

# TERRY V. OHIO: ITS FAILURE, IMMORAL PROGENY, AND RACIAL PROFILING

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At the time that the Court was considering *Terry v. Ohio*,<sup>1</sup> racial and social tensions in America were unsettled.<sup>2</sup> *Brown v. Board of Education* had declared the insidious Jim Crow laws unconstitutional,<sup>3</sup> but civil rights and social equality for African Americans were advancing slowly.<sup>4</sup> Crime rates were increasing in the cities and police officers were using draconian heavy-handed tactics to enforce the law, especially in minority communities.<sup>5</sup> In 1965, President Lyndon Johnson issued an executive order that appointed a commission to study the crime problem.<sup>6</sup> In its study, the Commission found that field interrogations—a tactic consisting of stopping, questioning, and if warranted, searching an individual who presents

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1. 392 U.S. 1 (1968).

2. See generally LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 386–440* (5th ed. 1982). During the decade of the sixties the nation experienced several urban riots. *Id.* While *Terry* was pending before the Court, Dr. Martin Luther King, Jr. was assassinated on April 4, 1968 in Memphis, Tennessee and, four days before *Terry* was announced by the Court, Bobby Kennedy was killed after winning the California presidential primary. *Id.* at 429, 432.

3. 347 U.S. 483 (1954).

4. See generally BENNETT, *supra* note 2, at 386–440.

5. See Susan Bandes, *Terry v. Ohio in Hindsight: The Perils of Predicting the Past*, 16 CONST. COMMENT. 491, 495 (1999).

6. Exec. Order No. 11,234, 30 Fed. Reg. 9,049 (July 16, 1965).

himself in a suspicious situation—were often used.<sup>7</sup> Although these practices were commonplace for most police officers, courts had not sanctioned them, but they also had not condemned the conduct.<sup>8</sup> The Commission’s report pointed out the questionable police tactics and their effect on society.<sup>9</sup> It found that police frequently abused their authority to conduct field interrogations and “in many communities, field interrogations [were] a major source of friction between the police and minority groups.”<sup>10</sup> It further pointed out that police investigations were often undertaken with little or no basis for suspecting criminal activity, and “field interrogations are often conducted with little or no basis for suspicion.”<sup>11</sup>

Police agencies that supported the procedure asserted that field interrogations, also known as stop-and-frisk, were not arrests and that they did not violate the Fourth Amendment right against unreasonable searches and seizures.<sup>12</sup> Proponents of stop-and-frisk argued that protecting society from potential crime is an essential component of police work.<sup>13</sup> They contended that when an officer acts within constitutional limits he has the duty to investigate whenever such circumstances indicate to him that there are reasonable grounds requiring him to do so.<sup>14</sup> The proponents also asserted, “[a] founded suspicion is all that is necessary, some basis from which the courts can determine that detention was not arbitrary

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7. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE, AT 183–84. (1967), <http://www.ncjrs.gov/pdffiles1/Digitization/147374NCJRS.pdf> [hereinafter TASK FORCE REPORT]. See also LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 10–17 (1967) (distinguishing “field interrogation” from traditional police procedures involving arrest or search incident to arrest).

8. Wayne R. LaFare, “Street Encounters” and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 42–43 (1968).

9. TASK FORCE REPORT, *supra* note 7, at 184. See also David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Courts Reality under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 981 (1998) (“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 . . .”) (quoting TASK FORCE REPORT, *supra* note 7, at 184).

10. TASK FORCE REPORT, *supra* note 7 at 183.

11. *Id.* at 184.

12. See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

13. Terry v. Ohio, 392 U.S. 1, 22 (1968).

14. Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio at 15–16, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67). See also Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 433, 433–434 (1967):

[T]he proponents claim that the power to forcibly stop and to search for self-protection, a power long and widely exercised by police, is necessary to prevent crime in a period of frighteningly rising crime rates and civil disorders; further, that the invasion of personal liberty entailed by such a detention and search is relatively minor, is constitutional because reasonable, and can be controlled by the courts and by effective police administration. Opponents, on the other hand, dispute the need, the mildness of the affront, and the susceptibility to judicial control of such practices; they point to the evidence that such police tactics produce minority group resentment and hostility. Additionally, they deplore the abandonment of probable cause, the traditional constitutional standard necessary to deprive a person of his liberty, in favor of reasonable suspicion, which they find too vague.

*Id.*

or harassing.”<sup>15</sup> It was their belief that the cursory frisk of the outer clothing is only a minor inconvenience and petty intrusion upon the rights guaranteed by the Fourth Amendment.<sup>16</sup>

The position taken by the proponents of stop-and-frisk had its flaws. First, their analysis established no standard to determine reasonableness for the stop. What facts or combination of facts are necessary to suggest that the officers had a reasonable, well-founded suspicion that criminal activity is afoot? How do we weigh the facts in the totality of the circumstances? Next, and probably the most important question was: did the assertion that stop-and-frisk was something less than an arrest exclude it from constitutional scrutiny? Further, although it was accepted that an officer could stop an individual to ask basic questions about his identity and actions, there was little or vague guidance about where the informal investigatory stop ended and an arrest began.<sup>17</sup>

Amidst the findings of the President’s Commission and the social setting, the *Terry* Court had the difficult task of balancing the police-purported need for a workable tool short of probable cause to use in temporary investigatory detentions and protecting the people’s constitutional right against the use of abusive police power. The solution had to be a delicate compromise that would not prevent proactive policing, but also would not permit unreasonable searches and seizures. The compromise had to restore minority communities’ confidence in policing and the judicial system. Before the Court’s decision was announced, the possibility of police abuse of a new standard that was not based on probable cause troubled some Justices on the Court.<sup>18</sup> In a letter to Chief Justice Warren, Justice Brennan wrote that he believed the forthcoming opinion would give police officers licenses

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15. Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio, *supra* note 14, at 16.

16. *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964).

17. Frank J. Remington, *The Law Relating to “On the Street” Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 386, 389–90 (1960).

18. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 825–26 (1998).

I’ve become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present ‘aggressive surveillance’ techniques which the press tell us are being deliberately employed in Miami, Chicago, Detroit + other ghetto cities. This is happening, of course, in response to the ‘crime in the streets’ alarums being sounded in this election year in the Congress, the White House + every Governor’s office. Much of what I suggest be omitted from your opinion strikes me as susceptible to being read as sounding the same note. This seems to me to be particularly unfortunate since our affirmance surely does this: from here out, it becomes entirely unnecessary for the police to establish ‘probable cause to *arrest*’ to support weapons charges; an officer can move against anyone he suspects has a weapon + get a conviction if he “frisks” him + finds one. In this lies the terrible risk that police will conjure up ‘suspicious circumstances,’ + courts will [crossed out: accept] credit their versions. It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police--> the Court will become the scapegoat.

Letter from Justice William, J. Brennan, Jr. to Chief Justice Earl Warren 2 (Mar. 14, 1968) (William J. Brennan, Jr. Papers are available through the Library of Congress, Manuscript Division).

to conduct aggressive surveillance techniques in Black communities, subjecting the Court to the ire of African-American citizens.<sup>19</sup> Yet, the *Terry* decision implies that the Court concluded the current state of law enforcement could not go unaddressed. The Court chose to adopt a rule requiring reasonable suspicion for temporary investigatory searches and seizures.<sup>20</sup> This standard was less than the traditional probable cause requirement for police searches and seizures.<sup>21</sup>

Considering the track record of the Warren Court regarding constitutional protections, it is not improper to assume its intent was to reach a decision that was fair and just.<sup>22</sup> One scholar has called the Court's decision in *Terry* "a practically perfect doctrine."<sup>23</sup> However, two major issues that ultimately defined the legacy of the decision were given desultory attention by the Court: (1) what is a *Terry* seizure and (2) what amount of evidentiary weight should be given to the inferences of the officer in the reasonable suspicion determination.

This paper will consider what I believe is the most egregious mistake the Court made: its failure to define the "*Terry* stop." The paper will address how this failure has endorsed interpretations of *Terry* that have subsequently legitimized racial profiling. Part I will succinctly provide the landscape of a temporary investigatory detention before *Terry*. Part II will take a close look at the *Terry* decision. Part III considers a companion case, *Sibron v. New York*, and how the Court disregarded the *Terry* decision adding further confusion to stop-and-frisk. Part IV discusses cases that are overreaching and that demonstrate an abuse of power by police officers when conducting investigatory stops. Part V describes how the "high-crime area" as used in *Illinois v. Wardlow* has become a cornerstone of racial profiling. Part VI examines "stop-and-frisk" in New York and the *Floyd v. The City of New York* opinion. Finally, I briefly conclude with a suggestion for the Court.

## I. TEMPORARY INVESTIGATORY STOPS BEFORE *TERRY*

Before *Terry v. Ohio*, courts defined seizure in the terms of probable cause.<sup>24</sup> A person was seized in violation of the Fourth Amendment when he was stopped by a police officer without a warrant issued upon the finding of probable cause or when an arrest was made without probable cause.<sup>25</sup> The principle that the Constitution requires probable cause for a valid arrest originates in the theory that an arrest constitutes a "seizure" within the meaning of the Fourth Amendment, and the presence of probable cause is necessary to ensure that the seizure is

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19. Barrett, *supra* note 18.

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

21. *Id.*

22. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down segregated education and providing the groundwork for many civil rights advances); *Mapp v. Ohio*, 367 U.S. 643 (1961) (developing the exclusionary rule for evidence discovered in violation of the Fourth and Fifth Amendments).

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

24. *Dunaway v. New York*, 442 U.S. 200, 207–08 (1979) ("Before *Terry v. Ohio*, the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." (citations omitted)).

25. *Id.*

“reasonable.”<sup>26</sup> Probable cause is the foundation of the Fourth Amendment. A search or seizure done without probable cause is presumed to be unreasonable.<sup>27</sup> Traditional probable cause for an arrest requires facts or circumstances that lead a reasonable police officer to believe that a person had committed or was committing a crime.<sup>28</sup>

Probable cause for an arrest to satisfy Fourth Amendment requirements was not responsive to an important question. When does a police encounter with an individual for investigative purposes rise to the level of a seizure that is protected by the Fourth Amendment? Temporary informal detentions had long been a tool used by police officers to investigate suspected criminal activity.<sup>29</sup> The Supreme Court decision of *Mapp v. Ohio* promulgated the exclusionary rule that required the suppression of evidence discovered in a search or seizure that violated the Fourth Amendment’s probable cause requirement.<sup>30</sup> Many believed that the exclusionary rule diluted police use of informal investigatory detentions as a method to detect crimes in a period in United States history where crime rates and police misconduct had increased.<sup>31</sup> In light of this development, law enforcement agencies believed that informal investigatory detentions or stop-and-frisk—which they classified as a method that was less than an arrest, and therefore did not require probable cause—should receive special treatment by the courts.<sup>32</sup> It was also their position that legislation should be drafted to protect a tool that was vital to crime detection and prevention.<sup>33</sup>

To address these questions, Delaware, New Hampshire, and Rhode Island promulgated statutes primarily adopting the Uniform Arrest Act of 1942.<sup>34</sup> The Act provided guidelines to police officers in several areas.<sup>35</sup> In particular, it provided guidelines on informal detention of an individual by a police officer when there is reasonable grounds to suspect that an individual had committed, is committing, or is about to commit a crime.<sup>36</sup> The Act was designed to increase the scope of police

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26. Comment, *Police Power to Stop, Frisk, and Question Suspicious Persons*, 65 COLUM. L. REV. 848, 856, 862 (May 1965) [hereinafter *Police Power*] (citing *Wong Sun v. United States*, 371 U.S. 471 (1963) and *Henry v. United States*, 361 U.S. 98 (1959)).

27. See *Johnson v. United States*, 333 U.S. 10, 14 (1948).

28. *Brinegar v. United States*, 338 U.S. 160, 175–176 (1949).

29. See Loren G. Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 532 (1967).

30. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

31. See Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43; see also Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423 (2004).

32. Stern, *supra* note 29, at 533–34.

33. *Id.*

34. See Warner, *supra* note 12, at 316–17 (The Interstate Commission on Crime appointed a committee in 1939 to perform a study of the law of arrest in order to determine the possibility of drafting a model act to reconcile the law as written with the law in action).

35. *Id.* (The Committee drafted an act that covered nine topics: questioning and detaining suspects; searching suspects for weapons; the force permissible in making an arrest; the right to resist an illegal arrest; arrest without a warrant; summons instead of arrest; release of persons arrested; permissible delay in bringing before magistrate; and identification of witnesses).

36. *Id.* at 320–21. Section 2 of the Uniform Arrest Act states:

officers' powers by allowing them to retain a person for two hours to investigate suspicious circumstances.<sup>37</sup> It stated that the detention was not an arrest.<sup>38</sup> Two other states, Massachusetts and New York, enacted similar statutes.<sup>39</sup> Although the language of the state statutes varied, they permitted police officers to stop persons who they reasonably believed were engaged in or had engaged in criminal activity.<sup>40</sup> All of the states declared the statutes to be constitutional, albeit on different grounds.<sup>41</sup> Whether the language used in the states' statutes, allowing an informal detention on the standard of reasonable cause, was a proxy for probable cause was left undetermined.<sup>42</sup>

To some extent, the United States Supreme Court finally weighed in on the issue of informal detentions in *Rios v. United States*.<sup>43</sup> In *Rios*, two police officers "observed a taxicab standing in a parking lot next to an apartment" in a neighborhood that had a reputation for narcotics activity.<sup>44</sup> "The officers saw the petitioner look up and down the street, walk across the lot, and get into the cab."<sup>45</sup> "Neither officer had ever before seen the petitioner, and neither of them had any idea of his identity."<sup>46</sup> "Except for the reputation of the neighborhood, neither officer had received information of any kind to suggest that someone might be

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(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his action to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

*Id.*

37. *Id.* at 322.

38. *Id.*

39. MASS. GEN. LAWS ANN. ch. 41, § 98 (West 2018); N.Y. CRIM. PROC. § 140.50 (McKinney 2018) (original version at ch. 996, § 1 (1970)).

40. MASS. GEN. LAWS ANN. ch. 41, § 98 (Westlaw); N.Y. CRIM. PROC. § 140.50 (Westlaw); DEL. CODE ANN. tit. 11, §§ 1901–12 (West 2018); N.H. REV. STAT. ANN. §§ 594:1–25 (2018); R.I. GEN. LAWS ANN. §§ 12-7-1 to 13 (West 2018).

41. *Police Power*, *supra* note 26, at 855.

42. See *De Salvatore v. State*, 163 A.2d 244, 248–49 (Del. 1960) (The Delaware court found "that 11 Del.C. § 1902 purports to govern, not arrests for crime which are governed by 11 Del.C. § 1906, but detentions of persons in the course of the investigating of crime. . . . We can find nothing in 11 Del.C. § 1902 which infringes on the rights of a citizen to be free from detention except, as appellant says, 'for probable cause.'"); *Commonwealth v. Lehan*, 196 N.E.2d 840, 845 (Mass. 1964) (The Massachusetts court held "that G.L. c. 41, § 98, constitutionally permits a brief threshold inquiry where suspicious conduct gives the officer 'reason to suspect' the questioned person of 'unlawful design,' that is, that the person has committed, is committing, or is about to commit a crime. . . . An individual who acts in a suspicious way invites threshold investigation. It does not unreasonably invade the individual's right of privacy to hold that the price of indulgence in suspicious behavior while abroad at night is a police inquiry.").

43. 364 U.S. 253 (1960).

44. *Id.* at 255–56.

45. *Id.* at 256.

46. *Id.*

engaged in criminal activity at that time and place.”<sup>47</sup> “The taxicab drove away, and the officers followed it in their car. . . .”<sup>48</sup> At an intersection, the cab stopped for a traffic light.<sup>49</sup> “The two officers alighted from their car and approached . . . the cab.”<sup>50</sup> “[T]he petitioner dropped a recognizable package of narcotics to the floor of the vehicle; one of the officers grabbed the petitioner as he alighted from the cab; the other officer retrieved the package[.]”<sup>51</sup> “The petitioner moved to suppress as evidence the package of heroin that the police had seized.”<sup>52</sup> After a brief argument by the petitioner’s counsel, the court granted the motion and entered a judgment of acquittal.<sup>53</sup> The evidence in the case was subsequently given to United States authorities that instituted a federal prosecution.<sup>54</sup>

The Court in *Rios* stated:

[T]he Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers’ view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence. The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.<sup>55</sup>

Although the Court did not directly address the standard required for an investigatory stop, it appears that the above statement recognized that a brief informal detention might be constitutional despite the fact that probable cause to arrest is absent.<sup>56</sup> The lower courts still had to grapple with the problem of the relation between the statutory standard of reasonable suspicion and the constitutional standard of probable cause.

## II. TERRY V. OHIO

The Supreme Court in *Terry* had an opportunity to resolve the confusion and set a standard for the lower courts to follow in cases involving an informal investigatory stop and seizure. In *Terry*, Detective Martin McFadden, an officer with thirty-five years of experience, noticed what he believed were three men, two of whom were African American, casing a store for a future robbery.<sup>57</sup> He walked over

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47. *Id.*

48. *Id.*

49. *Rios*, 364 U.S. at 256.

50. *Id.*

51. *Id.*

52. *Id.* at 258.

53. *Id.*

54. *Id.*

55. *Rios*, 364 U.S. at 262.

56. *Commonwealth v. Lehan*, 196 N.E.2d 840, 844 (Mass. 1964).

57. *Terry v. Ohio*, 392 U.S. 1, 5–6 (1968).

to the three men, identified himself as a police officer, and asked for their names.<sup>58</sup> McFadden testified that he received a mumbled response to his inquiry.<sup>59</sup> He then immediately grabbed Terry, spun him around, and patted down the outside of his clothing.<sup>60</sup> When McFadden felt a pistol in the inside breast pocket of Terry's overcoat, he reached inside and retrieved a gun.<sup>61</sup> The second man, Chilton, was also searched, and a gun was retrieved from him.<sup>62</sup> Both men were charged with carrying a concealed weapon.<sup>63</sup>

The trial court denied the defendants' motion to suppress the guns on the ground that the officer, "on the basis of his experience, had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action."<sup>64</sup> The court held that the officer had the right, for his protection, to pat down the outer clothing of these men who he reasonably believed might be armed.<sup>65</sup> It "distinguished between an investigatory 'stop' and an arrest, and between a 'frisk' of the outer clothing for weapons and a full-blown search for evidence of a crime."<sup>66</sup> Both men were found guilty of carrying a concealed weapon, and "the Supreme Court of Ohio dismissed their appeal on the ground that no 'substantial constitutional question' was involved."<sup>67</sup>

The United States Supreme Court granted certiorari to determine 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.<sup>68</sup> The Court recognized this to be a difficult and sensitive issue that had never been squarely presented before the Court.<sup>69</sup>

In addressing the issues presented by the police stop-and-frisk tactic, the Court first addressed whether stop-and-frisk, although a limited intrusion and not a full-blown arrest, rises to the level of search and seizure within the meaning of the Constitution.<sup>70</sup> It held that a seizure occurs whenever a police officer accosts a person and restrains his freedom to walk away, and the Fourth Amendment applies to all such seizures.<sup>71</sup> The Court also found that the thorough exploration of the outer clothing of an individual's body "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment[.]"<sup>72</sup> Again, the Fourth Amendment applies. Defining the scope of the search, the Court also stated, "[t]he scope of the search must be 'strictly tied to and justified by' the

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58. *Id.* at 6–7.

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Terry*, 392 U.S. at 7.

64. *Id.* at 8.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Terry*, 392 U.S. at 9–10.

70. *Id.* at 16.

71. *Id.*

72. *Id.* at 17.

circumstances which rendered its initiation permissible.”<sup>73</sup>

At the heart of the case, the Court found that the rubric of police conduct that the case involved—“necessarily swift action predicated upon the on-the-spot observations of the officer on the beat”—had not and could not be subject to the warrant procedure.<sup>74</sup> This action “must be tested by the Fourth Amendment’s . . . proscription against unreasonable searches and seizures.”<sup>75</sup> Borrowing the balancing test analysis from the *Camara v. Municipal Court of San Francisco*,<sup>76</sup> the Court stated:

And in determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.<sup>77</sup>

Applying this analysis required the Court to balance the governmental interest that justified the intrusion against the invasion that the search and seizure entailed.<sup>78</sup> It opined that a judge assessing the reasonableness in a stop-and-frisk case must judge the officer’s actions against an objective standard.<sup>79</sup> That is, “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?”<sup>80</sup> The Court agreed with the proponents of stop-and-frisk that the government interest in making a temporary stop of an individual suspected of a crime is crime detection and prevention.<sup>81</sup> It asserted that in order to justify the 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.”<sup>82</sup> The Court further found that “[i]t was [a] legitimate investigative function Officer McFadden was discharging when he decided to approach [Terry] and his companions.”<sup>83</sup> Considering the facts of the case, the Court stated, “[i]t would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.”<sup>84</sup>

After finding that the stop was reasonable within the confines of the Fourth Amendment, the Court moved to the frisk. It announced that police officers’ safety while carrying out their duties is essential.<sup>85</sup> The Court stated:

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73. *Id.* at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

74. *Terry*, 392 U.S. at 20.

75. *Id.*

76. *See generally* 387 U.S. 523 (1967) (involving administrative searches of homes, and specifically dealt with “administrative” and “special need searches”).

77. *Terry*, 392 U.S. at 19–20.

78. *Id.* at 21.

79. *Id.*

80. *Id.* at 21–22.

81. *Id.* at 22.

82. *Id.* at 21.

83. *Terry*, 392 U.S. at 22.

84. *Id.* at 23.

85. *Id.* at 24.

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.<sup>86</sup>

Consequently, the Court held that if an officer reasonably believes the person he has stopped is armed and presently dangerous, he could take measures to determine whether the person is, in fact, carrying a weapon.<sup>87</sup> This pat down of the outer clothing for weapons may subject an individual to some indignity and embarrassment.<sup>88</sup> But, when an officer has reason to believe that the person he has engaged is dangerous and he may be armed, the cursory search is necessary to protect the safety of the officer.<sup>89</sup> It is only a pat down of the outer clothing to detect weapons and not a search concomitant with a search incident to an arrest.<sup>90</sup> The officer must be able to point to specific and articulable facts and reasonable inferences which he is entitled to draw from the facts in light of his experience, that would lead a prudent person to believe that his safety or the safety of others was in danger.<sup>91</sup>

#### A. The *Terry* Stop

In its decision, the Court failed to firmly decide when the Fourth Amendment seizure in *Terry* occurred. It recognized that some police stops do not require Fourth Amendment protection.<sup>92</sup> The Court concluded that a Fourth Amendment seizure occurs when a police officer stops an individual and restrains his freedom to walk away from the encounter.<sup>93</sup> Hence, the Fourth Amendment does govern seizures that are not full-blown probable cause arrests.<sup>94</sup> The Court created a middle ground distinguishing a mere police encounter from an arrest. In essence, an officer can make a limited stop of a person when there is reasonable cause to believe that criminal activity is afoot. However, the Court was ambiguous about when the seizure occurred in the case. The Court stated, "that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing."<sup>95</sup> In footnote 16 of the case, the Court defined the *Terry* seizure and applied it to the facts of the case. It stated:

Only when the officer, by means of physical force or show of authority, has

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86. *Id.* at 23.

87. *Id.* at 24.

88. *Id.* at 26.

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

90. *Id.*

91. *Id.*

92. *Id.* at 16.

93. *Id.*

94. *Id.*

95. *Terry*, 392 U.S. at 19.

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 constitutionally protected rights had occurred.<sup>96</sup>

It is obvious that Terry and Chilton were seized when Officer McFadden initiated physical contact with them. This was a significant restraint on their freedom to walk away. But, I suggest that a Fourth Amendment seizure occurred when Officer McFadden approached the men to investigate what he had concluded was a potential crime. After observing the actions of Terry and his companions for some time, Officer McFadden had become thoroughly suspicious and suspected that they were "casing a job, a stick-up."<sup>97</sup> He considered it was his duty to investigate the situation further.<sup>98</sup> He also stated that he feared the men could have had a gun, and "the situation was ripe for direct action."<sup>99</sup> Hence, Officer McFadden's initial contact with Terry and Chilton was more than just an attempt to engage in non-confrontational conversation about their intentions. He had concluded that a crime was in progress and an investigation was necessary. When an officer approaches a suspect to investigate what he believes to be criminal activity, it is not a casual conversation. It is incredulous to assume that a person who is stopped by such a police officer will feel free to leave and walk away.<sup>100</sup> Under the circumstances in the case, using the Court's definition of a seizure, Terry and Chilton were seized when Officer McFadden confronted them to investigate perceived criminal activity.

The *Terry* Court's finding that the seizure of Terry occurred when Officer McFadden initiated physical contact to search him is more perplexing in light of two other statements in *Terry*: (1) "[T]hat a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest[,]"<sup>101</sup> and, (2) "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores . . . to have failed to investigate this behavior further."<sup>102</sup> The first statement implies that a police officer may approach a person to investigate a crime on a standard that is

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96. *Id.* at 19 n.16.

97. *Id.* at 6.

98. *Id.*

99. *Id.* at 7.

100. See *United States v. Cordell*, 723 F.2d 1283, 1286 (7th Cir. 1983) (Swygert, J., concurring).

I believe that as a factual psychological matter people who are stopped for questioning of this kind by police officers, particularly officers who identify themselves as narcotics investigators, generally do not feel "free to leave" because of the implicit show of authority and singling out of the individual as suspicious.

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

101. *Terry*, 392 U.S. at 22–23.

102. *Id.* at 23.

less than probable cause. The second infers that Officer McFadden, using the standard in the former statement, was obligated to conduct the investigation of Terry and his companions. These statements, taken together, suggest, and rightly so, that a seizure occurs at the initial stop to investigate what an officer reasonably believes to be potential criminal activity.

#### B. *Sibron v. New York* Inconsistency

The Court's decision in *Terry* was further complicated by its decision in *Sibron v. New York*,<sup>103</sup> a case decided on the same day. Better known for its introduction of the reasonable suspicion language for stop-and-frisk,<sup>104</sup> the *Sibron* decision demonstrated the Court's uncertainty about the fledgling holding in *Terry*. In *Sibron*, a police officer observed Sibron for approximately eight hours.<sup>105</sup> During that period of time, the officer saw Sibron in conversation with six or eight persons whom he knew to be narcotics addicts.<sup>106</sup> The officer "did not overhear any of these conversations," and he did not see anything pass between Sibron and the men.<sup>107</sup> Later Sibron met with three other men who the officer identified as addicts.<sup>108</sup> Once again, nothing was overheard, and he saw nothing pass between Sibron and these men.<sup>109</sup> When Sibron sat down and ordered his food, the officer ordered him to come outside.<sup>110</sup> The officer then said to Sibron, "You know what I am after."<sup>111</sup> "According to the officer, Sibron 'mumbled something and reached into his pocket.' Simultaneously, [the officer] thrust his hand into the same pocket, discovering several glassine envelopes" that contained heroin.<sup>112</sup>

Ironically, the Court in *Sibron* did not use the *Terry* decision to render its holding.<sup>113</sup> It held that the police officer lacked probable cause to arrest Sibron, and therefore, the warrantless search by which the police officer discovered heroin on him could not "be justified as incident to a lawful arrest."<sup>114</sup> The officer heard none of the conversations that Sibron had with the addicts, and he observed no exchange among the men.<sup>115</sup> "The inference that persons who talk to narcotics addicts are

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103. 392 U.S. 40 (1968).

104. See *id.* at 60. Reasonable suspicion is the present day constitutional standard required for the *Terry* stop-and-frisk. See *Hiibel v. 6th Judicial Dist. Court*, 542 U.S. 177, 185 (2004). The *Terry* Court never used this terminology in its decision. Instead it referred to "unusual conduct which leads him [the officer] reasonably to conclude in light of his experience that criminal activity may be afoot . . ." and that the search was necessary to protect the officer or others from danger. *Terry*, 392 U.S. at 30. Reasonable suspicion as the standard for stop-and-frisk was first mentioned in the concurring opinion of Justice Harlan in the case of *Sibron*, 392 U.S. at 72 (Harlan, J., concurring). The implication of the reasonable suspicion standard in the *Sibron* decision is that *Terry's* new stop-and-frisk law required more than just suspicion.

105. *Sibron*, 392 U.S. at 45.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Sibron*, 392 U.S. at 45.

112. *Id.*

113. *Id.* at 61.

114. *Id.* at 63.

115. *Id.* at 62.

engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security."<sup>116</sup> The Court further found that the search could not be justified as a self-protective search for weapons.<sup>117</sup> The officer never indicated that he believed Sibron was armed or that he feared for his life.<sup>118</sup>

In reaching its decision that the stop of Sibron was an arrest and the search violated the probable cause requirement of the Fourth Amendment, the Court mentioned *Terry v. Ohio* on several occasions.<sup>119</sup> Yet, despite the fact that Terry delineated a new standard for investigatory stops the Court did not use the standard announced in *Sibron*.<sup>120</sup> The officer's statement to Sibron and the act of rummaging through Sibron's pocket was no more intrusive than the physical force used by McFadden to stop Terry. Hence, *Terry*, the Court's earlier decision, should have been controlling.

Applying *Terry's* rationale, that is, the seizure occurred when Officer McFadden grabbed Terry and Chilton to conduct a search, to the facts of *Sibron* implies that there was a Terry stop of Sibron when the officer accosted him and reached into his pocket. The officer's actions did not result in an arrest as suggested by the *Sibron* Court.<sup>121</sup> If Sibron was arrested when he was accosted, the results should have been the same in *Terry*, and *Sibron* has overruled *Terry*. The standard remains probable cause for an investigatory stop.<sup>122</sup> The contradiction between *Terry* and *Sibron*, and *Terry's* failure to clearly define a seizure left open the question of when a *Terry* stop occurs. The Court has made other attempts to define a *Terry* seizure, but they have only further muddled the waters.

### III. STRETCHING *TERRY*

#### A. *Mendenhall* and *Royer*

*United States v. Mendenhall* attempted to clarify what constituted a *Terry* investigative stop.<sup>123</sup> At an international airport, DEA officers profiled Mendenhall as someone who might be transporting drugs.<sup>124</sup> The officers stopped Mendenhall, identified themselves, and asked for her identification and airline ticket.<sup>125</sup> Mendenhall's answers to the officer's questions and the documents that she presented were inconsistent, and she appeared to be very nervous.<sup>126</sup> The officers returned Mendenhall's ticket and driver's license, and asked her to accompany

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116. *Id.*

117. *Sibron*, 392 U.S. at 64.

118. *Id.*

119. *Id.* at 62–65.

120. *Id.*

121. *See id.* at 72–73 (Harlan, J., concurring).

122. *Rodriguez v. United States*, 135 S. Ct. 1609, 1620 (2015) (quoting *Whren v. United States*, 517 U.S. 806, 817 (1996)).

123. 446 U.S. 544 (1980).

124. *Id.* at 547.

125. *Id.* at 547–48.

126. *Id.* at 548.

them “to the airport[’s] DEA office for further question[ing].”<sup>127</sup> She voluntarily followed them.<sup>128</sup> During questioning, Mendenhall agreed to a search and heroin was found.<sup>129</sup> Mendenhall argued that the officers seized her in violation of the Fourth Amendment.<sup>130</sup>

The Court in *Mendenhall* admitted that *Terry* did not decide if a seizure occurred “before the officer physically restrained Terry” to search him.<sup>131</sup> To address this omission in *Terry*, the Court stated:

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. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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.<sup>132</sup>

The Court found that “nothing in the [facts] suggest[ed] that [Mendenhall] had any objective reason to believe that she was not free to end the conversation” and leave.<sup>133</sup> What does it mean that a reasonable person would believe that he is not free to leave? What happens if a person attempts to end the encounter with a police officer?

In an attempt to answer the above questions, the Court in *Florida v. Royer*<sup>134</sup> found:

The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . [H]is refusal to listen or answer questions does not, without more, furnish [reasonable, objective grounds to detain them].<sup>135</sup>

*Mendenhall’s* addition to the definition of seizure—whether a reasonable person would feel free to leave—and *Royer’s* attempt to clarify—a person’s refusal

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127. *Id.*

128. *Id.*

129. *Mendenhall*, 446 U.S. at 548–49.

130. *Id.* at 547.

131. *Id.* at 552.

132. *Id.* at 554 (footnotes omitted).

133. *Id.* at 555.

134. 460 U.S. 491 (1983). Royer was observed at Miami International Airport by two plain-clothes detectives of the Dade County, Florida, Public Safety Department. *Id.* at 493. The detectives believed that Royer’s appearance, mannerisms, luggage, and actions fit the so-called “drug courier profile.” *Id.* The officers placed Royer in a small room, took his identification and ticket, and retrieved his luggage from the baggage area. *Id.* at 494. The Court found that Royer had essentially been arrested by the officers and that his appearance and conduct in general were not adequate grounds for probable cause. *Id.* at 502–05. But, the Court surmised that the facts in the case were enough for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while the officers attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. *Id.* at 505.

135. *Royer*, 460 U.S. at 497–98.

to listen to the officer or answer questions alone does not provide reasonable suspicion—gave credence to prospective abuses of *Terry*'s stop-and-frisk doctrine. The Court's continuous ambiguity left the door open for unequal application of *Terry* in cases with circumstances that directly affect minorities.

#### B. *INS v. Delgado*

For instance, in *I.N.S. v. Delgado*,<sup>136</sup> a case involving an Immigration and Naturalization Service search of a factory looking for illegal immigrants, the Court found that workers in the factory were not seized when several officers questioned employees at their workstations while other officers stood at the factory's door to ensure that all employees were interviewed.<sup>137</sup> The Court stated:

We reject the claim that the entire work forces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites. 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. . . .

. . .

. . . 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.<sup>138</sup>

It is inconceivable that the Court in *Delgado* would find that the immigrants in the factories were not seized. The threatening presence of several agents throughout the factories and at all entrances drastically curtailed the workers' freedom to leave or move about the factory.<sup>139</sup> Placing armed agents at every point

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136. 466 U.S. 210 (1984).

137. See *id.* at 212. Acting pursuant to two warrants,

[T]he INS conducted a survey of the work force at Southern California Davis Pleating Co. . . . in search of illegal aliens . . . .

At the beginning of the surveys, several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their workstations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work, and were free to walk around within the factory.

*Id.* at 212–13.

138. *Id.* at 218, 220–21.

139. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“[T]he threatening presence of several [law enforcement] officers, [and] the display of [ ] weapon[s]” could indicate a seizure”).

of egress to a building is a demonstration of official authority. The obvious function of surrounding and securing of the exits was “to produce [the appearance of] a captive workforce.”<sup>140</sup> It is only reasonable for an individual to infer that the officers’ intent is to restrict egress from the building and that he is not free to leave. This is shown by the workers’ response to the agents when they entered the building. “[U]pon entry of the INS investigators into the plants, the employees shouted ‘La Migra’ and a large number of employees began running around the factory or hiding.”<sup>141</sup>

The persistent surveying of practically every employee further implied to the workers that they were not free to leave unless they responded to the agent’s questioning. The agents systematically “approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship.”<sup>142</sup> If the employee gave what the agent considered “an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers.”<sup>143</sup> The procedure used by the INS involved more than mere questioning or a casual conversation with the employees.<sup>144</sup> The agents were investigating criminal activity (illegal immigration) based on an anonymous tip that the factories may be hiring illegal immigrants.<sup>145</sup> This is a classical demonstration of the type of temporary investigatory detention that *Terry* was designed to address. The INS officers detained the immigrants at the factory based on circumstances that led them to reasonably believe that criminal activity was afoot.<sup>146</sup> The Fourth Amendment was implicated.<sup>147</sup>

The Court totally disregarded facts about the individuals encountered, such as their previous experiences with INS agents, cultural background and understanding of law enforcement authority, or their lack of experience in the American criminal justice system.<sup>148</sup> Such factors could be important in deciding whether the deliberate circumstances of the seizure led the employees to believe their freedom was significantly impeded.<sup>149</sup> Delgado’s expansion of the *Terry* seizure became a race-specific tool that law enforcement officers used to curtail what they perceived as potential illegal activity.

### C. *Florida v. Bostick*

In *Florida v. Bostick*, “two officers, [as part of a drug interdiction effort,] complete with badges, insignia and one of them holding a recognizable zipper

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140. *Int’l Ladies’ Garment Workers’ Union v. Sureck*, 681 F.2d 624, 632 (9th Cir. 1982), *rev’d by Delgado*, 466 U.S. 210 (1984).

141. *Id.* at 643.

142. *Delgado*, 466 U.S. at 212.

143. *Id.* at 212–13.

144. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (describing what constitutes a seizure of one’s person).

145. *Sureck*, 681 F.2d at 626.

146. *Id.* at 631.

147. *See Terry*, 392 U.S. at 30–31.

148. *See Delgado*, 466 U.S. 210; *Sureck*, 681 F.2d 624.

149. *See generally* CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 203–25 (2003).

pouch, containing a pistol, boarded a bus” on a scheduled stopover.<sup>150</sup> Without articulable suspicion, the officers picked out Bostick, an African American male, who was seated in the back of the bus and asked to inspect his ticket and identification.<sup>151</sup> Finding nothing remarkable about the ticket and identification the officers returned them to Bostick.<sup>152</sup> They then requested Bostick’s consent to search his luggage.<sup>153</sup> He consented and drugs were found.<sup>154</sup> Bostick moved to suppress the cocaine on the grounds that it had been seized in violation of his Fourth Amendment rights.<sup>155</sup>

Relying on *Delgado*, the Court held:

[W]hen the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick’s movements were “confined” in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.<sup>156</sup>

*Bostick* relied on two factors to determine if a seizure occurred: (1) was there coercive police conduct, and (2) the fact that Bostick’s detention may have been consensual because he was a voluntary passenger on the bus.<sup>157</sup> It summarized the test for a seizure as:

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.<sup>158</sup>

Although the Court did not decide whether a seizure occurred in *Bostick*, it maintained that the facts left “some doubt” that Bostick was seized.<sup>159</sup> This suggests that the Court believed Bostick was free to leave at all times during the encounter.

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150. Florida v. Bostick, 501 U.S. 429, 431 (1991) (quoting Bostick v. State, 554 So. 2d 1153, 1154–1155 (Fla. 1989)).

151. *Id.*

152. *Id.*

153. *Id.* at 432.

154. *Id.*

155. *Id.*

156. *Bostick*, 501 U.S. at 435–36.

157. *Id.* at 437.

158. *Id.* at 439–40.

159. *Id.* at 437.

Again, the Court failed to consider the factors it announced in *Mendenhall*, in particular, the threatening presence of officers, display of a weapon, and the officers' language or tone of voice that might suggest that compliance is required.<sup>160</sup> The pervasive and authoritative conduct displayed by the agents in both *Delgado* and *Bostick* communicated to the defendants that they were not free to leave. The fact that a person is voluntarily seated on a bus or at his workplace does not authorize the police to force an encounter upon him.<sup>161</sup> His choices are submitting to police questioning or walking away and facing the consequences of delaying his travel or losing his job. Placing a person in a situation where he must decide between submitting to police detention and socially and personally acceptable behavior is a seizure that requires Fourth Amendment protection.<sup>162</sup>

#### IV. ILLINOIS V. WARDLOW

##### A. High Crime Area

The *Delgado*, *Royer*, and *Bostick* decisions were not the end of the Court's inability to comprehend the effect that the failures in *Terry* would have on the use of race in policing. The failure to properly define the new standard devised in *Terry* left the door open for judicial review that would distort its original intention, and that would lead to greater abuse of police power than that experienced in the 1960s.<sup>163</sup>

In *Illinois v. Wardlow*, police working as uniformed officers in the special operations section of the Chicago Police Department were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking.<sup>164</sup> An officer in the car observed Wardlow holding an opaque bag and standing next to a building.<sup>165</sup> Wardlow looked in the direction of the officers and fled.<sup>166</sup> The officers eventually cornered Wardlow.<sup>167</sup> One of the officers then exited the car and immediately conducted a pat-down search for weapons.<sup>168</sup> "During the frisk, [the officer] squeezed the bag [Wardlow] was carrying and felt a heavy, hard object similar to the shape of a gun."<sup>169</sup> The officer then opened the bag, discovered a .38-

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160. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

161. *Bostick*, 501 U.S. at 450 (1991) (Marshall, J., dissenting).

162. See *Florida v. Royer*, 460 U.S. 491, 502 (1983). Agents in an airport stopped Royer on the suspicion that he was a drug courier. *Id.* at 493. After his answers to questions and his identification left officers with further suspicion they took him to a room for interrogation. *Id.* at 494. His tickets and identification were not returned, and the agents retrieved his luggage. *Id.* Finding that Royer was arrested the Court stated, "at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity." *Id.* at 502.

163. See Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 How. L.J. 567, 585-87 (1991) (discussing tensions between racial communities and law enforcement since *Terry*).

164. 528 U.S. 119, 121 (2000).

165. *Id.* at 121-22.

166. *Id.* at 122.

167. *Id.*

168. *Id.*

169. *Id.*

caliber handgun, and Wardlow was arrested.<sup>170</sup>

The Supreme Court, upholding the police seizure of Wardlow, adopted a *per se* rule that unprovoked flight in a high-crime area is sufficient suspicion for an officer to detain an individual.<sup>171</sup> The Court recognized that either presence in a high-crime area or flight taken alone does not meet the standard of reasonableness required by the Fourth Amendment.<sup>172</sup> Relying on *Terry*, it surmised that presence in a high-crime area plus other circumstances could suggest reasonable suspicion.<sup>173</sup> It stated: “Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”<sup>174</sup> Police “officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.”<sup>175</sup>

The Court found that the officers were converging on an area known for drug activity and they anticipated encountering several people.<sup>176</sup> It was under these circumstances that they decided to investigate Wardlow when he fled.<sup>177</sup>

*Terry*’s standard permits an officer to conduct an investigatory stop when he observes “unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . .”<sup>178</sup> It was meant to assist police officers to carry out the tasks of crime detection and crime prevention by allowing them to investigate actual or potential criminal activity.<sup>179</sup> The Court in *Wardlow* disregarded *Terry*’s stated purpose and its required standard. Flight in a high-crime area is surely not criminal activity, and it is not suggestive of such.

The Court in *Wardlow* made perfunctory mention of the reasons for Wardlow’s flight and whether it suggested criminal activity. It found that Wardlow’s conduct “was ambiguous and susceptible of an innocent explanation.”<sup>180</sup> Based on *Terry*, the Court determined that “the officers could detain the individuals to resolve the ambiguity.”<sup>181</sup> However, these factors—the ambiguity and innocent explanations for the flight—highly suggest that the officers did not reasonably suspect Wardlow was engaged in criminal activity.

Although the *Terry* test for reasonable suspicion was amorphous and devoid of substance, the Court expressed the mandate that an officer must be able to

170. *Wardlow*, 528 U.S. at 122.

171. *See id.* at 124.

172. *Wardlow*, 528 U.S. at 124 (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime”) (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

173. *Wardlow*, 528 U.S. at 124 (“In this case, moreover, it was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion”) (citations omitted).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

179. *Id.* at 22.

180. *Wardlow*, 528 U.S. at 125.

181. *Id.*

articulate more than an “inchoate and unparticularized suspicion or ‘hunch’” of criminal activity.<sup>182</sup> This particularized and objective assessment is based upon all of the circumstances known to the officer, and it must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.<sup>183</sup> When the officers first noticed Wardlow, he was standing next to a building holding a bag.<sup>184</sup> Standing next to a building holding a bag is clearly not indicative of criminal activity. Next, Wardlow looked in the direction of the officers and fled.<sup>185</sup> The Court labeled Wardlow’s flight as unprovoked. However, it did not explain why it considered the flight to be unprovoked. Further, the record in the case does not disclose that sirens were blaring or commands to stop were given to Wardlow.<sup>186</sup> In its brief, the respondent argued:

Arguably, Respondent fled at the sight of four police cars and eight police officers, who converged on that location simultaneously. This behavior is not innately suspicious and is not . . . “unprovoked flight from a police officer” . . .

Respondent’s flight from a caravan of police cars, when viewed in “the whole picture,” did not provide objective criteria pointing to a reasonable suspicion of criminal activity.<sup>187</sup>

It is unclear from the Court’s decision or the record why looking in the direction of the officers would suddenly compel Wardlow to run. Wardlow could have run for several reasons, none of which would rise to the level of reasonable suspicion.<sup>188</sup> Wardlow may have run because he was late for an appointment,

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

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

[T]he totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

. . . .

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

*Id.* at 417–18.

184. *Wardlow*, 528 U.S. at 121.

185. *Id.*

186. Brief for the Respondent at 22, *Illinois v. Wardlow*, 528 U.S. 119 (2000) (No. 98-1036), 1999 WL 607000.

187. *Id.* (footnotes omitted).

188. *Wardlow*, 528 U.S. at 128–29 (Stevens, J., dissenting)

exercising, or going to meet a friend. These options are innocent and, usually, do not prompt a stop from a police officer.<sup>189</sup> In many minority localities, the sight of four police cars converging on a location prompts the inhabitants to flee. Criminal activity is not the precursor for the flight.<sup>190</sup> Because of past experiences with police officers, self-preservation is more important than waiting around to see what transpires.<sup>191</sup> Nothing suggests that the officers' seizure of Wardlow was based on reasonable suspicion that Wardlow was engaged in criminal activity.<sup>192</sup>

By making unprovoked flight in a "high crime area" grounds for reasonable suspicion, the Court has given police officers carte blanche authority to stop minorities. First, the Court gave no guidance that would assist in determining a high-crime area.<sup>193</sup> It only made mention of "an area of heavy narcotics trafficking" without further explanation of other factors relevant to the determination.<sup>194</sup>

A United States Court of Appeals for the First Circuit case, *United States v. Wright*,<sup>195</sup> decided after *Wardlow*, citing several cases found that the determination of a "high crime area" is a factual question that can be proved by a combination of several factors:

- (1) [T]he nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case[;]
- (2) limited geographic boundaries of the "area" or "neighborhood" being evaluated[;]
- and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue[.]<sup>196</sup>

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The question in this case concerns "the degree of suspicion that attaches to" a person's flight—or, more precisely, what "commonsense conclusions" can be drawn respecting the motives behind that flight. A pedestrian may break into a run for a variety of reasons—to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature—any of which might coincide with the arrival of an officer in the vicinity.

*Id.*

189. See, e.g., Harris, *supra* note 9, at 994.

190. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 680–81 (1994).

191. See Adam B. Wolf, Case Note, *The Adversity of Race and Place: Fourth Amendment Jurisprudence in Illinois v. Wardlow*, 528 S. Ct. 673 (2000), 5 MICH. J. RACE & L. 711, 717 (2000); see also Tracey Maclin, "Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 253 (1991) ("[b]lack men know they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent.").

192. *Wardlow*, 528 U.S. at 121–22.

193. *Id.* at 139 (Stevens, J., dissenting).

194. *Id.* at 124.

195. 485 F.3d 45 (1st Cir. 2007).

196. *Id.* at 53–54. (citations omitted). In most cases, the relevant evidence for this factual finding will include some combination of the following: (1) the nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case, e.g., *Wardlow*, 528 U.S. at 124 (noting that the area was not simply generally crime-ridden, but was particularly "known for heavy narcotics trafficking," where the defendant was suspected of drug activity); *United States v. Edmonds*, 240 F.3d 55, 60 (D.C. Cir. 2001) (noting that the finding of a high crime area was supported by the similarity between the

This definition recites evidence commonly used to suggest a high crime area. However, it omits a factor from *Terry* that has become prevalent and controlling in investigatory stops in minority neighborhoods: police discretion based on the officer's experience.<sup>197</sup> When determining whether the evidence presented to show the reasonableness of the police officer's actions meets constitutional muster, the courts tend to give immense deference to the police officer's discretion.<sup>198</sup> Because of the deference given to police officers' experience, any combination of the factors stated in *Wright* will result in the police officer characterizing a location as a high crime area.<sup>199</sup>

#### B. *Wardlow's* "High Crime Area," and Police Discretion

On June 18, 1971, President Nixon, in a press conference, declared that drugs are "public enemy number one in the United States" and he announced a war on drugs.<sup>200</sup> This war on drugs quickly became a war on crime that escalated police use of drastic investigatory practices under the guise of *Terry*. Because it was presumed that most illegal drug activity occurred in minority communities, they were considered as high crime areas where drug investigatory stops should be conducted.<sup>201</sup> The term "high crime area" became synonymous with inner city African-American and Hispanic communities.<sup>202</sup> The Supreme Court legitimized the

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type of crime commonly found at that location and the type of crime for which the police suspected this defendant); (2) limited geographic boundaries of the "area" or "neighborhood" being evaluated, e.g., *United States v. Caruthers*, 458 F.3d 459, 468 (6th Cir. 2006) (affirming a district court's finding of a high crime area, in part, because the evidence of frequent crime was specific to the exact intersection where the stop occurred); *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (en banc) ("We must be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity."); and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue, e.g., *United States v. Bailey*, 417 F.3d 873, 874–75, 877 (8th Cir. 2005) (affirming high crime area finding, in part, because of criminal activity during week prior to the stop at issue, occurring in same location as the stop). Evidence on these issues could include a mix of objective data and the testimony of police officers, describing their experiences in the area.

197. See *Terry v. Ohio*, 392 U.S. 1, 27 ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

198. See Robin K. Magee, *The Myth of the Good Cop and The Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 172 (1994). Professor Magee argues that courts have developed a good cop paradigm, and "the Court has advanced the paradigm more broadly throughout Fourth Amendment jurisprudence by exhibiting faith, if not reverence, for police and their decision making."

199. *United States v. Cortez*, 449 U.S. 411, 418 (1981). Consider the appropriateness of the *Terry* stop "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement"—the police themselves.

200. Richard Nixon, Remarks about an Intensified Program for Drug Abuse Prevention and Control, 1971 Pub. Papers 738, 739 (June 17, 1971).

201. See, e.g., Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 869–76 (2002). See also, Tovah Renee Calderón, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 90–91 (2000).

202. See Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence from Fourth Amendment Reasonable Suspicion Analysis*, 57

use of locale as an appropriate element in the *Terry* analysis in at least two cases besides *Wardlow*.<sup>203</sup> In *Adams v. Williams*, the Court found that a police officer conducting an investigatory stop in a high crime area has reasonable ground to fear for his safety.<sup>204</sup> In *Maryland v. Buie*, the Court stated, “[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.”<sup>205</sup>

Professor Lewis Katz believes that consequently lower courts have made high crime areas the centerpiece of the *Terry* analysis.<sup>206</sup> He states:

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 . . . . By sanctioning 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.<sup>207</sup>

The *Terry* Court was aware that the frequency of stops in minority communities, and the police use of force to conduct the stops were problems at the time that the case was decided.<sup>208</sup> Yet, it established the officer’s discretion as a pivotal factor in the equation of reasonable suspicion for a *Terry* seizure.<sup>209</sup> This approach to the problem is myopic in light of the potentially damaging effect that the case could have on minority communities.

*Terry*’s reasonable suspicion test requires “specific articulable facts” that may include inferences that an officer can draw from those facts based on his experience.<sup>210</sup> The expansions of *Terry* have moved towards a test that is based on “a healthy respect for the deductive processes of trained officers.”<sup>211</sup> In many instances, the locale and conclusions drawn by the officer become the primary basis for an investigatory stop.<sup>212</sup> A good illustration of this point is *United States v.*

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AM. U. L. REV. 1587, 1590, 1611 (2008). See also, Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 386 (2001).

203. *Adams v. Williams*, 407 U.S. 143, 147–48 (1972); *Maryland v. Buie*, 494 U.S. 325, 334 n.2 (1990); see also THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 11.3.2.2, 481 (2008) (The character of the area has often added to the conclusion that articulable suspicion or probable cause was present).

204. *Adams*, 407 U.S. at 147–48.

205. *Buie*, 494 U.S. at 334 n.2.

206. Katz, *supra* note 31, at 493.

207. *Id.*

208. TASK FORCE REPORT, *supra* note 7, at 18.

209. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

210. *Id.* at 20–21.

211. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 11.03, 267 (5th ed. 2008).

212. See generally *United States v. Jordan*, 232 F.3d 447 (5th Cir. 2000).

*Jordan*.<sup>213</sup> In *Jordan*, Baton Rouge City Police Officers were patrolling what was described as a high crime area of the city that is noted for frequent drug activity, robberies, rapes, and murders.<sup>214</sup> The officers saw Jordan “running at full sprint” from the direction of a store located about a block away.<sup>215</sup> “As they observed Jordan, they saw him ‘looking back over his shoulder . . . . At one point he tripped and fell to the ground, immediately got up and continued into a full sprint.’”<sup>216</sup>

“The officers, concluding that Jordan may have robbed the grocery store, pulled their car in front of Jordan and stopped him.”<sup>217</sup> Jordan was instructed to place his hands on the hood of the car.<sup>218</sup> He refused to do so.<sup>219</sup> Jordan was handcuffed, and searched.<sup>220</sup> A weapon was found in his pant leg.<sup>221</sup> Jordan moved to suppress the evidence contending that the officers did not have reasonable suspicion to conduct an investigatory stop under *Terry v. Ohio*.<sup>222</sup> The government argued “that the totality of the circumstances, including Jordan’s running, the proximity of the store, his furtive glances over his shoulder, the time (6:45 p.m. on a January evening) and place (a high crime area), justified the officer’s decision to stop Jordan.”<sup>223</sup>

Relying on *Wardlow*, the court agreed with the government and it stated:

The undisputed facts in the instant case clearly do not portray a recreational runner. The defendant appeared to be fleeing from something or someone. This conduct, combined with the time and place, was at least as “ambiguous” as the observation in *Terry* that two individuals were “pacing back and forth in front of a store, peering into the window and periodically conferring.” The officers were justified in detaining the defendant briefly to resolve this ambiguity.<sup>224</sup>

The scant facts in this case do not suggest reasonable suspicion. They only suggest that the officers subjectively concluded that Jordan was running because he was involved in criminal activity. The officers did not present inferences that were drawn from the facts observed. But, they offered a conclusion that was based on their observation that Jordan was running in a direction away from a store at 6:45 p.m. in what was deemed a high crime area. No objective reasons were given for Jordan’s sprint. Actually, the officers first noticed Jordan because he was running.<sup>225</sup> The facts do not suggest that Jordan’s running was provoked by the sight of the officers as was the finding in *Wardlow*.<sup>226</sup> Also, the officers cited no facts that

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213. *Id.*

214. *Id.* at 448.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Jordan*, 232 F.3d at 448.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 449.

224. *Jordan*, 232 F.3d at 449 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 677 (2000)).

225. *Jordan*, 232 F.3d at 448.

226. *Id.* at 449.

supported a robbery of the store had occurred.<sup>227</sup>

The court's ruling in *Jordan* implies that there is no reason to run in a "high crime area" except involvement in criminal activity. Reasonable suspicion in this case was founded on the officers' belief that an African American male running in a locale where crimes occur equates to criminal involvement. With little discussion, the court gave great weight to the officers' observations and conclusions.

Weak facts similar to those in *Jordan* are prevalent in the reasonable suspicion equation when police officers encounter citizens in inner-city and/or poor neighborhoods.<sup>228</sup> Although the cases vary, more often than not, courts are inclined to follow the officers' lead regardless of the reasonable inferences that can be gleaned from the facts of the case.<sup>229</sup> *Terry's* failures have developed a dilemma that is destined to get worse if policy changes are not implemented.

Consider, what I call the double-edged sword for African American men; not only are they suspects in a high crime area, but they are also suspects in locations where they traditionally do not belong. In *Terry*, Officer McFadden testified that Terry and Chilton caught his attention because "they didn't look right to me at the time" and he just didn't like them.<sup>230</sup> African American men may attract a police officer's attention simply because the officer believes he does not belong where he is observed.<sup>231</sup> A good example of this is the shooting of Trayvon Martin by George Zimmerman, a neighborhood watch volunteer, in a gated community in Sanford, Florida.<sup>232</sup> On the night of the shooting, Zimmerman called 911 after noticing

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227. *Id.* at 448.

228. One recent incident involved a call that I received from the son of a friend who is deceased. The young man and a friend drove up to his deceased dad's home (in a high crime area) to clean and make some repairs when they were stopped by a police officer of the city's Crime Detection Unit. The officer asked what they were doing and they explained that they were cleaning the house and making repairs so it could be sold. The officer then asked if they had drugs. The young men responded "no," and the officer asked to search the car. The deceased friend's son immediately told the officer that there was a gun in the glove compartment, but the papers designating the gun as legal were also in the car. The officer searched the car and found the gun in the glove compartment along with the papers. The officer then called dispatch and ran a check on the young man. The dispatcher advised the officer that there was an outstanding arrest warrant for the unpaid tickets against the young man. When giving the dispatcher the information on the young man the officer failed to mention the "Jr." in his name. The outstanding warrant was actually for his deceased dad. The young man was arrested. He spent a night in jail, and he missed two days from work clearing up the matter. The young man's only crime was that his dad's home was located in a high crime area.

229. *Commonwealth v. Washington*, 51 A.3d 895 (Pa. 2012) (finding the evidence missing was missing crucial element that Washington was knowingly running from the police); *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007) (finding reasonable suspicion for a stop stating: "Wright's running was 'unprovoked . . . upon noting the police.'"); *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000) (finding reasonable suspicion to stop Valentine on tip from an unidentified informant, and Valentine matched the description given, and he was walking in a high crime area at 1:00 a.m.).

230. *Terry v. Ohio*, 392 U.S. 1, 6 (1968).

231. Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 Val. U.L. Rev. 626, 628 (2006).

232. Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012), <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html>.

Trayvon.<sup>233</sup> He reported a “real suspicious guy[.]”<sup>234</sup> Zimmerman told the dispatcher “this guy looks like he is up to no good, or he’s on drugs or something. It’s raining, and he’s just walking around.”<sup>235</sup> Unknown to Zimmerman, Trayvon was headed to his father’s residence in the neighborhood after going to the store to buy snacks.<sup>236</sup> When Zimmerman approached Trayvon, a scuffle occurred and Trayvon was shot to death.<sup>237</sup> Trayvon caught Zimmerman’s attention because “he[] [was] a black male” and “they always get away.”<sup>238</sup> Zimmerman assumed that Trayvon did not belong in the community because of his race. Police officers also will often single out an individual not because of his criminal activity, but because of his race or ethnicity.<sup>239</sup>

#### V. NEW YORK CITY POLICE AND STOP-AND-FRISK

The most notorious exploitations of *Terry*’s failures have occurred under state statutes that were enacted to give guidance on stop-and-frisk. This is best documented in the New York City police department’s application of its stop-and-frisk statute. New York’s statute allows a police officer to:

[S]top a person in a public place located within the geographical area of such officer’s employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.<sup>240</sup>

As an extension of its broken window policing policy,<sup>241</sup> the New York City police department used the stop-and-frisk statute to direct “enforcement efforts at statistical ‘hot spots’ of criminal activity[.]”<sup>242</sup> The result was an exponential increase in the number of minorities who were stopped to investigate minor

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233. *Id.*

234. *Transcript of George Zimmerman’s Call to Police*, [https://archive.org/stream/326700-full-transcript-zimmerman/326700-full-transcript-zimmerman\\_djvu.txt](https://archive.org/stream/326700-full-transcript-zimmerman/326700-full-transcript-zimmerman_djvu.txt) (last visited Feb. 23, 2018).

235. *Id.*

236. Adam Weinstein, *The Trayvon Martin Killing, Explained*, MOTHER JONES (Mar. 18, 2012), <http://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained/>.

237. *See id.*

238. *Id.*

239. Jones, *supra* note 231, at 621–22.

240. N.Y. CRIM. PROC. § 140.50 (McKinney 2010).

241. George Kelling and James Wilson proposed the “broken window” theory of policing in a five-page article published in 1982 in the *Atlantic Monthly*; the essay argued that effective policing will involve protecting communities as well as individuals, and “if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.” George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>. *See also* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 323 (2010).

242. Rosenthal, *supra* note 241, at 323.

offenses.<sup>243</sup> The stops were aggressive,<sup>244</sup> and statistics suggest that they targeted African Americans and Hispanic American youth.<sup>245</sup>

In *Floyd v. City of New York*, several New York City citizens alleged that the New York police department practiced racial profiling when conducting investigatory detentions in violation of the Fourth and Fourteenth Amendments to the United States Constitution.<sup>246</sup> Judge Shira A. Scheindlin, in a lengthy and well-developed opinion, found that New York City officials had been deliberately indifferent to an unconstitutional policing policy that (1) permitted stops and frisks to be made on less than reasonable suspicion, and (2) utilized widespread practices that targeted blacks and Hispanics for stops.<sup>247</sup> In writing the opinion Judge Scheindlin found the following facts were uncontested:

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.
- The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.
- 52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.
- 8% of all stops led to a search into the stopped person's clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not. In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not.
- 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.
- In 52% of the 4.4 million stops, the person stopped was black.
- In 31% the person was Hispanic.
- In 10% the person was white.
- In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white.
- In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.

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243. See David Keenan & Tina M. Thomas, *An Offense-Severity Model for Stop-And-Frisks*, 123 YALE L.J. 1448, 1459–60 (2014).

244. See Carol S. Steiker, *Terry Unbound*, 82 Miss. L.J. 329, 331 (2013). See also Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html>. ("Most of the time, the officers swoop in, hornetlike, with a command to stop: 'Yo! You, come here. Get against the wall.'" Many of those stopped described aggressive or hostile attitudes by the police.)

245. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013).

246. *Id.* at 570–74.

247. *Id.* at 658–60.

- Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.
- Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.
- . . . .
- Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.<sup>248</sup>

Her analysis of the evidence revealed that, regardless of the racial composition of a geographic area, blacks and Hispanics were more likely to be stopped.<sup>249</sup> Once stopped, blacks were 30% more likely than whites to be arrested.<sup>250</sup> Minorities were 9-14% more likely to be subjected to the use of force.<sup>251</sup> She also found that the hit rate for blacks, as measured by the issuance of a summons or an arrest, was 8% lower than for white suspects.<sup>252</sup> This evidence demonstrated that minorities were targeted for stops based on a lesser degree of suspicion.<sup>253</sup> Judge Scheindlin also found evidence that officers were encouraged to make stops based on racial characteristics or stereotypes—to target the young blacks and Hispanics.<sup>254</sup>

Judge Scheindlin found that New York City police officers used a combination of variables, such as race, high crime area, and the suspect's demeanor to justify their stops.<sup>255</sup> However, it appears that race and factors related to race, such as a high crime area, were controlling when determining who should be detained.<sup>256</sup> The use of these variables in *Terry* stops has become prevalent.<sup>257</sup> They are used to suggest reasonable suspicion although all other factors in the case are innocent activities.<sup>258</sup> Under conditions such as those that existed in New York City's police department and police departments of other cities, it becomes imperative that courts, in their best judgment, prevent unconstitutional abuses of *Terry's* failures.<sup>259</sup>

As Judge Scheindlin adeptly stated:

This Court's mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool. Many police practices may be useful for fighting crime—preventive detention or coerced confessions, for example—but because they are unconstitutional

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248. *Id.* at 573–75.

249. *Id.*

250. *Id.* at 560.

251. *Floyd*, 959 F. Supp. 2d at 560.

252. *Id.*

253. *Id.*

254. *Id.* at 602–03.

255. *Id.*

256. *Id.* at 587.

257. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 60–70 (2009); Harris, *supra* note 190.

258. *See United States v. Arvizu*, 534 U.S. 266, 277–78 (2002).

259. *See Keenan & Thomas, supra* note 243, at 1461.

they cannot be used, no matter how effective.<sup>260</sup>

*Terry* was not designed to legalize unconstitutional police investigatory practices.<sup>261</sup> Courts are to “still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing” and that violates constitutional principles.<sup>262</sup>

Judge Scheindlin had her detractors who suggested that the methods used by the New York City police department were valuable tools in crime detection and prevention.<sup>263</sup> They cited statistics showing a reduction in crime rates during the period that the aggressive stop and search campaign took place.<sup>264</sup> Their theory was simply that in order to reduce increasing crime, the police department’s limited resources required it to fight crime in areas with the highest crime rates.<sup>265</sup> Her opponents also argue the benefit of stop and frisk, crime detection and prevention, “accepts the risk that officers may stop innocent people.”<sup>266</sup> This argument is greatly flawed. Aggressive stop-and-frisk tactics in minority communities have caused resentment from the residents, a distrust of the police, and a cavalier attitude about reporting crime and assisting police officers.<sup>267</sup> Hence, the acrimonious relationship between citizens who experience inept policing and the police may result in higher crime rates because the tactics alienate the community, rather than encourage cooperation and a partnership with police.<sup>268</sup>

## VI. AN ATTEMPT TO END RACIAL PROFILING

Despite the arguments posited by supporters of New York’s stop-and-frisk, Judge Scheindlin found that the city had illegally detained and frisked minority residents on the streets over many years.<sup>269</sup> In a “Remedies Opinion” to *Floyd v. City of New York*, she ordered several measures designed to give guidance to New York

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260. *Floyd*, 959 F. Supp. 2d at 556.

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

262. *Id.*

263. See generally David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-And-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117 (2013).

264. *Id.* at 127–28. Rosenthal’s rebuttal argument states:

Between 1991 and 2009, New York experienced the broadest and deepest decline in violent crime of any major American city. By 2012, New York’s homicide victimization rate dropped to 5.05 per 100,000 population. Space does not permit a complete examination of the causes of New York’s crime drop. Elsewhere, I have reviewed the evidence and demonstrated that there is a substantial case to be made that New York’s stop-and-frisk tactics deserve considerable credit. Two additional studies by eminent criminologists have provided additional evidence supporting this conclusion.

*Id.* (citations omitted).

265. *Id.* at 132–35.

266. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

267. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 363–65 (1998); see also Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1279–86 (1998) (discussing police frisks and black men in light of *Terry*).

268. See generally CHARLES J. OGLETREE ET AL., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* (1995) (study examining racism in multiple city police departments).

269. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562–63 (2013).

City police officers when conducting investigatory stops, and to improve police and community relations. Among those measures were:

- (1) She appointed an independent monitor to oversee the reform process;<sup>270</sup>
- (2) The New York Police Department should revise its policies and training regarding stop and frisk to adhere to constitutional standards;<sup>271</sup>
- (3) The New York Police Department should revise its policies and training regarding racial profiling to make clear that targeting the “right people” for stops is a form of racial profiling and violates the Constitution;<sup>272</sup>
- (4) The department will provide standards for what constitutes a stop, when a stop may be conducted, when a frisk may be conducted, and when a search into clothing or into any object found during a search may be conducted;<sup>273</sup>
- (5) All uniformed officers are required to provide narrative descriptions of stops in their activity logs;<sup>274</sup>
- (6) The department is to develop an improved system for monitoring, supervision, and discipline officers;<sup>275</sup>
- (7) Body cameras are to be worn and utilized by officers when making a stop.<sup>276</sup>

A Second Circuit panel stayed Judge Scheindlin’s order pending an appeal by the city.<sup>277</sup> The panel found Judge Scheindlin had compromised the appearance of impartiality.<sup>278</sup> It remanded the case with orders that Judge Scheindlin be removed and a new judge appointed.<sup>279</sup> Consequently, there was an agenda change in the mayor’s office, and the new administration filed a motion for remand to allow the parties to discuss settlement.<sup>280</sup> The motion was granted.<sup>281</sup> After much wrangling in the court, the City and police department finally moved forward to institute reform.

The reforms have produced a remarkable drop in the rate of unlawful stop-and-frisks.<sup>282</sup> However, the ratio of African Americans detained in relation to other groups has not changed.<sup>283</sup> There are fewer stops-and-frisks, but African Americans still suffer the brunt of the stops.<sup>284</sup> Judge Scheindlin’s remedies inability to resolve the racial-profiling problem can only be attributed to the police department’s

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270. Opinion and Order, *Floyd v. City of New York*, 1:08-cv-01034-SAS-HBP, at 9–13 (S.D.N.Y. Aug. 12, 2013).

271. *Id.* at 13–25.

272. *Id.* at 17.

273. *Id.* at 14–18.

274. *Id.* at 22.

275. *Id.* at 23–25.

276. Opinion and Order, *Floyd v. City of New York*, 1:08-cv-01034-SAS-HBP, at 25–28 (S.D.N.Y. Aug. 12, 2013).

277. See *Ligon v. City of New York*, 736 F.3d 118, 128–30 (2d. Cir. 2013).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. See Azi Paybarah et al., *De Blasio on Stop-and-Frisk: ‘We Changed It Intensely,’* POLITICO (Dec. 8, 2016), [www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886](http://www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886).

283. *Id.*

284. *Id.*

continued use of race and high-crime areas as primary factors for stops; factors that Judge Scheindlin recognized as salient in a *Terry* stop-and-frisk.<sup>285</sup> Until courts recognize the impropriety of the use of race and high crime areas as determinants in stop-and-frisk and remove them from the equation, racial profiling will continue to exist.

## VII. CONCLUSION

The *Terry* Court's attempt to reach a compromise between temporary police detentions and public outrage at overaggressive police actions was meant to bring civility to a fragile situation. However, the decision failed to address possible outcomes that would inflict greater abuses of the Fourth Amendment on racial minorities. By failing to properly define a constitutionally valid stop, the Court left the door open to what has become an open season for frivolous stops of young African-American men and other ethnic minorities. Changes in police policies based on measures similar to those fashioned by Judge Scheindlin in *Floyd v. City of New York* are only the first step in ending rampant racially motivated stops of minority citizens. Until the Court exercises "judicial integrity" in stop-and-frisk cases, and revisit policies established in its Fourth Amendment cases that have become progenitors of racial profiling, *Terry* will be the Warren Court's greatest failure that was meant for good.<sup>286</sup>

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285. *Floyd*, 959 F. Supp. 2d at 562–63.

286. See *Terry v. Ohio*, 392 U.S. 1, 15 ("Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.").