

TERRY v. OHIO AT THIRTY-FIVE: A REVISIONIST VIEW

*Lewis R. Katz**

In its landmark decision, *Terry v. Ohio*,¹ thirty-five years ago, the United States Supreme Court upheld forcible detentions (stops) and searches (frisk) on less than the Fourth Amendment standard of probable cause. The decision came just seven years after *Mapp v. Ohio*² where the Supreme Court extended the protection of the Fourth Amendment exclusionary rule to the states and demanded that police obey the law while enforcing it.³ *Terry* represented a sudden change in direction away from the Warren Court's focus of protecting individual rights from police abuse of power, evidenced in *Mapp* and *Miranda*,⁴ to empowering police and expanding police power on the street in *Terry*.⁵

At first glance, the *Terry* doctrine seems to provide police with reasonable authority to investigate suspicious activity and prevent crimes, rather than limiting police only to chasing criminals after the commission of a crime. In fact, history has treated the *Terry* doctrine kindly; Professor Steven A. Saltzburg described the decision as a “practically perfect doctrine.”⁶ While *Terry* has, in fact, provided police with the necessary tools to proactively fight crime, the *Terry* Court dismally failed to strike an adequate balance between effective law enforcement and

* John C. Hutchins Professor of Law, Case Western Reserve University. An earlier draft of this article was presented at the Annual Fourth Amendment Symposium, “The Tools to Interpret the Fourth Amendment,” of the National Center for Justice and the Rule of Law, of the University of Mississippi School of Law, on April 2, 2004. I want to thank William C. Carter and John Martin for their helpful comments on an earlier draft and my research assistants Claire Chau, Ryan Kerian and Shaylor Steele for their research and editorial assistance.

¹ 392 U.S. 1 (1968).

² 367 U.S. 643 (1961).

³ *Mapp*, 367 U.S. at 655 (concluding that because the Fourth Amendment's right to privacy is enforceable against the States through the Due Process Clause of the Fourteenth Amendment, all evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in state court).

⁴ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment privilege against self-incrimination includes proper procedural safeguards against police abuse of “the process of in-custody interrogation of persons suspected or accused of crimes”).

⁵ See generally Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1136-37 (1998) (discussing balancing of individual liberties with police power).

⁶ Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 911 (1998).

individual freedom.⁷ The Court struck that balance completely in favor of the police, and the balance has been further tipped in favor of police by later Supreme Courts.

Prior to *Mapp v. Ohio*, police were free in most states to act without regard to the limitations imposed by the Fourth Amendment. The burden of that police conduct fell most heavily on people in inner city, minority neighborhoods. At the time of *Mapp*, half the states had not imposed the exclusionary rule as a matter of state law.⁸ In states without an exclusionary rule, police were free to detain and search people without reasonable cause because that police conduct had no impact on the outcome of any resulting criminal charges against the subject of the detention and search. Even in states that had adopted the exclusionary rule, citizens were exposed to arguably illegal detentions and searches under cover of suspicious persons, loitering and vagrancy statutes and ordinances.⁹ The movement

⁷ Cf. Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 How. L.J. 567, 576 (1991) (arguing that the Court made the right compromise at the time but *Terry's* subsequent erosion negated the Court's insight).

⁸ See Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246 (1961).

Not all of the American states have adopted the exclusionary rule; indeed, only about half of them have done so. Twenty of the states appear to have adopted the rule without substantial qualification. . . . In Michigan, although the exclusionary rule was adopted early by the courts, certain categories of evidence are now placed outside the operation of the rule by constitutional amendment, including narcotics, firearms and other dangerous weapons seized in places other than a dwelling house. Alabama, Maryland, and South Dakota have by legislation adopted the rule only as to the situations stipulated in their statutes. Hawaii and Alaska have apparently not spoken to the question since becoming states. The federal rule of exclusion operates in the District of Columbia.

Id. at 251-52 (footnotes omitted).

⁹ See KATHERYN K. RUSSELL, *THE COLOR OF CRIME* (Niko Pfund ed., 1998).

For example, vagrancy laws allowed Blacks to be arrested for the "crime" of being unemployed. Mississippi's statute was representative:

[A]ll freedmen, free negroes and mulattoes . . . over the age of eighteen years, found on the second Monday in January, 1866, or thereafter with no lawful employment or business, or found unlawfully assembling themselves together. . . shall be deemed vagrants, and on conviction thereof, shall be fined . . . not exceeding fifty dollars . . . and imprisoned . . . not exceeding ten days.

Id. at 19-20 (quoting Jason Gillmer, *U.S. v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 538 (1995) (citing an *Act to Amend the Vagrant Laws of the State*); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

Administratively, vagrancy-type statutes are regarded as essential criminal preventives, providing a residual police power to facilitate the arrest, investigation and incarceration of suspicious persons. When the District of Columbia vagrancy law was revised ten years ago, Congress was told by police officials ". . . that one of the principal needs to assist in correcting the existing criminal situation in the District of Columbia is the strengthening of the existing vagrancy law." In most jurisdictions these statutes are sufficiently indefinite to give the police wide scope. They

of the states toward adoption of the exclusionary rule on their own and the imposition of the exclusionary rule on the remaining states in 1963, as well as the contemporaneous challenges to loitering and vagrancy statutes as unconstitutionally vague and overly broad, required police to develop new theories to justify interference on less than probable cause with a citizen's liberty and privacy interests on the street.¹⁰

A 1959 District of Columbia case, *United States v. Mitchell*,¹¹ illustrates the issue. While walking his beat, a police officer noticed the defendant attempting to flag a taxi cab at 5:30 in the morning.¹² The man was carrying a pillowcase, and from it an electric cord was dangling onto the ground.¹³ The officer approached the defendant and asked him where he was coming from and what his name was.¹⁴ The defendant stated his name and told the officer that he was coming from a party.¹⁵

permit arrest without warrant and summary prosecution without jury before a justice of the peace or magistrate, and often simplify the problem of proof by placing on the defendant the burden of at least going forward with evidence of innocence. To the extent that one police actually are hampered by the restrictions of the ordinary law of arrest, by the illegality of arrests on mere suspicion alone, and by the defects and loopholes of substantive criminal law, vagrancy-type statutes facilitate the apprehension, investigation or harassment of suspected criminals. When suspects can be arrested for nothing else, it is often possible to "go and vag them.

Id. at 714 (footnotes omitted); see also Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 151 (2000). See generally William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 12-14 (1960); Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717 (1989).

¹⁰ See *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

This ordinance is void-for-vagueness, both in the case that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and because it encourages arbitrary and erratic arrests and convictions. . . . The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them

Those generally implicated by the imprecise terms of the ordinance — poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts.

Papachristou, 405 U.S. at 162-63, 170 (citations omitted); see also *Chicago v. Morales*, 527 U.S. 41 (1999) (invalidating a city ordinance that prohibited "criminal street gang members from loitering with one another or with other persons in any public place" for being impermissibly vague on its face and an arbitrary restriction on personal liberties).

¹¹ 179 F. Supp. 636 (D.D.C. 1959).

¹² *Mitchell*, 179 F. Supp. at 637.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

The defendant also provided identification which corroborated his oral identification.¹⁶ The officer had been walking the beat all night and had not seen or heard evidence of a party.¹⁷ At this point in time, the officer had not observed a crime, nor had he received a report of a crime.¹⁸ However, the officer asked the defendant to accompany him to a police call box roughly a block away.¹⁹ When the defendant (wisely) inquired whether he was under arrest, the officer replied, "No, you are just being detained."²⁰ Upon arrival at the call box "the defendant seated himself on the record player contained in the [pillowcase]," and the officer made the call to the police station.²¹ The police dispatch informed the officer that no house breakings had been reported.²² Suddenly, the defendant fled leaving the property behind, and a short time later a report of a house burglary was received by police.²³ One week later, the defendant was apprehended and charged with house breaking and larceny of the record player and records contained in the pillow case that he had left when he bolted.²⁴

Mitchell was tried in the District of Columbia where the federal exclusionary rule, adopted in 1914, applied.²⁵ The defendant moved to suppress the evidence. Counsel for both the government and the state agreed that the mere questioning of the defendant did not constitute an arrest.²⁶ However, the defense asserted that an arrest occurred when the defendant was asked to accompany the officer to the call box.²⁷ The district court agreed, suppressed the evidence and held that the defendant had been seized without probable cause when he was required to accompany the officer to the call box.²⁸ At the time, federal law did not authorize the legal detention of a suspect on less than probable cause.

After *Mapp* dictated the same result as *Mitchell* in all of the states, pressure arose to allow police to make investigatory stops on less than probable cause as they had done for generations in this country. The United States Supreme Court

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See *Weeks v. United States*, 232 U.S. 383, 392 (1914) (holding that evidence which is obtained by federal officials as a result of unlawful searches and seizures cannot be used to convict accused persons because it violates the Fourth Amendment).

²⁶ *Mitchell*, 179 F. Supp. at 636.

²⁷ *Id.*

²⁸ *Id.* at 637-38.

in *Terry* upheld the practice, acknowledging that the practice was common and indicating an intent to harness the practice within the reasonableness standard of the Fourth Amendment.²⁹

In this Article, I suggest that, while the Warren Court provided a needed tool to police, it failed to achieve its stated purpose of tying the practice to the Fourth Amendment reasonableness standard. First, the Court failed to adequately define an “investigatory stop,” leading later courts to harden the definition, eliminating the Fourth Amendment from most on-the-street police-citizen encounters. Second, the facts in *Terry* failed to meet the reasonableness standard Chief Justice

²⁹ See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 659-60 (1994).

For the first time, the Court allowed a criminal search and seizure without probable cause. From *Terry* forward, the question would not be whether there was probable cause, but whether there was reasonable suspicion that criminal activity was afoot. The Court based this change on a balancing of interests. On the one hand, law enforcement called for supple new tools to respond to crime and the dangers its perpetrators posed to officers; on the other, the Court thought the loss of individual liberty was not too great, since *Terry* only allowed a brief stop and a limited, pat-down search of outer clothing to find weapons.

Id. at 659-60 (footnotes omitted); see also Brian D. Walsh, *Illinois v. Wardlow: High-Crime Areas, Flight, and the Fourth Amendment*, 54 ARK. L. REV. 879 (2002).

Before *Terry v. Ohio*, the seizure of an individual required probable cause to arrest. *Terry* was the first case in which the Court was squarely faced with the question of “whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.” *Terry* and its progeny ultimately recognized a narrow exception to the rule requiring an officer to have probable cause for arrest prior to a search or seizure. The limited scope of the search and seizure associated with these brief investigative encounters between law enforcement and suspect, as compared to an arrest, allowed the Court to make such an exception.

Id. at 890-91 (footnotes omitted).

For a discussion of how *Terry* also caused confusion about the meaning of arrest, see Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129 (2003).

The Supreme Court in *Terry* and its progeny brought within the coverage of the Amendment much of what the common law labeled “accostings” and pushed the time of arrest back, requiring a detention exceeding the dimensions of permissible stop. *Terry* significantly departed from the common law’s dismissal of some intrusions as accostings by incorporating “stops” within the Amendment but roughly followed the common law, and arguably the Framers’ intent, by distinguishing between minor intrusions and arrests. Accepting as a settled principle *Terry*’s expansion of the Fourth Amendment to include stops within its coverage and attempting to reconcile the common law and the Framers’ intent, at a level of particularity, with those principles, it should be concluded that an arrest is a detention that requires something more than an accosting, that is, something akin to a detention exceeding the bounds of a *Terry* stop.

Id. at 192 (footnotes omitted).

Warren purported to apply and which subsequently has been further weakened in later cases. Finally, the decision in *Terry* failed to strike a meaningful Fourth Amendment balance between effective law enforcement and individual freedom.

Part I of this Article closely examines the stop in *Terry* (which the Warren Court did not do). Part II examines the late 1960s which provided the context for the Supreme Court's decision and which influenced that decision. Part III critiques the Supreme Court decision in *Terry* and asks whether the Court was really trying to impose the restraints of the Fourth Amendment on the most common form of police-citizen street interactions or whether the Court was bowing to its fears of what was happening on the streets in urban America in 1968. Part IV discusses how the *Terry* decision opened the door for successor Courts to define "stop" to exclude most on-the-street encounters from the *Terry* definition of stop, thereby eliminating all judicial oversight of such encounters. Part V discusses the *Terry* reasonableness standard which evolved into reasonable suspicion, and how that standard, too, has been watered-down to expose people in urban, minority neighborhoods to intrusive police investigations with virtually no evidence of any intended criminal behavior. This article suggests that terms like "high crime area" or "high drug trafficking area" have become proxies for race. While the *Terry* majority of eight justices may not have anticipated how extensively the later Courts would weaken the protections which the *Terry* Court purported to impose, the Warren Court opened the door for the subsequent restrictions on individual rights by its standardless decision in *Terry*.

PART I: THE FACTS OF THE STOP

The vast power of police to stop and conduct limited searches of citizens on less than probable cause was affirmed in a case originating on the streets of Cleveland, Ohio. The stop in *Terry*, when examined closely, fails the reasonableness standard developed by the Court to uphold the stop and frisk and subsequent arrest of *Terry* and his two companions. We need to examine carefully the facts leading to that stop, as well as the stop itself, in order to fully understand the implications of the decision.

On Halloween mid-afternoon in 1963, Martin McFadden, a plain clothes Cleveland Police detective, was patrolling his regular beat in downtown Cleveland.³⁰ He was looking for shoplift-

³⁰ Transcript of Chilton's Trial, reprinted in *State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, app. B at 1449 (John Q. Barrett ed.,

ers and pickpockets, as he had done for over 35 years.³¹ McFadden testified “that he had developed routine habits of observation over the years and that he would stand and watch people or walk and watch people at many intervals of the day.”³²

Officer McFadden observed two black men, John Terry and Richard Chilton. He testified that when he looked at Terry and Chilton standing on the street, “*they didn't look right to me at the time*,”³³ although he was not acquainted with either man by name or sight, and he had received “[a]bsolutely no information regarding [the] men at all.”³⁴ Officer McFadden did not explain what about the two men “didn't look right” to him.³⁵ The two men were dressed in topcoats, the standard dress of the day.³⁶ They were engaged in no unusual behavior when they initially attracted McFadden's attention.³⁷ When pressed on what about the two men attracted his interest and whether he would pursue them as he did if he saw them that day across from the court house, Officer McFadden replied, “I really don't know.”³⁸

What happened as McFadden studied Terry and Chilton depends upon which version of Officer McFadden's statement of the facts one reads and in which court opinion the facts appear. McFadden watched the men over a period ten minutes.³⁹ He watched as one of the two men left the other and walked down the street and looked inside a shop window and continued walking, and then walked back to the other man, again looking in the shop window.⁴⁰ The second man then repeated the same behavior.⁴¹ That behavior is the critical conduct which gives rise to the stop in this case. If they did it once or twice each, their behavior was pretty unremarkable. So, how many times they looked in the store window is crucial. In the police report filed the same day as the incident, Officer McFadden wrote that the men did this “about three times each.”⁴² Between the day of the

1998) [hereinafter Transcript].

³¹ *Id.*

³² *Id.* at 1456.

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1457.

³⁷ *Id.* at 1456.

³⁸ *Id.* at 1421.

³⁹ *Id.* at 1457.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Police report from Officer McFadden, to the Cleveland Ohio Police Department (Oct. 31, 1963) (on file with the Cleveland Ohio Police Department) [hereinafter Police Report].

event when he wrote the police report and his memory was freshest, and the suppression hearing, which was almost one year to the day after the event, Officer McFadden's memory changed. At the suppression hearing three times each became "at least four or five times apiece,"⁴³ which later turned into four to six trips each.⁴⁴ Moreover, at trial, when asked how many trips he observed, Officer McFadden replied, "about four trips, three to four trips, maybe four to five trips, maybe a little more, it might be a little less. *I don't know, I didn't count the trips.*"⁴⁵ The Ohio Court of Appeals decision in the case picked up on the uncertainty and asserted that the men separated and looked in the window "at least two to five times" each.⁴⁶ However, by the time the fact worked its way into Chief Justice Warren's majority opinion in the Supreme Court, the number expands exponentially. He wrote that the men did this "between five or six times apiece—in all roughly a dozen trips."⁴⁷ Later in the majority opinion, Chief Justice Warren came up with still another number when he described Terry and Chilton's behavior: "where these men pace alternately along an identical route, pausing to stare in the same store window roughly twenty-four times."⁴⁸ The body of law which stems from *Terry* is dependent upon this single fact.

Officer McFadden was never sure which store was the subject of the suspects' attention. At the suppression hearing he admitted he had no experience in observing the activities of individuals who were "casing" a store for a robbery.⁴⁹ In the police report, Officer McFadden indicated that they were looking in an airline ticket office; at the suppression hearing, the Detective mentioned an airline office or a jewelry store.⁵⁰ Chief Justice Warren (wisely) chose not to focus on this issue. If the men were "casing a . . . stickup,"⁵¹ as Officer McFadden believed, a downtown airline office would be unlikely to produce significant cash. Even in 1963, airline tickets were rarely purchased with cash. A jewelry store would be a more lucrative target. Terry and Chilton's street behavior and the supposed target of their interest are extremely important issues because they are all that set apart these suspects from any other two

⁴³ Transcript, *supra* note 30, at 1402.

⁴⁴ *Id.* at 1407.

⁴⁵ *Id.* at 1457 (emphasis added).

⁴⁶ *State v. Terry*, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968).

⁴⁷ *Terry*, 392 U.S. at 6 (counting each trip back and forth counting as two observations into the store window).

⁴⁸ *Id.* at 23.

⁴⁹ Transcript, *supra* note 30, at 1420.

⁵⁰ *Id.* at 1457.

⁵¹ *Id.* at 1418.

people on the street, unless it was their race.

The third man, Carl Katz, a white man, approached Terry and Chilton in conversation.⁵² McFadden did not know the white man either.⁵³ McFadden suspected that the two black men were “casing a job, a stick-up,” and he feared they may have a gun.⁵⁴ Cleveland was a segregated city, and police lore had it that the only time whites and blacks congregated was to plan or commit a crime. When Terry and Chilton walked on, turning a corner and walking down the street, they stopped in front of Zucker's, a men's clothing store, where they met up again with Katz.⁵⁵ At that point, McFadden decided to act.

Officer McFadden walked over to the three men, identified himself as a police officer, and asked for their names.⁵⁶ McFadden testified that he received a mumbled response to his inquiry.⁵⁷ McFadden then immediately grabbed Terry, spun him around, and “patted down the outside of his clothing.”⁵⁸ When Officer McFadden felt a pistol in the inside breast pocket of Terry's overcoat, the Supreme Court reported that McFadden, then, reached inside the overcoat to retrieve the pistol but was unable to do so.⁵⁹ He ordered all three men into the clothing store where he removed Terry's overcoat and removed a .38-caliber automatic pistol.⁶⁰ He then ordered all three men to face the wall, and proceeded to pat-down “the outer clothing of Chilton and the third man, Katz,”⁶¹ finding a .38-caliber revolver in Chilton's pocket, but no weapon on Carl Katz.⁶² Warren went on:

The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments.⁶³

All three men were arrested and taken to the police station.⁶⁴ Eventually, Terry and Chilton were formally charged with

⁵² *Id.* at 1408.

⁵³ *Id.* at 1458.

⁵⁴ *Id.* at 1418, 1466.

⁵⁵ *Id.* at 1409.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1411.

⁵⁹ *Terry v. Ohio*, 392 U.S. 1, 7 (1968).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Transcript, *supra* note 30, at 1465.

⁶³ *Terry*, 392 U.S. at 7.

⁶⁴ Transcript, *supra* note 30, at 1456.

carrying concealed weapons.⁶⁵ Katz was held as a “suspicious person” and then released two days later.⁶⁶

Chief Justice Warren's recitation of the facts was essential to the outcome of the case in the Supreme Court and the development of the rules pertaining to stop and frisk. There is a marked contrast between Chief Justice Warren's selective account of the facts of the case derived from some of McFadden's testimony at the suppression hearing and McFadden's initial description of what happened that was contained in the police report. The Detective's initial account reads quite differently:

At this point I approach these three men and informed them I was a police officer and told them to keep their hands out of their pockets. First one I searched was John Woods Terry age 31 colored of 1275 East 105th St. and in the inside pocket of his topcoat (left side) found a 38 cal. automatic, name on same P. Baretta-cal.9 Corto-M.1934 Brevet- Cardone V.T. 1941 xlx serial NO. 897012. One bullet was in the chamber 6 bullets in the clip.

On searching Richard D[.] Chilton age 32 of 1610 Lotus Dr found a 38 cal revolver loaded with 5 bullets Name Hopkins and Alen Mfg Co Pt. Jan 5 -88 X- L Double action[.] Found this gun in the right hand front pocket of the topcoat Chilton was wearing. Serial NO 5209

Searching Carl Katz white age 49 of 3755 Mayfield Rd found no weapons. Request that these two guns be turned over to Ballistics to be checked out.

Also request that the three above mentioned men be checked out by the Robbery Squad.⁶⁷

The first significant difference is that McFadden ordered the men to keep their hands out of their pockets when he intercepted them. That fact never made it into the Supreme Court's statement of the facts. The second significant difference is that, in the police report, Officer McFadden said that he “searched” the men, but there is no reference to a pat-down frisk in the police report. However, at the suppression hearing, the detective insisted that he conducted only a pat-down of the suspects' outer clothing before reaching into the pockets of the two who he believed were carrying weapons.⁶⁸ The detective also testified that when he ordered the three men into Zucker's men's store where he ordered a clerk to call for the wagon, he patted down the other two men and retrieved a gun from suspect

⁶⁵ *Id.* at 1518.

⁶⁶ *Id.* at 1465.

⁶⁷ Police Report, *supra* note 42. Officer McFadden testified, “I ordered the three of them inside the store and told them to keep their—”. Transcript, *supra* note 30, at 1412.

⁶⁸ *Id.* at 1459-60.

Chilton's outer coat pocket.⁶⁹ He testified that he never searched the third man, Katz, because the frisk did not reveal that he possessed a gun.⁷⁰

PART II: HISTORY

Officer McFadden's stop and search was upheld in Ohio courts even though there was no existing legal support for the decision in Ohio law or from the United States Supreme Court. There was ample discussion, however, in other state courts. There was New York case law upholding such searches and seizures on "reasonable suspicion" based upon a New York statute.⁷¹ In California, the state supreme court had upheld a stop and frisk of two men parked in a car on a lover's lane who fled when police approached them.⁷² Justice Traynor wrote that "the presence of two men in a parked automobile on a lover's lane at night was reasonable cause for police investigation."⁷³ The Illinois Supreme Court had also upheld a stop but did not distinguish between probable cause and a lesser standard for the stop.⁷⁴

⁶⁹ *Id.* at 1461-62.

⁷⁰ *Id.* at 1462. Under the Fourth Amendment case law that existed in 1963, the three men were forcibly detained without probable cause. They were arrested and the subsequent search for weapons, whether a full search or a pat down frisk, was illegal. It is only after the Supreme Court decision in *Terry* that investigatory detentions were distinguished from arrests, and limited pat-down searches for weapons were distinguished from searches of the person. *Id.* at 1461-62. Even though such distinctions did not matter in 1963 at the time of the searches in *Terry*, it is very possible that Officer McFadden only conducted a pat-down search of the suspect, Terry. McFadden was acting alone; he had not summoned back-up assistance. A pat-down from behind kept Terry between McFadden and the other two suspects, and a pat-down rather than a search would have been less distracting to McFadden and would have enabled him to keep track of the other two suspects.

⁷¹ N.Y. CODE CRIM. PRO., ch. 86, § 180-a (1964) (current version at N.Y. CRIM. PROC. § 140.50 (McKinney 2004)); see *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1964).

[T]he evidence needed to make [an] inquiry is not of the same degree or conclusiveness as that required for an arrest.

. . . [T]he incidence of crime in the neighborhood, the peculiar approaches of the defendant and his companion to the grill, the rapid leaving when the police were seen (even in plain clothes three men in a car watching could reasonably give alarm to a person alert to detection), all justified the police stopping the defendant and questioning him.

Rivera, 201 N.E.2d at 34-35.

⁷² *People v. Martin*, 293 P.2d 52, 53 (Cal. 1956).

⁷³ *Martin*, 293 P.2d at 53.

⁷⁴ *People v. Faginkrantz*, 171 N.E.2d 5 (Ill. 1960)

The defendant's unlikely explanation of his presence in an alley far from his home at 4:30 A.M., and his inability to produce any indicia of ownership of the car coupled with his admitted criminal record and the history of burglaries in the alley, gave the police reasonable cause to

Citing to “early English practice,” the New York statute, and New York and other state court decisions, the Ohio court of appeals said that police have the right to stop and question persons in suspicious circumstances without probable cause to support an arrest.⁷⁵ Having upheld the forcible detention, the court said “it follows that the officer ought to be allowed to ‘frisk,’ under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril.”⁷⁶

The United States Supreme Court decision must be understood in the context of its time. When the case was docketed in the United States Supreme Court the country seemed to be coming apart at the seams.⁷⁷ Nonviolent resistance to segregation and other Jim Crow practices had stalled; black nationalist voices were advocating that white violence should be met in kind.⁷⁸ Urban rioting unsettled the country as had massive protests against the Vietnam war. There was a growing white backlash to civil rights advances. That backlash was often violent.

There was also a marked increase in violent crime

believe that he was committing a crime.

Faginhrantz, 171 N.E.2d at 7.

⁷⁵ *State v. Terry*, 214 N.E.2d 114, 117 (Ohio Ct. App. 1966), *aff’d*, 392 U.S. 1 (1968).

⁷⁶ *Terry*, 214 N.E.2d at 120.

⁷⁷ See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 372-73 (2001).

Just three months before *Terry*, the report of the National Advisory Commission on Civil Disorders (often called the Kerner Commission) explained the connection between the urban riots of the 1960’s and police conduct towards minorities in unambiguous terms. Hostility between blacks and police was a major factor—indeed, sometimes the precipitating factor—in several of these riots.

Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police.

The Kerner Commission’s report was not the first to make this point. Just a year before, the President’s Commission on Law Enforcement and the Administration of Justice had come to a very similar conclusion. . . . The Commission wrote that:

. . . .
In case the Justices had somehow missed the unmistakable evidence in these reports and elsewhere that racial injustice at the hands of the police was unavoidably intertwined with the issues in *Terry*, the amicus brief filed by the NAACP Legal Defense and Education Fund made the point in the starkest possible terms. It leaves little doubt that how police treated minorities in street encounters was a matter of grave concern to those combating discrimination against blacks.

Id. at 372-73 (footnotes omitted); see also, Adina Schwartz, “Just Take Away Their Guns”: *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996) (discussing the commission reports and other racial factors).

⁷⁸ Harris, *supra* note 77, at 371-73.

throughout the sixties and an even greater increase in the fear of crime.⁷⁹ In the trial court, the case was *State v. Chilton*, but by the time the case arrived in the Supreme Court it had become *Terry v. Ohio*. John Chilton, who like Terry was already out of prison on the weapons conviction, was shot and killed while robbing a Columbus, Ohio, drugstore, after shooting and maiming the owner of the drugstore. This seemed to verify Officer McFadden's suspicions five years earlier.⁸⁰ Between the time the case was argued in December 1967, and the time the decision was handed down on June 10, 1968, Dr. Martin Luther King had been murdered in Memphis, Tennessee.⁸¹ His death was immediately followed by large-scale rioting in many cities.⁸² Senator Robert Kennedy was murdered as he left the Ambassador Hotel in Los Angeles after claiming victory in the California presidential primary just five days before the Court issued its decision in *Terry*.⁸³

The Supreme Court stood at the center of much of the backlash to the changes in America during the sixties.⁸⁴ The

⁷⁹ At the suppression hearing, the assistant county prosecutor stated, "crimes [were] on the increase, crimes of violent nature [were] on the increase, [and] crimes of carrying a gun [were] on the increase." Transcript, *supra* note 30, at 1434. The trial court agreed that "crime . . . has been on the increase." *Id.* at 1445.

In the five years from 1960-1965 there was a 24.4% increase in the violent crime rate in America. Between 1965-1970 the rate jumped to 81.6%. Over the decade there was a 125.9% increase in violent crime rate. Furthermore, between 1960-2001, the years leading up to the *Terry* decision, were the largest annual increases in the national rate of violent crime. Between 1966-1967 the increase was 15.1% and between 1967-1968 the increase was 17.9%. Bureau of Justice Statistics, *Violent Crime in the United States*, FBI, Uniform Crime Reports, at <http://www.ojp.usdoj.gov/bjs> (last visited May 13, 2004).

⁸⁰ Terence Sheridan, *Court Upholds Friskings*, CLEVELAND PLAIN DEALER, June 11, 1968, at 58.

⁸¹ David A. Harris, *Terry and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 979-80 (1998).

⁸² Harris, *supra* note 81, at 980.

⁸³ Jose F. Anderson, *Perspectives on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed"*, 39 HOW. L.J. 693, 716 n.123 (1996).

⁸⁴ See Yale Kamisar, *The Warren Court (Was it Really So Defense-Minded), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *THE BURGER COURT* (Vincent Blasi ed., 1983).

The last years of the Warren Court's "criminal procedure `revolution'" constituted a period of social upheaval, marked by urban riots, violence in the ghettos, and disorders on the campuses. The political assassinations and near-assassinations of the late 1960s, both Congress's and presidential candidate Richard Nixon's strong criticism of the Court, the "obviously retaliatory" provisions of the Crime Control Act of 1968, and the ever-soaring crime statistics and ever-spreading fears of the breakdown of public order "combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."

Court was at the heart of the desegregation battles. The Court also stood at the very center of the due process revolution, trying to make the constitutional guarantee of a fair trial a reality. No decisions of the Warren Court, other than *Brown v. Board of Education*,⁸⁵ more rankled southerners and other conservatives, than the Court's 1961 decision, *Mapp v. Ohio* which applied the exclusionary rule to the states, and *Miranda v. Arizona* in 1966, which limited police interrogation practices.⁸⁶ After *Mapp*, violations of a defendant's right to be free from illegal arrests and searches were no longer without remedy in states such as Ohio that had refused on its own to apply the exclusionary rule. As a result, *Mapp* ensured that some guilty defendants would go free as tangible evidence of guilt was suppressed. The decisions in *Mapp* and *Miranda* were attacked as coddling criminals, and the criminal justice system and the Supreme Court had become issues in the upcoming 1968 presidential election. "Impeach Earl Warren" signs appeared along highways in most parts of the country.⁸⁷

The case landed in a weary Warren Court little more than a year away from its end. It became clear in *Terry* that the Court was no longer able or willing to try, as it had done in *Mapp* and *Miranda*, to engage in a major reform of the police

Id. at 67-68 (footnotes omitted); see also Stephen A. Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980).

Those opposed to the expansion of federal judicial control over police activities saw their displeasure with the Supreme Court increase the longer Earl Warren served as Chief Justice. The criticism came from many quarters, including law enforcement officials. Criminal procedure decisions that appeared to tilt the balance of advantage toward the suspect or the accused were vigorously attacked. Critics charged that the Court had ignored reality by erecting procedural burdens that prevented law enforcement officials from effectively protecting the safety of the community. They claimed that the rights of the public and the victims of crime were receiving little notice from justices intent on fettering police work.

Id. at 152 (footnotes omitted); see also Harris, *supra* note 81, at 978.

As 1968—a presidential election year—began, candidate Richard Nixon made political points by promising that he would restore respect for the law by correcting the mistakes of the Warren Court's liberal jurisprudence. Thus law and order and the struggle of "the peace forces . . . against the criminal forces" became one of the major issues in the presidential campaign in 1968. It was against this backdrop—changes in the legal environment embodied by *Mapp*, violent unrest in cities and on campuses, racial confrontations, and political assassinations—that *Terry* was decided.

Id. at 981 (footnotes omitted).

⁸⁵ 347 U.S. 483 (1954).

⁸⁶ Justice Walter Schaefer, *Panelists Comments*, 54 KY. L.J. 499, 521 (1966) ("And putting on flesh and blood—coming face-to-face with our ideals and looking them in the teeth—is not always a comfortable process, nor is it always an easy one.")

⁸⁷ Joseph L. Rauh, Jr., *Historical Perspectives: An Unabashed Liberal Looks At a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 233 (1990).

establishment.⁸⁸ The Court, as it had in *Miranda*, could have made the legitimacy of an investigatory detention dependant upon police compliance with a set of prophylactic rules.⁸⁹ Of

⁸⁸ See Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518 (1975).

But surely the most fundamental reasons for the Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in ghettos, and disorder on campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the "peace forces" and the "criminal forces." The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.

Id. at 538-39 (footnotes omitted). *But see* Jerold H. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977).

My colleague, Francis Allen, has suggested that the Warren Court had lost its "impetus" for imposing new constitutional standards towards the end of Chief Justice Warren's tenure. He notes in particular the decision in *Terry v. Ohio*, decided during Chief Justice Warren's next-to-last term. *Terry's* significance arguably extends beyond the Court's specific ruling that a frisk justified by less than probable cause is permissible under the [F]ourth [A]mendment. Though its recognition of the practical limitations that undermine the deterrent impact of the exclusionary sanction, Chief Justice Warren's opinion for the Court in *Terry* may have laid the groundwork for future challenges to that sanction by the Burger Court. *Terry* may also be viewed as reflecting new doubts within the Warren Court's liberal majority as to the wisdom of adopting excessive "prophylactic" standards to preserve basic guarantees. Professor Allen suggests that *Terry* and other Court decisions in the late 1960s may indicate that the Court was being forced back into the mainstream of a community consensus primarily concerned with effective law enforcement. Such a shift would have been quite understandable in light of the intense reactions to violent crime and riots during the late 1960s. If the Warren Court had indeed started such a shift, then the Burger Court might be viewed in a quite different light when compared with its predecessor.

The civil libertarian may justifiably argue, however, that the decisions of the late 1960s did not reflect any overall change in the posture of the Warren Court. While *Terry* may be viewed as an illustration of the Warren Court's eventual retreat from its earlier "expansionist phase," it also may be viewed as just another example of the Warren Court's special difficulties in dealing with [F]ourth [A]mendment issues.

Id. at 1346-47 (footnotes omitted).

⁸⁹ *Cf.* Allen, *supra* note 88.

These rules avoid or lessen the occasions that require consideration of the "totality of the circumstances" presented by the record and the concomitant determination whether, on balance, the defendant received a fair trial in the particular case. The principal advantages of per se rules to a Court embracing broad supervision of criminal justice function were thought to be two. First, such rules give relatively certain guidance to the lower courts, and thus avoid the confusions and uncertainties associated with precedents that weigh a multitude of factors, some of which may be unique to the particular case at hand. Second, such rules are applicable to a great mass

course, the same argument that was made in response to *Miranda* would have surfaced: that creation of a set of tight rules would be legislating and would have exceeded the Court's authority to determine whether a defendant was convicted in accordance with the Constitution.⁹⁰

PART III: THE DECISION

In the majority opinion in *Terry*, Chief Justice Warren initially framed the controversy presenting the two competing global views on stop and frisk: that "the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity,"⁹¹ versus "that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest."⁹²

He then digressed and explained how the effectiveness of the exclusionary rule is limited where, presumably as in this case, "obtaining convictions is [not] an important objective of the police."⁹³ Rather, he pointed out how the exclusionary rule "is

of cases at the trial court levels without direct involvement of the Supreme Court, thereby minimizing the consequences of the Court's lack of time and resources to adjudicate than the smallest fraction of criminal cases presenting constitutional issues.

Id. at 532 (footnotes omitted).

⁹⁰ See generally Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 *FORDHAM L. REV.* 715 (1994) (providing a detailed analysis of *Terry* and *Miranda*).

⁹¹ *Terry*, 392 U.S. at 10.

⁹² *Id.* at 11.

⁹³ *Id.* at 14. See generally Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 255, 255 (1961) ("Police officers are not controlled more rigorously by the exclusionary evidence rule than they are by force of their own respect for the law. If police obey the rules set by the community to govern police practice, they obviously will not obtain evidence illegally. The point is often missed."). See also Frank J. McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy* 52 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 266 (1961).

I cannot accept the proposition that turning criminals loose on society by suppressing illegally seized evidence does adequately solve the problem of punishing the over zealous and misbehaving officer. It punishes, in fact, the innocent citizenry. The officer is not disciplined for the failure to obtain a conviction. The officer is not disciplined in our modern society for his illegal search. The federal exclusionary rule in effect now for nearly fifty years has not noticeably deterred illegal searches and seizures which, if the civil liberties groups are to be believed, are as pressing a problem today as they ever were.

Id. at 267-68; see also Anthony G. Amsterdam, *The Supreme Court and The Rights of Suspects in Criminal Cases*, 45 *N.Y.U. L. REV.* 785 (1970).

But if the Court strikes down a police practice, announces a "right" of a criminal suspect in his dealings with the police, God only knows what the result will be. Out there in the formless void, some adjustment will undoubtedly be made to accommodate the new "right," but what the

powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”⁹⁴ The Court addressed the issue of the day and said that “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”⁹⁵

Not only did this statement signal that the Court was backing down from the leadership role it had assumed in *Mapp* and *Miranda*, it amounted to an amazing admission of powerlessness from a Court that purported to care about the issue. That admission was a prelude to sanctioning a tool that would exponentially ratify increased police power on the street, a tool which would be very susceptible to abuse and arbitrary and discriminatory police conduct. Then the Court applied the standard it had set for measuring the reasonableness of the exercise of that tool to the facts of the case in such a way to signal that the reasonableness standard would only operate as a brake upon the most egregious exercises of police power. The standard adopted and applied in *Terry* had the effect of a stamp of approval on such police behavior.

The Court seemed resigned to its powerlessness: that no matter how it ruled in *Terry*, it would have little impact on the streets because no matter the rule, police would not obey it. Thus, the Court elected not to marshal whatever was left of its moral strength to demand that police obey the law while

product of this whole exercise will be remains unfathomable. So, again, the Court is effectively disarmed.

Id. at 791.

⁹⁴ *Terry*, 392 U.S. at 14.

⁹⁵ *Id.* at 14-15; see Harris, *supra* note 77

These words may appear a bit puzzling. The Court appeared to give credence to the idea that aggressive police practices like stops and frisks impact blacks and other minorities disproportionately. At the same time, it says that it will not require the use of the exclusionary rule in these situations, since excluding evidence cannot affect police conduct not targeted at securing evidence. Understandably, commentators have drawn different implications from these seemingly opposed strands of argument. Nevertheless, the effect of racial discrimination by law enforcement did indeed make up an important part of what the Supreme Court hoped to accomplish. By acknowledging the racial implications of the police practices it decided to allow and regulate, it brought the issue within the realm of proper consideration in constitutional criminal procedure. *Terry* represents a clear signal that the racial aspects of police procedure did indeed make a difference, and could be addressed in discussion of the constitutional regulation of police procedure.

Id. at 374 (footnotes omitted).

enforcing it.⁹⁶ By the time *Terry* came before the Warren Court, it apparently lacked the strength and courage it once had to try to reshape America.

The Court then turned to the issues of the case, focusing predominantly upon the frisk, which the Court saw as “[t]he crux of the case.”⁹⁷

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to “stop and frisk”—as it is sometimes euphemistically termed—suspicious persons.⁹⁸

However, this analysis virtually ignored the critical threshold question of when the stop occurred, a question which Chief Justice Warren admitted was a trigger issue of controversy in the country.⁹⁹ For *Terry* to provide meaningful guidance, the Court needed to expand on this “trigger issue,” which the Court candidly acknowledged was its first task.¹⁰⁰ The Fourth Amendment protection of reasonableness would not apply until there was a seizure within the meaning of the amendment. As Chief Justice Warren pointed out, prior to a seizure, a police officer, like any other citizen, is free to talk to people on the street without implicating the Fourth Amendment.¹⁰¹ The Court

⁹⁶ See Allen, *supra* note 88.

Admittedly, local police forces are expected to be accountable to the agencies of local government that create and maintain them. In reality, however, one of the striking characteristics of American police agencies, both at the state and federal level, is the degree to which they have succeeded at eluding genuine accountability to civil authority. Indeed, the upper levels of the police hierarchy itself are often unable to maintain effective supervision over the lower levels.

Id. at 524.

⁹⁷ *Terry*, 392 U.S. at 23.

⁹⁸ *Id.* at 9-10.

⁹⁹ *Id.* at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 13.

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Id.

failed to note, nor has ever later acknowledged, that a police officer's request for information carries with it a certain compulsion that does not accompany one citizen's request for information from another.

A. *The Stop*

The Court admitted that the stop could have occurred either when McFadden approached the men or when McFadden spun Terry around. However, the Court was clearly ambivalent as to when the stop occurred and thus never conclusively stated when Terry was seized.

Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionality protected rights had occurred.¹⁰²

Chief Justice Warren wrote that "McFadden `seized' petitioner and subjected him to a `search' when he took hold of him and patted down the outer surfaces of his clothing."¹⁰³ The Court settled on the moment when Officer McFadden, receiving no assuring response to his question, spun Terry around to use him as a buffer between himself and the other two suspects and frisked Terry's outer clothing.¹⁰⁴ Choosing that precise moment insulated the state from Fourth Amendment scrutiny earlier in the encounter, delaying when the state had to establish reasonable cause for the seizure and the frisk. It also raised a question as to whether the Court's assessment of reasonableness was not at least partially based upon McFadden's description of Terry's mumbled response to McFadden's inquiry.¹⁰⁵ Of course,

¹⁰² *Id.* at 19 n.16.

¹⁰³ *Id.* at 19.

¹⁰⁴ *Id.* at 19 n.16.

¹⁰⁵ *See id.* at 34 (White, J., concurring).

Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Id. (White, J., concurring); *see also* *Hiibel v. Nevada*, 124 S. Ct. 2451, 2458 (2004)

the view that the three men were not seized until Officer McFadden laid hands on Terry and spun him around is dependent upon concluding that reasonable persons in Terry, Chilton and Katz's position would not have felt compelled to remain on the scene and respond to McFadden even before the moment that Terry was grabbed, but, instead, could have refused to cooperate and walked away.¹⁰⁶ Only an ostrich could reach that conclusion. It requires ignoring, which the Court did, McFadden's order to the three men to keep their hands out of their pockets, and it requires ignoring the power and implicit threat of violence that police posed when dealing with black men on the street in 1968. If the Court truly could not tell precisely when the seizure took place, that uncertainty demonstrates a complete lack of understanding of the relationship on the street between police and citizens, especially between police and black citizens. It is an understanding that the present Court totally lacks, but we had expected better of the *Warren* Court.

On the other hand, there is also language in Chief Justice Warren's opinion and in the separate concurring opinions of Justices White and Harlan that signals a belief that when Officer McFadden confronted Terry, Chilton and Katz, he seized the three men within the meaning of the Fourth Amendment.¹⁰⁷ This should have been an obvious conclusion. When Officer McFadden confronted the three men, identified himself as a

(holding that a Nevada "stop and identify" statute that requires a suspect to disclose his name in the course of a valid *Terry* stop does not violate the Fourth Amendment).

¹⁰⁶ See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that a Fourth Amendment seizure from police questioning occurs only where a reasonable person would feel compelled to stay).

¹⁰⁷ See, e.g., *Terry*, 392 U.S. at 30.

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.; *id.* at 33 (Harlan, J., concurring) ("His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so.")

There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him.

Id. at 34 (White, J., concurring).

police officer, and ordered them to keep their hands out of their pockets,¹⁰⁸ they were hardly free to disregard the officer's questions and walk away.

There is no easy explanation for the Court's ambivalence about when the seizure took place. It is difficult to explain because the Court was not very precise and the encounter escalated very quickly: "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing."¹⁰⁹ There were just few seconds between the initiation of the encounter and the laying on of hands to allow for much consideration as to when exactly the three men were seized. Nothing of substance changed between the time McFadden accosted the three and when he laid hands on Terry.

The Court held that based on the facts, Officer McFadden had reasonable suspicion from the outset, and therefore, the timing of the stop was not outcome determinative.¹¹⁰ Eight Justices appeared to believe that "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" an intrusion at that moment.¹¹¹ However, the failure to determine when the stop occurred had major repercussions for subsequent decisions over the next four decades.¹¹² Chief Justice Warren's lack of insight into the ripple

¹⁰⁸ Police Report, *supra* note 42.

¹⁰⁹ *Terry*, 392 U.S. at 7.

¹¹⁰ *Id.* at 28, 30.

¹¹¹ *Id.* at 21.

¹¹² See Harris, *supra* note 81.

Unfortunately, *Terry* and its companion cases do not deal directly with the issue of what constitutes sufficient grounds for a stop. In *Terry*, the Court said that the central issue was not the propriety of the stop but the frisk, and all but refused to discuss the stop; in *Sibron v. New York*, the Court proceeded directly to a discussion of the frisk without any consideration of the seizure of the defendant and his removal from the place where the officer found him. Despite Justice Harlan's prodding, the Court did nothing more in *Terry* and *Sibron* to define what it would accept as the legal basis for a stop, an issue "on which courts, lawyers and police deserve guidance." Thus the task was left to subsequent decisions.

Id. at 988-89 (footnotes omitted); see also Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

In *Terry*, the government argued that police conduct that detains a person, but falls short of a traditional arrest, is not a "seizure" within the meaning of the [F]ourth [A]mendment. The *Terry* Court "emphatically reject[ed] this notion." It explained that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Although the Court stressed this definition of "seizure," it did not clearly apply its definition to the facts at hand. The Court claimed that it could not determine whether any seizure occurred before Officer McFadden physically contacted Terry. Consequently, it assumed that before McFadden

effects of this factual determination paved the way for the later Supreme Court to hold that Fourth Amendment seizures occur far later in a police-citizen encounter, thus delaying citizens' Fourth Amendment protections and shielding police from the

frisked Terry, "no intrusion upon constitutionally protected rights had occurred."

The Court's uncertainty seems strained. If, as the Court stated, a seizure occurs whenever an officer accosts a citizen and restrains his or her freedom, than Terry and his companions were seized prior to the frisk Under either of the Court's definitions of "seizure," it seems clear that Terry was seized before Officer McFadden grabbed him. Justice Harlan thought so. He explained that the officer's observations justified accosting Terry and "restraining his liberty of movement." Indeed, only the most defiant citizen would feel free to leave a police officer under such conditions. Nevertheless, the *Terry* majority assumed that no intrusion had occurred that implicated the [F]ourth [A]mendment. Had the Court directly confronted the facts, it would have been forced to acknowledge that accosting a person on the street restrains liberty and demands fourth amendment scrutiny.

Id. at 1297-98 (footnotes omitted); see also Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988).

The Court's apparent failure to recognize the potential import of its holdings in *Camara* and *Terry* heightened the impact of their conceptual changes in [F]ourth [A]mendment interpretation. Both cases significantly altered the traditional relationship between the [R]easonableness and [W]arrant [C]lauses, and yet the Court did not address their implications beyond the relatively discrete areas of housing inspections and stops and frisks. That several of the Justices who have protested most vocally to expanding the reasonableness balancing test concurred in *Terry* and *Camara*—the cases which made the expansion possible—best evidences the Court's failure to appreciate the implications of the changes at the time they were made. The Court had unloosed reasonableness but seemed uncertain about where the new doctrine was going or how to constrain it. What was certain, however, was that each subsequent case would add to the controversy over the proper realm of probable cause and the reasonableness balancing test, further fracturing fourth amendment analysis.

Id. at 404-06 (footnotes omitted); cf. Kamisar, *supra* note 84.

The Warren Court's opinions in the stop and frisk cases leave much to be desired. The [J]ustices "detoured around" the threshold issue of investigative "stops," one on which the lower courts, lawyers, and police deserved guidance, and discussed only the "frisk" issue; strained a good deal to avoid explaining how the police, after removing an *opaque* envelop [sic] from a "frisked" suspect's pocket, could open the envelope to see what was inside; seemed to misunderstand "classical 'stop and frisk' theory"; confused the limited search permitted to uncover weapons that may be used to assault police with the more extensive search permitted when an arrestee is about to be transported to the police station; and seemed to assume that a less restrictive Fourth Amendment test applies when the police act *without* a search warrant (although the Court had repeatedly held to the contrary).

But the stop and frisk cases left such a spongy standard, one that allowed police so much discretion and provided the courts so little basis for meaningful review . . . that these Warren Court decisions must have been cause for celebration in more than a few precinct stations throughout the land.

Id. at 65.

amendment's limitations. The result is unfettered discretionary power which has resulted in an erosion of civil liberties and an arguably unrestrained sanctioning of police powers.¹¹³

In the end, the majority eschewed a general principle and simply stated, "we can only judge the facts of the case before us."¹¹⁴ In fact, the Court stated that anything more might hinder crime prevention.

Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.¹¹⁵

The Court's dismissal of the exclusionary rule mirrors some of the harshest criticism leveled against the Court after 1961: that its decision in *Mapp* would hinder effective law enforcement.¹¹⁶

¹¹³ Cf. Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1169 (1995) ("As the Court articulated in *United States v. Cortez*, the Terry standard is not self-evident in practice: Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise.") (footnotes omitted).

¹¹⁴ *Terry*, 392 U.S. at 15. "Doubtless some field interrogation[s] conduct violates the Fourth Amendment." *Id.* at 13-14.

¹¹⁵ *Id.* at 15.

¹¹⁶ See Arlen Specter, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 40-43, (1962) ("Some of the resentment to *Mapp* arises from the manner in which the exclusionary rule was imposed upon the states. The objection is frequently raised that a sudden change on such a fundamental evidentiary question is properly a legislative, rather than a judicial function."); see also Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 85 (1962).

Some eminent jurists of the past, including Justice Benjamin Cardozo, at the time when he sat on the New York Court of Appeals, were opposed to the exclusionary rule. In his celebrated opinion in *People v. Defore* Justice Cardozo gave some clear cut, sensible reasons why New York chose not to follow the exclusionary rule. He adhered to the view that relevant evidence should not be brushed aside and ignored solely because of the methods the police used to obtain it. The great scholar, Dean John Henry Wigmore, was opposed to the rule, and in his monumental treatise on Evidence he pointed out the historically unfounded judicial reasoning that was used in the first federal case to adopt the exclusionary rule.

After all these years of a general recognition of the exclusionary rule as a rule of evidence only, and after it was for so long proclaimed to be such by the Supreme Court itself, the Court in *Mapp v. Ohio* suddenly labels the rule to be a requirement of due process. Of little comfort is the fact that three of the nine [J]ustices (Frankfurter, Harlan, and Whittaker) adhered to the former viewpoint.

Why this change in the Court's attitude? The answer, in my opinion, is very simple. It's just another example of the Court's continuing efforts to police the police—and that is an executive, or at most a legislative function of government. It certainly is not the constitutional function of the judiciary.

The Court seemed to surrender to that criticism in *Terry*. The criticism is incomplete and unfair because it purports to examine the cost of applying the constitutional protection without ever considering the costs of not applying the constitutional protection.

Forty years later, no reasonable person could suggest that it was improper for Officer McFadden to take some action. However, the Court's conclusion that a strict application of the exclusionary rule may hinder crime prevention was based on the erroneous assumption that McFadden's only option was to seize the men. He could have scrutinized their behavior by continuing to follow them. He even could have let them know without confronting them that he was a police officer. What would have been the effect of such different behavior? If the three men were contemplating a robbery, as Officer McFadden believed, they would have dropped the plan once they were aware that he suspected them. No robbery would have been committed on that street at that time, and the suspected crime would have been prevented in a far less invasive way. Naturally, such a suggestion opens the door to the criticism that anything less than a seizure, a search and ultimately an arrest would have left the guns found on Terry and Chilton's persons on the street and would have left the men free to commit a robbery on another street at another time. Such criticism, however, assumes that the men were "casing a robbery," and there was never any additional evidence that robbery was their purpose.

Id. at 88-87 (footnotes omitted). *But see* Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. CRIMINOLOGY & POLICE SCI. 171 (1962) (criticizing Inbau's arguments against *Mapp v. Ohio*). For further criticism of the arguments against *Mapp*, see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

After *Brown* gave blacks equality in education, it was only a matter of time before the Supreme Court would turn to racial equality in other contexts, such as criminal procedure. Indeed, as the civil rights movement gained momentum, the notion that blacks should be protected in their civil rights, but not when their liberty and lives were at stake, must have seemed patently absurd.

Thus, for several reasons, 1961 presented a much more favorable climate to launch a criminal procedure revolution, starting with restraints on police power, than had earlier years . . . Moreover, by 1961, the nation as a whole was less tolerant of local law enforcement abuses and more receptive to the notion of federal intervention in traditional state affairs. The Supreme Court's decision in *Mapp* reflects these developments. In *Mapp*, the Court took power from the states at a time when the states could not be trusted and protected blacks at a time when the nation was awakening to the need to protect them. As such, the common conception of *Mapp* as an aggressively countermajoritarian decision is simply inaccurate.

Id. at 1389 (footnotes omitted).

B. Reasonableness of the Stop

After the Court glossed over the issue of when the stop occurred, they moved onto the reasonableness of the stop.¹¹⁷ First, the Court affirmed that terms such as “stop” and “frisk” are not outside the Fourth Amendment.¹¹⁸ Second, these non-traditional seizures and searches are to be “tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures,” rather than the probable cause standard applicable to arrests and traditional searches.¹¹⁹ Third, the reasonableness of the intrusion will be determined “by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”¹²⁰ Fourth, “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹²¹ “Anything less would invite intrusions . . . based on nothing more substantial than inarticulate hunches[.]”¹²² Fifth, the intrusion must be subject “to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances” and be subjected to “an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?”¹²³

Then the Court applied these principles to the Terry stop. The Court stated that “effective crime prevention and detection” justifies a police officer “in appropriate circumstances and in an appropriate manner approach[ing] a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”¹²⁴

It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a

¹¹⁷ *Terry*, 392 U.S. at 20.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 20.

¹²⁰ *Id.* at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

¹²¹ *Id.* at 21.

¹²² *Id.* at 22.

¹²³ *Id.* at 21-22.

¹²⁴ *Id.* at 22.

street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly [twenty-four] times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of [thirty] years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.¹²⁵

And with that pronouncement, the Court moved beyond the stop to the frisk which it considered the most important issue.

It is useful again to look closely at the facts that the Court found sufficient to find the investigatory seizure reasonable.¹²⁶ That task is necessary to determine whether the decision was based upon "articulable facts and circumstances"¹²⁷ or an "inarticulate hunch"¹²⁸ and must be used as guidance to measure different fact situations following *Terry*.

First, Officer McFadden was not readily forthcoming about why Terry and Chilton initially aroused his curiosity on that crowded downtown street. For some reason, he was watching the two men from the outset even though he did not know them or anything about them.¹²⁹ Of course, watching people on the street does not interfere with Fourth Amendment rights and need not be justified. The only facts that Officer McFadden could articulate to support the seizure were the trips two of the suspects, Terry and Chilton, made to look in a store window and then return to confer with the other and with Katz.¹³⁰

Second, the Court played fast and loose with the most important fact in the case: the number of trips Terry and Chilton made up the street and how many times they looked into the store window. Warren reported that the two men looked into the

¹²⁵ *Id.* at 22-23.

¹²⁶ *Id.* at 32-33 (Harlan, J., concurring). Note that the *Terry* majority never used the term reasonable suspicion.

¹²⁷ *Id.* at 21.

¹²⁸ *Id.* at 22.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 6.

window twenty-four times.¹³¹ That figure is reported with a certainty that the evidence does not support. McFadden was confused about how many times this occurred; a fair reading of the many times he stated what happened leads to the conclusion that they looked into the window between four and twenty-four times. His police report written immediately after the arrests stated that each man made three trips.¹³² This fact is critical because it is unclear as to whether the seizure would have been reasonable based on fewer observations of the store window.

Third, Officer McFadden could not identify which store the men were looking into. Initially, he thought they were looking into an airline office which would not have had a large amount of cash on hand or merchandise that might have attracted them. He singled out the airline office in the police report. At the suppression hearing, a year later, Officer McFadden testified that he thought a jewelry store was the target.

Fourth, by the time Officer McFadden confronted the three men, they had apparently given up on whichever store had been the target of their repeated trips and interest. At that time the two men were conducting themselves “[l]ike anybody else.”¹³³ They walked for three minutes in that fashion beyond the two stores, turned the corner and were walking down a different street.¹³⁴ After walking that distance, they stopped in front of a men's clothing store, where Officer McFadden had moved, where they were joined by the third man, and the three talked for a minute or two.¹³⁵ Officer McFadden then accosted the three men, identified himself as a police officer, ordered them to keep their hands out of their pockets and asked their names.¹³⁶

Finally, and of lesser significance, the men did identify themselves when asked to by McFadden, even though Chief Justice Warren characterized their response as a single mumbled response.¹³⁷ McFadden testified that each man “gave [his name] to me quick.”¹³⁸ In the same direct examination, Officer McFadden said, “They said something;”¹³⁹ on cross-examination in response to the prosecutor's question, Officer McFadden said, “they mumbled something.”¹⁴⁰

¹³¹ *Id.* at 23.

¹³² Police Report, *supra* note 42.

¹³³ Transcript, *supra* note 30, at 1402.

¹³⁴ *Id.* at 1403.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1403-04.

¹³⁷ *Terry*, 392 U.S. at 7.

¹³⁸ Transcript, *supra* note 30, at 1403.

¹³⁹ *Id.* at 1404.

¹⁴⁰ *Id.* at 1409.

The facts of the case, on which this major change in the law rests, are ludicrous upon close examination. Chief Justice Warren set up the test: whether the seizure was based on an “inarticulate hunch”¹⁴¹ rather than upon “articulable facts and circumstances”¹⁴² giving rise to a reasonable belief that a crime was imminent. The limited information on which Officer McFadden acted clearly points to his acting on a hunch which might have warranted his continuing interest in them but certainly not a lawful seizure based upon such paltry and contradictory information. Nonetheless, Chief Justice Warren concluded that Officer McFadden's seizure and search of the men were reasonable.

He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a “stick-up.” We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.¹⁴³

If it had not been for Justice Harlan filling in the gaps, the *Terry* decision might have stood for allowing police to search (frisk) any time a police officer becomes concerned that a person is armed, regardless of whether there was reasonable cause to

¹⁴¹ *Terry*, 392 U.S. at 22.

¹⁴² *Id.* at 21.

¹⁴³ *Id.* at 28.

forcibly detain a suspect. Justice Harlan clarified that “the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.”¹⁴⁴ The facts in *Terry* justifying the forcible detention are so weak that they should raise eyebrows even in those courtrooms where judges are unusually inclined to favor the police.

What the Court, in fact, did was uphold a seizure on less than probable cause based on little more than race. In so doing, the Court virtually obliterated the Fourth Amendment protections which it had imposed on the states, at least for inner city young black men, exposing them, without legal protection, to the same police harassment that black men had historically faced in their dealings with police dating to the time of slavery.¹⁴⁵ Incredibly, this was a Court sympathetic to this problem, but the decision in *Terry*, instead, revealed a Court that was sympathetic to maintaining control over the black population. Rather than strike a balance between legitimate societal needs and individual rights as the Court claimed it was doing, the Court struck the balance totally in favor of the police.¹⁴⁶

¹⁴⁴ *Id.* at 33 (Harlan, J., concurring). While Justice Harlan would have made the right to frisk automatically flow from the right to stop, subsequent law has made them separate inquiries. *Id.*

¹⁴⁵ See RUSSELL, *supra* note 9.

From 1619 to 1865, slave codes embodied the criminal law and procedure applied against enslaved Africans. The codes, which regulated slave life from cradle to grave, were virtually uniform across states—each with the overriding goal of upholding chattel slavery. The codes not only enumerated the applicable law but also prescribed the social boundaries for slaves—where they could go, what types of activity they could engage in, and what type of contracts they could enter into.

. . . As indicated, slaves faced death for numerous criminal offenses.

Harsh sanctions, such as brutal public executions, were imposed to keep slaves in their place. Under Maryland law, for example, a slave convicted of murder was to be hanged, beheaded, then drawn and quartered.

Following this, the head and body parts were to be publicly displayed.

Slaves lived with the constant fear that at any moment they might be charged and convicted of crimes they did not commit. They also lived with the knowledge that if they were the victims of crime, there was no avenue for redress.

Id. at 14-16 (footnotes omitted).

¹⁴⁶ *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) (arguing that the Court succumbed to “hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”). Cf. Jose F. Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711 (2000).

The Warren Court's attempts to secure rights for the accused through well intentioned opinions often resulted in opinions that were difficult to justify under traditional scholarly analysis and that were often crafted in a way that subjected them to attack. Nevertheless, the shortcomings advanced by the critics regarding the Court's approach to constitutional

It is too late in the day to question the validity and reasonableness of investigatory stops on less than probable cause.¹⁴⁷ Common sense dictates that police must have reasonable power to forcibly engage people before a crime is committed rather than limiting police power to chasing criminals after the crime is completed. However, the greatest harm in *Terry* is that it ratified a stop *without defining "stop" and did so on such weak facts*. Chief Justice Warren acknowledged the problem: the need to prevent crime without losing control of the police who may use these powers unfairly to harass black and Latino kids on the streets.¹⁴⁸ But the *Terry* outcome focused only on the crime prevention issue and ignored the problems associated with the exercise of the enormous power the Court in *Terry* bestowed on the police. Thirty-seven years later those issues have grown even more serious.¹⁴⁹ In the end, *Terry* is the genesis for later Justices, less inclined to limit police power, who (1) narrowed the definition of "stop," placing most citizen-police encounters beyond the oversight of the Fourth Amendment, and (2) even further watered-down the reasonable cause standard which was not strong to begin with in *Terry*.¹⁵⁰

decision-making should also recognize that the goal of government accountability in criminal prosecutions is the primary focus of a large portion of the Bill of Rights. They should also take into account the fact that our country has a history of largely ignoring the rights of the poor, oppressed, and those in the minority, even after express language was written in the Constitution to protect them.

Id. at 747-48 (footnotes omitted).

¹⁴⁷ In the interest of full disclosure, I was an author of the amicus brief in *Terry* submitted by the American Civil Liberties Union in which we argued that the Fourth Amendment should not allow seizures of the person on less than probable cause. *See generally* Brief of Amicus Curiae American Civil Liberties Union of Ohio, *Terry v. Ohio*, 293 U.S. 1 (1968) (No. 67).

¹⁴⁸ *Terry*, 392 U.S. at 14-15.

¹⁴⁹ *See generally* William M. Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (arguing that the practice of racial profiling engenders more than just individuals' subjectively discriminatory views, but rather derives from the historical stigmatization of African Americans as predisposed to criminality, dating back to the era of slavery); Symposium, *Racial Profiling: A New Road Hazard*, 3 RUTGERS RACE & L. REV. 1 (2001).

¹⁵⁰ *See* Sundby, *supra* note 5.

Chief Justice Warren's opinion in *Terry* is almost excruciatingly cautious in his effort to explain the Court's departure from a norm of probable cause and to limit the consequences of such a departure. Reduced to its essence, the Chief Justice's holding is a relatively modest one, basically creating a limited right of "self defense" for a police officer who in carrying out her duties comes across someone whom she reasonably believes is armed and dangerous. The problem with *Terry*, therefore, lies not in its very limited upholding of stops and frisks (a holding most of the commentators in this Symposium find acceptable). Rather, *Terry*'s difficulty rests in the long-term consequences it sowed by casting the holding in terms of a broadly framed reasonableness balancing test. For although Chief Justice Warren's cautious opinion suggests that the use of the reasonableness balancing test was meant to be viewed as a narrow departure from the norm of probable

PART IV: DEVELOPMENT OF THE STOP AFTER *TERRY*

Four years after *Terry*, the Supreme Court (now without Chief Justice Warren) acknowledged what *Terry* never specifically, but impliedly, said: “A brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time.”¹⁵¹

Despite the *Terry* Court's acknowledgment of problems on the street when police use their power to harass certain groups, historically young black men and boys,¹⁵² that Court failed to

cause, we now know that the test has taken on a life of its own.

Id. at 1135 (footnotes omitted). *But see* Akhil R. Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

[*Terry*] failed to define “search” and “seizure” broadly enough: Sustained and purposeful surveillance by the unaided eye, the bad *Terry* implied, is not a Fourth Amendment “search” and thus, apparently, need not be reasonable. The bad *Terry* refused to retreat from earlier cases suggesting that warrants are required “whenever practicable” and that in most situations only “exigent circumstances” will excuse the lack of a warrant. The bad *Terry* offered no explanation—none whatsoever—why cops may sometimes search and seize without a warrant even in a situation where no probable cause exists and thus no warrant could lawfully be issued by a magistrate. . . . The bad *Terry* hinted at some of the factors that bear on reasonableness, but failed to develop a systematic account of these factors, needlessly leading civil libertarians to worry that under a proper reasonableness regime, government would have free rein. And to the extent the bad *Terry* could be read to imply that under a proper reasonableness analysis, searching in the absence of individualized suspicion is always unconstitutional—that there must always be “specific” facts pointing to specific targets—the bad *Terry* offered civil libertarians false hope, and made a promise that the Court cannot keep if it means to be faithful to text, history, and common sense. Finally, the bad *Terry*, while acknowledging the flaws of the exclusionary rule, nevertheless pledged allegiance to it, and recycled silly arguments that the rule is somehow mandated by the Constitution and by sound legal principles.

Id. at 1099-1100.

¹⁵¹ *Adams v. Williams*, 407 U.S. 143, 146 (1972).

[*Terry* and its companion cases] . . . were the first cases in which this Court explicitly recognized the concept of “stop and frisk” and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest. This case marks our first opportunity to give some flesh to the bones of *Terry et al.* Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on *Terry's* skeletal framework.

Adams, 407 U.S. at 153-54 (Marshall, J., dissenting).

¹⁵² *Harris*, *supra* note 81.

In African-American communities, police did not so much follow the law as embody it; residents simply had to put up with whatever version of justice officers on the street chose to impose, no matter how brutal or unfair. By 1967, the abuse of blacks by police using stops and frisks—the very technique at issue in *Terry*—had become such a pervasive experience in inner city neighborhoods that the President's Commission on Law

develop controls on how that newly sanctioned power might be used.¹⁵³ By focusing on the moment when Officer McFadden grabbed Terry to conduct the frisk as the moment of seizure, the Court ignored the reality of citizen-police street encounters and the need for judicial oversight under the Fourth Amendment of

Enforcement and the Administration of Justice addressed the subject directly. "Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street."

Id. at 980-81 (footnotes omitted); *see also* RUSSELL, *supra* note 9.

Police harassment comes in many forms. It is also demonstrated by the number of times Black men are stopped, questioned, and assaulted by police as they go about their daily lives. . . . The frequency of contact between Black men and the police has led a generation of Black men to teach their sons "The Lesson"—instructions on how to handle a police stop.

. . . . Many black men have developed protective mechanisms to either avoid vehicle stops by police or to minimize the potential for harm during these stops. The primary shield they use is an altered public persona. This includes a range of adaptive behaviors, e.g., sitting erect while driving, traveling at the precise posted speed limit, avoiding certain neighborhoods, not wearing certain head gear (e.g., a baseball cap), and avoiding flashy cars.

. . . . Black distrust of the justice system is not new. It is historically rooted in the role police played in enforcing the slave codes, Black codes, Jim Crow segregation, and the ultimate form of vigilante justice, lynching. In his treatise on race in America, Gunnar Myrdal reported that between 1920 and 1932, White police officers were responsible for more than half of all the murders of Black citizens. Historical accounts also show that White policemen were often present at lynchings. Today, police brutality barely resembles its past forms. Many Blacks alive today, however, still remember the widespread, persistent, and inhumane abuse Blacks suffered at the hands of police.

Id. at 34-35 (footnotes omitted).

¹⁵³ *See, e.g.,* United States v. Armijo, 781 F. Supp. 1551, 1554-55 (D.N.M. 1991).

An officer questioned train passengers in New Mexico based on information he received from a train employee. *Armijo*, 781 F. Supp. at 1555. The informant indicated defendant as a possible drug courier because he "was a young, well-dressed Hispanic wearing a gold watch and gold ring travelling [sic] in the first class section." *Id.* at 1554. The officer followed the defendant to the parking lot where Mr. Armijo greeted his mother and placed his luggage in a car. *Id.* at 1555. The officer approached the defendant and asked him several questions before identifying himself as a DEA agent and asking for identification and permission to search the luggage in the trunk. *Id.* After the defendant refused the search, the officer threatened to "detain the car and Mr. Armijo's mother." *Id.* The court held that this was a seizure, and that "neither Mr. Armijo's race nor his refusal to consent constitute reasonable suspicion that a crime was being committed." *Id.* at 1557; *see also* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), *overruled in part*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). An elderly woman, who had been attacked in her home, reported that the assailant was a black man. *Brown*, 221 F.3d at 334. Oneonta is a predominantly white town. *Id.* Police compiled a list of black students in town and made random stops of non-whites, but came up with no suspects. *Id.* A class action §1983 suit was filed, and several of the claims were dismissed on the premise that the men were never seized within the meaning of the Fourth Amendment. *Id.* at 335. On appeal, the Second Circuit Court of Appeals reversed the dismissals for three of the men, but upheld the rest because appellants failed to file affidavits. *Id.*

such intrusions. But the *Terry* Court also ambivalently wrote that “[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”¹⁵⁴ However, later Supreme Court decisions seized on that ambivalence and focused only on the physical seizure of *Terry*, thus continuously narrowing those situations that are subject to the reasonableness requirement.¹⁵⁵ The effect has been to eliminate very coercive police encounters from the scope of the Fourth Amendment guarantee of reasonableness, freeing the police on those occasions from all judicial oversight.

The Supreme Court developed the current standards in a series of cases in contexts which are inherently stressful and where government agents compounded that stress. Ironically, there is more Fourth Amendment protection in an automobile which is notoriously devoid of such protections because any stop of a moving vehicle is a seizure subject to the reasonableness standard.¹⁵⁶ A stop of a pedestrian is not as clear unless the officer specifically commands or otherwise compels the pedestrian to stop,¹⁵⁷ and the reasonableness standard does not come into play until the suspect actually heeds the command.¹⁵⁸

A. Airport Concourses

¹⁵⁴ *Terry*, 392 U.S. at 16.

¹⁵⁵ See *United States v. Mendenhall*, 446 U.S. 544 (1980); see also *California v. Hodari D.*, 499 U.S. 621, 626 (1991). A police officer gave chase to a defendant who took flight at the sight of the officer. *Hodari D.*, 499 U.S. at 623. During the chase, the defendant discarded a rock of cocaine. *Id.* The Court held that the evidence was not a fruit of seizure because no physical force was applied before the evidence was dropped and even if the chase was considered a “show of authority,” a seizure did not occur when the defendant had not yielded. *Id.*

¹⁵⁶ See *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of those Amendments.”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).

¹⁵⁷ *Michigan v. Chesternut*, 486 U.S. 567 (1988).

[T]he police conduct . . . would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent’s freedom of movement. The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt . . . [w]hile the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure.”

Id. at 575 (footnotes omitted).

¹⁵⁸ *Hodari D.*, 499 U.S. at 626 (“The narrow question before us is whether, with respect to show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.”).

United States v. Mendenhall. This line of cases began with *United States v. Mendenhall*, where the United States Supreme Court could not agree when a Fourth Amendment seizure that would have activated the reasonableness test had taken place.¹⁵⁹ *Mendenhall* arose when a woman disembarking from an airplane in Detroit aroused the suspicions of Drug Enforcement Agency (DEA) agents present at the airport for the purpose of detecting unlawful trafficking in narcotics.¹⁶⁰ The agents approached the woman because it appeared to them that her conduct was characteristic of persons unlawfully carrying narcotics.¹⁶¹ She arrived on a plane from Los Angeles; she disembarked from the plane last and appeared nervous as she scanned the airport; she claimed no luggage; and she changed airlines for her flight out of Detroit.¹⁶² The agents approached her and asked to see her identification and airline ticket.¹⁶³ The names on the ticket and driver's license were different, and Ms. Mendenhall indicated that she had been in California just two

¹⁵⁹ *Mendenhall*, 446 U.S. at 544.

¹⁶⁰ *Id.* at 547.

¹⁶¹ See Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747 (1997).

Police officers rely on drug courier profiles to justify stopping and questioning citizens about whether they are carrying illegal drugs. A nationally recognized profile does not exist; federal, state, local, and even individual law enforcement officials may have their own "profile." Citizens easily may match one of these profiles, because the profiles list general and often contradictory characteristics: traveling by plane, train, automobile, or bus; traveling alone, with friends, or with your children; being young, middle-aged, or "older"; having short or long hair; traveling to or from Fort Lauderdale, Miami, New York, Los Angeles, San Diego, Atlanta, Chicago, Detroit, Austin, Birmingham, Chattanooga, Charlotte, Dayton, Indianapolis, Kansas City, Newark, Tulsa, Dallas-Fort Worth, or any foreign country; traveling in a business suit, casual clothes, or disheveled clothing; paying cash for your ticket; traveling without checking your luggage, carrying only a garment bag, or checking several large suitcases; traveling and returning home in twenty-four to forty-eight hours; being nervous or anxious when traveling; glancing around the airport, bus, or train terminal; looking over your shoulder; making telephone calls immediately after arriving at your destination; and taking public transportation to your destination.

Id. at 748-49 (footnotes omitted).

¹⁶² *Mendenhall*, 446 U.S. at 548 n.1.

¹⁶³ See Robert J. Burnett, *Random Police-Citizen Encounters: When is a Seizure a Seizure?* 33 DUQ. L. REV. 283 (1995).

Many airport vice details throughout the United States utilize Walk and Talk drug interdiction programs ("Walk and Talk Programs") in order to approach and arrest airport travelers suspected of drug trafficking. These Walk and Talk Programs do not employ any type of drug courier profile and do not require the officers to have a reasonable suspicion that a person is engaged in criminal activity. Instead, the officers randomly approach individuals and ask them potentially incriminating questions about their travel plans and the contents of their luggage. The program is designed to elicit incriminating responses which ultimately may provide the officer with sufficient grounds to detain the passenger further.

Id. at 283 (footnotes omitted).

days.¹⁶⁴ When the officers identified themselves as federal narcotics agents, Ms. Mendenhall appeared shaken and nervous.¹⁶⁵ The agents returned her ticket and license and asked her to accompany them to the airport DEA office for further questioning.¹⁶⁶ Eventually, at the airport security office, Mendenhall turned over the narcotics she was carrying in her underclothing when the agents made it clear that she could not leave until she was searched.¹⁶⁷

The admissibility of that evidence ultimately hinged on the nature of her presence in the security office. If Mendenhall's encounter with the DEA agents in the airport concourse and her trip to the security office constituted a forcible stop, it would have to meet the *Terry* standards for a lawful seizure. The factors that aroused the agents' suspicion turned on the "drug courier profile,"¹⁶⁸ an informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics, which in the same term as *Mendenhall* was described by the Court as "too slender a reed" on which to support a seizure.¹⁶⁹ If, on the other hand, there was no forcible stop and seizure of Ms. Mendenhall, the reasonableness of the agents' conduct would not be open to question.¹⁷⁰ The Supreme Court could not agree.

Two Justices, Stewart and Rehnquist, took the position that no seizure occurred because a reasonable person would have believed that she was free to ignore the agents' questions and requests and walk away.¹⁷¹ The two Justices explained that a seizure could be recognized, even when the person does not attempt to leave, by the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the use of language or tone of voice indicating that

¹⁶⁴ *Mendenhall*, 446 U.S. 548.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 549, 559.

¹⁶⁸ *Id.* at 548 n.1.

¹⁶⁹ *Reid v. Georgia*, 448 U.S. 438, 440-41 (1980) (concluding that fitting the characteristics of a "drug courier profile" in and of itself is insufficient to justify detention). *But see* *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (providing more leeway with drug courier profiles the Court explained, "[a] Court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent").

¹⁷⁰ *Mendenhall*, 446 U.S. at 552.

¹⁷¹ *Id.* at 544 ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

compliance with the officer's request might be compelled.¹⁷² Absent these indicia, the two Justices contended, "inoffensive conduct" between an individual and the police cannot, as a matter of law, amount to a seizure.¹⁷³ Justice Stewart was impressed by the fact that the agents returned Mendenhall's driver's license and airline ticket before requesting that she accompany them to the security office.¹⁷⁴ Consequently, even though Mendenhall may not, herself, have believed that she was free to ignore the agents, Justices Stewart and Rehnquist concluded that she had no objective reason to believe that she could not end the conversation in the concourse and proceed on her way.¹⁷⁵

Acceptance of the Stewart-Rehnquist formulation would have drastic consequences because it labels as consensual almost all police-citizen encounters that are not arrests and places them outside the purview of the Fourth Amendment and immune from review.¹⁷⁶ This formulation states that, as a matter of law, most encounters between citizens and police are consensual and purports to adopt objective criteria to determine this issue. At the outset, this is a view of the world which is inconsistent with how most people untrained in law would see the situation. Few would believe they are free to ignore an officer's requests for information and cooperation.¹⁷⁷ Someone in Mendenhall's

¹⁷² *Id.*

¹⁷³ *Id.* at 555.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *Commonwealth v. Lidge*, 582 A.2d 383, 384-85, 387 (Pa. 1990). The officers apprehended a woman in an airport because she fit a drug courier's profile. *Lidge*, 582 A.2d at 363-65. They sat on both sides of her, questioned her, and having received consent, searched her bags. *Id.* at 364-65. The court held that "appellant was not detained in any manner. She engaged in a consensual conversation in a public place with the police officers." *Id.* at 368; see also *People v. Johnson*, 865 P.2d 836, 837-38, 843 (Colo. 1994). The appellate court reversed the district court's decision to suppress evidence. *Johnson*, 865 P.2d at 837. Officers apprehended defendant after they saw him jogging to a payphone in an airport. *Id.* at 837-38. The officers asked him several questions, checked his identification and ticket and, with permission, searched his bag. *Id.* at 838. The officers found six ounces of cocaine. *Id.* The court held that because the officers used a conversational tone, did not display a weapon, and held the defendant for only a few minutes, the defendant had not been seized. *Id.*

¹⁷⁷ See Daniel J. Steinbrock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity and Inclivity of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001).

The doctrine of consensual encounters, as established by the Supreme Court and administered by the lower courts, is by and large a fictional construct, exempting from the coverage of the Fourth Amendment significant interferences with personal liberty. The Supreme Court's doctrine is flawed in conception by its use of the reasonable person standard, and its picture of a reasonable person is simply out of touch with societal reality. Briefly put, most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police.

Id. at 521-22; see also Christopher Slobogin, *The Poverty Exception to the Fourth*

Amendment, 55 FLA. L. REV. 391 (2003).

Consider also the Court's suspect holding that brief police-citizen encounters on the street and on public transportation are "consensual," despite the fact that such encounters are often tense even when the citizen is innocent. That holding is much more likely to affect the poor, who spend relatively more of their time on the street. Similarly, living in a high crime (poor) neighborhood, while not sufficient in itself to give police reasonable suspicion to stop individuals, can authorize detention on relatively little else, such as when the person runs from the police, despite the fact that many poor people, especially African-American ones in certain urban areas, do not want to deal with the police even when innocent of any crime.

Id. at 405 (footnotes omitted); *see also* Maclin, *supra* note 112.

In the unrealistic world of *Mendenhall*, the average citizen feels free to ignore a police officer who has approached her. In this abstract world, it is irrelevant whether the citizen is aware of her right to ignore the officer. In the real world, however, few people are aware of their [F]ourth [A]mendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear. If *Mendenhall* had dealt with the issue candidly, it would have acknowledged that the average person does not feel free to leave a police encounter. If a person is unlikely to ignore an officer's approach, and is equally unlikely to know of her right to depart, is the Court really serious in believing that the average person will exercise her right to do so?

Realistically, the Justices probably do not believe that the typical police-citizen encounter is the equivalent of two old friends greeting each other on the street corner. Professor Kamisar has given a more plausible explanation for the *Mendenhall* standard. He observed that the standard is actually a "policy decision that the police should be allowed to rely on the moral and instinctive pressure to cooperate inherent in [police-citizen] encounters by *not treating them* as "seizures" for Fourth Amendment purposes.

Id. at 1300-01 (footnotes omitted); Burnett, *supra* note 163.

The application of the *Mendenhall/Royer* test has unfortunately created a vast category of police-citizen encounters which fall outside the parameters of the Fourth Amendment. In reality, most citizens do not feel free to *end an encounter* with police when randomly approached in an airport terminal or other similar public venues. Despite the obvious restraint on liberty, these police-citizen encounters fall outside the Fourth Amendment and are regrettably characterized as mere encounters or nonseizures because, in the Supreme Court's view, a reasonable person would feel free to end the encounter and walk away. As long as the police officer is polite, non-accusatory and calm, a court applying *Mendenhall/Royer* will readily find that a reasonable person would have felt free to leave or disengage the encounter. Accordingly, no seizure has occurred and the police have not triggered the protections of the Fourth Amendment. More importantly, police using such consensual tactics do not need justification for the initial questioning and can approach and interrogate anyone as long as they do not cross the magical threshold.

Herein lies the problem. If the citizen refuses to reply or walks away, the authorities will deem such refusal to cooperate as justification for a prolonged detention. Conversely, if the citizen answers the initial, generalized questions and no suspicion or criminality is exposed, the officer will often escalate the encounter by asking the individual if he would consent to a luggage or body search. In either scenario, the intrusion is escalated without justification.

Id. at 287-88 (emphasis added); *see also* Wayne R. LaFave, *Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police*,

situation complies with the request because she believes that she must. This is true in airports and on inner city streets. Absent some hesitation on the part of an individual in Mendenhall's situation, we are unlikely to see police react in a way that would have proved to Justices Stewart and Rehnquist that Mendenhall was not free to ignore the agents' requests. Justice Stewart maintained that no Fourth Amendment interest would be served by inquiring into the reasonableness of the agents' behavior. It seems that the proper question is the opposite of the one Stewart asked: whether any legitimate interest is served by not evaluating police conduct of this sort by the reasonableness-balancing test advanced in *Terry*.

The other six Justices disagreed with the extreme Stewart-Rehnquist analysis and concluded that a *Terry* seizure had taken place. Even so, they split down the middle: Burger, Powell and Blackmun concurred with Stewart and Rehnquist on the ground that the seizure was justified by reasonable and articulable suspicion of criminal activity.¹⁷⁸ The three dissenting Justices, Brennan, White and Marshall, argued that Ms. Mendenhall's conduct was insufficient to provide reasonable suspicion that she was engaged in criminal activity and that the agents' treatment of her was indistinguishable from a traditional arrest.¹⁷⁹ The majority forged in *Mendenhall* results from the joining of two Justices who did not believe that the defendant had been seized, and three justices who did believe that she was seized but that the seizure was reasonable. While this type of fragmentation offers little guidance, it is a clear indication that a narrow majority of the Court was prepared to allow the police substantial latitude in the absence of physical contact or removal to the police station.

Florida v. Royer. In 1983, again in a case involving the stopping of a suspected drug courier, the Court attempted to clarify the position advanced in *Mendenhall*. While the Court in *Florida v. Royer*¹⁸⁰ remained unable to put together a majority opinion, by combining the plurality's positions with some of

Pachydermatous Prey: Whence Fourth Amendment "Seizures"?, 1991 U. ILL. L. REV. 729 (1991).

[*Mendenhall-Royer* is not merely a "reasonable person" test, nor even a "reasonable innocent person" test, but rather a "reasonable innocent pachydermatous person" test, for the Court finds a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open to them.

Id. at 739-40; see also Michelle R. Ghetti, *Seizure Through the Looking Glass: Constitutional Analysis in Alice's Wonderland*, 22 S.U. L. REV. 231 (1995) (providing a creative analysis comparing Fourth Amendment consensual encounter jurisprudence to the fictional world portrayed in Alice's Wonderland).

¹⁷⁸ *Mendenhall*, 466 U.S. at 560 (Powell, J., concurring).

¹⁷⁹ *Id.* at 572-74 (White, J., dissenting).

¹⁸⁰ 460 U.S. 491 (1983).

those offered by Justice Brennan (who provided the fifth vote) and still others put forward by the four dissenters, several propositions emerged that were supported by a majority of the Supreme Court. Eight Justices were in agreement that the police officer who approached a suspected drug courier at an airport concourse did not violate the Fourth Amendment by that approach and request for identification because it was not a seizure activating the Terry reasonableness test requiring objective justification for the intrusion.¹⁸¹ Four of those Justices, however, along with Justice Brennan, took the position that the consensual aspects of the encounter evaporated¹⁸² when police escorted the suspect to the police interrogation room at the airport while the officers retained his ticket and identification, removed his luggage to the interrogation room and did not inform him that he was free to leave. The Justices concluded that “[a]s a practical matter, Royer was under arrest”¹⁸³ and that it was reasonable for him to believe that he was being detained. The plurality asserted that there “were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention.”¹⁸⁴

¹⁸¹ *Royer*, 460 U.S. at 502.

¹⁸² *Id.* at 503; *see also* *INS v. Delgado*, 466 U.S. 210 (1984).

Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer*, . . . plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. In *Royer*, when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were “permissible in themselves.”

Id. at 216 (emphasis added).

¹⁸³ *Royer*, 460 U.S. at 503.

¹⁸⁴ *Id.* at 502. Implicit in the plurality's statement is that seizing luggage during an investigatory stop is not a violation of Fourth Amendment protection so long as the police have reasonable suspicion. *But see id.* at 509-10 (Brennan, J., concurring).

[M]ost of the plurality's discussion of the permissible scope of *Terry* investigative stops is also unnecessary to the decision.

. . . .
The scope of a *Terry*-type “investigative” stop and any attendant search must be extremely limited or the *Terry* exception would “swallow the general rule that Fourth Amendment seizures [and searches] are “reasonable” only if based on probable cause.”

Id. at 509-10 (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)); *see also* *United States v. Place*, 462 U.S. 696 (1983) (Brennan, J., concurring).

The critical difference between *Mendenhall* and *Royer*¹⁸⁵ was that the officers in *Royer* kept the defendant's ticket and identification.¹⁸⁶ According to the plurality, *Royer* quickly changed into an illegal arrest because the officers had possession of his ticket and identification as well as his luggage and, as a practical matter, the suspect could not leave the airport without them.¹⁸⁷ Moreover, the suspect was not informed that he need not consent to a search of his luggage, which the plurality felt was very significant even though that type of warning is not generally a prerequisite to a valid consensual search.¹⁸⁸ Obviously, the retention of the travel documents in *Royer* was essential to the plurality's conclusion that a consensual encounter had been transformed into a *Terry*-type seizure and then an arrest.¹⁸⁹ Such a show of authority is sufficient to justify a reasonable belief that the individual who is stopped is not free

In some respects the Court's opinion in this case can be seen as the logical successor of the plurality opinion in *Florida v. Royer*. . . . [T]he Court today goes well beyond in endorsing the notion that the principles of *Terry* permit "warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." . . . [T]his suggestion finds no support in *Terry* or its progeny and significantly dilutes the Fourth Amendment's protections against government interference with personal property.

Place, 462 U.S. at 714-15 (Brennan, J., concurring) (citations omitted).

¹⁸⁵ See Edwin J. Butterfloss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988).

The divergent results, despite similar facts, of the two Supreme Court cases that formulated the *Mendenhall-Royer* test are indicative of the difficulty in applying the test. The only factual difference between the two cases at the point the plurality found *Royer* was seized was the retention of *Royer's* airline ticket and identification. Yet the results are vastly different. Justice Stewart did not even find that *Mendenhall* had been seized during her ordeal, while the plurality found that *Royer* was not only seized, but also arrested. Moreover, in finding a seizure of *Royer*, the plurality pointed to facts that also were present in *Mendenhall*. The Court's cases following *Mendenhall* and *Royer* provide no further elucidation.

Id. at 451 (footnotes omitted).

¹⁸⁶ *Royer*, 460 U.S. at 503 n.9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ The Court was unable to put together a majority that agreed on whether retention of identification constituted a seizure in *Royer*. Subsequent courts have only further complicated the matter. Compare *McLellan v. Commonwealth*, 554 S.E.2d. 699, 701 (Va. Ct. App. 2001) (holding that "an officer's subjective evaluation of the situation is not binding" on the court) with *Piggott v. Commonwealth*, 537 S.E.2d 618, 619 (Va. Ct. App. 2000) (holding that a passenger in a car was seized when the officer retained his ID the court stated, "[T]he consensual aspect of the encounter ceased when Detective Langford retained Piggott's identification while he ran a warrant check. A reasonable person in Piggott's circumstances would not have believed that he could terminate the encounter and walk away.").

to leave.¹⁹⁰

Florida v. Rodriguez. The line between consensual encounters that raise no Fourth Amendment reasonableness inquiries and *Terry*-stops that must be supported by reasonable suspicion remains undrawn. Following *Mendenhall* and *Royer*, the Court, in *Florida v. Rodriguez*,¹⁹¹ was faced with yet another case involving an airport encounter between police officers and suspected drug couriers. Three travelers who aroused police suspicion specifically tried to avoid contact with the police officers, and the defendant, who unsuccessfully attempted to avoid confronting the officers by going the wrong way on an escalator, directed profanity at the officers.¹⁹² The officer

¹⁹⁰ See Burnett, *supra* note 163.

The *Mendenhall/Royer* analysis is clearly insufficient. The current application of the test is incompatible with the mandate of *Terry*. In *Terry*, the Supreme Court specifically warned of the danger of isolating the initial stages of police-citizen encounters from constitutional safeguards. The Court feared that the removal of judicial scrutiny would eliminate the only effective deterrent to police misconduct. The Court's solemn concern has flourished under *Mendenhall/Royer*. Many of the encounters initiated by police now fall outside the protections afforded by the Fourth Amendment. The absence of the Fourth Amendment protection encourages the absolutely random detention of innocent citizens.

Id. at 305-06 (footnotes omitted); see also Butterfoss, *supra* note 185.

[L]iteral application of the *Mendenhall-Royer* "free-to-leave" test would result in virtually all police-citizen encounters being characterized as seizures and thereby eliminate the "non-seizure" category of such encounters.

Nevertheless, the test has not been applied—nor was it intended to be applied—in such a manner. Rather, as stated above, precisely the opposite has occurred. Application of the test has created a broad "nonseizure" category of police-citizen encounters that permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct. This has been accomplished both by constructing a highly artificial "reasonable person," who is much more assertive in encounters with police officers than is the average citizen, and by ignoring the subjective intentions of the officer. The result is that [F]ourth [A]mendment rights of citizens are determined through a legal fiction. In many encounters with citizens, police conduct is not scrutinized under the [F]ourth [A]mendment because in the courts' view a reasonable person would feel free to end the encounter and walk away. However, given the reality that citizens virtually never feel free to walk away from an encounter initiated by a police officer, most of the citizens in these "nonseizure" encounters do not feel free to walk away. Moreover, in a significant number of these "nonseizure" cases, the police officers involved testified that the citizen in fact was *not* free to leave. The result is that citizens do not feel free to end encounters with police and who, in fact, would not be permitted to do so, are left outside the scope of the [F]ourth [A]mendment protections because the reasonable person constructed by the courts would have felt free to leave.

Id. at 439-40 (footnotes omitted).

¹⁹¹ 469 U.S. 1 (1984) (per curiam).

¹⁹² *Rodriguez*, 469 U.S. at 3-4.

“suggested” that the defendant step aside about fifteen feet, which he did.¹⁹³ The officer then requested and was granted permission to search the defendant's suitcase.¹⁹⁴ Three bags of cocaine were found during the search.¹⁹⁵ The officer testified at the suppression hearing that until the cocaine was found, the three were free to leave.¹⁹⁶

The Supreme Court held that the initial encounter between the defendant and the police officers, “where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interests.”¹⁹⁷ The Court's analysis was disingenuous. A consensual encounter is one that implies that the individual is free to avoid the encounter altogether or to terminate it at will. In each of the three airport encounter cases, the defendants complied with persistent police requests. In *Rodriguez*, the defendant's behavior clearly indicated an intention to avoid the police but an inability to do so. It is difficult to conclude that anyone in the defendant's position, after manifesting his intent to avoid the confrontation, would reasonably believe that he need not step aside and talk with police officers. Moreover, the Court refused to characterize the additional intrusion when the defendant was asked to move fifteen feet out of the traffic on the concourse as a *Terry-stop*.¹⁹⁸

B. Close Encounters

INS v. Delgado. The definition of seizure became more opaque in several cases involving questioning in close spaces. In *INS v. Delgado*, Immigration and Naturalization Service agents conducted surveys of the work force at several factories in search of illegal aliens.¹⁹⁹ Each survey lasted more than an hour.²⁰⁰ Agents positioned themselves near the factory exits to make sure that none of the employees left without being questioned.²⁰¹ Other agents circulated through the work area asking each employee questions relating to the employee's citizenship and status in the United States.²⁰² During the questioning, the employees were permitted to continue working and were free to circulate on the work floor, provided that no one attempted to

¹⁹³ *Id.* at 4.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 5.

¹⁹⁸ *See id.* at 5.

¹⁹⁹ *INS v. Delgado*, 466 U.S. 210, 211-12 (1984).

²⁰⁰ *Delgado*, 466 U.S. at 214.

²⁰¹ *Id.* at 212.

²⁰² *Id.*

leave before being questioned.²⁰³ “The agents displayed badges, carried walkie-talkies and were armed,” but no agent drew a weapon during the surveys.²⁰⁴

Drawing from the airport cases, Justice Rehnquist, writing for the majority, appeared to adopt a bright-line rule.

[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. . . . Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps—such as those taken in *Brown*²⁰⁵—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.²⁰⁶

The Court rejected the claim that the entire work force had been seized.²⁰⁷ The Court said that the inability of the workers to leave was part of the ordinary arrangement between employers and workers: “Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers.”²⁰⁸ Even though some workers tried to hide from the agents, the Court concluded that the presence of agents at the doors did not elevate the encounter to a Fourth Amendment seizure.²⁰⁹

Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those

²⁰³ *Id.* at 213.

²⁰⁴ *Id.* at 212.

²⁰⁵ *Brown v. Texas*, 443 U.S. 47 (1979). Officers observed the defendant walking in a “high drug problem area,” and although he was not engaged in any criminal activity and there was no reason to believe that he was carrying a weapon, the officers stopped him and asked for identification. *Brown*, 443 U.S. at 49. When the defendant refused, the officers frisked him, found nothing, yet arrested him for violation of a “stop and identify” statute. *Id.* The Court held the defendant was unreasonably seized within the meaning of the Fourth Amendment. *Id.* at 52.

²⁰⁶ *Delgado*, 466 U.S. at 216-17.

²⁰⁷ *Id.* at 218.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.²¹⁰

Having found that the employees were not seized, the Court incredibly concluded that the respondents also were free not to cooperate.²¹¹

Justice Brennan dissented and accused the Court of misapplying its own test.²¹² Applying the governing test, whether or not a reasonable person would believe that he is free during the course of the questioning to disregard the questions and walk away, Justice Brennan concluded:

Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a “show of authority” of sufficient size and force to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the INS agents' questions.²¹³

The *Delgado* majority's reasoning is absurd. Justice Rehnquist's reference to the consensual nature of an encounter when citizens are asked questions by police ignores the very

²¹⁰ *Id.*

²¹¹ *Id.* at 220-21.

While persons who attempted to flee or evade the agents may eventually have been detained for questioning, respondents did not do so and were not, in fact, detained. The manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory. Respondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures.

Id. (citations omitted).

²¹² *Id.* at 228 (Brennan, J., dissenting) (quoting *Mendenhall*, 466 U.S. at 554).

[Justice Stewart's] opinion also suggested that such circumstances might include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.”

A majority of the Court has since adopted that formula as the appropriate standard for determining when inquiries made by the police cross the boundary separating merely consensual encounters from forcible stops to investigate a suspected crime.

Id. (citations omitted).

²¹³ *Id.* at 229 (Brennan, J., dissenting).

nature of the group questioned in *Delgado* and the desperate situation faced by undocumented aliens.²¹⁴ To conclude that these workers were free to refuse to cooperate with the INS agents is outrageous because it ignores the facts of the case. Further, Justice Rehnquist dismisses the workers' claim that the INS agents prevented them from leaving on the theory that the work rules prevented them from leaving. However, the fact was that INS agents prevented the workers from leaving until they answered the INS agents' questions.

Working the Buses. In *Florida v. Bostick*,²¹⁵ police engaged in a practice called "working the buses," where they boarded buses shortly before departure and asked some or all of the passengers, without individualized suspicion, for information about themselves, their destination, and for permission to search their luggage for drugs.²¹⁶ The Florida Supreme Court found the encounter to be fraught with coercion because the officers would stand over the individual questioned and block the aisle which effectively prevented a person from leaving.²¹⁷ Consequently, despite the trial court's finding of fact that the officers informed the defendant that he did not have to consent to a search, the Florida high court characterized the encounter as a seizure that was rendered unconstitutional because of the lack of individualized suspicion.²¹⁸

The United States Supreme Court disagreed, emphasizing that a seizure does not occur every time an officer approaches a citizen in public and questions that person.²¹⁹ The Court said that if the encounter had taken place inside the bus terminal or before the passenger boarded the bus, it would not have risen to

²¹⁴ See Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946 (2002).

While Justice Rehnquist may want us to believe (or may himself think) that he is applying a race neutral standard, in fact he is not. To begin with, the "any reasonable person" category presumably includes Latinas/os. Latinas/os and non-Latinas/os, however, are likely to perceive the INS in different ways. Whether or not Latinas/os are documented, they are, on the whole, more likely than non-Latinas/os to be apprehensive about encounters with the INS. Given the difference between how Latinas/os and non-Latinas/os are likely to respond to INS authority, Justice Rehnquist's unmodified reasonable-person approach is fictional. Specifically, it creates the misimpression that there is a neutral identity position from which to ask the seizure question.

Id. at 995-96 (footnotes omitted).

²¹⁵ 501 U.S. 429 (1991).

²¹⁶ *Bostick*, 501 U.S. at 433.

²¹⁷ *Id.*

²¹⁸ *Id.* at 434.

²¹⁹ *Id.*

the level of a seizure.²²⁰ The fact that the encounter took place in the cramped confines of a bus did not render the situation qualitatively different. The Court stated that “the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him.”²²¹ Rather, the compulsion to remain rather than depart was the result of something other than the conduct of the law enforcement officers, according to the Court.²²² Instead, the right question, the majority wrote, is whether a reasonable person would feel free to decline the police request to search and otherwise terminate the encounter.²²³

The Supreme Court ignored the fact that most persons riding interstate buses have far less influence and economic and political power than airplane passengers.²²⁴ Bus passengers are less likely to feel free to refuse a police request and more likely to believe that a police request is an order, regardless of the actual words used to make the request, an impression that is heightened by the physical dominance of the officer blocking the aisle and standing over the seated passenger.²²⁵ The political consequences of such behavior on an airplane would be far different from the consequences when the target is a bus.

It is inconceivable that police would “sweep the planes” for drugs, regularly delaying departures while police officers on the plane asked to see identification and tickets and requested permission to search carry-on luggage. The dissenters commented:

By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct

²²⁰ *Id.*

²²¹ *Id.* at 436.

²²² *Id.*

²²³ *Id.*

²²⁴ See Slobogin, *supra* note 177, at 406 (“Relative wealth makes a difference in search and seizure. . . . [T]here are fairly robust indications that the Court’s caselaw affords the poorer people in our country much less protection of their privacy and autonomy than those who are better off.”).

²²⁵ See LaFave, *supra* note 177.

Even if it is generally true that police encounters with pedestrians, including travelers who become ensnared in drug courier detection activities at airports, are *not* seizures, the confrontations which occur on buses as a part of suspicionless police sweeps nonetheless ought to be deemed seizures because they are dramatically different in terms of the character of the police activity involved and its impact upon the reasonable traveler. This difference, essentially, comes down to these two propositions: (i) the police dominance of the situation manifested by their sweep activity, undertaken with the obvious connivance of the common carrier to which bus travelers have entrusted their care, is highly coercive because it is so unlike any contact which might occur between two private citizens; (ii) that dominance has a uniquely heavy impact upon bus travelers precisely because they do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize.

Id. at 746-47.

suspicionless, dragnet-style sweeps put passengers to the choice of cooperating or of attempting to exit their buses and possibly being stranded in unfamiliar locations. It is exactly because this “choice” is no “choice” at all that police engage in this technique.²²⁶

The Supreme Court revisited the issue in *United States v. Drayton*,²²⁷ which presented significantly different facts from the earlier case. In *Drayton*, three police officers boarded an interstate bus at a rest stop just prior to the bus's departure.²²⁸ One officer moved to the back of the bus; the second stayed in the front by the exit; and the third officer, Lang, worked his way from rear to front speaking with the passengers and asking permission to search their luggage and persons.²²⁹ Officer Lang did not advise the passengers that they could refuse permission, unlike the investigators in *Bostick*.²³⁰ The defendant was traveling with another man.²³¹ When the officer came up to Drayton and his companion, he told them they were looking for drugs and weapons.²³² He asked if they had any luggage, and both men pointed to the suitcase in the overhead luggage rack.²³³ Lang asked if he could check; a search of the bag revealed no contraband.²³⁴ Then Lang asked Drayton's companion if he could check his person; the companion agreed.²³⁵ A pat-down revealed hard objects similar to “drug packages” in both thigh areas.²³⁶ At that point, the companion was arrested and removed from the bus.²³⁷ Officer Lang then asked Drayton if he could check him, and Drayton agreed.²³⁸ The pat-down revealed similar objects as were found on the companion, and Drayton was arrested.²³⁹

The United States Court of Appeals for the Eleventh Circuit reversed the convictions, holding that passengers do not feel free to disregard an officer's request for permission to search unless they are given some positive indication that consent may be refused.²⁴⁰ The United States Supreme Court reversed and

²²⁶ *Bostick*, 501 U.S. 450.

²²⁷ 536 U.S. 194 (2002).

²²⁸ *Drayton*, 463 U.S. at 197.

²²⁹ *Id.* at 198.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 199.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *United States v. Drayton*, 231 F.3d 787, 790-91 (11th Cir. 2000); *rev'd*, 536

rejected the Eleventh Circuit's bright-line rule that evidence seized during suspicionless drug interdictions on buses must be suppressed unless police advise passengers that they have the right to refuse.²⁴¹ The Court drew conclusions opposite from those drawn by the Eleventh Circuit.

Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.²⁴²

The Court concluded that such an encounter on the street would have been consensual, and the fact that it takes place on a bus does not convert it into an illegal seizure.²⁴³

There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.²⁴⁴

Nor did the fact that the officer displayed his badge turn the encounter into a seizure. Relying on *Delgado*, the majority said, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response."²⁴⁵ Further, the majority rejected the defendant's claim that the arrest of his companion turned the encounter into a seizure because no reasonable person would then feel free to

U.S. 194 (2002).

²⁴¹ *Drayton*, 536 U.S. 202-03.

²⁴² *Id.* at 203-04.

²⁴³ *Id.* at 204.

²⁴⁴ *Id.* (citations omitted).

²⁴⁵ *Id.* at 205 (quoting *Delgado*, 446 U.S. at 216).

refuse cooperation.²⁴⁶ “If anything,” the Court said, “Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after arresting Brown, Lang addressed Drayton in a polite manner and provided him with no indication that he was required to answer Lang's questions.”²⁴⁷

It is very hard to imagine that either Brown (the traveling companion) or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had a choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one.

The sum of all these cases from *Terry* to *Drayton* is that the government advocated (1) expanding police power to extend to investigatory stops on less than probable cause and (2) narrowing the definition of “stop” to exclude most citizen-police encounters. In other words, state, local and federal governments sought extended power for police and, once that power was granted, spent the next thirty years persuading the Court to exclude most citizen-police encounters from the limits imposed on the extended powers. Only when an officer verbally indicates that the citizen must stop or utilizes other forcible means is the government put to its proof to show that there was reasonable cause to justify the stop. The prosecution must offer its proof only where a reasonable person would not feel free to walk away and ignore the police officer's questions or, where walking away is not at issue, to refuse the officer's request for cooperation. *Terry* opened the door for this outcome by focusing on the moment that Officer McFadden grabbed Terry and spun him around. The reality is that Terry and his companions no longer had the liberty to ignore Officer McFadden and walk away once McFadden walked up to them outside the men's store, ordered them to keep their hands out of their pockets, and asked their identities.

What is missing in all of these cases is an understanding of the power differential between law enforcement agents and citizens. The reasonable person, untrained in this area of the law, simply does not believe that ignoring a police request is an option.²⁴⁸ Unless trained in the law, people are not aware of their

²⁴⁶ *Id.* at 206.

²⁴⁷ *Drayton*, 536 U.S. at 206.

²⁴⁸ *State v. Baldwin*, 686 So. 2d 682, 683-85 (Fla. Dist. Ct. App. 1996). The police observed two men loitering in a high crime area. *Baldwin*, 686 So. 2d at 683. The police admitted that the two men were not engaging in any suspicious activities, but approached the men nonetheless. *Id.* Defendant refused to be searched, but did not leave the scene while police searched his friend. *Id.* The

rights in the context. Moreover, police officers exploit that ignorance and create the impression that the person does not have a choice. When a patrol car closely follows a pedestrian,²⁴⁹ when a police officer persists in asking a person to stop and answer questions in an airline terminal when the traveler has tried to ignore or evade the officer,²⁵⁰ or when a law enforcement officer is blocking exits and leading some people away,²⁵¹ it is the height of folly to think people have a real choice.²⁵² Moreover,

officers repeatedly told the defendant to get his hands out of his pockets. *Id.* The officers then saw defendant throw something to the ground, at which point they physically detained him. *Id.* at 683-84. The court held that the officer requested, not commanded, defendant to take his hands out of his pockets. *Id.* at 685. That distinction kept the encounter from being an illegal detention. *Id.*

²⁴⁹ See generally *Michigan v. Chesternut*, 486 U.S. 567 (1988); see also *Maclin*, *supra* note 112.

Chesternut reflects the current Court's unwillingness or inability to empathize with those citizens who are subjected to police scrutiny. Is the Court credible when it says that "people are not shorn of all Fourth Amendment protection when they step from their homes onto public sidewalks," but then holds that the police are free to chase individuals up and down the streets, provided their actions are not "so intimidating"? Perhaps the result in *Chesternut* is due to the fact that none of the Justices has been recently chased down public streets by a police car. After *Chesternut*, if people want to feel secure on the streets, they had better be track stars. The use of the right-to-inquire rule has undermined the Court's ability to credibly define when a person has been seized. The Court has expanded the rule to a point where a government's desire to chase, stop, and question persons has become more important than the citizen's right to come and go as he pleases.

Id. at 1307 (footnotes omitted).

²⁵⁰ See generally *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam); see also *Mendenhall*, 446 U.S. at 544.

²⁵¹ See generally *Delgado*, 466 U.S. 210; see also *Drayton*, 536 U.S. 194.

²⁵² See *Anderson*, *supra* note 146.

In the consent jurisprudence of the Rehnquist Court that related to search and seizure matters, the logic of *Schneekloth* and *Mendenhall* ultimately became the standard for evaluating the adequacy of consent. Thus, since the law would rarely deny police the fruit of their aggressive investigations, the scales were tipped in their favor and they were thereby encouraged to press hard to obtain consent even though their conduct may well have been coercive to the average citizen. The Supreme Court's lukewarm regard for protecting citizens from aggressive police efforts to obtain consent to search during routine investigations created a severe accountability vacuum that encouraged police abuse.

Id. at 741; see also Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chases*, 58 TENN. L. REV. 73, 78-79 (1990).

The present Supreme Court, however, appears to have lost sight of *Terry's* even-handed approach to the [F]ourth [A]mendment. While continuing to lessen the government's burden to establish the constitutional reasonableness of its conduct, there has been no corresponding expansion of the suspect's zone of protected privacy and liberty. Instead, the Court has narrowed the coverage of the [F]ourth [A]mendment by holding that more and more law enforcement activity is excluded from the definition of search and seizure. This on-going contraction of the [A]mendment's scope follows a pattern in which the facts of the particular case suggest that the police cannot justify their actions as constitutionally reasonable, yet the Court will conclude that the police conduct is a desirable part of the war on crime. In such situations the

during these encounters police officers use words and gestures calculated to make citizens comply. The emphasis is on compliance, not choice.

I can well understand the compulsion that persons so accosted feel. In January 1969, I attended an Association of American Law Schools annual meeting in Detroit. At the time, I was a young law professor in Cleveland, a naval reserve officer, a husband and father, and a veteran of the *Terry* case. I also had long hair and a beard. I decided to take a Greyhound bus back to Cleveland. I bought my ticket and headed to the bus when I was accosted by a federal agent. I do not remember what agency, but it was early January during the height of the Vietnam war. I surmised that he was looking for draft evaders or deserters who had fled to Canada and were returning to the states to see their families during the holidays. The agent demanded to see my identification and draft card which I refused to show him. He persisted in a loud and angry manner until I walked around him and boarded the bus. Until the bus departed, the agent stood directly outside the window where I was seated, glaring at me the entire time. I fully expected him to board the bus and drag me off. He was bullying travelers into cooperating and showing their identity cards. I knew he could not legally compel me to cooperate, but—not knowing I was a lawyer versed in the particular law—he was determined to persuade me that I had no choice in the matter. He glared at me until the bus finally left. I had nothing to hide, but I thought I had a duty to assert my rights because he was determined to act as though I had none, a tactic which I am certain worked over and over for him, just as it does now.

How unsettled I felt, knowing my rights but insecure wondering if the officer (1) knew my rights and (2) would honor those rights. Now, when travelers succumb to an officer's persistence comparable to that which I faced, I am sure that the manner in which the encounter is portrayed at a suppression hearing leads a judge to conclude that a reasonable person would have felt that he could just walk away. In other words, the officer's manner on the street or in the terminal is very different

police conduct can receive Court approval only if it is placed beyond the coverage of the [F]ourth [A]mendment, thereby eliminating any requirement of constitutional reasonableness. The result-oriented nature of the Court's approach allows it to tailor the [A]mendment's coverage by covertly determining whether the reasonableness requirement can be satisfied before deciding whether to impose the requirement upon the police.

Id. at 78-79 (footnotes omitted).

from how it is portrayed in the courtroom.

Transpose that situation to a street corner in an inner city and change the citizen from a law professor to a young black man.²⁵³ Does anyone really believe that that young man has a choice when a police officer walks up to him and starts asking questions? If the young man refuses to answer or, worse, walks away, he may well believe that his safety or life is in danger. It is naive or duplicitous to say that the reasonable person would believe that he is free to disregard the police officer and walk away. It would be highly unreasonable for the young man to think he could ignore the police officer's "request."²⁵⁴

PART V: REASONABLE SUSPICION

Not only has the Court excluded a significant portion of citizen-police encounters from Fourth Amendment scrutiny, it has categorically broadened police power to make legal investigatory stops. Even those cases where a *Terry* investigatory stop is held to have occurred have been negatively affected by the decision in *Terry*. The reasonableness standard utilized in *Terry* is flawed and has resulted in a further erosion of Fourth Amendment protections. Chief Justice Warren's majority opinion never used the term "reasonable suspicion," instead writing of "unusual conduct" which leads a police officer "reasonably to conclude in light of his experience that criminal activity may be afoot."²⁵⁵ It was only in Justice Harlan's concurring opinion in *Sibron* that the "reasonable suspicion" standard was articulated.²⁵⁶ In applying this diluted-cause

²⁵³ See, e.g., *United States v. Ringold*, 335 F.3d 1168 (10th Cir. 2003), cert. denied, 540 U.S. 1026 (2003). Police observed defendant, a black male, driving through Kansas with California plates and followed him. *Ringold*, 335 F.3d at 1170. Defendant stopped at a gas station and the police followed, parked their squad car in front of defendant's car and approached him while he pumped gas. *Id.* The officers surrounded the defendant and told him he was suspected of transporting drugs. *Id.* The police asked to search his vehicle, which defendant consented to, and the police found marijuana. *Id.* Despite the fact that the police followed the defendant, cut off his ability to leave the gas station, asked unfounded questions about drugs, and never told him that he did not have to comply, the Court cited *United States v. Bostick* and held that "the police conduct would [not] have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 1171-72.

²⁵⁴ See *Laser*, supra note 113.

The Supreme Court has not yet addressed, however, the equally compelling question of whether a person's refusal to consent to a search request during a noncoercive police encounter can constitute even a part of the basis for a *Terry* stop or search, and lower courts are in disagreement concerning this issue. One circuit permits police officers to use the defendant's refusal to consent to a search request as one of the factors constituting the "totality of circumstances," while other circuits do not.

Id. at 1172-73.

²⁵⁵ *Terry*, 392 U.S. at 30.

²⁵⁶ *Sibron v. New York*, 392 U.S. 40 (1967).

standard, the Warren Court claimed the need to distinguish facts and circumstances from inarticulate hunches,²⁵⁷ but failed to do so when they validated the stop of Terry and Chilton based on Officer McFadden's statements that the two "didn't look right"²⁵⁸ and that McFadden "just didn't like 'em."²⁵⁹ Thus, the current standard for a stop was forever grounded upon the very type of inarticulate hunch that the Court said was an insufficient basis for a *Terry* stop.²⁶⁰ From the outset, the *Terry*

The Court is of course entirely correct in concluding that we should not pass upon the constitutionality of the New York stop-and-frisk law 'on its face.' The statute is certainly not unconstitutional on its face: that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it 'constitutional on its face' if that expression means that any action now or later thought to fall within the terms of the statute is, ipso facto, within constitutional limits as well. No statute, state or federal, receives any such imprimatur from this Court.

This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street police work. Without giving carte blanche to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional.

Id. at 71 (Harlan, J., concurring).

²⁵⁷ *Terry*, 392 U.S. 21-22.

And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. (citations and footnotes omitted).

²⁵⁸ Transcript, *supra* note 30, at 1456.

²⁵⁹ Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 730 (1998).

²⁶⁰ See Laser, *supra* note 113.

As the Court articulated in *United States v. Cortez*, the *Terry* standard is not self-evident in practice: "Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise."

Since *Cortez*, courts have interpreted the 'totality of the circumstances' broadly, thus expanding the scope of what constitutes an acceptable

“reasonable suspicion” test exhibited the form of a standard devoid of any real substance. Consequently, later courts relying on this standard mired in vagary have further weakened “reasonable suspicion” to uphold stops based on nothing or very little more than race or socioeconomic status. These later cases are totally consistent with the result in *Terry*, if not the *Terry* Court’s sentiment of bringing such conduct within the ambit of the Fourth Amendment.

The suspects had moved away from the street where Officer McFadden had observed the men looking in a store window and where he thought the robbery would take place.²⁶¹ The Supreme Court, however, rejected this fact as being critical, essentially concluding that the men had not abandoned the intent to commit a crime, something the Court, of course, could not have known.²⁶² When the men left Huron Road and turned the corner on to Euclid Avenue, nothing about their behavior would continue to sustain a reasonable belief that they were about to commit a crime.

It was never clear exactly what the Court was upholding and what level of cause needed to be met, other than something less than probable cause. Nor did the companion cases—*Sibron v. New York*²⁶³ and *Peters v. New York*²⁶⁴—add much clarification. In *Sibron*, again, the Court focused on the search for weapons, finding it unsupportable because the officer’s statement before the search for weapons “made it abundantly clear that he sought narcotics,” not a weapon.²⁶⁵ In *Peters*, the Court refused to rule on the constitutionality of the New York statute, which authorized police to stop people and search for dangerous

Terry stop. In the drug-trafficking context, for example, the Court has held that police officers can conduct *Terry* stops even when the ‘totality of the circumstances’ is nothing more than a set of innocent behaviors.

Id. at 1169 (footnotes omitted).

²⁶¹ *Terry*, 392 U.S. at 5.

²⁶² *Id.* at 28 (“Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point.”); see, e.g., *State v. Cyr*, 501 A.2d 1303 (Me. 1985). An officer saw a car parked in the parking lot of a furniture store. *Cyr*, 501 A.2d at 1306. The officer knew that the store had recently been burglarized, but chose not to approach defendant. *Id.* The defendant drove away from the store, and the officer followed, eventually electing to stop the car. *Id.* at 1305. The defendant was charged with operating a motor vehicle without a license. *Id.* Even though defendant left the suspicious scene, and was never shown to have any intent to burglarize the store, the court held that “[g]iven the location of the truck, the time of night, and the other surrounding circumstance, we conclude that specific and articulable facts existed to justify the minimal intrusion involved in stopping the vehicle.” *Id.* at 1306.

²⁶³ *Sibron v. New York*, 392 U.S. 40 (1967) (consolidated with *Peters v. New York*).

²⁶⁴ *Peters v. New York*, 392 U.S. 40 (1968) (consolidated with *Sibron v. New York*).

²⁶⁵ *Sibron*, 392 U.S. 64 (consolidated with *Peters v. New York*).

weapons on “reasonable suspicion,” by finding that the search was incident to a lawful arrest for burglary based upon probable cause.²⁶⁶

The reasonable suspicion standard became firmly established a decade after *Terry*, in *Brown v. Texas*, when the Court held that a police officer's claim that a man “looked suspicious” without accompanying facts which supported that conclusion was insufficient to meet the reasonable suspicion standard.²⁶⁷ Thus, Justice Harlan's approach to the issue in *Terry* and development of the reasonable suspicion standard took hold and became the standard which we still use thirty five years later.²⁶⁸

The *Terry* doctrine, as applied in *Terry* and in subsequent cases, has deprived persons in inner-city minority communities of basic Fourth Amendment guarantees. Overwhelmingly, young black men are the subjects of *Terry* stops and the formulation and maturation of the reasonable suspicion standard made that impact inevitable.²⁶⁹

²⁶⁶ *Peters v. New York*, 392 U.S. at 66 (consolidated with *Sibron v. New York*); see also N.Y. CODE CRIM. PRO., ch. 86, § 180-a (1964) (current version at N.Y. CODE CRIM. PROC. § 140.50 (McKinney 2004)).

²⁶⁷ *Brown v. Texas*, 443 U.S. 47, 52 (1979).

²⁶⁸ *Terry*, 392 U.S. at 131-34 (Harlan, J., concurring). The only part of the Harlan approach which has not become law was his view that once an officer has reasonable suspicion to forcibly stop a suspect, the right to conduct a limited search for weapons should flow automatically from the right to stop. *Id.* Instead, the Court has maintained that the stop and the frisk are two separate inquiries, although the right to search for weapons has been treated as almost automatic in some lower courts, especially in drug cases. See, e.g., *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (adopting a per se rule allowing a *Terry* frisk following a stop supported by reasonable suspicion of drugs: “The indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer.”).

²⁶⁹ Cf. Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person,”* 36 HOW. L.J. 239 (1993).

While the Justices in *Terry* were conscious of the problems between African Americans and police officers, they failed to provide adequate safeguards to ensure that the relations between police and the African American community would be considered when determining whether a reasonable person would feel free to deny consent to a search and seizure. The Court was presented with the opportunity to affirmatively incorporate the long history of police oppression into its formula to determine voluntary consent to a search and seizure. Instead, the Supreme Court chose not to do so, thus, perpetuating the social wrongs it knew occurred almost daily.

In decisions following *Terry*, the Supreme Court has continued to ignore the historical relationship between minority communities and the police.

Id. at 248-49 (footnotes omitted); cf. *Harris*, *supra* note 29.

A substantial body of law now allows police officers to stop an individual based on just two factors: presence in an area of high crime activity, and

In the years since *Terry*, the standard of reasonable suspicion has become more problematic by the emphasis upon two factors. The first is the officer's experience. In *Terry*, the Court said that Officer McFadden's conclusion that criminal activity was afoot was reasonable "in light of his experience."²⁷⁰ However, Chief Justice Warren failed to elaborate on the relevant experience. Officer McFadden, an expert at identifying shoplifters and pickpockets, testified that he had never apprehended a robber.²⁷¹

Terry involved reliance on a police officer's judgment based on experience on the street. That judgment must withstand an objective evaluation, but by necessity it represented a vote of confidence in a police officer's ability to discern impending criminal behavior even though the facts are insufficient to form the probable cause necessary for an arrest. When reviewing a police officer's conclusion of impending criminal activity, a court must review the evidence along with inferences and deductions drawn by a trained law enforcement officer, "inferences and deductions that might well elude an untrained person."²⁷² Those

evasive behavior. In other words, many courts now find that reasonable suspicion to stop exists when the person involved 1) is in a crime-prone location, and 2) moves away from the police.

Even if this does not seem remarkable in the abstract, these "location plus evasion" cases become distressing when viewed in conjunction with a related fact: These stops and frisks are applied disproportionately to the poor, to African Americans, and to Hispanic Americans. This is because these individuals are most likely to live in so-called high crime areas, and to have reason to avoid the police. Police use *Terry* stops often in crime-prone areas, making people in those areas recurrent targets, when residents react by attempting to avoid the police, "location plus evasion" cases supply a ready-made basis from more *Terry* stops. This begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling their communities. Thus "location plus evasion" cases bring into sharp focus the idea of fairness in society in general, and in the criminal justice system in particular. At a time when racial bias in the justice system is a difficult an issue as ever, "location plus evasion" cases strengthen the impression that this country has two justice systems: one for whites and one for minorities.

Id. at 660 (footnotes omitted).

²⁷⁰ *Terry*, 392 U.S. at 30.

²⁷¹ Transcript, *supra* note 30, at 1420.

²⁷² *United States v. Cortez*, 449 U.S. 411, 418 (1981); see also *United States v. Arvizu*, 534 U.S. 266 (2002).

Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.

... The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the

facts and circumstances, along with the inferences and deductions “understood by those versed in the field of law enforcement . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”²⁷³ The Supreme Court added in *United States v. Arvizu*, that “[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”¹⁹²⁷⁴ Giving weight to a law enforcement officer's assessment of an ongoing street situation is a fair tool to incorporate into the determination of the reasonableness of the decision to stop and question a suspect. However, it must not become a substitute for a court's independent evaluation of the reasonableness of the officer's decision and should not serve as a basis for rubber stamping the officer's conclusion.²⁷⁵ When it serves as a rubber stamp for the officer's conclusions, it vests unlimited discretion in the officer on the street, discretion which the Court has sought to limit in other Fourth Amendment contexts.

The second problematic factor is the weight given to the locale where the stop takes place. The Supreme Court has made it clear that the neighborhood where a suspect is found is not enough, alone, to justify an investigatory stop.²⁷⁶ In *Brown v.*

passenger compartment. Finally, for the reasons we have given, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes were entitled to some weight.

Arvizu, 534 U.S. at 276-77.

²⁷³ *United States v. Cortez*, 449 U.S. 411, 418 (1981). *But see Toledo v. Penn*, 109 Ohio Misc. 2d 1, 5 (Mun. Ct. 2000) (“Activity that merely piques the curiosity of a police officer will not suffice.”).

²⁷⁴ *Arvizu*, 534 U.S. at 273.

²⁷⁵ *See Harris*, *supra* note 29.

[T]he Court's recent *Terry* cases show what *Terry* only hinted at: The reasonable suspicion standard does not require much evidence to allow an officer to make a Fourth Amendment seizure. Further, the answer to the question “How much is enough?” has shifted, slowly but inexorably, to the point that a few innocent activities grouped together, *or even no suspicious activities at all*, can be enough. The Court wants police judgment in these matters respected; deference is the rule. The police are to be given wide latitude to operate as they see fit.

Id. at 669.

²⁷⁶ Subsequent courts have been as inconsistent as the Supreme Court on this issue. *See, e.g., United States v. Burton*, 334 F.3d 514 (6th Cir. 2003), *cert. denied*, 540 U.S. 1135 (2004). An officer received a tip that two black men were selling drugs. *Burton*, 334 F.3d at 515. He saw two black men in a car, stopped the vehicle for being illegally parked, and questioned the men about narcotics. *Id.* The court held that “where, as here, the traffic stop took place on a street known to the police as a high-crime area, we believe that asking a few questions about illegal activity to the driver of an automobile stopped for a traffic violation at

Texas, the Court said that “[appellant's being] in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.”²⁷⁷

Nonetheless, the Supreme Court has used locale as an appropriate element in the *Terry* equation, and in one of the earliest stop and frisk cases, *Adams v. Williams*, it appeared to be the critical component.²⁷⁸ In *Illinois v. Wardlow*, Chief Justice Rehnquist wrote that “[a]n individual's presence” in a high crime area “standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime” but immediately undermined that statement:

But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a “high crime area” among the relevant contextual considerations in a *Terry* analysis.²⁷⁹

And the Supreme Court in *Maryland v. Buie*, while indicating that “[e]ven in high crime areas where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted[,]”²⁸⁰ did indicate the importance of such a locale in the reasonable suspicion analysis.²⁸¹ The clear message is that in “high crime” or “high drug activity” areas, i.e. the inner city, the possibility of criminal activity is so substantial as to make everyone in the area subject to police inquiry.

Consequently, lower courts give enormous weight to this collateral factor, often requiring little more than some other innocuous bits of information to fulfill the reasonable suspicion requirement justifying a stop. Thus, “high crime area” becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops. Location in America, in this context, is a proxy for race or ethnicity.²⁸² By sanctioning

11:30 p.m. is not unreasonable.” *Id.* at 519. *But see* *United States v. Lawson*, No. 92-3214, 1994 WL 9944 (D.C. Cir. Jan. 3, 1994). Police officers surrounded a man in a wheelchair based on an anonymous tip and the fact that defendant was in a high crime neighborhood. *Id.* at *1. The court found “these two factors alone insufficient to justify the stop.” *Id.* at *10.

²⁷⁷ *Brown v. Texas*, 443 U.S. 47, 52 (1979).

²⁷⁸ *Adams v. Williams*, 407 U.S. 143 (1972).

²⁷⁹ *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). (citations omitted).

²⁸⁰ *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990).

²⁸¹ *Buie*, 494 U.S. at 334.

²⁸² *See Wardlow*, 528 U.S. at 132 nn.7-8.

[M]any minorities [believe] that field interrogations are conducted “indiscriminately” and “in an abusive . . . manner” and label[] this phenomenon a “principal problem” causing “friction” between minorities

investigative stops on little more than the area in which the stop takes place, the phrase “high crime area” has the effect of criminalizing race. It is as though a black man standing on a street corner or sitting in a legally parked car has become the equivalent to “driving while black” for motorists.²⁸³

One of the best illustrations of both points, substituting a police officer's expertise for an objective evaluation and substituting locale for facts, is an Ohio case, *State v. Bobo*,²⁸⁴ where three officers from the Cleveland Police Department Narcotics Unit, “in an unmarked police car, were investigating an area of the city known for heavy drug activity.”²⁸⁵ The officers “noticed a car with two occupants legally parked on the street near an open field.”²⁸⁶ The officers circled the block and returned to the parked vehicle where, now, only one occupant of the car was visible.²⁸⁷ One of the officers testified that Marvin Bobo popped up on the passenger's side of the front seat, looked at the police officers, and then disappeared once again “as if to hide something under the front seat.”²⁸⁸ The officers approached Bobo's vehicle on foot, asked him to step out, and conducted a search.²⁸⁹ The officers found a weapon under the front seat.²⁹⁰ Bobo was arrested and charged with two weapons offenses.²⁹¹ No

and the police.

Many stops never lead to an arrest, which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas.

Id. at 132-33 nn.7-8 (Stevens, J., dissenting) (citations omitted); *cf.* *Florida v. Bostick*, 501 U.S. 429, 442 n.1 (1991) (Marshall, J., dissenting) (stating that stops are not random and that race is a factor in determining who is stopped); *United States v. Sokolow*, 490 U.S. 1 (1989).

By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to “overbearing or harassing” police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.

Sokolow, 490 U.S. at 12 (Marshall, J., dissenting) (citations omitted).

²⁸³ *State v. Ward*, 610 N.E.2d 579, 582 (Ohio Ct. App. 1992) (Harper J., dissenting) (“The majority of this court today, as has been the recent trend in this court, is actually holding that, as a matter of law, those unfortunate black, Hispanic and poor white citizens who by virtue of their economic and social status live in so-called ‘high crime areas’ are suspects.”) (citations omitted).

²⁸⁴ 524 N.E.2d 489 (Ohio 1988).

²⁸⁵ *Bobo*, 524 N.E.2d at 490.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

drugs were found on Bobo, his companion, or in the car.²⁹² Bobo's motion to suppress the gun and the police officers' testimony about the gun was denied by the trial court, which then found the defendant guilty.²⁹³ The court of appeals reversed the conviction on the ground that the investigative stop was illegal because "there were not articulable facts to justify the officers' reasonable suspicion that . . . [Bobo] was engaged in criminal activity."²⁹⁴

The Ohio Supreme Court disagreed and reversed the appellate court, finding that the stop was reasonable.²⁹⁵ The court's conclusion in *Bobo* rested on four factors: 1) "the area in which Bobo was parked was an area noted for the number of drug transactions which occurred there"; 2) "the stop was made at approximately 11:20 p.m."; 3) "the circumstances surrounding the stop must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training"; and 4) "the officers' observation of Bobo popping up and then ducking down or leaning forward."²⁹⁶ It is instructive to note that the state argued that the arresting officer's twenty years of experience "and numerous years in the surveillance of drug and weapon activity" should weigh heavily in the assessment of the facts.²⁹⁷ After all, we are told that the officer knew how drug transactions went down and knew how to assess a suspect's "gesture . . . in ducking under his seat."²⁹⁸ Notice was not taken that the usual drug transaction is quick; the buyer and seller do not linger.²⁹⁹ The officers did not see any other persons walking up to the car.³⁰⁰ Moreover, the officers were not in a police car. Persons parked in a high drug area who see a vehicle with three men observing their parked car coming around the block again and stopping behind the parked car might well be frightened and prompted to move around perhaps in preparation for pulling away from the curb if they feel further threatened.

Bobo is indicative of how stops in the inner city are viewed by reviewing courts. The critical factors cited by the court were the area where Bobo was parked, the time of day, and the experience of the officers; everything else was terribly ambiguous. Arguably, area and time of day are not meant to be the foundation upon which a stop is made. Yet *Bobo* stands for the proposition that every person coming and going at night on

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 491-92.

²⁹⁷ *Id.* at 491.

²⁹⁸ *Id.* at 490.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

an urban street in a “high crime” or “high drug activity” locale is subject to being stopped, questioned, and possibly searched.³⁰¹ Although *Terry* held that an officer's experience requires her to draw inferences from facts, not to draw conclusions from nothing, in *Bobo* it was merely a ubiquitous claim of furtive gestures that sealed the case.³⁰² Such outcomes could not have

³⁰¹ See, e.g., *United States v. Edmonds*, 240 F.3d 55 (D.C. Cir. 2001). An officer with 14 years of experience working in the neighborhood approached a defendant because his car was parked in a school zone. *Edmonds*, 240 F.3d at 57. His suspicion was based on location since the area was notorious for drug activity. *Id.* He approached the defendant, asked him for identification and to step out of the car. *Id.* The defendant fled the scene. *Id.* The court held that defendant was seized when the officer asked him for identification, but held that the seizure was reasonable based on the officer's experience and location of the defendant's vehicle. *Id.* at 64. But see *Commonwealth v. Bacon*, 411 N.E.2d 772 (Mass. 1980). The officers stopped two young men driving a Cadillac at 4:10 A.M. *Bacon*, 411 N.E.2d at 773. When the young men observed the officers, one raised his hand as if to hide his face. *Id.* The court held that “two youthful appearing men were operating a relatively expensive (but four year old) motor vehicle at 4:10 A.M. on a Saturday morning on Washington Street in Boston does not alone warrant a reasonable suspicion of criminal activity that would justify a police investigatory stop.” *Id.* at 775 (footnotes omitted). The court went on to say that while concealing one's face may be a factor as to the reasonableness of a stop in some cases, it did not give the officer's reasonable suspicion in this case. *Id.*

³⁰² See *State v. Bobo*, 524 N.E.2d 489, 495 n.2 (Ohio 1988) (Wright, J., dissenting).

The following exchange took place between defense counsel and [Officer] Mandzak:

“Q. So that the best you can say is that you saw someone bend down; am I correct?”

“A. At what point?”

“Q. Wouldn't you say you saw him make this motion?”

“A. Yes.”

“Q. You don't know what his hands did, do you?”

“A. It looked like he was putting something underneath the seat.”

“Q. Were you able to see his hands?”

“A. No.”

“Q. So you don't know if he made a hand movement or not, do you?”

“A. I don't know what he did. It looked like he was putting something under his seat.”

“Q. You don't know that, do you?”

“A. I was suspicious of it.”

“Q. The best you could tell, all he could have been doing is bending down and his hand not go below the seat?”

“A. It is possible.”

“Q. You don't know if his hand was even outstretched, do you?”

“A. It looked like he was bending down.”

“Q. You don't know if his hand was outstretched, do you?”

“A. How do you mean outstretched?”

“Q. In this fashion, in front of him?”

“A. I couldn't see his hands.”

“Q. Could you see his arms?”

“A. I saw the back part of his body.”

“Q. Could you see his arm?”

“A. No.”

Id.

been the intent of the Court in *Terry*, but have become reality. There was no drug deal in Bobo's car that night. The person parked in the car with Bobo was a woman, and "[t]he facts in this case indicate that, if anything, a romantic tryst, not a drug deal or any other illegal activity, was occurring in the car."³⁰³ While these facts resulted in imprisonment of a guilty man in Bobo, similarly weak facts are responsible for the constant seizures of countless innocent citizens whose only "crime" is being poor, a minority, or in a high crime neighborhood. This deplorable repercussion stems from the striking failures of *Terry* and its progeny.

CONCLUSION

The *Terry* Court said that while expanding police power by recognizing investigative stops on less than probable cause, it intended to harness that power and bring it under the reasonableness command of the Fourth Amendment. The effect, however, has been the expansion of police authority that has yet to be tempered by the Fourth Amendment, especially in urban locations where the courts tend to focus more on the location than on the particular facts of the case. After more than thirty-five years of experience with the *Terry* rules, it is time to reintroduce the Fourth Amendment on to the streets of America and into the relationships that law enforcement officers have with people on the streets and in other venues.³⁰⁴

³⁰³ *Bobo*, 524 N.E.2d at 494-95 (Wright, J., dissenting); see *id.* at 495 n.3 ("The female occupant testified that she and appellee went out to dinner and then they parked on the street. It appears they were parked for more than an hour before the police arrived. In addition, [Officer] Mandzak testified that when he looked into the car, she [the female occupant] was fastening her clothing.").

³⁰⁴ The fact that the Amendment was designed as a limit on governmental powers is a reality that has been lost on the Court. Compare Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (arguing that the present Supreme Court "has ignored or distorted the history of the Fourth Amendment" and that "the central meaning of the Fourth Amendment is distrust of police power and discretion") (footnotes omitted) with Sundby, *supra* note 112.

Camara and *Terry* constituted innovative departures from a fourth amendment mentality that had restricted the amendment's coverage in the name of maintaining the warrant clause's rigorous protections. In this sense the Court's willingness in *Camara* and *Terry* to face the unique fourth amendment problems posed by government activities like housing inspections and stop and frisks is admirable. Two decades later, however, it has become evident that those decisions came at a price. The combined effect of *Camara* and *Terry* is the major reason the Court has failed to meet the first challenge of defining a rational relationship between the warrant and reasonableness clauses that fulfills the amendment's purposes.

... The Court in *Camara* and *Terry* embraced the reasonableness balancing test in a manner that conceptually weakened probable cause and failed to provide any long-term guidance or limits for the future role of reasonableness.

There is a need to redefine the Fourth Amendment term “seizure” by assuming that a person has been seized by a law enforcement officer if the officer does not inform the subject at the initiation of the encounter that the subject is free to disregard the request/command. This approach involves abandoning the fiction that the reasonable person when confronted by a police officer feels free to walk away or refuse to cooperate. People do not believe they can simply disregard a police request. That belief is the natural result of the manner in which an officer's request is communicated, often cloaked in the form of a command. There is only one way to assure that the reasonable person would feel free to disregard the request/command and that is to have the officer inform the subject of the choice.³⁰⁵ Although the United States Supreme

Id. at 398-99; and Scott E. Sundby, “Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen,” 94 COLUM. L. REV. 1751 (1994), with Harris, *supra* note 81.

But it is also worth noting that *Terry* takes the law of search and seizure as it applied to street encounters some distance back in the direction of pre-*Mapp* law, to the time that police officers ruled the streets on simple gut instinct that told them whether a person was “dirty.” If *Mapp* meant officers could no longer ignore the Fourth Amendment because of the newly-imposed requirement of probable cause, *Terry* returned a significant portion of discretion to the police, increasing their power to interfere with a citizen’s “right of locomotion” and to conduct searches. To be sure, *Terry* required that police have an articulable reason for their conduct, rather than having total discretion. But the conclusion is inescapable that in *Terry* the police won back a significant part of the power they needed to conduct business according to pre-*Mapp* standards.

Id. at 985 (footnotes omitted).

³⁰⁵ Compare Butterfloss, *supra* note 185, at 442 (proposing “that the *Mendenhall-Royer* standard, as presently interpreted, should be discarded because it is unworkable and fails to strike the appropriate balance between the liberty interests of the citizen and the interest of the state in combating crime. . . . The test should be replaced by a per se rule . . .”), with Anderson, *supra* note 146,

[The only alternative way to fix the balance that has been tilted heavily in favor of the police] may be to resort to locally heightened and sanctioned police review. This will require citizens to carefully consider policies and approaches that may be used to monitor the actions of local police. The reliance on judicial controls has proven to be a mistake because such reliance is inefficient. That is not to say that sound jurisprudence that protects the rights of the accused is still not required, it simply cannot be relied on as the primary tool for enforcing police accountability.

Id. at 750; and Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994).

Finally, in considering what the [Fourth] amendment ought to mean, we must afford legislators and administrators an opportunity to play their role in Fourth Amendment decision making. Historically, legislators and administrators have been minor players in search-and-seizure jurisprudence, but they have the potential to be the greatest heroes of the Fourth Amendment’s morality tale because they are best situated to protect the people by regulating and controlling law enforcement officials—the actors who most directly impact on citizens’ Fourth Amendment

Court is loathe to impose such requirements upon the police except in the most “inherently coercive” situations, it is that Court's willingness to engage in the fiction that has created the problem. The only way to overcome the present situation is to impose a requirement that absence such warning, there is a seizure of the person which must meet the reasonableness standard.

There also is a need to reshape the reasonable suspicion standard to elevate the suspect's conduct above ancillary factors. The locale of a stop, which is often a proxy for race, should not be a substitute for suspicious behavior on the part of the suspect. Moreover, the inferences that a court credits to a trained law enforcement officer should be inferences drawn from actual facts and suspicious conduct, not inferences heaped on top of inferences often originating, again, in race. Obviously, reasonable suspicion is a lesser standard than probable cause, but it still demands a conclusion drawn from actual conduct instead of just race, location, and time of day, in other words, not thin air. A more rigorous analysis of reasonable suspicion requires only that the auxiliary factors—location, time of day, and an officer's intuition—be treated as supplemental instead of a substitute for facts and circumstances in the reasonable suspicion equation.

interests. Should legislators or administrators fail to live up to their potential, they can be educated, prodded, or removed from office by the people.

By integrating juries, judges, legislators, and administrators into the Fourth Amendment's decisionmaking structure, we stimulate the ideal of participatory political decision making under our republican form of government. In the continuing struggle between individual autonomy and collective security, we the people must “find a way to talk about an irreconcilable clash of interests that does some real justice to claims on both sides.” This dialogue cannot be left to the organs of the state because the judiciary is not us; the legislature is not us; the executive is not us. By putting the people back into the Fourth Amendment via their participation in jury determination of search-and-seizure law, we empower the people as an important force of social definition and cohesion.

Id. at 431.