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toward ex-felons.[147] Moreover, a feeling of estrangement from ıe development of law-abiding would obviate these problems ilitative philosophy of punish-

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Gary L. Reback

v. Braterman, 396 U.S. 12 (1969).

Nonarrest Automobile Stops: Unconstitutional Seizures of the Person

Lower courts hold routinely that a policeman who lacks probable cause to arrest can stop a moving car to investigate suspected criminal activity by its occupants[1] or to inspect the license of the car's driver.[2] This Note evaluates the constitutional status of these nonarrest[3] seizures of motorists.[4]

United States Supreme Court cases make clear that some seizures based on less than probable cause to arrest are constitutional. In *Terry v. Ohio*,[5] the Court upheld a seizure of a stationary pedestrian based on less than probable cause. In *Adams v. Williams*,[6] the Court applied the *Terry* rule to uphold a seizure of the occupant of a parked car. Clearly, however, *Terry* and *Adams*, which arose in other contexts, do not settle the constitutional status of nonarrest automobile stops.[7]

This Note contends that when a police officer without probable cause to arrest[8] stops a moving[9] car[10] in order to confront the occupants of the

1. *See* the cases cited in note 30 *infra*.
2. *See* the cases cited in note 33 *infra*.
3. In this Note, the term "nonarrest stop" embraces stops based on less than probable cause to arrest undertaken for the purpose of investigating suspected criminal activity, *see* text accompanying notes 30–31 *infra*, or for the purpose of inspecting driver's licenses, *see* text accompanying notes 32–34 *infra*.
4. For purposes of this Note, "motorist" includes any occupant of a moving car.
5. 392 U.S. 1 (1968).
6. 407 U.S. 143 (1972).
7. In case law the term "stop" has come to mean a brief seizure of a person for investigation based on reasonable suspicion of criminal involvement. *See id.* at 146; Terry v. Ohio, 392 U.S. 1, 8, 10 (1968). This terminology is unfortunate because it obscures the facts that: an individual who is stationary may be seized, *see* note 19 *infra* and accompanying text; an individual may have been seized even though he is still moving, *see* note 21 *infra*; the Supreme Court has not upheld an investigative seizure of a moving individual, *see* text accompanying notes 43–46 *infra*; and stopping of vehicles other than for investigative seizures raises seizure issues, *see* text accompanying notes 20–21 *infra*.
In order to avoid some of this confusion, "stop" will be used in this Note only to describe seizures resulting from police interruption of a vehicle's movement. A stop, however, occurs when a policeman directs a motorist to halt his car, rather than at the termination of movement. *See* note 21 *infra*. *See also* note 38 *infra*. A seizure for investigation of a stationary individual, *see* note 18 *infra*, will be referred to as an "investigative seizure."
8. *See* text accompanying note 29 *infra*.
9. The Supreme Court has held that the occupant of a parked car may be seized for investigation on less than probable cause to arrest. Adams v. Williams, 407 U.S. 143 (1972). In addition, the Court indicated in remanding Rios v. United States, 364 U.S. 253, 262 (1960), that a policeman without probable cause to arrest could approach the occupant of a taxicab stopped temporarily at a red light for "routine interrogation." The Court did not characterize the encounter in *Rios* as a seizure, and the case may rest on the ground that any citizen can approach a stationary car, *see* Terry v. Ohio, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring), rather than on the ground that a justified seizure occurred. Nonetheless, because the factor of movement is central to the analysis in this Note, *see* texts accompanying notes 61–75 & 87–92 *infra*, the occupant of a car stopped temporarily at a traffic signal or other "barrier" not erected specifically for the purpose of stopping cars to confront their occupants will be treated as equivalent to the occupant of a parked car. *Cf.* Brinegar v. United States, 338 U.S. 160, 188 (1949) (Jackson, J., dissenting).
10. Automobile search doctrine, *see* note 11 *infra*, is sometimes viewed as a subset of a broader doctrine governing search of mobile vehicles. *See* Carroll v. United States, 267 U.S. 132, 144–56 (1925). Discussion here will be directed to automobile stops because most vehicle stop cases arise in this context. The analysis in the Note, however, applies equally well to stops of other private vehicles, such as

car,[11] he violates the fourth amendment guarantee against unreasonable seizures of the person.[12] The Note begins by demonstrating that an automobile stop is a seizure and then considers the case law presently governing stops. Next it discusses the state and individual interests involved in nonarrest stops and the two models which Supreme Court cases suggest for balancing these interests. Finally, the Note shows that analysis and precedent compel the conclusion that a moving car may be stopped in order to confront its occupants only upon probable cause to arrest and that nonarrest seizures of motorists are therefore unconstitutional.

I. Present Automobile Seizure Law

A. *Automobile Stops Are Seizures*

In *Terry*, the Supreme Court wrote that "not all personal intercourse between policemen and citizens involves 'seizures' of persons."[13] Examination of the *Terry* Court's characterization of a seizure, however, indicates clearly that the constitutional prohibition against unreasonable seizures of the person regulates automobile stops.

The *Terry* Court, considering a policeman's encounter with a stationary pedestrian,[14] wrote that a seizure occurs whenever a policeman, by "physical force or show of authority,"[15] restrains an individual's "freedom to walk away."[16] Generalizing from the case of a stationary pedestrian,

boats or airplanes. On the other hand, the analysis is inapplicable when an individual utilizes public transportation because the use of public transportation weakens, *cf.* texts accompanying notes 59–60 & 66–67 *infra*, or makes inapplicable, *cf.* texts accompanying notes 61–65 & 68–75 *infra*, some of the fourth amendment interests discussed in the Note.

11. For purposes of this Note, "to confront" means to make an arrest, to seize for investigation, or to seize for a driver's license inspection. In some cases, however, vehicle stops are made to effectuate lawful searches, of which an encounter with the vehicle's occupants is a "necessary part." Plazola v. United States, 291 F.2d 56, 59 (1961), *overruled in part*, Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966). Such stops presently take three forms. (1) A moving car may be stopped and searched in the absence of probable cause to arrest, if the searching officer has probable cause to believe seizable material is secreted in the car. Chambers v. Maroney, 339 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). (2) Border searches may be made of any vehicle entering the United States. Deck v. United States, 395 F.2d 89 (9th Cir. 1968); Almeida-Sanchez v. United States, 93 S. Ct. 2535, 2539 (1973) (dictum); Carroll v. United States, *supra* at 154 (dictum). (3) Vehicle stops may be made for equipment inspections without suspicion of a violation. People v. De La Torre, 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (2d Dist. 1967). *But see* Commonwealth v. Swanger, —— Pa. ——, 307 A.2d 875 (1973) (vehicle inspections other than at roadblocks cannot be made absent probable cause to suspect violation). Stops to effectuate lawful searches are beyond the scope of this Note, but it should be noted that the arguments advanced in the Note for the unconstitutionality of inspection stops, *see* text accompanying notes 93–100 *infra*, also apply to stops of individual vehicles for equipment inspections absent evidentiary justification.

In addition, those portions of a vehicle into which an arrestee may readily reach to gain possession of a weapon or destructible evidence may be searched incident to a valid arrest. *See* Chimel v. California, 395 U.S. 752, 763–64 (1969); *cf.* People v. Koehn, 25 Cal. App. 3d 799, 102 Cal. Rptr. 102 (5th Dist. 1972). *But see* note 27(3) *infra* (limitations on search incident to traffic arrest). Finally, some courts have found a search of a vehicle for weapons during a valid investigative stop permissible if there is reason to think there are weapons in the car. *See* note 40(6) *infra*.

12. U.S. Const. amend. IV.

13. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

14. *Id.* at 6–7.

15. *Id.* at 19 n.16.

16. *Id.* at 16. *See* Cupp v. Murphy, 93 S. Ct. 2000, 2003 (1973).

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a seizure of the person may be defined as a restraint on an individual's "liberty of movement."[17] Thus a stationary individual[18] encountered by a policeman has not been seized unless he is detained.[19] On the other hand, since an automobile stop inevitably restrains a motorist's liberty of movement,[20] a policeman seizes the occupant of a moving car whenever he directs that the vehicle be stopped.[21]

B. *Present Standards for Automobile Stops*

Identification of automobile stops as seizures raises the question of what constitutional standards govern automobile stops. Supreme Court cases are less illuminating in this inquiry because the Court has not considered a case which forced it to determine the minimum justification required for an automobile stop.[22] If car stops are arrests, well-settled fourth amendment law would establish that a stop is valid only if the stopping officer has probable cause to arrest.[23] The Supreme Court suggested strongly

17. Henry v. United States, 361 U.S. 98, 103 (1959); *see* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

18. For purposes of this Note, the term "stationary individual" means a stationary pedestrian or the occupant of a stationary vehicle, *see* note 9 *supra*.

19. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Cases involving encounters between policemen and occupants of stationary cars will thus pose the question of whether the officer has restrained an individual's liberty of movement. *See id.*; Rios v. United States, 364 U.S. 253 (1960). *But see* Adams v. Williams, 407 U.S. 143, 146 n.1 (1972) (seizure occurred when policeman requested an individual to roll down car window); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (officers' stationing selves on either side of a car held to be a seizure).

20. *See* United States v. Nicholas, 448 F.2d 622, 624 n.3 (8th Cir. 1971) *and* cases cited therein.

21. Since a seizure is defined functionally as a restraint on an individual's liberty of movement, *see* text accompanying notes 14–17 *supra*, a policeman seizes a motorist at the moment he first directs the motorist to stop. *See* Carpenter v. Sigler, 419 F.2d 169, 171 (8th Cir. 1969) (defendant "'seized' when the police officers signalled him to pull to the curb by the use of their flashing red light"); United States v. Nicholas, 448 F.2d 622, 624 n.3 (8th Cir. 1971) (dictum).

A policeman may attempt to stop an automobile by force, *e.g.*, forcing it to the side of the road, *see* United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970); or by show of authority, *e.g.*, flashing a red light, *see* Carpenter v. Sigler, *supra*, or erecting a roadblock, *see* People v. De La Torre, 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (2d Dist. 1967).

Some cases involving moving automobiles will raise the question of whether a policeman caused the vehicle to be stopped. *See* United States v. Baxter, 361 F.2d 116 (6th Cir.), *cert. denied*, 385 U.S. 834 (1966), where, after seeing a highway patrol car, a motorist stopped his car to obtain the officer's assistance with an equipment failure. *Cf.* note 9 *supra*.

22. In reversing convictions of motorists whose cars were stopped to effectuate confrontations, the Court has been able to rely on fourth amendment search law. Incriminating searches incident to arrests have been found invalid because probable cause to arrest did not exist at the time the search was made. Whiteley v. Warden, 401 U.S. 560 (1971); Beck v. Ohio, 379 U.S. 89 (1964). *See also* Rios v. United States, 364 U.S. 253 (1960). In one case the Court held that a search was invalid because it was neither a search incident to arrest nor otherwise justified under search doctrine. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

In Henry v. United States, 361 U.S. 98 (1959), incriminating evidence was obtained after the stop but before any search. *See* texts accompanying notes 90 & 68–70 *infra*. Because the admissibility of the evidence turned on the validity of the seizure, *see* text accompanying notes 36–41 *infra*, *Henry* would have raised the issue of the minimum justification required for a stop, but the prosecution conceded that the stop was an arrest, thus conceding also that probable cause to arrest was required to justify the stop. 361 U.S. at 103; *see* note 25 *infra*.

23. *Compare* Wong Sun v. United States, 371 U.S. 471 (1963), *and* Henry v. United States, 361 U.S. 98 (1959), *with* Draper v. United States, 358 U.S. 307 (1959). Probable cause to arrest means reasonable grounds to believe that the person to be arrested has committed or is committing a crime. Henry v. United States, *supra* at 100. In addition, the arrest undertaken must be within the arresting officer's authorization. United States v. Di Re, 332 U.S. 581 (1948). Statutes commonly

in *Henry v. United States*[24] that a car stop is an arrest and must be justified accordingly.[25] Nonetheless, lower courts do not analyze all stops as arrests.[26] Instead, they view the stop as a means of effectuating a confrontation, and the characterization of the confrontation undertaken as an arrest, an investigative seizure, or a driver's license inspection determines the justification required to sustain the stop.[27]

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authorize warrantless arrests upon probable cause for felonies, but require that a police officer must have witnessed the crime or have an arrest warrant to make a valid arrest for a misdemeanor. *See, e.g.*, 18 U.S.C. § 3052 (1970).

24. 361 U.S. 98 (1959).

25. In *Henry*, the prosecution conceded that a car stop was an arrest. *Id.* at 103. Thus the question at issue was whether probable cause to arrest existed at the time of the stop, because evidence obtained after an invalid arrest cannot justify the arrest. *See* note 37 *infra* and accompanying text. All members of the Court agreed that probable cause did not exist at the time of the stop, *id.* at 104, 106, and the majority reversed the conviction, *id.* at 104.

However, in dissent Justice Clark, joined by Chief Justice Warren, argued, despite the prosecutor's concession, that an automobile stop was not an arrest. *Id.* at 106. The majority, in contrast, expressly affirmed the prosecution's concession as proper "on the facts of this particular case." *Id.* at 103. The Court's qualification seems to have been directed at the then pending case of Rios v. United States, 364 U.S. 253 (1960), in which two policemen approached a taxicab which was stopped at a traffic light. *See* 361 U.S. at 103 n.7. Since the time of arrest was crucial to the disposition of the case, the majority's position is more than mere dictum. Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 291–92 (1971). Some cases have ascribed the strength of holding to the majority's characterization of the stop as an arrest. *See, e.g.*, Bowling v. United States, 350 F.2d 1002, 1003 (D.C. Cir. 1965) (Edgerton, J.; the one judge concurring with Judge Edgerton refused to reach this issue, *id.* at 1004); People v. Mickelson, 59 Cal. 2d 448, 450, 380 P.2d 658, 659, 30 Cal. Rptr. 18, 19 (1963).

In Brinegar v. United States, 338 U.S. 160 (1949), three dissenting justices identified at least some automobile stops as arrests. Justice Jackson, with whom Justices Frankfurter and Murphy concurred, argued that the stopping of a single car in the course of a criminal investigation is the "initial [step] in arrest, search and seizure," *id.* at 188, and requires probable cause, *id.* at 183, 187–88. Justice Jackson wrote, "I do not, of course, contend that officials may never stop a car on the highway without the halting being considered an arrest or a search. Regulations of traffic, identifications where proper, traffic census, quarantine regulations, and many other causes give occasion to stop cars in circumstances which do not imply arrest or charge of crime." *Id.* at 188. (Any schema which varies the justification required for a seizure according to the characterization of that seizure, however, is subject to abuse. *See* note 27 *infra*.) Justice Burton's concurrence in *Brinegar*, on the other hand, would have upheld a stop for investigation on less than probable cause to arrest or search. *Id.* at 179. The majority did not need to reach the issue of the justification required for a confrontation seizure because it found the probable cause to search standard of *Carroll* satisfied. *Id.* at 170–71, 178–79; *see* note 11(1) *supra*.

26. *See, e.g.*, Young v. United States, 435 F.2d 405 (D.C. Cir. 1970).

During the interval between *Henry* and *Terry*, courts sometimes held, often citing *Henry*, that an arrest occurred upon the stopping of a vehicle or at a similarly early point in the encounter. *See* Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965), *overruled on other grounds*, Strode v. State, 231 So. 2d 779 (Miss. 1970). *See also* United States v. Ruffin, 389 F.2d 76 (7th Cir. 1968).

Nonetheless, even before *Terry*, stops were frequently held not to constitute arrests. One theory utilized by lower courts was that federal law did not control the question. *See, e.g.*, United States v. Williams, 314 F.2d 795 (6th Cir. 1963); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963). The other theory was simply that not all stops were arrests. *See, e.g.*, Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Busby v. United States, 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962). Some cases explicitly recognized that nonarrest stops still raised seizure issues, *see, e.g.*, Wilson v. Porter, *supra*, while others implied that they did not, *see, e.g.*, Busby v. United States, *supra*.

27. *See* text accompanying notes 28–34 *infra*.

Present case law leaves unclear the difference between an arrest and a nonarrest seizure. On the basis of Rios v. United States, 364 U.S. 253, 261–62 (1960), it may be argued that the fact of arrest turns on the officer's intention. Lower courts frequently stress a lack of intent to arrest in upholding nonarrest stops. *See* United States v. James, 452 F.2d 1375, 1378 n.3 (D.C. Cir. 1971); Young v. United States, 435 F.2d 405, 408 (D.C. Cir. 1970). *See also* White v. United States, 448 F.2d 250 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). In addition, cases finding stops invalid

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Thus the lower courts' treatment of stops as means of effectuating various kinds of seizures rather than as arrests is justified insofar as a stop is a neutral occurrence which does not indicate whether the stopping officer intends to make an arrest, investigate suspicious circumstances, or inspect a driver's license. This schema, however, is subject to severe abuses.

(1) The uncertainty regarding the proper characterization of a given seizure combines with the fact that characterization determines the justification required for a stop to encourage policemen to assert and courts to believe that the stop undertaken is a supportable one. The potential for wrongly characterizing the stop as one supportable under the circumstances is present especially in the case of inspection stops. Although courts will often find very innocuous behavior sufficient to create the reasonable suspicion necessary for an investigative stop, *see, e.g.*, United States v. Leal, 460 F.2d 385 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972), they do sometimes hold an investigative stop invalid on the grounds that no basis for reasonable suspicion existed, *see, e.g.*, United States v. Davis, 459 F.2d 458 (9th Cir. 1972). The fact that inspection stops require no suspicion, however, is a stimulant to police claims that what was actually an invalid investigative stop was an inspection stop. *See* United States v. Turner, 442 F.2d 1146 (8th Cir. 1971). Only some courts are prepared to guard against this abuse of the inspection power. *See* note 34 *infra*. The consequences of upholding any stops based on less than probable cause to arrest are discussed at text accompanying notes 35–41 *infra*. These consequences are exacerbated when courts characterize stops wrongly as supportable ones.

(2) A closely related abuse arises from the uncertainty as to when an arrest occurs during a validly initiated nonarrest seizure. *Compare* Jackson v. United States, 408 F.2d 1165 (8th Cir.), *cert. denied*, 396 U.S. 862 (1969), *with* the cases distinguished therein, *id.* at 1168. A search incident to arrest is valid only if it is preceded by a valid arrest. Beck v. Ohio, 379 U.S. 89 (1964). But evidence obtained in other ways during a nonarrest encounter may validly help create probable cause to arrest. *See* note 40 *infra*. Uncertainty regarding the exact moment at which an arrest occurs allows policemen and courts to fix the time of arrest in order to support the introduction of evidence. For example, if a search for evidence is undertaken, it may be asserted that a valid arrest preceded the search and that the search was a valid search incident to arrest. *See* Jackson v. United States, *supra*. *But see* Beck v. Ohio, *supra*. However, if plain sight observations are the basis for probable cause to arrest, *see* note 40(4) *infra*, it may be argued that the arrest validly followed the observations during the course of a valid nonarrest seizure. *See* Young v. United States, *supra*. *But see* Henry v. United States, 361 U.S. 98 (1959).

(3) The plain sight doctrine, *see* text accompanying notes 68–70 *infra*, coupled with the difficulty of characterizing a given seizure, creates a third potential for abusing nonarrest stop powers. Generally a car may be searched only upon probable cause to search or incident to a valid arrest. *See* note 11 *supra*. However, a policeman who has neither probable cause to search nor probable cause to arrest may in fact undertake an alleged nonarrest stop of a car in order to observe its contents rather than to confront its occupants. Unless a court is sensitive to the issue of pretext stops, *see* note 34 *infra*, illegal contents in plain sight will then sustain an arrest, *see* note 40(4) *infra*. Nicholson v. United States, 335 F.2d 80 (5th Cir.), *cert. denied*, 384 U.S. 974 (1966), offers an example of a confrontation stop apparently undertaken to discover the contents of a car. During a stop, and after the driver of the stopped car had produced a valid license, a policeman conducted a flashlight inspection of the car which disclosed burglar tools and stolen objects. The potential for such abuse is intensified by those cases in which some courts have sustained limited searches of vehicles for weapons during investigative stops. *See* note 40(6) *infra*.

The problem of pretext use of the nonarrest stop power is similar to the abuse of the power to arrest for minor traffic offenses and then make a search of the vehicle incident to the arrest. In response to this latter abuse, some courts have held routine searches incident to traffic arrests unconstitutional. People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967); *see* United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972) (dictum), *cert. granted*, 410 U.S. 982 (1973); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (dictum), *cert. denied*, 364 U.S. 833 (1960). *But see, e.g.*, Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964). However, the response to pretext use of nonarrest stop powers has on the whole been less protective. *See* (1) *supra* and note 34 *infra*.

The potential for such abuse is particularly great in the case of inspection stops. First, isolated inspection stops have small chance of discovering license violators, so almost any use of the power may be motivated by other concerns. A regularized procedure for inspection stops would be more sustainable, since it would be likely to be more efficacious and would be less susceptible to abuse. California, for example, provides by statute that stops to inspect for vehicle equipment violations may be undertaken without evidentiary justification only at a roadblock. *See* note 58 *infra*.

1. *Arrest stops.*

Lower courts hold consistently that a moving car may be stopped to effectuate a valid arrest.[28] When an officer has probable cause to arrest prior to the stop, characterization of the encounter as a stop to effectuate an arrest affords the individual no less protection than he would be given by *Henry*'s characterization of the stop itself as an arrest. Under either model probable cause must exist at the time of the stop. Since Supreme Court cases clearly presuppose that probable cause to arrest is sufficient justification to sustain the arrest of a motorist,[29] examination here is confined to the question of whether stops based on less than probable cause to arrest are constitutional.

2. *Investigative stops.*

Many lower courts have held that a policeman without probable cause may stop a car to question an occupant about possible criminal involvement.[30] In order for an investigative stop to be valid, the investigating officer must act on objective facts creating a reasonable suspicion that the detained motorist may presently be involved in criminal activity.[31]

3. *Inspection stops.*

Under state statutes[32] which grant policemen sweeping authority to inspect driver's licenses, lower courts have also sustained stops for driver's license inspections.[33] Inspection stops may presently be made without any

Such a procedure is less likely to be abused in order to search a certain car. Second, the lack of any requirement of a justifying evidentiary basis leaves the decision to make inspection stops completely in the officer's discretion, *see* Williams v. State, 248 Ind. 66, 222 N.E.2d 397 (1966), *cert. denied*, 388 U.S. 917 (1967), and may encourage use for other reasons. These concerns have led the Supreme Court of Pennsylvania to declare unconstitutional stops of individual cars for safety, and perhaps for driver's license, inspections. *See* Commonwealth v. Swanger, —— Pa. ——, 307 A.2d 875 (1973); notes 34, 58 & 93 *infra*.

28. *See, e.g.*, United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970). *See also* note 23 *supra* and accompanying text.

29. *See* Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959). *See also* Rios v. United States, 364 U.S. 253 (1960).

30. *See, e.g.*, United States v. Fisch, 474 F.2d 1071 (9th Cir.), *cert. denied*, 93 S. Ct. 2742 (1973); United States v. Leal, 460 F.2d 385 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); Fields v. Swenson, 459 F.2d 1064 (8th Cir. 1972); United States v. James, 452 F.2d 1375 (D.C. Cir. 1971); United States v. Catalano, 450 F.2d 985 (7th Cir. 1971), *cert. denied*, 405 U.S. 928 (1972); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972); United States v. Brown, 436 F.2d 702 (9th Cir. 1970); Young v. United States, 435 F.2d 405 (D.C. Cir. 1970); United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970).

31. *E.g.*, United States v. Fisch, 474 F.2d 1071, 1075 (9th Cir.), *cert. denied*, 93 S. Ct. 2742 (1973); United States v. Leal, 460 F.2d 385, 388 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); United States v. Brown, 436 F.2d 702, 705 (9th Cir. 1970). *See also* Adams v. Williams, 407 U.S. 143, 146–47 (1972); Terry v. Ohio, 392 U.S. 1, 31 (1968). *Contra*, United States v. Ward, No. 72–3176 (Apr. 5, 1973), *rehearing en banc granted* (9th Cir., June 14, 1973), *excerpted in* 13 CRIM. L. REP. 2123 (stop of individual to question him about the criminal activity of others upheld).

32. *E.g.*, CAL. VEHICLE CODE § 12951 (West 1971).

33. United States v. Turner, 442 F.2d 1146 (8th Cir. 1971); United States v. Berry, 369 F.2d 386 (3d Cir. 1966); Rodgers v. United States, 362 F.2d 358 (8th Cir.), *cert. denied*, 385 U.S. 993 (1966); Lipton v. United States, 348 F.2d 591 (9th Cir. 1965).

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35. In Brinegar v. United States,
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36. *See, e.g.*, Beck v. Ohio, 379 U.
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37. *E.g.*, Henry v. United States,
(7th Cir. 1968) (license plate check car
arrest).

38. Henry v. United States, 361 U.
1972) (search cannot create probable
valid); Montana v. Tomich, 332 F.2d
have valid driver's license cannot create
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evidentiary justification; thus a properly authorized policeman may stop any motorist at any time to inspect his license.[34]

C. *The Consequences of Nonarrest Stops*

The lower courts' failure to follow *Henry*'s suggested treatment of car stops as arrests has two major consequences. First, standards allowing stops on less than probable cause afford motorists less protection against seizure than *Henry* suggests they should have.[35] In addition, lower standards for the stop can have a major impact on the course of a criminal proceeding.

The impact of seizure law on criminal proceedings stems from the fact that all evidence produced by an invalid seizure is constitutionally objectionable.[36] In particular, evidence obtained after an arrest cannot create probable cause justifying the arrest.[37] Since a stop is a seizure, evidence obtained after an invalid stop is objectionable.[38] Hence, if a stop is an arrest, evidence obtained after a stop based on less than probable cause

34. *E.g.*, United States v. Turner, 442 F.2d 1146 (8th Cir. 1971). However, another panel in the Eighth Circuit has indicated grave doubts about this doctrine. *See* United States v. Nicholas, 448 F.2d 622, 626 (8th Cir. 1971) (dictum). Moreover, Commonwealth v. Swanger, —— Pa. ——, 307 A.2d 875 (1973), has probably held stops of individual cars, *see* note 58 *infra*, for driver's license inspections on less than probable cause unconstitutional. *Swanger* involved a statute allowing vehicle stops without evidentiary justification to inspect the "vehicle, as to its equipment and operation." *Id.* at ——, 307 A.2d at 877 n.3. The court's language, however, embraced driver's license inspection stops. *See id.* at ——, 307 A.2d at 878–79. In addition, the court's reasoning would clearly embrace inspection stops. *See infra* this note; note 93 *infra* and accompanying text.

Some courts have expressed concern about inspection stops which are undertaken to investigate possible criminal activity other than driver's license violations. Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), overturned a conviction based on such a pretext inspection stop. *See also* Bowling v. United States, 350 F.2d 1002, 1003 (D.C. Cir. 1965) (Edgerton, J.). The potential for pretext use of the inspection power was one reason given by the Supreme Court of Pennsylvania for invalidating stops of individual cars to conduct equipment, and possibly driver's license, inspections without evidentiary justification. *See* Commonwealth v. Swanger, *supra* at ——, ——, 307 A.2d at 887 & n.3, 878–79. However, other cases pay only lipservice to this concern, *see* Lipton v. United States, 348 F.2d 591, 594 (9th Cir. 1965), or ignore it, *see* United States v. Berry, 369 F.2d 386 (3d Cir. 1966). One case has even held that the presence of other suspicion cannot negate the inspection power. United States v. Turner, *supra* at 1148.

35. In Brinegar v. United States, 338 U.S. 160 (1949), Justice Jackson wrote in dissent that "human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Id.* at 180–81. Justice Jackson pointed out that policemen will "interpret and apply [search and seizure standards] themselves and will push to the limit." *Id.* at 182. Thus seizure standards lower than those suggested in *Henry* may encourage unwarranted interferences with individuals not involved in illegal activities.

36. *See, e.g.*, Beck v. Ohio, 379 U.S. 89 (1964) (exclusion of betting slips uncovered by search incident to invalid arrest); Henry v. United States, 361 U.S. 98 (1959) (exclusion of observations made after invalid arrest); Johnson v. United States, 333 U.S. 10 (1948) (exclusion of visual and olfactory sensations occurring at time of invalid arrest); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (exclusion of olfactory sensations occurring after invalid investigative seizure).

The objectionable evidence is excludable on the defendant's motion. Weeks v. United States, 232 U.S. 383 (1914) (federal courts); Mapp v. Ohio, 367 U.S. 643 (1961) (state courts).

37. *E.g.*, Henry v. United States, 361 U.S. 98 (1959); United States v. Ruffin, 389 F.2d 76 (7th Cir. 1968) (license plate check cannot create probable cause to arrest when preceded by invalid arrest).

38. Henry v. United States, 361 U.S. 98 (1959); United States v. Davis, 459 F.2d 458 (9th Cir. 1972) (search cannot create probable cause to arrest when the attempted investigative stop is invalid); Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964) (search following arrest for failure to have valid driver's license cannot create probable cause when the inspection stop was invalid).

Because a stop occurs when a policeman directs a motorist to halt his vehicle, *see* note 21 *supra*,

will not sustain an arrest.[39] On the other hand, if investigative or inspection stops may validly be undertaken upon less than probable cause, a policeman without probable cause may properly seize a motorist: on reasonable suspicion in the case of an investigative stop; without any suspicion in the case of an inspection stop. Evidence obtained during the course of the encounter may then contribute to the creation of probable cause[40] which sustains an arrest,[41] even though the arrest would be invalid under the *Henry* standard.

II. Interest Analysis

Fourth amendment doctrine sets the bounds of police activity by balancing state and individual interests.[42] A determination of whether confrontation seizures of motorists based on less than probable cause are constitutional therefore depends on examination of the state and individual interests involved in those stops.

A. *State Interests*

To date the Supreme Court has not sustained investigative[43] or inspection stops of motorists, but the Court has twice upheld seizures of non-

police observations of a motorist's reaction to an order to stop cannot provide justification for that stop. *See* United States v. Adams, No. 72-1313, at 10-11 (7th Cir., May 11, 1973) (dissenting opinion), *excerpted in* 13 Crim. L. Rep. 2233, 2234 (defendant's suspicious behavior after invalid order to stop cannot justify investigative stop). *But see* United States v. Davis, *supra* at 459-60 (implication that suspicious behavior after invalid attempted investigative stop might justify stop). However, under lower courts' treatment of nonarrest stops, *see* text accompanying notes 30-34 *supra*, a motorist's suspicious response to a valid stop order may create probable cause to arrest. *See* United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970) (car sped up when police attempted stop); note 40(3) *infra*.

39. Henry v. United States, 361 U.S. 98 (1959).

40. If the lower court model not treating stops as arrests is followed there are at least seven methods by which probable cause to arrest may be established during a stop. (1) The motorist may be unable to respond satisfactorily to the policeman's questions, thus creating probable cause. United States v. Turner, 442 F.2d 1146 (8th Cir. 1971) (defendant could not produce a license during an inspection stop); Jackson v. United States, 408 F.2d 1165, 1170-71 (8th Cir.), *cert. denied*, 396 U.S. 862 (1969) (evasive answers during an investigative stop). (2) A check of police records may provide incriminating information. *See* United States v. Ruffin, 389 F.2d 76 (7th Cir. 1968) (license check revealed car stolen). (3) The detained individual's behavior or that of another may create probable cause. United States v. Brown, 436 F.2d 702 (9th Cir. 1970) (after shot fired another party ran to join suspect); United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970) (car sped up when police attempted stop); *see* Henry v. United States, 361 U.S. 98, 99, 104 (1959). (4) The policeman's senses may indicate the presence in the car of illegal matter. Young v. United States, 435 F.2d 405 (D.C. Cir. 1970) (gun in plain sight); *see* Henry v. United States, *supra* at 99-100, 103-06; United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (marijuana odor). (5) A weapons search, or frisk, of the seized individual may uncover an illegal object. People v. Heard, 226 Cal. App. 2d 747, 72 Cal. Rptr. 374 (2d Dist. 1968); *see* Adams v. Williams, 407 U.S. 143 (1973); Terry v. Ohio, 392 U.S. 1 (1968). (6) It is possible that in some circumstances a weapons search of the vehicle may be undertaken which may uncover an illegal object. *See* United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971); United States v. Wickizer, 465 F.2d 1154 (8th Cir. 1972); People v. Rosello, 36 App. Div. 2d 595, 318 N.Y.S.2d 393 (1st Dep't), *aff'd*, 29 N.Y.2d 838, 277 N.E.2d 785, 327 N.Y.S.2d 852 (1971). (7) A stop may create a police file on an individual which later leads to an arrest in another connection. *See* United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972).

41. *See* the cases cited in notes 30 & 33 *supra*.

42. Terry v. Ohio, 392 U.S. 1, 21 (1968); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

43. However, in three cases justices have argued that investigative stops should be valid upon

motorists based on less than pr
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1. *Prevention of crime.*

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44. 392 U.S. at 29. The *Terry* Cou
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J. Urb. Law 733, 759-62 (1972). In *Ad*
407 U.S. at 46.

45. 392 U.S. at 5-7, 28, 30.

46. 407 U.S. at 144-45, 147. In Ric
in remanding the case that a policeman
probable cause. *But see* note 9 *supra*.

47. 407 U.S. at 145-47; *see* Terry
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F.2d 458, 459 n.3 (9th Cir. 1972); Arn
Sibron v. New York, 392 U.S. 40, 73
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See, e.g., United States v. Leal, 460 F.
Indeed, the *Terry* Court indicated that re
scope of, seizures were more appropriate
a given class of seizures. 392 U.S. at 1
despite the lack of need for immediate
with the Court's posture in *Terry*.

48. LaFave, *"Street Encounters"*
Mich. L. Rev. 39, 65 (1968); Note,
(1968).

motorists based on less than probable cause. First, *Terry* sustained a "protective"[44] seizure of a stationary pedestrian whose activities gave a patrolling policeman a reasonable suspicion that he was "casing" a shop for an armed robbery.[45] Second, *Adams* held that the occupant of a parked car could be subjected to an investigative seizure when a tip created a reasonable suspicion that the individual was armed and that he possessed narcotics.[46]

In upholding these seizures, the Court based its decisions on a generalized state interest in the prevention and detection of criminal activity.[47] These interests may be particularly strong in the case of suspected criminal activity by automobile occupants.

1. *Prevention of crime.*

Investigative stops. The state has a strong interest in the prevention of crime, and particularly of violent crime.[48] The societal benefits of preventing the commission of a crime may thus justify a seizure when objective facts not sufficient to establish probable cause suggest that a crime is about

reasonable suspicion of criminal activity. In Erinegar v. United States, 338 U.S. 160, 179 (1949), Justice Burton's concurrence asserted that stops based on suspicion not sufficient to justify an arrest are valid. In *Henry* Justice Clark, joined by Chief Justice Warren, argued in dissent that reasonable suspicion should sustain an automobile stop. 361 U.S. at 106. In Whiteley v. Warden, 401 U.S. 560, 573 (1971), Justice Black's dissent argued that the *Terry* rule would uphold a stop on reasonable suspicion. Justice Blackmun's dissent in *Whiteley* expressed basic agreement with Justice Black. *Id.* at 575.

44. 392 U.S. at 29. The *Terry* Court refused to reach the issue of seizure for investigation, saying that the record did not reveal whether Terry had been detained for investigation. *Id.* at 19 n.16. The Court limited its holding to approving a seizure to allow a weapons search for the protection of the police officer and others nearby. *Id.* at 29–30. Nonetheless, Justice Harlan's concurrence argued that unless the case created a general police right to frisk individuals for weapons, the propriety of an underlying investigative seizure was an implicit holding of the opinion. *Id.* at 33–34. (*But see* Justice Marshall's concurring opinion in Adams v. Williams, 407 U.S. 143, 154 (1972). Justice Marshall, joined by Justice Douglas, argued that *Terry* did create only a narrow right to search for weapons.) Lower courts, however, have consistently concluded that *Terry* in fact sanctioned an investigative seizure. *See, e.g.*, Young v. United States, 435 F.2d 405 (D.C. Cir. 1970). A number of such federal court cases are collected and criticized in Note, *Stop and Frisk: The Issue Unresolved*, 19 J. URB. LAW 733, 759–62 (1972). In *Adams* the Supreme Court adopted this interpretation of *Terry*. 407 U.S. at 46.

45. 392 U.S. at 5–7, 28, 30.

46. 407 U.S. at 144–45, 147. In Rios v. United States, 364 U.S. 253 (1960), the Court indicated in remanding the case that a policeman could approach a temporarily stationary vehicle on less than probable cause. *But see* note 9 *supra*.

47. 407 U.S. at 145–47; *see* Terry v. Ohio, 392 U.S. 1, 17–18 n.15, 22. Lower courts occasionally suggest that the validity of an investigative seizure depends upon a weighing of such factors as the gravity of the suspected crime and the need for immediate action. *See* United States v. Davis, 459 F.2d 458, 459 n.3 (9th Cir. 1972); Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967). *See also* Sibron v. New York, 392 U.S. 40, 73 (1968) (Harlan, J., concurring). But most lower court cases accept a generalized interest in crime prevention and detection as the basis for investigative stops. *See, e.g.*, United States v. Leal, 460 F.2d 385, 388 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972). Indeed, the *Terry* Court indicated that restrictions on the evidentiary justification required for, and the scope of, seizures were more appropriate than limitations upon the kinds of crimes which would sustain a given class of seizures. 392 U.S. at 17–18 n.15. The Court's sustaining of the seizure in *Adams*, despite the lack of need for immediate action or of a threat to others, 407 U.S. at 143–44, accords with the Court's posture in *Terry*.

48. LaFave, *"Street Encounters" and the Constitution*: Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 39, 65 (1968); Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 182 (1968).

to be committed. Because a motorist's extreme mobility may otherwise allow him to avoid police confrontation until a crime has been committed, the state has an especially strong interest in stopping a car to freeze momentarily a situation of suspected criminality.[49]

Inspection stops. Driver licensing advances state interests in highway safety.[50] Since inspection stops may be made at any time, they serve the specialized preventive function of deterring a violation which has no outward manifestations.[51]

2. *Detection of crime.*

Investigative stops. Strong state interests in the detection, apprehension, and punishment of criminals also enter the balance in adjudicating the constitutional reasonableness of investigative stops. The automobile creates two special obstacles for the detection of criminals. First, the mobility of a car allows very rapid escape after the commission of a crime.[52] Second, the design of a car facilitates the hiding and transportation of the instrumentalities and fruits of crimes.[53] Thus, unless investigative stops may be undertaken, societal interests in detecting and eventually punishing criminals may to some degree be thwarted by the use of automobiles.

Inspection stops. Inspection stops without evidentiary justification serve a specialized detection function of enforcing a statute whose violation has no external manifestations.

B. *Individual Interests*

The state interests in investigative and inspection stops must be balanced against the individual interests at stake in an automobile stop. Analysis of fourth amendment case law suggests that automobile stops may impinge on at least five of an individual's seizure-related fourth amendment interests.

49. In Young v. United States, 435 F.2d 405 (D.C. Cir. 1970), for example, policemen saw a truck with five occupants which had been parked in front of a bank make a U-turn to follow a delivery truck leaving the bank. Assuming that there were some indicia of criminal activity, the mobility of the suspects' truck and the possibility of losing contact with the truck in traffic would have made it difficult for the policemen to prevent the commission of a suspected crime without stopping the truck.

50. *See* Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 CALIF. L. REV. 907, 914–15 (1963).

A second state interest served by licensing requirements is the production of revenue. *See, e.g.*, CAL. VEHICLE CODE §§ 14900–01, 14904 (West 1971 & Supp. 1973). In this Note, however, consideration of the state interests involved in inspection stops will be limited to highway safety. The revenue produced by driver's license statutes is insignificant, *see id.*, and a court would not be likely to rely on such an interest as a basis for upholding inspection stops.

51. *See* Comment, *supra* note 50, at 915; Commonwealth v. Swanger, 307 A.2d 66, 69 (Pa.) (vacated opinion), *same result on rehearing*, —— Pa. ——, 307 A.2d 875 (1973); Lipton v. United States, 348 F.2d 591, 593 (9th Cir. 1965).

52. *See* United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied*, 405 U.S. 924 (1972) (bank robbery); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967) (mugging).

53. *See* Nicholson v. United States, 335 F.2d 80 (5th Cir.), *cert. denied*, 384 U.S. 974 (1966) (burglar tools); People v. Vallee, 7 Cal. App. 3d 167, 86 Cal. Rptr. 475 (2d Dist. 1970) (stolen copy machine).

1. *Freedom from arbitrary*

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54. Brinegar v. United States, 338 U
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interference") (footnote omitted); Comm
878 (1973) ("right of the individual to be
(footnote omitted); *see* Terry v. Ohio, 39
States, 371 U.S. 471, 479 (1963).

55. *See* Camara v. Municipal Court, 3

56. Terry v. Ohio, 392 U.S. 1, 15 (19

57. *See id.* at 15, 21 & n.18, 22, 27.

58. Routine border searches at an
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Court, 387 U.S. 523, 532–34 (1967) (se
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5 (D.C. Cir. 1967) (mugging).
Cir.), *cert. denied*, 384 U.S. 974 (1966)
. Rptr. 475 (2d Dist. 1970) (stolen copy

1. *Freedom from arbitrary state interference.*

A motorist has a fourth amendment interest in being free from arbitrary state interferences,[54] as do nonmotorists.[55] Ordinarily this protection is afforded by requiring that an "objective evidentiary justification"[56] single out an individual for seizure.[57] However, in some circumstances protection from arbitrary interference may be afforded if an officer who can demonstrate that his action is legally authorized seizes members of a class on a regularized basis.[58] A motorist's interest in freedom from arbitrary state

54. Brinegar v. United States, 338 U.S. 160, 177 (1949) ("the citizen who has given no good cause for believing he is engaged in [criminal] activity is entitled to proceed on his way without interference") (footnote omitted); Commonwealth v. Swanger, —— Pa. ——, ——, 307 A.2d 875, 878 (1973) ("right of the individual to be free from government intrusions without apparent reason") (footnote omitted); *see* Terry v. Ohio, 392 U.S. 1, 15, 21 (1968). *See also, e.g.*, Wong Sun v. United States, 371 U.S. 471, 479 (1963).

55. *See* Camara v. Municipal Court, 387 U.S. 523, 528, 530–31 (1967).

56. Terry v. Ohio, 392 U.S. 1, 15 (1968).

57. *See id.* at 15, 21 & n.18, 22, 27.

58. Routine border searches at an established checkpoint, for example, provide assurance that the authority of customs officers to seize and search is not being arbitrarily exercised. *See* text accompanying note 97 *infra; cf.* Almeida-Sanchez v. United States, 93 S. Ct. 2535, 2539 (1973). Similar protection is afforded by the establishment of legally authorized roadblocks to inspect driver's licenses or vehicle equipment. *See* People v. De La Torre, 257 Cal. App. 2d 162, 64 Cal. Rptr. 804 (2d Dist. 1967) (roadblock for vehicle equipment inspections discovered drunken driver). California requires by statute that vehicle equipment checks be hedged by one of the safeguards against arbitrary interferences. *Compare* CAL. VEHICLE CODE § 2814 (West 1971) (equipment checks may be conducted at a roadblock without cause to suspect a violation) *with id.* §§ 2804, 2806 (reasonable suspicion required for equipment check other than at roadblock). In Commonwealth v. Swanger, —— Pa. ——, 307 A.2d 875 (1973), the Supreme Court of Pennsylvania adopted standards similar to but more restrictive than those of the California *Vehicle Code*. The court held that a safety inspection of a single car must be based on probable cause to suspect a violation. *Id.* at ——, 307 A.2d at 879. The court intimated strongly, however, that safety inspections not based on probable cause could be made at roadblocks. *Id. at* ——, ——, 307 A.2d at 877 & n.3, 878. The holding probably applies to driver's license inspection stops as well. *See* note 34 *supra. See also* Camara v. Municipal Court, 387 U.S. 523, 532–34 (1967) (search warrant required for building safety inspection in order to assure propriety of administrative decisions to search and to guarantee the authorization of the searching officer).

A somewhat similar mode of reconciling law enforcement needs and the individual's interest in freedom from arbitrary interference is suggested by Justice Powell's concurrence in Almeida-Sanchez v. United States, *supra* at 2544. He proposed that warrants be issued to the border patrol to conduct spot checks of vehicles in a limited area for customs violations. Such a procedure would guarantee a generalized authorization for the law enforcement activity, but absent some evidentiary requirement or regularized basis for stops it reintroduces the element of discretion and therefore the potential for unreviewable abuse. In making similar innovative use of a search warrant requirement to protect against abuse of the power to make building safety inspections, the Court in Camara v. Municipal Court, *supra* at 538, stressed that the warrants would be issued for area inspections. The warrant itself guarantees the authorization of the searching officer; issuance of the warrant for an area inspection removes the potential for abuse of discretion. *Id.* at 532, 538; *cf.* Almeida-Sanchez v. United States, *supra* at 2538 & n.3.

It should be noted that the protection against arbitrary use of search and seizure powers afforded by seizure at a roadblock also exists outside the context of such routine inspections as those for customs, equipment, and driver's license violations. In his dissent in Brinegar v. United States, 338 U.S. 160 (1949), Justice Jackson, joined by Justices Frankfurter and Murphy, indicated approval of routine roadblock stops for some purposes. *See id.* at 188. He also indicated, however, that he would approve a roadblock erected in the vicinity of a kidnapping for the purpose of searching every outgoing car. *Id.* at 183. In assessing the constitutionality of roadblocks other than for routine inspections, Justice Jackson would have considered "the gravity of the offense" and thus would not have approved a roadblock to "catch a bootlegger." *Id.*

The fact that roadblock stops protect against arbitrary interferences might not, however, suffice of itself to sustain the constitutionality of roadblock stops other than for routine inspections. One factor contributing to the fourth amendment treatment of routine inspections is the relatively low degree of hostility toward the affected individual inherent in the government activity. *See* the cases cited in note 94 *infra*. The purpose of routine inspection stops is to uncover or to deter a relatively

interferences will be violated when he is seized in circumstances which provide neither of these guarantees against abuse of policemen's seizure powers.

2. *"Autonomous self-positioning."*

An automobile stop impinges upon an individual's interest in making autonomous decisions to remain where he is or to go elsewhere.[59] *Terry* held that whenever an individual has been deprived of this autonomy he has been seized.[60] Obviously, this interest is as strong for a stationary individual as for the occupant of a moving car.

3. *Free passage.*

A moving individual has a further interest in liberty of movement which a stationary individual does not have—the interest in being able to continue his movement. The Supreme Court recognized this interest in "free passage without interruption" in *Carroll v. United States*.[61] *Carroll* arose in the context of the stopping of an automobile to allow a search,[62] but it has also been cited by the Court in discussing stops to allow seizures.[63]

Clearly any moving individual has an interest in free passage, but a motorist's interest is especially strong. First, an individual utilizes a car specifically to enhance his personal mobility. In addition, while anyone can interrupt the movement of a slowly moving individual—for example, a pedestrian—ordinarily only a policeman can stop a motorist.[64] Thus, as a practical matter, the occupant of a moving car has greater expectations of achieving free passage. These expectations have constitutional significance because fourth amendment jurisprudence holds that reasonable expectations of freedom from government interference play a role in the delineation of fourth amendment rights.[65]

large number of otherwise undetectable violations closely associated with situations suggestive of potential violations (*e.g.*, border crossings, vehicle operation). On the other hand, in the case of, for example, a kidnapping, the state is seeking one potential offender with the purpose of criminally prosecuting him. Seizures in the course of a criminal investigation at a roadblock thus exhibit a considerable degree of inherent animosity toward the seized individual. *Cf.* note 81 *infra*; text accompanying note 94 *infra*. Since the degree of hostility toward a seized individual inherent in the seizure is a factor influencing the standards governing a given class of seizures, *see* text accompanying notes 80–81 *infra*, the state and individual interests at stake in seizures for criminal investigation might well not be appropriately balanced by roadblock stops.

59. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968).

60. *Id.*; *see* text accompanying notes 14–21 *supra*.

61. Carroll v. United States, 267 U.S. 132, 154 (1925).

62. *Id.* at 136, 160, 162.

63. *See* Henry v. United States, 361 U.S. 98, 104 (1959).

64. *See* United States v. Jackson, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970).

65. *See* Katz v. United States, 389 U.S. 347 (1967). In *Terry*, the Court wrote, "[W]herever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted." 392 U.S. at 9.

4. *"Autonomous other-e*

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5. *Privacy rights.*

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68. Harris v. United States, 390 U.
69. *Id.* at 236.
70. *See* note 40(4) *supra*.
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4. *"Autonomous other-encountering."*

Automobile stops also impinge upon an individual's interest in avoiding those whom he does not wish to encounter.[66] Although closely related to and often realized by exercise of autonomous self-positioning, this interest has distinct content. The distinction is obscured by the fact that a policeman can ordinarily encounter a motorist only by interfering with his autonomous self-positioning and freedom of passage. The distinct content of this interest may be seen, however, in the fact that a policeman can encounter a stationary individual without interfering with his autonomous self-positioning.[67] The interest in autonomous other-encountering exists for both stationary and moving individuals, but it is especially strong for a motorist because he can almost entirely avoid undesired encounters with individuals other than policemen.

5. *Privacy rights.*

Finally, the occupant of a moving automobile has special fourth amendment privacy interests which stem from the operation of fourth amendment search law. Case law holds that plain sight observations by policemen are not searches,[68] and that a policeman who is justifiably in a position to observe incriminating evidence in plain sight[69] may arrest on that basis.[70] Thus a policeman who lawfully[71] approaches a vehicle may arrest its occupant if he observes illegal activity or illegal objects in plain sight.[72] On the other hand, search law governs a policeman in searching for objects not visible from outside the car.[73]

The interaction of these doctrines gives a motorist greater privacy expectations than either a pedestrian or an occupant of a stationary car has. First, a pedestrian has neither the degree of personal privacy afforded by an automobile's design[74] or a vehicle occupant's opportunity to conceal ob-

66. *See* Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring).
67. *See id.* at 19 n.16 (majority opinion).
68. Harris v. United States, 390 U.S. 234 (1968).
69. *Id.* at 236.
70. *See* note 40(4) *supra.*
71. A policeman's approach of a vehicle is lawful in two circumstances. First, the approach may be one any citizen could make. *See* note 9 *supra.* If the approach is one only a policeman could make, it is lawful if undertaken on legal justification sufficient in the circumstances. *See* Harris v. United States, 390 U.S. 234 (1968).
72. *See* note 40(3)–(4) *supra.*
73. *See* Carroll v. United States, 267 U.S. 132 (1925); note 11 *supra.*
74. Some activities considered by our society to be of an extremely private nature occur regularly in automobiles. "[T]he car [is] a means of transporting a small house out of the range of parental scrutiny [for] its subsequent employment as a bedroom. . . . [T]he car is now regarded by nearly everybody as a part of the house, and by millions as the most important part." P. WYLIE, GENERATION OF VIPERS 227 (ann. ed. 1955). " 'One of the most priceless things we are all losing is privacy. . . . And I'm convinced that this is a big factor in the automobile. It's one of the few places where you get a little privacy. On a warm day, women will sit in a car with their skirts hiked up to here and they get a little air and they wouldn't think of doing that on a bus.' " J. BURBY, THE GREAT AMERICAN MOTION SICKNESS OR WHY YOU CAN'T GET THERE FROM HERE 125 (1971) (quoting a General Motors research director).

jects.[75] The motion of a moving car further gives a motorist greater privacy than the occupant of a stationary car has. An automobile is only partially enclosed and therefore only partially private; anyone may easily approach and look into a stationary vehicle. A moving car, on the other hand, though not a shield from all intrusions, is difficult to approach, and it is therefore difficult to observe its contents. The combined factors of a vehicle's enclosed nature and its movement thus afford the occupant of a moving car greater expectations of privacy than either a pedestrian or an occupant of a stationary vehicle has.

III. Modes of Interest Balancing

Present Supreme Court case law suggests two possible modes for striking the constitutional balance between the state and individual interests involved in automobile stops. First, the validity of any stop may be conditioned upon the seizing officer possessing high evidentiary justification.[76] Alternatively, the validity of some stops may be conditioned upon the seizing officer possessing less evidentiary justification but observing strict restrictions on the scope of the seizure.[77]

The law of arrest utilizes the first mode of interest balancing. Well-settled doctrine maintains that the high evidentiary requirement of probable cause balances appropriately the state and individual interests involved in the severe deprivation of liberty occasioned by an arrest.[78] *Terry* and *Adams*, on the other hand, establish that under certain circumstances evidentiary standards lower than probable cause for the initiation of seizures, coupled with strict restrictions on the seizures' scope, balance state and individual interests more appropriately than do high evidentiary standards for the initiation of seizures.[79]

Terry articulated the degree of a seizure's intrusion upon an individual as the criterion for determining which mode of interest balancing properly accommodates state and individual interests.[80] Two factors may be identified as relevant to the *Terry* Court's evaluation of a seizure's intrusiveness: the degree of state animosity toward the individual inherent in the seizure;[81] and the degree of interference with fourth amendment in-

75. *See, e.g.*, United States v. Wickizer, 465 F.2d 1154 (8th Cir. 1972) (sawed-off single-shot rifle); People v. Vallee, 7 Cal. App. 3d 167, 86 Cal. Rptr. 475 (2d Dist. 1970) (stolen copy machine).

76. *See* Henry v. United States, 361 U.S. 98, 103 (1959).

77. *See* Terry v. Ohio, 392 U.S. 1, 17 (1968).

78. *See* note 23 *supra* and accompanying text.

79. *See* Adams v. Williams, 407 U.S. 143, 145–46 (1972); Terry v. Ohio, 392 U.S. 1, 25–27, 30–31 (1968).

80. 392 U.S. at 24–27.

81. *See id.* at 26. The Court stressed the prosecutorial nature of an arrest and the investigative nature of the seizure in *Terry*. *Id.* at 26–27. *See also* Cady v. Dombrowski, 93 S. Ct. 2523, 2527–31 (1973); Almeida-Sanchez v. United States, 93 S. Ct. 2535, 2542 (1973) (Powell, J., concurring); Camara v. Municipal Court, 387 U.S. 523, 537 (1967); Frye v. United States, 315 F.2d 491, 493–94 (9th Cir.), *cert. denied*, 375 U.S. 849 (1963).

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A. *Investigative Stops*

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83. *Id.* at 26–27.

84. *Id.* at 26.

85. *See* text accompanying notes 43

86. *See* Adams v. Williams, 407 U
30 (1968).

terests occasioned by the seizure.[82] The Court noted that the seizure in *Terry* had less inherent animosity toward an individual than does an arrest, which is effected with anticipation of prosecution.[83] In addition, the Court found the brief interference with the seized individual in *Terry* slight in comparison to an arrest.[84] Whenever either element of a seizure's intrusiveness is greater than it was in the seizures involved in *Terry* and *Adams*, *Terry*'s rationale demands analysis of whether individual interests are sufficiently protected by stressing restrictions on the scope of rather than the initiation of the seizure.

IV. Interest Balancing

In both *Terry* and *Adams* the seized individual was stationary, and the seizure was occasioned by a detention rather than an interruption of movement.[85] The discussion in Part II demonstrated that occupancy of a moving car intensifies an individual's interests in freedom from seizure. An automobile stop is therefore a more severe interference with individual rights than were the seizures in *Terry* and *Adams*. Thus, even taking *Terry* and *Adams* as the appropriate balance between state interests and a stationary individual's interests, nonarrest automobile stops call for fresh analysis.

A. *Investigative Stops*

1. *Individual interests.*

Degree of interference. Although investigative stops have the same degree of inherent animosity as do other investigative seizures, the intensity of the interference with fourth amendment interests occasioned by automobile stops suggests that they should require a higher degree of justification.

First, *Terry* and *Adams* involved only the interests of freedom from arbitrary state interference, autonomous self-positioning, and autonomous other-encountering. The Court clearly required that an individuating judgment justify the seizure.[86] The interest in freedom from arbitrary interference was thus protected, although to a lesser extent than in the case of arrests. As noted above, the interest in autonomous self-positioning is equally strong with respect to motorists and other individuals. Motorists, however, have a stronger interest in autonomous other-encountering, because they have greater expectations of being able to avoid those whom

82. *See* 392 U.S. at 26. The Court stressed the continuing interference of an arrest, as contrasted to the brief interference of the seizure in *Terry*. *Id.*
83. *Id.* at 26–27.
84. *Id.* at 26.
85. *See* text accompanying notes 43–46 *supra*.
86. *See* Adams v. Williams, 407 U.S. 142, 145–47 (1972); Terry v. Ohio, 392 U.S. 1, 19, 27, 30 (1968).

they do not wish to encounter. Thus occupancy of a moving car intensifies one of the interests at stake in *Terry* and *Adams*, and a stop is therefore somewhat more intrusive than the seizure of a stationary individual.

The degree of interference of an investigative stop is increased by the fact that it interrupts an individual's movement, while the individuals in *Terry* and *Adams* were stationary. An investigative stop thus impinges on the interest in free passage and the closely related privacy interests created by a car's movement and enclosed nature. These interests have already been recognized as calling for the protection afforded by the probable cause standard.

As noted above, *Henry* strongly suggests, without so holding, that probable cause is required to stop a vehicle to confront its occupants. *Henry*'s endorsement of the probable cause standard for cases involving the interest in free passage is supported by a well-established line of automobile search cases, beginning with *Carroll*. These cases hold that probable cause to search is required before an officer may interrupt an automobile's progress for the purpose of conducting a search.[87] The *Carroll* Court wrote,

> It would be intolerable and unreasonable if a [law enforcement agent] were authorized to stop every automobile on the chance of finding [contraband], and thus subject all persons lawfully using the highways to the inconvenience and indignity of a search.... [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official ... probable cause [to search] ....[88]

Although stopping a car for a search adds a further element of government intrusion to the seizure of its occupants, stops either to search or to confront interfere equally with the interest in free passage. Seizure alone interferes sufficiently with the right to free passage to require the protection of the probable cause standard. Indeed, the *Carroll Court* was explicitly concerned with the "right to free passage without interruption [*i.e.*, seizure] *or* search."[89] *Carroll* thus suggests probable cause as the proper evidentiary standard to be met to justify interruption of the free passage of an automobile occupant.

In addition, the disposition reached in *Henry* was very protective of the special privacy interests generated by a car's movement and enclosed nature. In *Henry*, the policemen's plain sight observations of the actions of the car's occupants and the contents of the car *after* the stop might have

87. *See* note 11(1) *supra*.

88. 267 U.S. at 153–54. In Brinegar v. United States, 338 U.S. 160, 176–77 (1949), the Court said: "The troublesome line posed by the facts in the *Carroll* case and this case is one between mere suspicion and probable cause. . . . Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference."

89. 267 U.S. at 154 (emphasis added).

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90. *See* 361 U.S. at 103–04; text a

created probable cause to arrest.[90] By requiring that probable cause exist *before* the stop, the Court fully protected the motorist's special privacy interests.

Thus, because a motorist's interest in autonomous other-encountering is stronger than that of a stationary individual and because a motorist has especially strong interests in free passage and privacy, low standards for the initiation of the stop are inappropriate. Probable cause should be the justifying standard which must be met.

Inappropriateness of limitations on scope. An additional reason to find that evidentiary standards lower than probable cause for the initiation of seizures coupled with scope restrictions inadequately protect a motorist's interests, is that a motorist's interests in free passage and privacy do not lend themselves to protection by scope limitations. The limitation on the duration of the seizure imposed in *Terry* was designed to protect only the interests in autonomous self-positioning and autonomous other-encountering; these interests are susceptible to being protected by scope limitations on seizures. The essence of both interests is choice, and a temporarily detained individual has his right to choose reinstated upon his release. A motorist's interests in free passage and privacy, on the other hand, are more fragile. Once they are impinged upon, the damage cannot be undone. The essence of the interest in free passage is freedom from interruption; release after interruption cannot restore this interest. Similarly, once a policeman has intruded upon the privacy afforded by a car, his withdrawal does not undo the invasion of privacy.

Summary. Two lines of reasoning call for requiring probable cause for automobile stops. First, the degree of interference with a motorist's fourth amendment interests requires a high evidentiary standard of justification for the initiation of the seizure. Second, the nature of those interests involved in automobile stops which were not involved in *Terry* and *Adams* makes scope limitations unsatisfactory.

2. *State interests.*

The foregoing discussion suggests that probable cause should be required for automobile stops unless the state has a more compelling interest in investigative stops than in other investigative seizures.

A car in motion creates an especially strong state interest in freezing temporarily a situation of suspected criminality, and it could be claimed that the very factor calling for the imposition of a high evidentiary standard to protect individual interests creates a countervailing increase in the state interest. In *Henry*, however, the Court wrote that "[t]he fact that

90. *See* 361 U.S. at 103–04; text accompanying notes 68–72 *supra*.

the suspects were in an automobile"[91] did not reduce the justification required for the stop. Moreover, in the context of searches the Supreme Court has made clear that the factor of a car's movement does not reduce the justification required to stop and search an automobile.[92] Thus the Court has not allowed the factor of a car's movement to outweigh an individual's fourth amendment interests.

Case law and analysis both lead to the conclusion that probable cause to arrest is the appropriate standard for automobile stops. The courts accordingly should adopt the *Henry* model that stops are arrests and find investigative stops based on mere reasonable suspicion unconstitutional.

B. *Inspection Stops*

1. *Individual interests.*

The severe interference with individual interests occasioned by investigative stops also occurs in inspection stops. This parallel suggests that inspection stops, which are undertaken without evidentiary justification, are also unconstitutional.

The argument for the unconstitutionality of inspection stops may be even stronger than that for the unconstitutionality of investigative stops. Case law requires neither that an officer making an inspection stop have evidentiary justification nor that he be able to demonstrate that a particular seizure was not undertaken arbitrarily. The lack of either kind of safeguard against arbitrary exercise of the seizure power means that an individual's interest in freedom from arbitrary interference is impinged upon.[93] On the other hand, the fact that inspection stops are regulatory in character and may therefore be characterized by less inherent animosity toward the seized individual than are investigative stops[94] may counterbalance the increased intrusiveness caused by interference without evidentiary justification. Nonetheless, the intrusiveness of inspection stops calls

91. *Id.* at 104; *see* United States v. Adams, No. 72-1313, at 10–11 (7th Cir., May 11, 1973) (dissenting opinion), *excerpted in* 13 CRIM. L. REP. 2233, 2234. *But see id.* at 5–6 (majority held that car's movement contributed to justification of an investigative stop); Bailey v. United States, 389 F.2d 305, 310 (D.C. Cir. 1967) (suspected flight from the scene of a crime "tips the scales here in favor of probable cause").

92. *See* text accompanying note 87 *supra.*

93. *See* Commonwealth v. Swanger, —— Pa. ——, ——, 307 A.2d 875, 879 (1973). In addition, because inspection stops have neither kind of safeguard against arbitrary use of the seizure power, *see* text accompanying notes 56–58 *supra*, there is no point at which "the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who [can] evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." Terry v. Ohio, 392 U.S. 1, 21 (1968) (footnote omitted). *See* Commonwealth v. Swanger, *supra* at ——, 307 A.2d at 878–79 (1973) (if no justification required for stop of single automobile to conduct safety inspection, "there could be no judicial review of the intrusion").

94. *See* Cady v. Dombrowski, 93 S. Ct. 2523, 2527–31 (1973); Almeida-Sanchez v. United States, 93 S. Ct. 2535, 2542 (1973) (Powell, J., concurring); Brinegar v. United States, 338 U.S. 160, 188 (1949) (Jackson, J., dissenting); Frye v. United States, 315 F.2d 491, 493–94 (9th Cir.), *cert. denied*, 375 U.S. 849 (1963). *See also* Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

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95. *See* text accompanying note 50 s
96. *See* note 11(2) *supra.*
97. *See* Note, *Border Searches and*
text accompanying note 58 *supra.*
98. *See id.* at 1012.
99. *Id.*
100. 267 U.S. at 154.

for finding inspection stops unconstitutional in the absence of a countervailing state interest.

2. *State interests.*

The state interest in inspection stops is highway safety. Seizure without evidentiary justification may be argued to be necessary for the enforcement of a statute whose violation has no visible manifestations.[95] In the analogous area of customs regulations, it is well settled that border searches without evidentiary justification are constitutional.[96] However, border searches are a special case to which neither logic nor precedent compels the assimilation of inspection stops. First, the routine nature of border searches, which are usually conducted under circumstances evidencing the searching officer's authorization, provides some guarantee against arbitrary interferences. Subjecting members of a class to interference on a regularized basis reduces the need for an individuating judgment to prevent arbitrary interference with a given individual.[97] In addition, the chance of discovery of a violation in the case of border searches is greater than in the case of inspection stops because border searches are geared to a situation more strongly suggestive of potential violations.[98]

Second, because border searches are a predictable interference, they impinge less severely on the other fourth amendment interests considered in this Note. Specifically, the choice central to autonomous self-positioning and autonomous other-encountering may be exercised in determining whether or when to cross the border, and the very predictability of the interference deprives an individual of strong expectations of free passage and privacy.[99] Finally, the Supreme Court in *Carroll* expressly excepted border searches from the class of interferences with the interest in free passage which must be based upon probable cause.[100]

The intrusiveness of inspection stops, coupled with the absence of the factors sustaining border searches as a more reasonable exercise of government power, indicates that inspection stops as presently upheld are unconstitutional. Inspection stops cause the same severe interference with individual rights as do investigative stops. In addition, they impinge on an individual's interest in freedom from arbitrary interferences. Although inspection stops are characterized by less inherent animosity toward an individual than are investigative stops, scope limitations are insufficient to protect an individual's interests and the seizure lacks those characteristics

95. *See* text accompanying note 50 *supra*; text following note 53 *supra*.
96. *See* note 11(2) *supra*.
97. *See* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1012 (1968); text accompanying note 58 *supra*.
98. *See id.* at 1012.
99. *Id.*
100. 267 U.S. at 154.

sustaining somewhat analogous border searches. Inspection stops should be found to be unreasonable seizures of the person.

V. Conclusion

Analysis and precedent indicate that confrontation stops of automobiles undertaken on less than probable cause to arrest are unconstitutional seizures of the person. In upholding nonarrest stops courts inadequately protect the fourth amendment interests created by occupancy of a moving automobile. First, the interference of a stop is a severe one, and high evidentiary standards must be met before severe interferences with an individual's fourth amendment interests may be undertaken. Second, the limitations on the scope of nonarrest stops are inadequate to protect a motorist's interests in free passage and privacy. The state interests advanced to uphold nonarrest stops do not outweigh these considerations, especially since the Supreme Court has not allowed the factor of a car's movement to decrease the justification required to interfere with motorists. Thus *Terry* and *Adams* provide inapposite models for automobile stops; *Henry*'s model that automobile stops are arrests, which are justified only on probable cause, should be adopted.

Carl R. Schenker, Jr.

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I. Judicial Supre

A. *Judicial Supremacy*

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1. 384 U.S. 641 (1966).
2. *Id.* at 656.
3. *See generally* A. Bickel, The Le
can Supreme Court (1960).
4. 5 U.S. (1 Cranch) 137 (1803).