



An Officers' Guide to Reverse-Engineering Appropriate Suspicion: Too Much Discretion Can Be a Dangerous Thing

— by MIGUEL PENALOSA, JR.

Courts must protect the Fourth Amendment from further dilution, by keeping officers from using boilerplate language allowing them to reverse-engineer necessary suspicion to justify an illegal stop.

Introduction

“**T**here we go!” my Field Training Officer (“FTO”) barked as we pulled out of the desert on to Interstate 8 somewhere between El Centro and San Diego. The tires screeched and the engine roared as our Border Patrol unit sped to catch up to the van that had just passed. We had been sitting on the side of the freeway looking for suspicious vehicles carrying undocumented individuals.¹ My adrenaline started pumping as I began to envision a vehicle pursuit like the ones I had seen in training at the academy. However, as we closed in on the van, I thought to myself, “What is suspicious about this vehicle? Why are we pulling this one over?”

As we activated our lights and siren the van began to pull over, I asked my FTO if he thought there were undocumented aliens in the van. “Let’s go find out,” he replied, slamming the gear shifter into park. Inside the van I saw a single Hispanic male sitting in the driver’s seat. Other

than the fact that it was a large occupancy vehicle with only one person visible, there was nothing suspicious about the van.

I approached the van, walking along the passenger side, while my FTO asked the driver to step out of the vehicle. I could see nothing inside except some personal belongings; nothing appeared amiss. We questioned the driver on the side of the road for five or ten minutes to determine where he was coming from and where he was going, a standard line of questioning law enforcement officers use to develop suspicion. The driver eventually gave us consent to search his van, not that I really expected to find anyone hiding under the seats, but as a trainee I wanted to be thorough, especially since my FTO was scrutinizing my actions as much as he was the driver's. Satisfied with the driver's responses, and absent any hidden bodies or contraband, we let the man continue on his way.

The traffic stop lasted no more than fifteen minutes, but as we walked back to our unit I couldn't help but wonder if we had adequate suspicion to pull over the driver in the first place. Having recently graduated from the Federal Law Enforcement Training Academy ("Academy"), criminal procedure was fresh in my mind. I knew we needed "reasonable suspicion"—some evidence that someone was committing, or was about to commit, an immigration violation—in order to perform a traffic stop.² However, I could not think of any articulable facts constituting reasonable suspicion. Rather, it seemed to me we had violated a man's constitutional rights, and no one would ever know about it.

When we got back in our unit, in a tone that was as non-accusatory as I could muster, I asked my FTO if we had enough suspicion to conduct a stop. Without hesitation, he said, "You find suspicion . . . it's all about how you write it up." Based on this response, I realized I would always have the power

to stop anyone I wanted to investigate. If I found something illegal, I could sprinkle the magic words I learned at the Academy in my report and voilà, probable cause, reasonable suspicion, whatever I needed would appear.

Having taken an oath to protect and defend the Constitution and uphold the laws of the United States, I felt conflicted. This experience and others I witnessed as a junior police cadet, community service officer, and law enforcement officer led me to fully appreciate the power and responsibility officers carry. However, I also learned that not all my fellow officers took that responsibility to exercise this power as seriously as I did. Needless to say, my career as a federal agent was short lived. Years later, while attending law school and working in criminal defense, I still see report after report containing the same boilerplate language I had been trained to recite. Given my experience, when I read such reports, I am concerned about the legality of initial detentions.

This article addresses the concerns I developed as a federal law enforcement officer. I assert the need for courts to protect the Fourth Amendment from further dilution, by keeping officers from using boilerplate language allowing them to reverse-engineer necessary suspicion to justify an illegal stop. Unless courts carefully scrutinize law enforcement officers' actions, officers will be able to cover up constitutionally questionable actions with boilerplate language, thereby delegitimizing law enforcement efforts.

Part I of this paper will discuss the evolution of the Fourth Amendment and how courts have diluted the Fourth Amendment from requiring probable cause to reasonable suspicion for investigatory stops. Courts were once wary of giving law enforcement officers broad discretion in fear they would overstep constitutional limitations. As the law has evolved, courts have diminished

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Fourth Amendment protections to help suit law enforcement needs, as well as to ensure officer safety.

Part II examines how courts give deference to law enforcement officers. It will look at how the subsequent discovery of illegal activity is usually rewarded by deeming the initial detention valid. This section will discuss how courts reinforce bad police practices by focusing on the result of the detention rather than scrutinizing the motives for initiating

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investigations. I assert that failing to properly scrutinize law enforcement officers' actions can lead to them using boilerplate language not only to describe

suspicion that might not have been legally sufficient to initiate a detention, but also to escape civil liability. Thus, law enforcement officers' actions and credibility should be closely scrutinized in both civil and criminal cases.

Part III examines the importance of enforcing constitutional protections, and discusses courts that have properly analyzed officers' actions. Specifically, Part III looks at how the Court of Appeals for the Ninth Circuit has scrutinized such actions and identified boilerplate language to ensure that officers initiate investigatory stops based on an appropriate level of suspicion.

I. The Evolution of the Fourth Amendment and Investigatory Stops

The Fourth Amendment and law enforcement efforts are often in tension. Officers are required to engage in the "often competitive enterprise of ferreting out crime."³ On the other

hand, the Fourth Amendment protects citizens from unreasonable searches and seizures by the Government.⁴

Courts have extended these Fourth Amendment protections to investigatory vehicle stops as well as traditional detentions.⁵ Officers no longer require probable cause to make a detention comport with the Fourth Amendment; detentions are constitutionally valid where an officer has reasonable suspicion to believe that "criminal activity may be afoot."⁶ Reasonable suspicion exists when an "officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion."⁷ Even though reasonable suspicion is less stringent than probable cause, this standard still requires an objective justification for investigatory stops.⁸ "Mere hunches" are not enough.⁹

Courts only review the validity of a detention in the context of a criminal defendant's suppression motion or in a civil case alleging civil rights violations by law enforcement officers. In determining whether a detention was based on sufficient, articulable reasonable suspicion, the courts perform an objective analysis of the officer's actions. The subjective reasons of the individual officer are not relevant to the analysis.¹⁰

Some scholars argue that treating reasonable suspicion as an objective concept fails to protect against unjustified encroachments upon individual liberty.¹¹ In order to look at a set of facts, courts have to assume there is a set of circumstances that can describe a suspicious person and police only detain those people who act suspiciously.¹² When implicit biases are factored in to what constitutes suspicion, the flaws in reasonable suspicion become more evident.¹³ Two people can act in the same manner, but depending on whether an officer wants to investigate one further or not, the officer can spin innocuous facts to obtain the necessary articulable suspicion that already existed in their mind.

After *Terry v. Ohio* required courts to give “due weight . . . to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience,” courts have been forced to determine an officer’s suspicion on a case-by-case basis.¹⁴ Reviewing courts must look at the “totality of the circumstances” to decide whether the detaining officer had a “particularized and objective basis for suspecting legal wrongdoing.”¹⁵ In practice, courts almost always defer to officer “training and experience” in concluding sufficient suspicion justified the detention.¹⁶ This deferential standard allows law enforcement officers to make inferences and deductions about the cumulative information available to them that “might well elude an untrained person,” (including judicial officers).¹⁷

Ultimately, courts attempt to strike a balance between law enforcement needs and individual privacy rights.¹⁸ However, when courts defer to officers’ training and experience, courts are relying on officers’ subjective explanations, which may be tainted by officers’ desires to legally justify detentions that resulted in the discovery of criminal activity. The deferential standard is ripe for abuse: officers understand the legal standard and can navigate a cross-examination by highlighting (or inventing) facts they may not have been aware of at the time of the initial detention in order to pass constitutional muster, thus, eviscerating any protection that cross-examination provides as a truth-seeking tool.

II. Deference Given to Law Enforcement Officers

Law enforcement officers face myriad factual situations that make it difficult for courts to determine what constitutes suspicious behavior supporting detention.¹⁹ While courts have established guidelines for officers to follow, the evolving situations law enforcement officers face require a case-by-case factual analysis.²⁰

In *United States v. Arvizu*, the Supreme Court explained the level of suspicion needed by law enforcement to affect a stop.²¹ While a stop cannot be based on a mere “hunch,” it need not constitute a preponderance of the evidence either.²² This standard is relatively low.

Courts have never defined what constitutes a “mere hunch.” The elusive nature of what constitutes a “hunch” results in a visceral understanding of knowing it when one sees it.²³ Some scholars have described “hunches” as an emotional response rather than an application of reason.²⁴ Nonetheless, the requirement that reasonable suspicion must be more than a “hunch” but need not amount to a preponderance of the evidence leaves a lot of room for interpretation. This section will demonstrate that this vague standard results too often in courts deferring to, and approving, law enforcement officer action. In practice, the officer need only avoid using the word “hunch” in explaining his or her reasons for initiating a detention, even if his actions at the time he took them were legally deficient.²⁵

A. Court Recognition That Too Much Discretion Can Be Dangerous

As evidenced by its decision in *Colorado v. Bertine*, the United States Supreme Court understands the need to standardize procedures to ensure law enforcement officers do not abuse their discretion.²⁶ In *Bertine*, the Court recognized the substantial discretion law enforcement officers have while conducting their everyday activities. That understanding, along with its recognition of officers’ aggressive desire to ferret out criminal activity, led the Court to deny officers “unfettered discretion” while conducting warrantless inventory searches.²⁷

Some courts, particularly the Ninth Circuit, defer to officers’ inferences only when those inferences rationally explain how objective circumstances led to reasonable suspicion.²⁸ Those inferences must demonstrate the particular person

being stopped either committed, or was about to commit, a crime.²⁹ Officers are allowed to evaluate facts supporting reasonable suspicion in light of their experience, but that experience may not give officers “unbridled discretion” in making a stop.³⁰ The Ninth Circuit recognizes the importance of requiring law enforcement officers to qualify their suspicions. Otherwise, officers could label innocuous conduct as suspicious, and validate that suspicion based on the catch-all phrase, “training and experience.”

In *Illinois v. Gates*, the United States Supreme Court noted the competitive nature of law enforcement officers. Nevertheless, in *Gates*, the Court insulated law enforcement officer affidavits from closer scrutiny by reviewing courts.³¹ The Court reasoned that heightened scrutiny might lead officers to conduct more warrantless searches rather than face the possibility of obtaining a search warrant on information that is later deemed unreliable (thus requiring the suppression of evidence obtained based on that unreliable information).³² The lesser standard established in *Gates* allows officers to frame information in a way that leads an issuing magistrate to find probable cause for a warrant based on the officers’ interpretations, when in fact probable cause may not exist.

The deferential standard, coupled with a lower level of scrutiny, leads officers to the safety of boilerplate language known to support probable cause findings in previous cases. Unfortunately, the ease with which officers rely on such boilerplate results in insufficient case-specific factual information presented to courts, either in affidavits for search warrants or in reports and testimony presented in motion hearings testing the validity of the stop. When courts give too much weight to officers’ use of boilerplate language, the courts have no way

of actually qualifying the reliability and accuracy of that information. Officers will articulate and conflate points which they know have been deemed suspicious by courts and may not actually attribute any individualized suspicion to each case.

B. Issues with Officer Credibility and How Courts Deal with It

In determining whether sufficient cause justified a detention, courts often make credibility findings. In such instances, courts generally presume officers are credible witnesses without bias. However, as previously discussed, law enforcement officers have an interest in the case, and thus carry the same potential for bias as a defendant testifying on their own behalf. It would be naïve to think criminal defendants and arresting officers would not present facts in the light most favorable to their positions. Even in those rare cases where a court finds part of an officer’s testimony inaccurate, courts may uphold a stop or search.

In *Ornelas v. United States*, for example, Wisconsin police came across a vehicle parked in a motel parking lot.³³ Because the vehicle had California license plates, officers decided to investigate further.³⁴ The officers spoke to a hotel clerk and obtained the names of the registered motel guests who arrived in the vehicle.³⁵ Officers then cross-referenced the names with a DEA database, and learned that the guests had prior drug connections.³⁶ When the guests went to their vehicle, officers walked up to them, requested identification, questioned them, and obtained “consent” to search the vehicle.³⁷ The officer later testified that while searching the vehicle, he felt a loose panel and saw a rusty screw in the doorjamb.³⁸ The officer stated the rusty screw indicated to him that the screw had been

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removed at some point. Based on these observations and his experience in searching over 2,000 cars for narcotics, the officer dismantled the panel and discovered two kilograms of cocaine.³⁹

Courts therefore should not validate an officer's original suspicions simply because illegal activity was ultimately discovered.

After Ornelas filed a motion to suppress the evidence obtained in the search, the magistrate judge found there had been reasonable suspicion but not probable cause to search the vehicle.⁴⁰ The magistrate based his ruling on a factual finding that there was no rusty screw, despite the officer's testimony.⁴¹ Nonetheless, the evidence was not suppressed, based on the

doctrine of inevitable discovery, because there was a drug-sniffing dog on scene.⁴² The district court upheld the magistrate's ruling, albeit on a different ground, finding probable cause was established once the officer felt the loose panel.⁴³ On remand from the Seventh Circuit, the magistrate found the officer's testimony credible and again denied the motion to suppress.⁴⁴

The underlying issue litigated before the district court and on appeal in Ornelas was whether the officer had the requisite suspicion to conduct the investigatory stop and subsequent search. It is clear from the procedural history there was an issue regarding the officer's credibility. The magistrate made a factual finding that there was no rusty screw, while the officer testified there was one, which factored into the officer's determination that there were narcotics secreted in the vehicle. The end result was that the search was justified, and the conviction stood.

While courts usually defer to observations made by law enforcement officers, they should not enter a "means justifies the ends" analysis. Suppression motions, from which the Fourth

Amendment is interpreted, almost always arises in the context of a criminal prosecution; detentions and searches resulting in no prosecution seldom end up in court. Courts therefore should not validate an officer's original suspicions simply because illegal activity was ultimately discovered.

Courts should not be leery of making adverse credibility findings against law enforcement officers. While integrity is a quality that is valued, and essential in law enforcement, all officers do not equally share this quality. Further, the nature of the law enforcement business and the desire to take illegal substances and "criminals" off the street stand in the way of complete candor. To be fair, courts are limited in making their decisions solely on the evidence presented to them. This is why it is important to consider that law enforcement officers receive regular training updates on criminal procedure and learn what courts have deemed appropriate, and conversely, learn what is considered inappropriate or unconstitutional. Officers then incorporate this knowledge in their report writing and testimony.⁴⁵

While law enforcement officers may not be lawyers, they understand the legalese that courts rely on in making their determinations. This in turn facilitates the ability for a law enforcement officer to serenade the fact-finder with the talismanic words virtually guaranteeing a ruling upholding the officer's action. As a result, the integrity of our justice system slowly erodes. By and large, law enforcement officers do not purposely try to violate people's rights or deceive courts. However, the pressures of the job, and the anti-crime mentality, can lead officers to provide less than truthful testimony. Thus, it is important for courts to understand how to scrutinize officers' actions without excess deference.

C. Learning Boilerplate Language

In *Tennessee v. Garner*, the United States Supreme Court considered a Tennessee statute

allowing officers to use “all the necessary means to effect the arrest” of a fleeing defendant.⁴⁶ In *Garner*, Officer Hymon was responding to a nighttime burglary call when he encountered Garner, a fifteen-year-old boy, at the base of a fence and instructed him to stop.⁴⁷ The officer shot and killed him as he attempted to flee.⁴⁸ Officer Hymon did not see any weapons and did not claim that he feared for his safety at the time he shot Garner.⁴⁹ The officer’s only reason for shooting Garner was to prevent his escape.⁵⁰ Garner’s family filed a federal civil rights case against the officer. After a trial, the district court dismissed the case against the officer, finding he enjoyed qualified immunity under the Tennessee law, which permitted the shooting.⁵¹

The case ended up before the Supreme Court. The Court deemed Tennessee’s statute unconstitutional.⁵² The Court held, “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable” under the Fourth Amendment.⁵³ While the dissent argued about the dangerousness Garner could have posed to Officer Hymon, the majority prudently chose not to speculate on an existence of danger that was not articulated.⁵⁴

Garner is taught in law enforcement academies throughout the United States as an example of what amount of force officers are allowed to use and what is deemed an unreasonable use of force. It gives law enforcement trainees an extreme example of the use of force the Supreme Court found off limits, and teaches them what amount of force is appropriate. While *Garner* illustrates what has been deemed an unreasonable use of force, it also teaches savvy officers something else. If read closely, *Garner* infers that had Officer Hymon articulated some threat by saying he felt Garner posed a danger or felt

he was armed, the outcome of this case would have been different.⁵⁵

Officers quickly learn that there are certain types of actions that could create civil liability and then use that knowledge in factoring what action to take. Officers understand that they may be liable for their actions, but only if those actions are later deemed extreme or excessive. Based on their exposure to case law articulating the boundaries of legal conduct, officers quickly learn they can justify their actions by including language that makes their conduct comport with previous cases approving similar actions. Officers fall back on such language frequently enough that it becomes boilerplate routinely placed in reports. This repetitive recitation of events places the officer’s actions in the best light, but given its canned nature, it becomes impossible to determine whether the recitation is truthful and complete.

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It is safe to assume Officer Hymon’s candor was a result of his belief that he was justified in shooting the fleeing suspect, given Tennessee’s statute authorizing deadly force. He did not have to say that Garner posed a threat or that

he saw Garner reach for something he believed to be a weapon. Officer Hymon knew that simply telling the truth was enough to shield him from liability under Tennessee law. But what if the same incident occurred today? Would a present day officer be as honest as Officer Hymon? Or would it be easier for this officer to include something simple, and unimpeachable, to avoid liability, such as: “I saw a bulge in the suspect’s waistline. The suspect made a furtive movement towards the bulge and I saw what I believed to be a weapon. Fearing for my safety and the safety of other officers I fired a shot striking the suspect in the back.”⁵⁶

This type of language is seen in police reports all over the United States. Law enforcement officers understand the job they do is dangerous and courts have acknowledged it.⁵⁷ This is why courts have to scrutinize officers' accounts and analyze their testimony to ensure they are not using boilerplate language to cover up wrongdoings, or to explain illegal detentions or searches.

III. Enforcing Constitutional Protections: Courts that Have Properly Scrutinized Officers' Actions

Courts have long held an arrest cannot be justified based on the fruits of an illegal search.⁵⁸ The Ninth Circuit enforces this standard by requiring officers to fully articulate their suspicions. The Court

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has held that suspicion may not be based on broad profiles casting suspicion on entire categories of people, without individualized suspicion of the person being stopped.⁵⁹ The Court rejects vehicle stops based on a description of conduct that could be committed by large categories of presumably innocent travelers.⁶⁰ Otherwise, law enforcement officers could make "virtually random seizures."⁶¹

The Ninth Circuit deals with many cases alleging suspicionless searches and seizures because it encompasses states

near the Mexican border, and because of the difficulty that may exist in articulating suspicion for immigration violations.⁶² Many of these cases address vehicle stops made by Border Patrol agents with less than appropriate suspicion. These cases show that agents often develop suspicions or "hunches," and then seek out articulable facts to pursue their suspicions. While Border Patrol stops can be based on less than probable cause they still require reasonable suspicion that a federal crime is being, or is about to be, committed.⁶³ Many times, boilerplate language such as "a location or route frequented by illegal immigrants" is used to justify their suspicions; however, this is not especially probative when many legal residents also travel on the same roads.⁶⁴

While the reasonableness of a stop does not depend on an individual officer's motivation, the appropriate level of suspicion is required.⁶⁵ Unlike state law enforcement officers who can use one of the myriad traffic or municipal violations to pursue other motivations, federal law enforcement officers are limited in their jurisdiction and cannot rely on a mere traffic infraction to justify a detention. The Ninth Circuit recognizes this challenge, and scrutinizes facts to ensure officers do not routinely use boilerplate language that does not indicate suspicious behavior.

This type of scrutiny is important because it pushes law enforcement officers to articulate appropriate individualized suspicions for their investigatory stops. It also sends the message to officers that they will be held to an appropriate legal standard, and the court will not simply rubberstamp an officer's allegations of suspicion. Moreover, such scrutiny will not jeopardize an officer's safety. This level would actually help ensure officer safety because officers would be less likely to pursue questionable actions that may place them in perilous positions. If officers only pursued investigations with appropriate articulable suspicion, they would go into situations better prepared. Further, this level of scrutiny keeps

all of the actors in the criminal justice system focused on appropriately enforcing the law.

Conclusion

“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not [to deny] law enforcement the support of the usual inferences which reasonable men draw from evidence.”⁶⁶ The purpose of the Fourth Amendment is to maintain a check on officers to prevent constitutional violations and preserve the integrity of the criminal justice system. As law enforcement practices evolve to meet new demands in fighting crime, courts must remain vigilant to ensure constitutional protections are preserved. Courts must do this by limiting deference to officers, by limiting the use of boilerplate justifications for searches and seizures, by carefully scrutinizing the factors articulated by officers, and, finally, by vetting officers to ensure they are not reverse-engineering suspicion.

If the van my FTO and I pulled over contained something illegal, a court would most likely have concluded our stop was valid, even if it was not based on the appropriate suspicion at the time of the initial stop. Less likely, the court would have seen through our lack of suspicion by scrutinizing our initial actions and accounts of the event. As a firm believer in the Constitution, I would like to believe the latter would have been the outcome, but having seen similar cases play out in court on more than one occasion, I have my doubts.

The American criminal justice system applies the presumption of innocence, and applies the notion that it is better to let ninety-nine guilty people go free than to convict one innocent person. While courts must strike a balance between allowing officers to conduct investigations and preserving citizens’ privacy interest, it is important to remember our system is built on the presumption of innocence which provides “justice for all.”

Courts must be vigilant in monitoring law enforcement actions. Once officers realize their questionable actions will be scrutinized, they will be left to pursue only those actions they know are legally sufficient. It is important for courts to help officers better understand their sworn duty to protect and defend the integrity of the Constitution is just as important—if not more—than arresting criminals.

To ensure a safe, fair, and just society, policing is everyone’s duty, including the courts. As Justice Earl Warren said, “the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”⁶⁷ ■

Author Biography

Miguel Penalosa is a San Diego Public Defender who represents indigent clients charged with a variety of crimes. Before attending law school, Mr. Peñalosa graduated the Federal Law Enforcement Academy with honors and worked as a federal agent with the United States Border Patrol along the United States-Mexico international border. Mr. Peñalosa’s father was a police officer with the San Diego police department for 27 years. Mr. Peñalosa originally sought to follow in his father’s footsteps but after working for the San Diego Sheriff’s Department and ultimately the Border Patrol, Mr. Peñalosa decided to attend law school in hopes of gaining further insight into the inequalities and disparities he saw in the criminal justice system. Mr. Peñalosa, a true believer in protecting citizens’ rights, understood the difficulty that law enforcement officers dealt with in the field and how many officers dealt with those constitutional hurdles. He has now dedicated his life to ensure that his former “brothers/sisters in blue” do not step outside of constitutional bounds while doing their jobs and in turn ensures that citizens’ rights are protected from police misconduct. ■

Endnotes

1 Border Patrol agents are trained to use the term, “undocumented alien,” rather than more neutral descriptors such as “undocumented individual” or “undocumented person.” Indeed, under federal law, “The term ‘alien’ means any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3). Federal criminal laws apply the term “alien” as well. *Cf.* 8 U.S.C. § 1324 (“Bringing in and Harboring Certain Aliens”) and 8 U.S.C. § 1326 (“Reentry of Removed Aliens”).

2 *United States v. Brignoni–Ponce*, 422 U.S. 873, 878 (1975) (holding officers may stop vehicles only if they are aware of specific articulable facts, which would reasonably warrant suspicion that the vehicles are occupied by aliens who may be illegally in the United States).

3 *Johnson v. United States*, 333 U.S. 10, 14 (1948). In *Johnson*, Justice Jackson’s majority opinion explained the biases that law enforcement officers introduced into investigations and cautioned that allowing too much discretion would facilitate constitutional violations.

4 U.S. CONST. amend. IV.

5 *See United States v. Brignoni–Ponce*, 422 U.S. 873, 878 (1975); *see also United States v. Arvizu*, 534 U.S. 266, 273 (2002) (holding a “totality of the circumstances” may justify investigatory stops).

6 *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (also permitting a pat-down search for the presence of weapons where specific and articulable facts exist justifying a concern for officer safety).

7 *United States v. Valdes-Vega*, 685 F.3d 1138, 1143 (9th Cir. 2012) (citing *United States v. Montero–Camargo*, 208 F.3d 1122, 1129 (9th Cir.2000) (en banc)).

8 *United States v. Montero–Camargo*, 208 F.3d 1122, 1129 (9th Cir.2000) (en banc).

9 *Id.*

10 *Whren v. United States*, 517 U.S. 806, 813 (1996).

11 L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1145 (2012).

12 *Id.*

13 *Id.*

14 *Terry*, 392 U.S. at 27.

15 *United States v. Arvizu*, 534 U.S. at 273.

16 *See Ornelas v. United States*, 517 U.S. 690, 699, (1996) (holding appellate courts should defer to trial court’s finding an officer was credible in determining sufficient suspicion exists to justify a search); *see also Arvizu*, 534 U.S. at 273 (finding officers suspicions were valid by looking at the ‘totality of the circumstances’ that led to an investigatory vehicle stop).

17 *United States v. Cortez*, 449 U.S. 411, 418 (1981).

18 *Richardson*, *supra* note 9, at 1144.

19 *Cortez*, 449 U.S. at 417.

20 *Arvizu*, 534 U.S. at 273–74.

21 *Id.*

22 *Id.*

23 This notion is similar to Justice Stewart’s definition of obscenity: “I know it when I see it.” Such a concept may work in the context of identifying pornography but leaves much room for interpretation among courts when dealing with Fourth Amendment principles. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

24 Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 Vand. L. Rev. 407, 411 (2006).

25 See, e.g., *State v. Emilio* 144 Vt. 477, 480-481, 479 A.2d 169, 171 (1984) (suppressing evidence after the officer admitted that he acted on a hunch because he sensed something wrong with a car because it was driving near the area of a recent burglary call, unfamiliar to the area, and missing a front license plate).

26 *Colorado v. Bertine*, 479 U.S. 367, 381 (1987) (Marshall, J., dissenting) (holding pretext inventory searches were not a warrantless search exception, and requiring specialized procedures to protect from the “grave danger” of an officer’s abuse of discretion).

27 *Id.*

28 *United States v. Manzo–Jurado*, 457 F.3d 928, 934–935 (9th Cir.2006).

29 *Id.* (quoting *Montero–Camargo*, 208 F.3d at 1129).

30 *Id.* at 935.

31 *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

32 *Id.*

33 *Ornelas*, 517 U.S. at 692.

34 *Id.*

35 *Id.*

36 *Id.*

37 The consent search was contested at the lower court. Ornelas stated that he did not give consent to search the vehicle as the officer testified. *Id.*

38 *Id.*

39 *Id.*

40 Wisconsin law required probable cause in order to dismantle a car. *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* The Supreme Court took certiorari to determine whether clear error or de novo review applied in determining the validity of a search on appeal.

45 Most cases dealing with insufficient suspicion were decided in the middle of the 20th century. While police practices have evolved as a result of prior decisions that have clarified constitutional limits, it is the author’s belief that law enforcement has also learned to tailor their language so that their actions pass constitutional muster, rather than believe that such violations no longer occur.

46 *Tennessee v. Garner*, 471 U.S.1, 4 (1984).

47 *Id.*

48 *Id.*

49 *Id.* at 21.

50 *Id.* at 4.

51 *Id.* at 5.

52 *Id.*

53 *Id.* at 11.

54 *Id.*

55 *Id.* (“Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.... Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”)

56 Boilerplate language such as this can be added to any report. By changing only small details of the actual event an officer knows a court likely will defer to his description of the event, and the officer can insert such language to express a belief that may or may not have been actually present at the time the officer acted. Officers use such boilerplate to justify deploying their Taser, batons, and pepper spray, as well as lethal weapons. Only the criminally accused can rebut their account of the events, and officers will always welcome a he-said/she-said dispute with a criminal defendant.

57 *See Terry*, 392 U.S., at 20–22.

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

59 *United States v. Sigmond–Ballesteros*, 285 F.3d 1117, 1121 (9th Cir.2002) citing *United States v. Rodriguez– Sanchez*, 23 F.3d 1488, 1492 (9th Cir.1994).

60 *Valdes-Vega*, 685 F.3d at 1144.

61 *Id.*

62 The difficulty exists because officers are not allowed to use race as a sole factor for determining suspicion for immigration violations, forcing officers to find other ways of articulating suspicion regarding the alienage of a person. *See Brignoni–Ponce*, 422 U.S. at 873 (holding officers may stop vehicles only if they are aware of specific articulable facts, which would reasonably warrant suspicion that the vehicles are occupied by aliens who may be illegally in the United States).

63 *Id.* at 880.

64 *Manzo–Jurado*, 457 F.3d at 936.

65 *See Whren v. United States*, 517 U.S. 806, 813 (1996) (holding an officers subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis, allowing officers to engage in pretextual stops).

66 *Johnson*, 333 U.S. at 13-14.

67 *Spano v. New York*, 360 U.S. 315, 320-21 (1959). ■