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Posner opinion aims to put teeth into 'reasonable suspicion' doctrine

How much evidence do the police need to make an arrest? Black-letter law says "probable cause." Why? Because the Fourth Amendment expressly provides that probable cause is the amount of evidence necessary for a reasonable seizure.

How much evidence do the police need to make a less intrusive investigative stop? Black-letter law would say it is a standard less than probable cause called "reasonable suspicion." But the phrase "reasonable suspicion" is found nowhere in the U.S. Constitution.

So what is "reasonable suspicion"? Where did it come from? How is "reasonable suspicion" different from "mere suspicion"? These are some of the questions the 7th U.S. Circuit Court of Appeals recently confronted in *U.S. v Paniagua-Garcia*, 813 F.3d 1013 (2016).

An Indiana police officer passed the defendant's car on an interstate highway. He observed the driver holding a cellphone with his head bent toward the phone. The officer testified that he "appeared to be texting." Indiana law prohibits a driver from texting while operating a motor vehicle. For this reason, the officer pulled the car over. A colloquy with the driver resulted in the driver's consent to a search. The search uncovered 5 pounds of heroin.

After being charged in federal court with possession, the defendant moved to suppress the evidence on the ground that the police had neither probable cause nor reasonable suspicion to make the stop. The motion was denied, the defendant was convicted and he filed an appeal.

"Reasonable suspicion" is a relatively new concept in constitutional criminal procedure. Prior to 1968, the only recognized seizure of a person was an arrest that required probable cause the only standard of evidence found in the Fourth Amendment.

This changed with the landmark case of *Terry v. Ohio* in 1968. 392 U.S. 1 (1968). *Terry* recognized that there could be a seizure less invasive than an arrest. It has been variously referred to as an "investigative stop" or a "*Terry* stop." Unlike an arrest, the purpose of this kind of limited seizure is solely to determine whether or not probable cause for an arrest can be established.

But because it is nonetheless a seizure, it must be "reasonable" under the Fourth Amendment. The Supreme Court created the standard "reasonable suspicion" to describe the quantum of evidence necessary to support a *Terry* stop.

It is not easy to define "reasonable suspicion." The Supreme Court has said that it is both "obviously less demanding than that for probable cause" (*U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985)) and "considerably less than proof of wrongdoing by a preponderance of the evidence" (*U.S. v. Sokolow*, 490 U.S. 1 (1989)).

On the other hand, it is more than an "inchoate and unparticularized suspicion or hunch." *Terry*. It cannot be "reduced to a neat set of legal rules" and requires looking at the "totality of the circumstances the whole picture." *Sokolow*.

Judge Richard A. Posner wrote the opinion for the court. He began by noting that there was absolutely no proof that the driver had been texting. The prosecution, however, contended that the officer nevertheless had reasonable suspicion to believe that he was, so the stop was constitutional.

The court noted that what the officer saw — a driver bending down toward a cellphone in his hand — was consistent with a broad number of activities. The driver could have been making or receiving a phone call; inputting addresses; reading news or maps; playing music or audio books; playing video games; even watching a movie. These activities may perhaps be as dangerous as texting, but none of them is forbidden by Indiana law.

Since it was just as likely that the driver was engaging in one of these many legal activities rather than texting, Posner logically concluded that "the most plausible inference from seeing a driver fiddling with his cellphone is that he is not texting."

And the government here presented absolutely no empirical evidence of what percentage of drivers text. So what the government was essentially arguing was that the possibility of unlawful texting should be enough to create reasonable suspicion to support a *Terry* stop.

Yet a "possibility" is not enough to constitute "reasonable suspicion." For, as Posner notes, it is always possible that any person could be a robber, a killer, a drug lord or a pedophile. But "a suspicion so broad that it would permit the police to stop a substantial portion of the lawfully driving public is not reasonable." A "suspicion" is simply not the same as a "reasonable suspicion."

It is impossible to tell by looking through the driver's side window of a moving car whether the driver's "fiddling" with his phone is prohibited texting or a perfectly legal activity.

Posner contrasts Indiana's narrow prohibition of texting while driving with Illinois' much broader law that simply makes it unlawful for a driver to have a cellphone in his hands. He notes statistics showing that in 2013 only 186 citations were issued for violations of Indiana's no texting law; this compares with more than 6,700 citations for violations of Illinois' hands-free law.

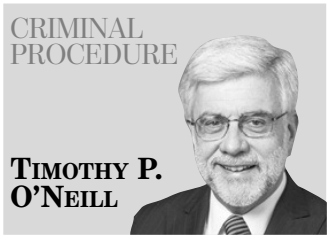
Posner concludes that the final irony is that by trying to criminalize a narrower slice of activity, Indiana has probably made its statute unenforceable.

Defense attorneys should pay heed to this opinion. Over the years the concept of "reasonable suspicion" has morphed into what Posner refers to as simply a "possibility."

This watering-down of the *Terry* standard can be seen in the report "Stop and Frisk in Chicago" issued by the American Civil Liberties Union last year. Chicago Police Department rules provide that *Terry* stops that do not lead to arrests must be recorded on contact cards.

The ACLU randomly reviewed 250 contact cards and found that half of the cards did not provide reasons that would constitute reasonable suspicion. For example, the mere conclusion that a person is "suspicious" does not constitute the kind of articulable reason required to support a proper *Terry* stop.

Posner's opinion provides a model for evaluating both what evidence the police have and whether the evidence is sufficient to justify a *Terry* stop.



Timothy P. O'Neill is the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

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