify most fourth amendment intrusions. The Supreme Court has recognized exceptions only when the circumstances of a specific situation called for a departure from the general rule.\(^\text{32}\) The development of the law does not invite the courts to apply a case by case sliding scale balancing test.

\textit{Terry} cited \textit{Camara v. Municipal Court}\(^\text{33}\) as the source of its balancing test.\(^\text{34}\) In \textit{Camara}, the Court considered the constitutionality of warrantless city housing inspections.\(^\text{35}\) The Court reaffirmed the fourth amendment's preference for warrants but determined that probable cause, or reasonableness, should be determined by "balancing the need to search against the invasion which the search entails."\(^\text{36}\) The Court concluded that "the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment"\(^\text{37}\) and that "'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."\(^\text{38}\) Thus, \textit{Camara} established both the balancing test for gauging fourth amendment rights and the method of assessing the fourth amendment implications of administrative searches.

\textit{Terry} did not involve an administrative search. The stop and frisk in \textit{Terry} rested on particularized suspicion of the defendants. \textit{Terry} nev-

\begin{itemize}
  \item \textsuperscript{30} \textit{Whitebread} \& \textit{Slobogin}, \textit{supra} note 3, \textsection 3.02.
  \item \textsuperscript{31} \textit{Llaguno}, 763 F.2d at 1564. Interestingly, in \textit{Llaguno}, the majority cited \textit{United States v. Carroll Towing Co.}, 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.), a famous negligence case, to assist its discussion of when a warrantless search is constitutional.
  \item \textsuperscript{32} \textit{Whitebread} \& \textit{Slobogin}, \textit{supra} note 3, \textsection 3.02.
  \item \textsuperscript{33} 387 U.S. 523 (1967).
  \item \textsuperscript{34} \textit{Terry v. Ohio}, 392 U.S. 1, 21 (1968).
  \item \textsuperscript{35} \textit{Camara}, 387 U.S. at 525.
  \item \textsuperscript{36} \textit{Id.} at 537.
  \item \textsuperscript{37} \textit{Id.} at 538.
  \item \textsuperscript{38} \textit{Id.}
ertheless adopted Camara’s analytical approach as the framework of analysis for some fourth amendment questions even where no warrant was required and the police were conducting criminal investigation based on particularized suspicion. In Terry, the Court identified “the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular government invasion of a citizen’s personal security.”

Terry applied the balancing test to permit a stop and frisk on less than probable cause; it did not invite ad hoc balancing in every case. The result of Terry’s balancing is that reasonable suspicion, which is a standard less than probable cause, is sufficient to support a stop and frisk, which is an intrusion less than an arrest and full search. The task of defining when the lower standard will suffice and what the lower standard was left for later cases.

In Terry, the Court committed itself to some balancing to determine the permissible boundaries in police-citizen interaction. The Court, however, continued to limit the situations in which the balancing test, rather than the straightforward probable cause requirement, would be applied. For example, in Dunaway v. New York, the Court rejected the state’s argument for a sliding scale approach. The Court stated:

[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the ‘often competitive enterprise of ferreting out crime’. . . A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

Since Dunaway, however, the Court has recognized numerous exceptions to the probable cause requirement. In Chaidez, the court catalogued the decisions of the Supreme Court permitting searches and seizures on less than probable cause. The question is: How far have the courts moved from Dunaway? The answer given by Chaidez and

39. Terry, 392 U.S. at 19.
41. Id. at 213-14.
42. See generally LAFAVE, supra note 3; WHITEBREAD & SLOBOGIN, supra note 3; Matthew F. Bogdanos, Search and Seizure: A Reasoned Approach, 6 PACE L. REV. 543, 561-86 (1986); Edwin Butterfoss, As time Goes By: The Elimination of Contemporaneity and Brevity in Search and Seizure Cases, 21 HARV. C.R.-C.L. L. REV. 603 (1986).
43. Chaidez, 919 F.2d at 1196-97. The Chaidez court noted that in the following situations the Court upheld the constitutionality of a search or seizure notwithstanding the absence of probable cause or a warrant: (1) administrative searches, see Camara v. Municipal Court, 387 U.S. 523 (1967); (2) inventory searches, see South Dakota v. Opperman, 428 U.S. 346, 369-76 (1976); (3) drug-testing programs, see National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); and (4) searches incident to arrest, see Chimel v. California, 395 U.S. 752 (1969).
Llaguno is "quite far." To the Court of Appeals for the Seventh Circuit, the Supreme Court's decisions signal that the appropriate focus is now on the general question of reasonableness.

While the Court has applied balancing to a number of situations since Dunaway, the Court of Appeals has exaggerated the Court's willingness to balance in determining fourth amendment rights. The cases relied upon by the Chaidez court reflect willingness to engage in "one time only" balancing to determine the appropriate fourth amendment rules for particular situations. The cases do not reflect willingness to engage in the type of ad hoc balancing called for by Chaidez.\(^44\) They are not sprinkled along a continuum.

Instead, the decisions represent specific balances struck for specific types of situations. In several of the cases cited in Chaidez, the Supreme Court recognized that the government has strong interests that support specific types of administrative searches: inspections to enforce health and safety codes;\(^45\) inventory searches of seized property;\(^46\) and drug testing of government employees in certain types of positions.\(^47\) Similar analysis led the Court to approve drunk driving road blocks.\(^48\) In other cases, the Court held that in specific settings—schools\(^49\) and international border areas\(^50\)—the fourth amendment balance between the authority of the government and the rights of the individual is weighted toward the government and the standards for government action are commensurately less exacting.

A close reading of the decisions reveals the error of the Chaidez court's conclusion. In Hayes v. Florida,\(^51\) the Court adhered to the recognition of the line between Terry stops and arrest: "There is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments."\(^52\) The Hayes Court did not define that line with precision. It suggested that reasonable suspicion can justify fingerprinting on the street, if "carried out with dis-

\(^{45}\) Camara v. Municipal Court, 387 U.S. 523 (1967).
\(^{52}\) Id. at 816.
"forcibly remov[ing] a person from his home or other place in which he is entitled to be and transport[ing] him to the police station, where he is detained, although briefly, for investigative purposes" requires probable cause. Thus, the Court reaffirmed the basic division between stops and arrests.

In *United States v. Montoya de Hernandez*, the Court declined to adopt a standard in addition to reasonable suspicion and probable cause and did not engage in ad hoc balancing. Instead, the Court determined the appropriate balance of individual-government interests at the border, where "the Fourth Amendment's balance of reasonableness is qualitatively different." The Court of Appeals for the Ninth Circuit had adopted a "clear indication" standard for a non-routine border seizure. The court of appeals used "clear indication" "as an intermediate standard between 'reasonable suspicion' and 'probable cause.'" The Court stated:

We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to "reasonable suspicion" and "probable cause"; we are dealing with a constitutional requirement of reasonableness . . . and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.

What does *Montoya de Hernandez* suggest for the question in *Chaidez*? The Court in *Montoya de Hernandez* opted for neither a new standard nor an ad hoc balancing test. *Montoya de Hernandez* represents a one-time assessment of the appropriate fourth amendment balance; it does not evidence willingness to balance on a case by case basis. The Court treated "reasonable suspicion" as a defined standard and held it was sufficient to justify border detention beyond what was routine. In *Montoya de Hernandez*, the detention went well beyond a *Terry* detention. The Court did not treat reasonable suspicion as a flexible standard that could "float up" to sustain an intrusion as extreme as this one.

53. Id. at 817.
54. Id. at 816.
56. Id. at 538.
57. Id. at 536.
58. Id. at 540.
59. Id. at 541.
60. The Court stated: "Under this standard officials at the border must have a particularized and objective basis for suspecting the particular person of alimentary canal smuggling." Id. at 541-42.
61. Montoya de Hernandez was held for almost 24 hours before she was finally searched pursuant to a warrant, which had been sought only after 16 hours of her detention.
It concluded that reasonable suspicion justified this intrusion because of the balance of interests at the border.

Similarly, in *United States v. Sokolow*\(^6\) the Court discussed reasonable suspicion as a defined standard. The Court stated:

That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means a fair probability that contraband or evidence of a crime will be found . . . , and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.\(^6\)\(^3\)

The Court rejected the Ninth Circuit's effort to mechanize the assessment of reasonable suspicion, but it did not treat reasonable suspicion as a wholly flexible standard.

Thus, although the Court has adopted more flexible standards for determining fourth amendment questions, it has resisted efforts to institute a test as flexible as that adopted in *Chaidez*. It has continued to work within the basic framework established by *Terry*, distinguishing between less intrusive seizures that require reasonable suspicion, and more intrusive seizures that require probable cause.

IV. THE FLEXIBLE STANDARD

A number of arguments support a flexible standard. Arguably, a flexible standard defines constitutional boundaries most precisely. It can adapt to the variety of fact situations that arise and must be resolved. It does not hamper the police with an arbitrary and ill-fitting rule. On the other hand, a flexible standard arguably presents disadvantages. It may provide elusive protection, giving too little guidance to courts and police. If outcomes cannot be predicted from case to case, the standard cannot give adequate protection. This section of the Article discusses the strengths and weaknesses of a flexible standard.

A. Elusive or Precise?

The *Chaidez* court reasoned that its sliding scale provides a better definition of fourth amendment rights than a test that sorts conduct into one of a few categories, each governed by a particular rule. The standard adopted in *Chaidez* is arguably a more precise definition and offers more precise protection of fourth amendment rights.

If all seizure cases are sorted into two categories, many will fit badly. A fixed rule cannot contemplate and accommodate the broad range of

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63. *Id.* at 7 (citations omitted).
police-individual interactions. In the Chaidez court's view, the established rules prohibit government conduct that more precisely tailored fourth amendment rules would permit.\textsuperscript{64} Therefore, the fixed rule generates "near miss" cases, in which the conclusion that the police action violated fourth amendment rights will be distasteful. The Chaidez court suggests that courts have reacted to such distaste by stretching the inflexible rule to fit the case.\textsuperscript{65} The court reasons that the resulting decisions both deprive the rule of its intended significance and resolve difficult cases without candidly evaluating the fourth amendment issues in light of the governing principles rather than the ill-fitting rule.\textsuperscript{66}

Certainly, the attempt to define bright line rules to guide fourth amendment analysis poses problems.\textsuperscript{67} A bright line rule necessarily cuts too broad a swath. In some instances, the bright line permits government conduct that the general standard, precisely applied, would not.\textsuperscript{68} For example, the rule in \textit{New York v. Belton},\textsuperscript{69} which authorized the police to search the entire interior of a car when they arrest a recent occupant of the car, permits searches that cannot be justified under the more general rule permitting searches incident to arrest.\textsuperscript{70} Under \textit{Belton}, the police can search areas of the car outside the grabbing distance of the arrestee.\textsuperscript{71} The bright line rule thus relieves the police of judgment calls

\textsuperscript{64} United States v. Chaidez, 919 F.2d 1195, 1197-98.

\textsuperscript{65} The court stated: "[b]oth the permissible reasons for a stop and search and the permissible scope of the intrusion have expanded beyond their original contours in order to permit reasonable police action when probable cause is arguably lacking." \textit{Chaidez}, 919 F.2d at 1998.

\textsuperscript{66} The court stated: "Trying to force a continuous world into two categories is not only impossible but also unnecessary when the text of the Constitution calls for an inquiry into 'reasonableness.'" \textit{Id}. at 1197.

\textsuperscript{67} \textit{See generally} LaFave, \textit{Being Frank}, supra note 28.

\textsuperscript{68} \textit{See, e.g.,} Michigan v. Summers, 452 U.S. 692 (1981) (Court held that detention of persons at the scene of a search warrant is permissible incident to the execution of that warrant if (1) those persons are "occupants" and (2) the warrant authorizes a "search for contraband" rather than a "search for evidence"); United States v. Robinson, 414 U.S. 218 (1973) (Court concluded that "a police officer's determination as to how and where to search the person of a suspect whom he has arrested is a quick ad hoc judgment which the fourth amendment does not require to be broken down in each instance into an analysis of each step in the search.") \textit{See also} Wayne R. LaFave, \"Case-by-Case Adjudication\" Versus \"Standardized Procedures\": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127 (1974).

\textsuperscript{69} 453 U.S. 454 (1981).

\textsuperscript{70} \textit{See generally} LaFave, \textit{Being Frank}, supra note 28.

\textsuperscript{71} \textit{See United States v. Karlin}, 852 F.2d 968, 972 (7th Cir. 1988) (upholding search incident to arrest of automobile's passenger compartment even though defendant had already been handcuffed and placed in a squad car); United States v. McCrady, 774 F.2d 868, 872 (8th Cir. 1985) (upholding search incident to arrest of automobile's passenger compartment even though defendant, who was a recent occupant of the automobile, had already been transported to the police station); \textit{see also} United States v. Pino, 855 F.2d 357, 364 (6th Cir. 1988) (upholding search of rear section of mid-sized station wagon); United States v. Russell 670 F.2d 323, 327 (D.C. Cir. 1982), cert. denied, 457 U.S. 1108 (1990) (upholding search of hatchback).
about where to search when they arrest an occupant of a car but does so at the expense of fourth amendment protection.

In other instances, the bright line rule prohibits as unconstitutional government conduct that would be approved under the general standard. The clearest example in this category—Miranda v. Arizona—lies outside the fourth amendment. Miranda enforces the fifth amendment by excluding statements taken without compliance with fixed procedures. Miranda excludes statements even if the defendant was not actually coerced.73

In Chaidez, the court reacted to its perception that categorizing investigative seizures into Terry seizures and arrests, with no middle ground, results in both types of problems. The court remarked: “[p]igeonholing is not boon for defendants: it has put considerable pressure on the limits of the Terry doctrine.”74 It later noted that its approach would protect fourth amendment interests “without hampering reasonable investigative techniques by the police.”75

Chaidez does not necessarily solve this problem. On one hand, it relieves pressure to expand Terry by succumbing to that pressure and giving greater latitude to the government. Under Chaidez the police can engage in more intrusive conduct without facing a probable cause requirement. On the other hand, it subjects the police to the risk of judicial second guessing. Rather than being told specifically what investigative techniques are reasonable, the police will learn case by case. Another argument made in favor of Chaidez is that the more broadly defined standard also keeps the focus on the rationale for the protection, whereas application of a fixed rule may degenerate into parsing the language of the rule.76 Some fixed rules have generated such problems. For example, the Supreme Court developed rules for evaluating probable cause in Aguilar v. Texas77 and Spinelli v. United States,78

73. WHITEBREAD & SLOBOGIN, supra note 3, § 16.06.
74. Chaidez, 919 F.2d at 1198.
75. Id.
76. The development of the law of interrogation after Miranda v. Arizona was decided illustrates this phenomenon. The post-Miranda cases dwell on the definitions of custody and interrogation and do not discuss the impact of the procedures employed on the suspect. See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, §§ 6.5-6.10 (1985); WHITEBREAD & SLOBOGIN, supra note 3, §§ 16.04-16.08.
77. 378 U.S. 109 (1964) (Court developed a two-prong test to determine whether probable cause existed where government agents relied upon an informant’s tip to obtain a search warrant; the first prong evaluated the veracity of the informant’s tip by assessing the underlying circumstances that formed the basis of the informant’s conclusions and the second prong focused on the informant’s reliability).
78. 393 U.S. 410 (1968) (re-affirming the Aguilar two-prong test).
but abandoned them in *Illinois v. Gates.* The Court concluded in *Gates* that the rules had dominated discussion and distracted the courts from the underlying question of whether the information presented was sufficient for probable cause. Focusing on the standard rather than specific rules interpreting the standard avoids this problem. However, the area of the law which *Chaidez* addresses is not plagued by over-precise rules. In interpreting *Terry* the courts have resisted pressure to adopt per se rules.

A flexible "reasonableness" standard, moreover, does not necessarily lead to precise and unbiased assessment of fourth amendment interests. The *Chaidez* standard assumes levels of suspicion fall along a continuum between reasonable suspicion and probable cause. Defining intermediate levels of suspicion falling between reasonable suspicion and probable cause is extremely difficult.

Moreover, the influence of cases decided under the old standard will skew the development of fourth amendment law under a flexible standard. Under the old standard, the courts apply *Terry* to encounters in which the police impose significant restraints on the individual. Cases decided under the old standard already occupy positions on the continuum. A court applying a flexible standard will refer to those cases as guides. For example, the courts have held in numerous cases that investigative detentions at gun point were *Terry* stops and could therefore be

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79. 462 U.S. 213, 238-39 (1983) (holding that the test is whether, under the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed).

80. The court concluded:

We agree . . . that an informant's veracity, reliability and basis of knowledge are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case. Rather, . . . they should be understood simply as closely intertwined issues that may usefully illuminate the . . . practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

Id. at 230.


82. See generally LAFAVE, supra note 3, § 9.2.

83. In *Chimel v. California*, 395 U.S. 752, 765 (1969), the Court commented as follows on the hazards of a "reasonableness" test:

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.

84. See Tracey Maclin, Seeing the Constitution From the Backseat of a Police Squad Car (book review), 70 B.U. L. REV. 543, 564 (1990); Maclin, Decline of the Right of Locomotion, supra note 28; see also United States v. Montoya de Hernandez, 473 U.S. at 541 ("subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question").
justified by a showing of reasonable suspicion. Under a new, flexible standard, comparable encounters are likely to be upheld easily on the basis of reasonable suspicion, since they fall within the established zone of government behavior authorized under *Terry*. The new rule's flexibility is likely to be employed for those situations in which the intrusion is more extreme than any authorized under *Terry*, but the police do not have the probable cause required for an arrest. The government can invoke the flexible rule to uphold such intrusions on some justification falling between reasonable suspicion and probable cause.

Looking in the other direction, the government may also invoke the flexible rule to uphold fourth amendment intrusions not supported even by reasonable suspicion. The government can argue, moving down the continuum, that a very limited seizure is less than a *Terry* stop and is justified even in the absence of reasonable suspicion. Thus, the movement encouraged by the rule enlarges the government's authority to impose restrictions on individual fourth amendment rights.

Similarly, *Llaguno* encourages a more relaxed definition of probable cause that authorizes government action on less information in serious cases. It is possible, but less likely, that it would be invoked to require a higher quantity of evidence to support government action in less serious cases.

In addition, a reasonableness test is likely to be biased in favor of the judgment exercised by the police. The court deciding a case will view the actions through the eyes of the police and ask whether, from that vantage point, the actions were reasonable. The information on which the decision rests is predominantly police testimony given at the suppression hearing. The individual complaining of a fourth amendment violation will testify far less often. The crucial question is what the police knew; the perspective of the complaining individual is not determinative.

### B. Consistency Versus Flexibility

Arguably, the flexibility of the *Chaidez* rule is an attractive fea-

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85. See *supra* notes 45, 48, and 58 and accompanying text.
87. The majority of cases are decided on the basis of testimony given at the suppression hearing held before a criminal trial.
ture.\textsuperscript{88} On the other hand, a fixed rule arguably fosters consistency and uniformity in the protection of the constitutional interests involved. Guidance in fourth amendment law is difficult to achieve because the decisions are fact specific. Nevertheless, guidance will be more effective if the rules are well defined.\textsuperscript{89}

The Seventh Circuit is moving to rules that are fact specific in the extreme, making consistency of result unlikely.\textsuperscript{90} This move is unwise and unnecessary. Courts can analyze cases effectively and adequately within the framework of the existing rules. The line between a stop and an arrest is already drawn with some flexibility. The court acknowledged that flexibility in United States \textit{v.} Serna-Barreto,\textsuperscript{91} when it stated:

The distinction between a stop and an arrest is one of degree, so it is not surprising that the courts have had difficulty in coming up with a bright-line test. Instead, they have tended to follow the laundry-list approach, well illustrated by the list (not exhaustive) of factors (all relevant, none decisive, and no indication of how to weigh or compare them) in United States \textit{v.} White . . . : officer's intent, impression conveyed, length of stop, questions asked, search made.\textsuperscript{92}

Indeed, the Chaidez court was misled by a similar discussion of that flexibility in United States \textit{v.} Quinn\textsuperscript{93} and cited it as advocating a sliding scale test like the one Chaidez adopted.\textsuperscript{94} In Quinn, the Court of Appeals for the First Circuit recognized the flexibility in the test for the line between stops and arrests:

No mechanical checklist has been assembled to facilitate distinguishing between such investigative stops, on the one hand, and those detentions, on the other, which, though not technical, formal arrests are the "equivalent of an arrest" and therefore require probable cause. . . . Rather the cases have used a balancing test to assess these intrusions, weighing "the limited violation of the individual's privacy against the opposing interests in crime prevention and detection and in the police officer's safety."\textsuperscript{95}

Thus, Quinn did no more than acknowledge and apply the flexible test developed under Terry.

Applying the standards for distinguishing stops and arrests, the

\begin{itemize}
\item \textsuperscript{88} United States \textit{v.} Chaidez, 919 F.2d 1195, 1196 (7th Cir. 1990). \textit{See generally} Wasserstrom & Seidman, \textit{supra} note 44.
\item \textsuperscript{89} \textit{See generally} William A. Schroeder, \textit{Factoring the Seriousness of the Offense into Fourth Amendment Equations}, 38 U. KAN. L. REV. 439 (1990).
\item \textsuperscript{90} \textit{See} Wasserstrom & Seidman, \textit{supra} note 44, at 48.
\item \textsuperscript{91} 842 F.2d 965 (7th Cir. 1988).
\item \textsuperscript{92} \textit{Id.} at 967. \textit{See also} Dix, \textit{supra} note 28, for a general discussion of criteria for classifying seizures.
\item \textsuperscript{93} 815 F.2d 153 (1st Cir. 1987).
\item \textsuperscript{94} Chaidez, 919 F.2d at 1198.
\item \textsuperscript{95} 815 F.2d at 156.
\end{itemize}
courts have derived reasonably consistent results. Decisions evaluating police use of guns to effect stops illustrate the courts' ability to work with the existing rules. In a number of cases, the police have used their firearms to seize a suspect and have contended in court that the seizure did not rise to the level of an arrest but remained a stop, justifiable by reasonable suspicion. The question for the courts has been whether the "manner of the stop . . . convert[ed] the investigatory stop into an arrest," requiring probable cause. The courts have rejected a per se rule, stating "a Terry stop does not become an arrest merely because an officer pointed a gun at a suspect." The courts have therefore looked to a number of factors, including the nature of the crime, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police. In most of the decisions addressing this question, the courts have determined that, under the circumstances, the police could use the challenged degree of force to effect the stop. In a few cases, the courts have held that the force exceeded that permitted for a stop and the police had effected an arrest.

The cases illustrate the consistency of result achieved under the existing standards. They also illustrate the flexibility inherent in determining the line between a Terry stop and an arrest. That flexibility provides room to deal with the factual variations of new circumstances but does not provide so much room that it defeats consistency. For example, the Seventh Circuit determined, even though he used his gun, the officer had not transformed the investigative stop, for which he had adequate justification, into an arrest, for which he did not. In Ocampo, the officer drew his gun as he approached the defendant's car, removed the defendant from the car, and retrieved a gun that the defendant had kicked under the passenger's seat. The court stated:

96. See cases cited infra notes 97 and 98.
99. Ocampo, 890 F.2d at 1369.
100. See United States v. Lane, 909 F.2d 895, 900 (6th Cir. 1990), cert. denied, 111 S. Ct. 977 (1991); Alvarez, 899 F.2d at 838-39; Serna-Barreto, 842 F.2d at 967-68; see also, cases cited in LAFAVE, supra note 3, § 9.2.
101. See United States v. Del Vizo, 918 F.2d 821 (9th Cir. 1990); United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1295-96 (9th Cir. 1988).
102. See generally WHITEBREAD & SLOBOGIN, supra note 3, § 9.03.
103. 890 F.2d 1363 (7th Cir. 1989).
104. Id. at 1367.
105. Id. at 1366.
"[T]he question of whether a seizure is an investigatory stop or an arrest involves the determination of whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the circumstances at hand." The court acknowledged that the officer's show of force would have been "tantamount to an arrest" in some cases, but held that under the circumstances it was warranted. Therefore, the initial interaction did not amount to an arrest.

Ocampo recognized flexibility in the line between a Terry stop and an arrest. Its approach treats the justification as a factor in selecting the appropriate standard. That is, because the circumstances justified more intrusive action, the court judges the action as a Terry stop rather than an arrest.

In United States v. Novak, the court evaluated the factors and concluded that the purported stop had become an arrest. In Novak, the defendant was stopped by 6 to 9 law enforcement officers, one of whom drew her gun on the defendant. The officers had no information suggesting the defendant was dangerous and nothing in the defendant's reaction to the officers signalled danger.

The flexibility reflected in these and other cases permits the courts to assess the appropriateness of the behavior justified by reasonable suspicion with consistency. It does not launch the courts into a case by case balancing test to determine whether the level of suspicion was high enough to support the action taken, even if that action went beyond the temporary interference permitted by the Terry line of cases. The courts would be unlikely to achieve consistency applying such a flexible rule.

C. A Guide to On-the-Street Behavior?

Whether the courts choose a flexible standard or a more defined standard will depend on how the court views the role and effectiveness of rules defining fourth amendment protection. If the court intends fourth amendment rules to guide and influence police behavior, the court will try to define the rule in terms that a law enforcement officer can hope to understand and apply with some degree of accuracy. On the other hand,

106. Id. at 1369.
107. The court stated: "The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the approach of the police are all facts which bear on the issue of reasonableness." Id. at 1369. The court then concluded: "In sum, after analyzing all the circumstances surrounding the seizure of the defendants, we do not find the officer's conduct so intrusive and unreasonable as to constitute an arrest; the officer's actions were reasonably related in scope to the circumstances at hand." Id. at 1370.
108. 870 F.2d 1345 (7th Cir. 1989).
109. Id. at 1351.
if the court intends the rules to provide an after-the-fact mechanism for protecting fourth amendment rights, the court will be satisfied if the rule is suitable for judicial application, even if the rule provides little guidance to law enforcement officers.

Fourth amendment rules should partake of both characters. The courts must define the rules to effect the purpose of the fourth amendment. That purpose includes limiting intrusive governmental conduct. A rule that provides no guidance to on-the-street behavior cannot effectively restrict unconstitutional governmental conduct.¹¹⁰

The current standards arguably provide so little guidance that moving to standards as general as those articulated in Chaidez and Llaguno sacrifices nothing. The standards defined by Terry have been criticized as too vague.¹¹¹ It has been argued that both the definition of reasonable suspicion and the distinction between an arrest and a Terry stop give inadequate guidance to on the street conduct.¹¹² Persuaded by that argument, the Chaidez court concluded that it would sacrifice nothing of value if it abandoned the pretended precision of the existing rules and adopted a less well defined rule that more precisely reflects an appropriate state-individual balance.

The courts have often expressed their awareness that fourth amendment rules must guide the police. The Supreme Court has addressed the question of how effectively fourth amendment law translates into a guide for police behavior.¹¹³ To a great extent, fourth amendment law has developed in the context of the exclusionary rule intended as a deterrent to unconstitutional behavior. The Court's concern has sometimes been not whether the police can understand the fourth amendment rule, but whether the exclusionary rule will induce them to follow the rule. In Terry, the Court stated: "[the exclusionary rule] is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."¹¹⁴ The courts should not dilute the definition of fourth amendment rights to accommodate their

¹¹⁰ See LaFave, The Robinson Dilemma, supra note 68, at 141. Other, non-constitutional limitations on police conduct exist, but are beyond the scope of this Article. See generally Dix, supra note 28.

¹¹¹ See generally LAFAVE, supra note 3, § 9.3(a), at 423-29; Maclin, Decline of the Right of Locomotion, supra note 28; Dix, supra note 28; Schwartz, supra note 86, at 449.

¹¹² LAFAVE, supra note 3, § 9.1.


¹¹⁴ Terry, 392 U.S. at 14. See generally J. DAVID HIRSCHEL, FOURTH AMENDMENT RIGHTS (1979) (discussing remedies for fourth amendment violations); Caleb Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955) (discussing need for remedies to supplement the exclusionary rule).
limited power to prompt police observance of fourth amendment rights. Rather, the courts should define the rule to give some guidance. If the rule is well-defined, the retrospective decision that the police, however well intentioned, failed to comply may serve to guide future action.

In some circumstances, the Supreme Court has adopted bright line rules to permit easy application on the street, as well as to ease the courts’ administrative burden. Unfortunately, bright line rules are not wholly satisfactory. A bright line rule will either over-restrict the police or under-protect the affected fourth amendment interest. In addition, even if courts can use bright line rules to guide the police in some situations, the courts cannot craft a bright line rule for every fourth amendment question.

Even when a bright line rule is inappropriate, however, the fourth amendment standard will normally provide some on-the-street guidance. When the courts apply a non-bright line rule to specific factual situations, their decisions illustrate the rule’s intended role and increase its impact on police behavior. The abstract articulation of the standard is unlikely to be helpful to the police. Judicial decisions provide more effective illustrations if the courts tie the illustrations to specifically articulated rules.

At this point, the courts’ decisions applying Terry provide some guidance to the police. Chaidez enunciates a standard that would less effectively guide on the street conduct. The more general the standard applied in the decisions, the less guidance they provide. A standard that requires the courts to determine reasonableness by balancing the degree of the intrusion and the level of suspicion requires police to engage in the same balancing. On-the-street balancing, however, is a difficult task. The investigating officer who wants to go beyond a Terry stop is asked to

115. See generally LaFave, Being Frank, supra note 28, at 449-51; LaFave, supra note 3; Whitebread & Slobozin, supra note 3.
116. See supra notes 45 and 58 and accompanying text.
117. But see Richard H. Uviller, Tempered Zeal 77 (1988) (discussing the confusion of the police concerning the boundaries of the fourth amendment).
118. See LaFave, supra note 3. See also Hirschel, supra note 114 (discussing understanding of applications of fourth amendment rules); Uviller, supra note 117 (recounting instances in which the police reflected misunderstanding of fourth amendment law).
119. It is nevertheless clear that the police can be confused about the law. See generally, Uviller, supra note 117; Hirschel, supra note 118.
120. See generally Schroeder, supra note 89.
determine whether her level of suspicion warrants the intrusion. She must consider factors such as the severity of the offense, the weight of the information justifying the action, and the extent to which her action exceeds a *Terry* stop. She must then ask whether the combination of factors falls on the continuum of justified actions between *Terry* stops and arrests.

The *Chaidez* approach envisions too broad a scale and too flexible a test. The judicial decisions would merely balance the facts of each case and place the outcome of the balancing on a broad continuum. The illustrations would be too fact-specific to guide governmental conduct.\(^{121}\)

**D. Impact on "the security of one's privacy against arbitrary intrusion by the police"**\(^{122}\)

For a number of reasons, the flexible approach of the Seventh Circuit will lead to diminished protection in practice. A flexible rule may be academically defensible yet destroy constitutional protection through its practical application. One persistent argument for simpler and brighter line rules is that they provide better guidance for the law enforcement officers principally responsible for respecting fourth amendment rights. Rules that tell the government that an intrusion at the level of an arrest requires probable cause and lesser intrusions require reasonable suspicion is not as clear as a rule authorizing the police to conduct a thorough search of the person of any individual arrested. Nevertheless, it gives some guidance. It tells the police that their cases will be sorted into two categories. Therefore, they must watch the degree of intrusion and the degree of justification and must not impose arrest-type restrictions unless they have probable cause to arrest.

A flexible standard gives no direction. It simply leaves the police to exercise their best judgment of what intrusion is justified by the information they possess and lets them know that the court will consider all the circumstances and evaluate the reasonableness of their conduct.\(^{123}\)

The police actions governed by *Chaidez* pose acute risks to fourth amendment interests. Police actions that fall short of arrest but nevertheless reflect criminal investigative action pose particular problems. These interactions represent the middle range of fourth amendment activity, where the exercise of discretion by the police may profoundly af-

\(^{121}\) See generally Maclin, *Decline of the Right of Locomotion*, supra note 28 (discussing the problems of standards that are too fact specific); LaFave, *Being Frank*, supra note 28.


\(^{123}\) See generally Schroeder, *supra* note 89.
fect the individual’s sense of freedom from arbitrary intrusion on privacy. Although less than an arrest, a *Terry* type action represents an intrusive disruption of the flow of daily life in circumstances in which the individual will be regarded as and treated as a criminal. Evaluating these interactions under a general formula on a case by case basis enhances those risks by leaving too much to police discretion.

The intrusions that generate civil action may best illustrate the intrusiveness of the government action. Occasionally, a plaintiff will sue for a fairly short detention. More often, the cases rest on allegations of arrest or excessive force. Some fall in between. *Buffkins v. City of Omaha* and *James v. Sadler* demonstrate the impact of police investigation on the individual. Buffkins arrived at the Omaha airport and was met by her sisters. She caught the attention of two police officers because she was the only black person who got off the plane and because she carried a teddy bear that appeared to have resewn seams. The officers had received a tip that "a black person or persons arriving on a flight from Denver" before 5:00 would be importing cocaine into Omaha. Therefore, one officer approached Buffkins. After identifying himself and showing her the identification she requested, he asked Buffkins "to bring her luggage and come with them to answer questions." They told her sister she could leave. In addition, they informed Buffkins of the tip that had prompted their action. They then took her luggage and escorted Buffkins and her sister to their office on the other side of the terminal. One officer "kneaded and felt" the teddy bear. They asked to search her luggage. She refused. "The officers eventually informed Buffkins that she was free to go and told her to 'have a nice day.'"

In *James*, the plaintiff, a minor, was at the beauty salon having her hair done when agents of the Bureau of Narcotics raided the salon. With a permanent wave solution on her hair and curlers in her hair, plaintiff was taken from under a hair dryer, patted down and instructed to wait

124. For an example of the intrusiveness of investigative action, see Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990). See generally Maclin, *Book Review, supra* note 84; Maclin, *Decline of the Right of Locomotion, supra* note 28.
125. See, e.g., Brooks v. Cook, 874 F.2d 815 (9th Cir. 1989).
127. 922 F.2d 465 (8th Cir. 1990).
128. 909 F.2d 834 (5th Cir. 1990).
129. 922 F.2d at 467.
130. Id.
131. Id.
132. Based on her response to this, the officers arrested Buffkins for disorderly conduct.
outside while the search of the salon proceeded. After 40 minutes, she was permitted to leave. By the time she reached home and rinsed her hair, the chemicals in the solution had already damaged her scalp.\textsuperscript{133}

Both \textit{Buffkins} and \textit{James} illustrate that an intrusion less than an arrest can cause significant harm to fourth amendment interests. Two fourth amendment concerns are acute in this context—erroneous intrusion and abusive exercise of governmental authority. First, seizures less intrusive than arrest represent a category of police-individual contact in which errors are likely to be made, leading the police to treat individuals as criminally suspect when, in fact, there is no well-founded reason. This situation exists because the standard for intrusion is low. The lower the standard, the greater the number of cases in which the intrusion carried out will not prove to be warranted.\textsuperscript{134}

Second, harassment is risked because the police can engage in these fourth amendment intrusions abusively with little risk of accountability.\textsuperscript{135} The Court acknowledged this risk in \textit{Terry},\textsuperscript{136} and others have since remarked on the risk.\textsuperscript{137} The low standard applied to the police exercise of judgment creates great opportunity for arbitrary and abusive exercise of discretion. The difficulty of judicial supervision, discussed below, compounds the problem. A judicial check on that judgment is applied in only a small percentage of the cases and, then, after the fact, with the circumstances reconstructed in the courtroom. Applying a sliding scale to more intrusive actions, such as the arrest in \textit{Llaguno} and the detention in \textit{Chaidez}, creates the risk that they, too, will be employed abusively. The abuse, when it occurs, is apt to fall most heavily on the least privileged members of society.\textsuperscript{138} By inviting overuse of arrest and

\textsuperscript{133} 909 F.2d at 835.

\textsuperscript{134} See Maclin, \textit{Book Review}, supra note 84, at 557. \textit{But see} UVILLER, \textit{supra} note 117, at 58-60.

\textsuperscript{135} See \textit{LAFAVE}, \textit{supra} note 3, § 9.1(e); Maclin, \textit{Book Review}, supra note 84, at 569, 573 (emphasizing the likelihood that the exercise of discretion permitted will have a strong negative impact on members of minority groups).

Interestingly, the absence of proof of abuse was noted by then Justice Rehnquist in his dissenting opinion in \textit{Delaware v. Prouse}, 440 U.S. 648 (1979): "Although such a system of discretionary stops could conceivably be abused, the record before us contains no showing that such abuse is probable or even likely." \textit{Id.} at 667. When it occurs, abuse may be hard to prove. The litigation culminating in the Supreme Court's decision in \textit{Rizzo v. Goode}, 423 U.S. 362 (1975), illustrates the difficulty of establishing that police conduct has violated civil rights. \textit{See also} \textit{City of Canton v. Harris}, 489 U.S. 378 (1989). It is unfortunate when constitutional protection is unavailable because of a failure of proof.

\textsuperscript{136} \textit{Terry}, 392 U.S. at 14.

\textsuperscript{137} \textit{See}, e.g., Maclin, \textit{Decline of the Right of Locomotion}, supra note 28.

near-arrest, not just stop and frisk, these cases threaten the security of
the individual against arbitrary police intrusion.

The Chaidez court based its reasoning in part on the Supreme Court
decisions upholding administrative searches and seizures. The
problems posed by seizures for criminal investigation are markedly dif-
f erent from fourth amendment issues raised by administrative
searches. For example, in National Treasury Employees Union v. Von
Raab the Court approved testing federal employees for drugs in the
absence of any particularized suspicion. The searches conducted under
Von Raab will frequently invade the fourth amendment privacy of indi-
viduals whose lives raise no suggestion of wrongdoing. The Court ac-
knowledged that “all but a few of the employees tested are entirely
innocent.” Administrative searches are almost by definition over-in-
clusive; they frequently invade the privacy of innocent individuals. In
contrast, the risk of focussing on an undeserving individual is lower in a
Terry interaction, because some level of suspicion is required. The risk is
nevertheless substantial, because the level of suspicion is so low.

Also, more error will be tolerated in administrative searches because
the circumstances and manner in which they are conducted reduces the
harm to fourth amendment interests. An undeserved intrusion under
Chaidez effects greater harm. Because administrative searches are con-
cededly over-inclusive, the stigma of the seizure as well as the negative
subjective reaction it produces are less. The individual is treated with a
group concededly composed largely of non-offenders. By contrast, in
the cases governed by Chaidez, the individual has been singled out for
criminal investigation. The disruption of fourth amendment interests
and personal debasement are consequently greater.

In addition, administrative searches occur in a procedural frame-
work that assures regularity and lack of discretionary intrusion. The

Super. 21, 588 A.2d 834 (App. Div. 1991) (minority defendants who had been stopped on the high-
ways demonstrated that criminal prosecutions arising out of traffic stops fell disproportionately on
members of the minority group).
140. See generally Stephen J. Schulhofer, On the Fourth Amendment Rights of the Law-abiding
142. Id. at 674.
143. See generally Schulhofer, supra note 140, at 110 (administrative searches encompass a
broader group and consequently generate less stigma).
144. The Court has emphasized the expectation that administrative searches will generate less
negative subjective reaction. See, e.g., Michigan Dept. of State Police v. Sitz, 496 U.S. 444; Marti-
J. dissenting).
145. See Maclin, Book Review, supra note 84.
Supreme Court has repeatedly stressed this aspect of the searches. In contrast to administrative searches, the types of interactions covered by Chaidez entail the maximum play of discretion. The Chaidez approach therefore represents a tremendous threat to the individual's security.

It is difficult to predict the limits of the court's new approach. In Chaidez and Llaguno members of the court willingly expanded the bases on which the government can justify fourth amendment intrusions by adopting sliding scale standards. These decisions permit arrest on a lower level of suspicion than ordinary probable cause and sub-arrest seizure of the person if there is more than ordinary reasonable suspicion. This balancing approach could logically be extended to permit more expansive Terry searches if the police had more suspicion than that usually required. It could also extend to the lowest level of Terry seizure, permitting justification at less than ordinary reasonable suspicion.

V. ELUSIVE REVIEW

Not only is a flexible standard hard for police to follow, it is also hard for courts to police. Our system of supervision has deficiencies. Many cases go unreviewed. The cases that receive judicial review give a skewed picture of police responsibility. Moreover, if the courts apply a deferential standard of review, the impact of judicial review is diminished to the point of insignificance.

Courts generally review only criminal investigative stops that lead to the discovery of evidence of crime. If the stop produces no evidence,

146. For example, in Martinez-Fuerte the court approved the practice of conducting checkpoint stops without warrants. United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976). The court reasoned that one purpose of the warrant requirement is "to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." Id. at 565 (citation omitted). In the case of checkpoint stops, however, the court did not anticipate such distortion because "[t]he reasonableness of checkpoint stops . . . turns on factors such as the location and method of operation of the checkpoint, factors that are not susceptible to the distortion of hindsight . . . ." Id.; see also Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (Court noted that guidelines governing checkpoint operation minimize the discretion of the officers on the scene); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.2 (1989) (citation omitted) (Court determined that the procedures prescribed by the customs service [at a border checkpoint stop] . . . do not carry the grave potential for "arbitrary and oppressive interference with the privacy and personal security of individuals"); Brown v. Texas, 443 U.S. 47, 51-52 (1979)(citation omitted) (Court reversed defendant's conviction, holding that when a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits); Delaware v. Prouse, 440 U.S. 648, 661 (1979) (court held that the police acted unreasonably under the fourth amendment where they randomly stopped defendant's vehicle to check the driver's license and the registration of the automobile, concluding that "[t]his kind of standardless and unconstrained discretion is the evil the court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent"); Camara, 387 U.S. at 532 (Court concluded that requiring government officials to obtain a search warrant from a neutral and detached magistrate minimizes the discretion of "the official in the field . . . precisely the discretion . . . which we have consistently circumscribed . . .").
only a civil suit alleging violation of individual rights will bring it to the
court's attention. Thus, both the number and the type of cases receiv-
ing judicial attention are unrepresentative of what occurs on the street.

The cases reviewed by the courts do not reflect the number of times
the police encroach on fourth amendment rights and find no evidence of
wrongdoing. Courts viewing this skewed picture respond to the need
for police authority it portrays rather than the abuse of individual rights
omitted from the picture. This problem is likely to be greater when
the police action is less than an arrest. Arrests, often effected without a
warrant, suffer some of the problem of distortion of hindsight. However,
a higher percentage of arrests will be considered by the courts. The intru-
sion of an arrest signals an investigative interest in the defendant beyond
that signalled by a stop. Moreover, an arrest is a greater intrusion and
therefore may be more likely to lead to a civil suit if it is not supported by
sufficient evidence. The standards applied to arrests provide additional
protection; they are both better defined and significantly higher.

Adoption of a more flexible standard to govern a spectrum of inter-
mediate police-individual interactions heightens these problems. It
leaves more to police discretion. It generates more opportunity for un-
supported stops to lead to fruitless intrusions on fourth amendment
rights. For the same reasons, the more flexible rule makes it harder for
an aggrieved individual to make out a case for civil relief on grounds of a
fourth amendment violation. It makes it less likely that appellate deci-
sions will provide meaningful guidance to the courts or the police.

The standard of review applied to determinations of fourth amend-
ment issues will also affect the impact of a flexible rule. The law defining
the standard of review applied to fourth amendment questions is cur-
rently in a state of flux. In Chaidez, the court noted that the standard of
review is "in transition." The courts of appeals addressing the ques-
tion are not in agreement. Apparently, the majority still engages in de
novo review of warrantless action raising fourth amendment issues.

147. See sources cited supra note 114.
148. See Cloud, supra note 81 (one cannot use criminal cases alone to evaluate the accuracy of
the drug courier profile "for they are inevitably skewed in favor of the profile." ). But see Üviller,
supra note 117 (expressing belief that at least some officers have a very high rate of success). See also
Hirschel, supra note 114, at note 71 (discussing perceptions concerning "productive and unproduc-
tive police searches").
149. The good faith exception to the exclusionary rule, established in United States v. Leon, 468
U.S. 897 (1984), can be seen as reflecting such a response. See also United States v. Leon-Reyna, 930
F.2d 396 (5th Cir. 1991) (stop upheld under good faith exception even though officer's suspicion
rested on information that was erroneous due to the officer's own negligence).
150. Chaidez, 919 F.2d at 1196.
151. See United States v. Montilla, 928 F.2d 583, 588 n.2 (2d Cir. 1991) (reviewing de novo the
Some judges, however, advocate a more deferential standard—a "clearly erroneous" standard to be applied to warrantless actions as well as actions based on warrants. The standard of review can compound the difficulties presented by the adoption of a flexible fourth amendment standard. If the court applies a de novo standard and exercises its judgment with protective scrutiny, the police are likely to feel frustrated by the lack of a standard to protect them against the hazard of judicial second-guessing. More likely, however, the pattern will be that identified by Professor Amsterdam: "appellate courts defer to trial courts and trial courts defer to the police." A deferential standard encourages that result, tending to leave definition of the standard to an interested party—law enforcement.

A deferential standard generates other serious problems. Uniformity of result, already difficult to achieve under a flexible standard, is more elusive. The appellate decisions will provide almost no guidance. The appellate process will leave the lower courts free to interpret the standard except when they are clearly wrong. The police will likely have inconsistent precedent from the lower courts, inadequately guiding their on-the-street judgment calls. The result is far from precise fourth amendment protection.

VI. CONCLUSION

In Chaidez, building on the plurality opinion in Llaguno, the Court of Appeals for the Seventh Circuit introduced a more flexible test for assessing the constitutionality of seizures of the person that are more intrusive than a usual Terry stop but less intrusive than a full arrest. The court advanced a sliding scale, ad hoc balancing test. In applying the test, the primary pertinent question is whether the seizure of the person was reasonable given the level of suspicion the police officer possessed.

question of whether there has been a seizure of the person under the fourth amendment); United States v. Maragh, 894 F.2d 415, 417-18 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 214 (1990); United States v. Kerr, 817 F. 2d 1384, 1386 (9th Cir. 1987); see also United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990) (reviewing de novo the question of whether probable cause to arrest existed); United States v. Jaramillo, 891 F.2d 620, 626 (7th Cir. 1989) (reviewing de novo the question of whether police had reasonable suspicion to justify investigatory stop of defendant).

152. See United States v. Jefferson, 906 F.2d 346, 348 (8th Cir. 1990) (reviewing by a clearly erroneous standard the question of whether, under the fourth amendment to the United States Constitution, a seizure of the person occurred); United States v. Teslim, 869 F.2d 316, 321 (7th Cir. 1989); United States v. Gray, 883 F.2d 320, 322 (4th Cir. 1989); United States v. Rose, 889 F.2d 1490, 1495 (6th Cir. 1989); United States v. West, 651 F.2d 71, 74 (1st Cir. 1981), cert. denied, 469 U.S. 1188 (1985); see also United States v. Edwards, 898 F.2d 1273, 1276 (7th Cir. 1990) (reviewing district court's denial of a motion to suppress under a clearly erroneous standard).

This test is more flexible than the tests developed by the Supreme Court. The test's flexibility threatens fourth amendment rights. The Supreme Court has already moved dangerously far in the direction of adopting flexible fourth amendment standards. The *Chaidez* test goes even farther in that direction. If the test is employed, it will impede consistency of result. Under such a test, judicial action has no useful value as precedent either to guide other courts or to guide on-the-street police behavior. The net effect of a move to such an extremely flexible test is to put protection of fourth amendment rights in the discretion of the police. In the guise of precise analysis, the court has enunciated a test that would gut fourth amendment protection against investigative seizures. The court should abandon the *Chaidez* test and continue to effect fourth amendment protection within the better defined framework already established by the Supreme Court.