STOP *TERRY*: REASONABLE SUSPICION, RACE, AND A PROPOSAL TO LIMIT *TERRY* STOPS

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The Terry *doctrine, which grants a police officer the authority to stop and frisk based on his or her reasonable suspicion rather than probable cause, was created by the Supreme Court at a time when the nation confronted a particular moment of violent racial strife. Since* Terry *was decided, the Supreme Court has continued to expand the reach of the doctrine—which opened the door for potential abuse. Existing data is increasingly proving that the loosening of constitutional standards is causing substantial harms to people of color nationwide. This article joins the existing scholarly discussion surrounding this decision to suggest one additional tool that might be used to address the racial impact of the* Terry *doctrine. In particular, this Article proposes that police authority to stop suspects on nothing more than reasonable suspicion be limited to cases in which an officer reasonably believes the suspect is engaged in something more than a mere possessory offense. The proposal is consistent with much of the Supreme Court's past language and will not substantially undercut police efforts to combat violent crime. In addition, this proposal will not be administratively burdensome since it would only require a police officer to articulate what about the suspect made him believe he was engaged in something other than a possessory criminal offense, which is not all that different from what police officers are currently required to do as a matter of internal policy. It is time to stop* Terry *to avoid the further erosion of rights caused by* Terry *stops.*

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Introduction

> *Fourth Amendment rights are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government*.[1]

Terry stops and frisks are now so pervasive that few seriously doubt the ability of the police to stop anyone on any street for virtually any reason. The line between such stops and their attendant protective frisks has become so infinitesimal the two are often presumed to be a single unit. The factors that courts have found to justify "reasonable suspicion" are legion. Remaining in one place for an extended period, standing in the wrong place, walking quickly away, running away, nervousness, and exceptional calmness have all been suggested as potential justifications for an investigatory exchange with the police that the target is not free to ignore.[2]

Prior to 1968, the Supreme Court consistently held that the Fourth Amendment demanded a substantial showing of probable cause before police could meaningfully interfere with liberty or privacy interests.[3] In the social turmoil of the 1960s, however, the Court retreated from that bright line and found instead that interference might be permitted on a lesser showing. The *Terry* stop and frisk and its intermediate justification, known as "reasonable suspicion," were

1. Michigan v. Long, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1940) (Jackson, J., dissenting)).

2. Florida v. Royer, 460 U.S. 491, 494, 502 (1983) (finding suspect's nervousness a factor contributing to a finding of reasonable suspicion); Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (finding that suspect's unprovoked flight in a high crime area upon noticing police gave rise to reasonable suspicion); United States v. See, 574 F.3d 309, 314 (6th Cir. 2009) (suggesting that sitting in a car for an extended period may add to the constellation of factors giving rise to reasonable suspicion); United States v. Logan, No. 12-1099, slip op. at 11 (6th Cir. May 10, 2013) (finding that presence in a high crime area may contribute to a finding of reasonable suspicion); United States v. Himmelwright, 406 F. Supp. 889, 892–93 (1975) (finding that suspect's "unusually calm" demeanor supported the finding of reasonable suspicion); United States v. Briggs, 720 F.3d 1281, 1286, 1292 (10th Cir. 2013) (holding that a suspect's evasive or erratic movements are part of the totality of the circumstances that justified a finding of reasonable suspicion).

3. *See, e.g.*, Henry v. United States, 361 U.S. 98, 102 (1959).

born. At the time, critics of the *Terry* doctrine warned that the Court was taking its first step toward the slow erosion of Fourth Amendment rights.[4] Police, Justice Douglas warned in dissent, would now be free to harass virtually without limit the less favored, the less fortunate, and the less protected.[5]

Unfortunately, since *Terry*, the predictions of the dissent have come to pass. The authority to stop and frisk citizens on nothing more than reasonable suspicion has produced too many examples of police abuses that do not advance legitimate law enforcement goals and that disproportionately impact poor people of color.[6] At its inception, *Terry* applied "reasonableness balancing" that theoretically protected both the police—by allowing room for safe investigation, and the citizenry—by permitting only the most limited of exchanges. But, the modern application of *Terry* has stretched the doctrine far beyond its humble beginnings.

The Court's decision in *Terry* has received considerable scholarly scrutiny regarding its disparate racial impacts as applied.[7] These critiques suggest a variety of fixes.[8] This article adds one more to the array of options. Specifically, I suggest that the fastest and most effective way to remedy at least some of the racial disparity currently seen in *Terry* stops is to prohibit stops for suspected possessory offenses. If adopted, my proposal would require that the pre-*Terry* rule be reinstated for such offenses—officers would need probable cause before they could forcibly stop an individual suspected of engaging in a mere possessory offense.

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4. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting) ("To give the police greater power than a magistrate is to take a long step down the totalitarian path.").

5. *Id.* at 39 ("Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime.").

6. *See infra* footnotes 129–161 and accompanying text.

7. *See, e.g.*, David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 43–44 (1994) (noting that *Terry* rule will "most heavily burden members of minority groups, especially African-Americans"); Lenese Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 182 (2003) (arguing that *Terry* allowed "race always to be considered"); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998) (criticizing *Terry* because it "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 972 (1999) (arguing that *Terry* would not be effective in preventing "rogue cops" from abusing expanded search and seizure powers unjustly to stop and frisk racial minorities).

8. *See infra* notes 182–185 and accompanying text.

This article proceeds in three parts. First, I examine the creation and subsequent expansion of the *Terry* doctrine. In the first section, I also consider the ways in which each expansion of *Terry* took it further from its foundation as a reasonable accommodation to the pressing needs of law enforcement. In the next section, I explore how the Court's post-*Terry* case-by-case reasonableness balancing has opened the door to stop-and-frisk abuses that are primarily endured by poor people of color. In the third and final section, I propose a remedy to the current state of affairs. As noted above, I recommend that we stop further extension of *Terry* by walking away from the Court's current articulation of the doctrine. As Justice Brennan once warned, the ongoing expansion of the *Terry* doctrine is "balancing into oblivion the protections the Fourth Amendment affords."[9] It is time to reevaluate the extant treatment of *Terry* and return the doctrine to its narrowly delineated origins.

I.
And Then There Were Three

Until the late 1960s, law enforcement officers could search or seize suspects only if they possessed probable cause or a duly authorized warrant. These pre-conditions were seen as meaningful impediments to arbitrary or discriminatory police action. In 1968, however, the Supreme Court held for the first time that in some instances police officers could interfere with the liberty and privacy interests of citizens in the absence of probable cause (or a warrant). Critics warned the decision was a first step in what was sure to be the continued erosion of constitutional rights. Recent studies demonstrate the *Terry* doctrine is indeed being used in statistically anomalous ways against poor people of color. However, in thinking about how best to address that reality, it is critical to consider the national events that undoubtedly influenced the creation of the doctrine, and to reflect on the goals the *Terry* doctrine was intended to advance at the time of its creation. Let us turn first to consider briefly what America looked like in the years leading up to *Terry*.

A. Shifting Racial Dynamics in America Prior to Terry

The year was 1968, and the country was in a period of unique social unrest. In the earlier part of the decade, the civil rights movement increasingly replaced its litigation strategy with a strategy of

9. Michigan v. Long, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting) (internal quotation marks omitted).

mass action protests.[10] The movement thus found its home, little by little, in the streets—not the courts.[11] At the same time, younger generations of civil rights leaders pushed for increasingly militant methods to ensure equality in race relations. Stokely Carmichael of the Student Nonviolent Coordinating Committee coined the term "Black Power" in 1966 in Mississippi.[12] The phrase came to represent black self-determination and a rejection of the dominant white power structure.

Concurrently, conservative politicians eroded popular support for the movement among non-blacks by casting civil rights protestors as the source of the nation's ostensibly growing criminal unrest.[13] An FBI report detailing a rise in national crime rates amplified this then-dominant Republican message.[14] Race riots during the middle and latter part of the decade set whites further on edge, as the imagery of armed black militants and cities in flames enhanced the perception that the nation's streets were dangerous and in need of greater policing.

In urban centers, demographic shifts and deindustrialization resulted in predominantly black inner city neighborhoods with high rates of unemployment.[15] The patrolling of these neighborhoods by largely white police forces exacerbated already fraying race relations.[16] In the middle and latter half of the decade, race riots broke out across the nation often in response to charges of police brutality or abuse. For example, New York saw two violent riots in 1964 that left five dead and nearly 500 injured. The first of these two, in Harlem, followed the shooting death of a fifteen-year-old black teenager by a white police

10. In the earlier part of the 20th Century, the NAACP executed a coordinated series of legal attacks on Jim Crow, including challenges to restraints on voting rights and segregated education in cases like *Smith v. Allwright*, 321 U.S. 649 (1944), and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). By the 1960s, this strategy was increasingly replaced with more public demonstrations like sit-ins, Freedom Rides, the Birmingham confrontation and the March on Washington. For a brief description of the Freedom Riders, the confrontations in Birmingham and the March on Washington, see JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, at 144–61, 179–95, 197–205 (1987).

11. BEN W. GILBERT ET AL., TEN BLOCKS FROM THE WHITE HOUSE: ANATOMY OF THE WASHINGTON RIOTS OF 1968, at 5 (1968).

12. *Id.* at 10.

13. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 41 (2010).

14. *See* JOHN EDGAR HOOVER, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORT—1964, at 3–5 (1965) (documenting overall crime rate increase in the early 1960s).

15. ALEXANDER, *supra* note 13, at 49–50.

16. *See, e.g.*, GILBERT ET AL., *supra* note 11, at 7 (noting that in Washington, D.C., in the mid- to late-1960s "four out of five policemen were white, in a city where two out of three citizens were black").

officer.[17] The second, in Rochester, followed the attempted arrest of a black teen for public drunkenness by white police officers during a neighborhood block party.[18] In the mid-1960s, actual and rumored police brutality sparked similar riots in Philadelphia, Watts, Newark and Detroit that left more than 100 people dead and thousands injured, and caused hundreds of millions of dollars in property damage.[19] In April of 1968, a firefight between the police and members of the Black Panther Party left one dead and five wounded in Oakland.[20]

The same month as the gun battle in Oakland, civil rights leader Martin Luther King, Jr., was shot and killed as he stood on the balcony of a motel in Memphis, Tennessee.[21] In the months leading up to his death, Dr. King, the then-standard bearer for non-violent civil protest, began to sound a more urgent message of change. The night before his death, he gave a speech declaring "if something isn't done, and in a hurry, to bring the colored peoples of the world out of their long years of poverty, their long years of hurt and neglect, *the whole world is doomed*."[22] Three days earlier, he warned a crowd of thousands at National Cathedral in Washington, D.C., "I don't like to predict violence, but if nothing is done between now and June to raise ghetto hope, I feel this summer will not only be as bad, *but worse than last year*."[23] Following King's assassination, the nation exploded in a spasm of racial violence that erupted from Washington to Watts. In

17. Stanley Lieberson & Arnold R. Silverman, *The Precipitants and Underlying Conditions of Race Riots*, 30 AM. SOC. REV. 887, 889 (1965).

18. 2 ENCYCLOPEDIA OF AMERICAN RACE RIOTS 566–67 (Walter C. Rucker, James N. Upton eds., 2006).

19. *See* Robert M. Fogelson, *Violence as Protest*, 29 ACAD. POL. SCI. 25, 38–41 (1968); Robyn Meredith, *5 Days in 1967 Still Shake Detroit*, N.Y. TIMES, July 23, 1997, http://www.nytimes.com/1997/07/23/us/5-days-in-1967-still-shake-detroit.html ?pagewanted=all&src=pm (discussing the 43 people killed during 1967 Detroit riots); LIST OF FATALITIES DURING CIVIL DISTURBANCE (1967), *available at* http://blog.nj .com/ledgernewark/FatalitiesList2.pdf (discussing the 27 fatalities of the 1967 Newark riot); TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-1968, at 293–99 (2006) (discussing the triggering events and aftermath of the 1965 Watts riots); *The Raging Silence*, PHILA. (Sept. 20, 2006), http://www.phillymag.com/ articles/philadelphia-magazine-the-raging-silence/ (describing the rumor of police abuse of a pregnant woman that precipitated the 1964 Philadelphia riot).

20. Cynthia D. Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 966 (1999).

21. Earl Caldwell, *Martin Luther King is Slain in Memphis*, N.Y. TIMES, Apr. 5, 1968, at A1.

22. Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968), *in* KEITH D. MILLER, MARTIN LUTHER KING'S BIBLICAL EPIC 175, 176 (2012) (emphasis added).

23. Bernadette Carey, *4000 Hear Dr. King at National Cathedral*, WASH. POST, Apr. 1, 1968, at A1 (emphasis added).

the end, more than 120 American cities were consumed in the rioting.[24]

For example, Washington, D.C., erupted in violence within hours of Dr. King's shooting. Studies suggested that far from being limited to a handful of rabble-rousers, participants—including some government employees—numbered in the tens of thousands (or approximately one out of every eight Washingtonians aged ten to fifty-nine).[25] During the riots, infantry divisions mounted machine guns on the steps of the Capitol and outfitted the White House with floodlights before surrounding it with troops.[26] In the end, the trail of damage left three days later in the wake of the violence was substantial: twelve people were dead; 1,190 people were injured; 1,000 fires had been set; 7,600 people had been arrested.[27] The total cost of the riot was more the $27 million.[28]

There was a sense though that the race riots that spread across the country in April of 1968 were not isolated responses to Dr. King's assassination but instead foreshadowed greater militancy on the part of black Americans in response to years of racial oppression. Two years before Dr. King's assassination, Stokely Carmichael, a leader of a new generation of civil rights activists, warned that his group—the Student Nonviolent Coordinating Committee ("SNCC")—would fight for local self-government in the capital "in the ways the boys in Vietnam are fighting for elections over there."[29] If they were not successful, he warned "we're going to burn down the city."[30] During a phone call made just prior to the riots in D.C., Carmichael was overheard saying "Well, if we must die, we better die fighting back."[31] He told a small crowd gathered in the SNCC offices, "Now that they've taken Dr. King off, it's time to end this nonviolence bullshit. We gotta get together."[32] The day after King's assassination, Carmichael elevated the rhetoric declaring, "The rebellions that have been occurring around these cities and this country are just light stuff to what is about to happen . . . [t]here no longer needs to be intellectual discussion. Black people know that they have to get guns."[33]

24. GILBERT ET AL., *supra* note 11, at 15–16.
25. *Id.* at 148, 152.
26. *Id.* at 89.
27. *Id.* at 119.
28. *Id.* at 32, 119.
29. *Id.* at 59–60.
30. *Id.*
31. *Id.* at 16.
32. *Id.*
33. *Id.* at 61.

Certainly, in 1968, racialized violence was not new to America. The enslavement of black Africans (and later black Americans) was enforced by a strict code of racial violence against blacks.[34] Following Emancipation, racialized violence took the form of targeted white vigilantism, particularly lynchings, that sought to enforce a social order of white supremacy.[35] In the late 1800s and early 1900s, America's pattern of racial violence broadened to encompass race riots. Here, again whites were the aggressors, blacks the targeted victims.[36]

By the mid-1900s, however, blacks began to respond defensively. The pattern thus shifted to battles that after being initiated by whites progressed into interracial battles in which both whites and blacks sought to inflict harm on the opposing racial group.[37] The riots that occurred during the "Red Summer" of 1919 are examples of such violence. In Chicago, Washington, D.C., and Knoxville, race riots initiated by large white mobs morphed into broader conflicts that left scores of blacks and dozens of whites dead.[38] Interestingly, until the

34. *See, e.g.*, JAMES CAMPBELL, CRIME AND PUNISHMENT IN AFRICAN AMERICAN HISTORY 27, 39, 47 (2013).

35. SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 3–56 (describing the role of lynching in the late nineteenth and early twentieth centuries); *see also* CAMPBELL, *supra* note 34, at 115, 117.

36. To name just a few, there were riots in Springfield, IL (1908), Wilmington NC (1898), East St. Louis (1917), and Tulsa, OK (1921). *See generally* Robert Senechal, *The Springfield Race Riot of 1908*, ILL. PERIODICALS ONLINE, http://www.lib.niu.edu/1996/iht329622.html (last visited November 1, 2013); DAVID CECELSKI & TIMOTHY TYSON, DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (1998); ELLIOT RUDWICK, RACE RIOT AT EAST ST. LOUIS: JULY 2, 1917 (1982); SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 (1992). In Memphis, Tennessee, tension between black Union soldiers and the white city police erupted in a two-day riot in 1866 that left forty-six blacks dead, five black women raped, and churches, schools and homes in black neighborhoods burned. *See* CAMPBELL, *supra* note 34, at 66. In 1871, rioting by Klansmen in Meridian, Mississippi, resulted in the murder of at least thirty blacks and the widespread burning of black churches and homes. *Id.* at 74.

37. *See* CAMPBELL, *supra* note 34, at 120.

38. Peter Perl, *Race Riots of 1919 Gave Glimpse of Future Struggles*, WASH. POST, Mar. 1, 1999, at A1. The 1919 riots in D.C., for example, began when a black suspect was released from police custody for the alleged attempted sexual assault of a white woman. *Id.* Angered by the police failure to solve the case, a mob of hundreds of white men armed themselves with "clubs, lead pipes and pieces of lumber" and began attacking unsuspecting blacks. *Id.* Meeting little to no resistance from the police, the mob beat blacks with impunity in front of the White House, and at a large commercial area on Seventh Street, N.W. *Id.* Throughout the city, blacks were pulled from street cars and beaten in the streets. *Id.* Though the mobs initially met with little resistance from their victims, eventually an armed, organized black opposition arose. *Id.* The absence of any meaningful law enforcement, and a false report published in the Washington Post on the second day of rioting likely informed the decision of black Washingtonians to protect themselves. *Id.* Specifically, the Washington Post falsely

late 1960s, the country's history of racial violence had no discernible impact on the Court's treatment of the protections provided by the Fourth Amendment. It was not until the mid-1960s that things began to change.

During the mid- to late-1960s period, racial violence began to take the form described earlier—riots in primarily black neighborhoods initiated by black residents. The target of most of the violence was property owned by non-blacks, and the primary object of mass anger rarely shifted to include people.[39] The riots that consumed the nation after King's death followed this pattern. But, later that same year another shift seemed to be in the making.

In the midsummer of 1968, a gun battle in Cleveland between the police and members of the Black Power Movement appeared to mark a new chapter in the nation's history of racial violence, namely a potential shift from the then-prevailing property-oriented mode of mass violence. The Cleveland riots stemmed from an initial instance of person-on-person racial violence—white police officers and black militants—and ended with more total white casualties than black.[40] Within the first hour of shooting alone, seven were left dead and fifteen had been wounded, of these at least fifteen were white.[41]

As word of the gun battle spread, the violence escalated into more familiar patterns with five days of rioting that caused more than

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reported that "all available [white] servicemen" had been called in for a "clean up" operation that evening on the corner of Pennsylvania Avenue and Seventh Street. *Id.* Sensing a dangerous and continuing escalation of the violence, black Washingtonians began arming themselves in anticipation of the onslaught. *Id.* Ten whites and five blacks were killed or mortally wounded that night. *Id.* However, the overall death totals were much higher. *Id.*

39. Examples of this property-based violence include the Harlem riots of 1935. *See generally* JANET ABU-LUGHOD, RACE, SPACE, AND RIOTS IN CHICAGO, NEW YORK, AND LOS ANGELES 141–42 (2007). The characterization of the violence was also noted in the 1967 Report of the National Advisory Commission on Civil Disorders. *See* V.M. Briggs, Jr., *Report of the National Advisory Commission on Civil Disorders: A Review Article*, 2 J. ECON. ISSUES 200, 201–02 (1968) ("There was, however, some evidence of deliberate destruction of white-owned business in ghettos.").

40. LOUIS MASOTTI & JEROME CORSI, SHOOT-OUT IN CLEVELAND: BLACK MILITANTS AND THE POLICE at xiii (1969). We may never know who starting the shooting that July evening in Cleveland. It is unclear from contemporaneous accounts of the gun battle whether it was police officers or armed members of a local black militant group who shot first. However, even if the white police were the aggressors, it can be said at minimum that the militants responded with an overwhelming show of force. *Id.* at 47. The all-out gun battle that ensued was described as "a combination of confusion and panic" with no one in control of either the police or the militants. *Id*. at 50.

41. *Id.* at 56–57.

$2 million in property damage.[42] There is nonetheless evidence that the sense of the Cleveland riot was that it marked the start of something different. Following the riot, a pamphlet was widely distributed in Cleveland's white suburbs that warned of a brewing plot by black Clevelanders to "get the white man where he lives."[43] A government report commissioned to study the Cleveland incident hinted at the level of race-based fear that existed—"Was the Glenville incident the result of a vast conspiracy to 'get Whitey' or the sudden, unpremeditated act of a few individuals? Who is to blame? Will it happen again—in Cleveland or elsewhere?"[44] The report concluded with a thinly-veiled suggestion that the "possibility of interracial civil war" may have been on the horizon.[45]

By November of 1968, Richard Nixon had been elected president on a campaign that echoed the "law and order" oratory of Barry Goldwater's 1964 campaign.[46] Indeed, the 1968 presidential campaign season was dominated by the tough on crime themes of the so-called "Southern Strategy," advanced by both Nixon and segregationist candidate George Wallace.[47] It was this America the Supreme Court confronted when, in June 1968, it issued its decision in *Terry v. Ohio*.

B. Reasonableness Balancing Joins Probable Cause

Despite centuries of failing to create linkage between the nation's history of racial bloodshed and the protections of the Fourth Amendment, the new era of racial violence of the late 1960s saw the Supreme Court deploying the Fourth Amendment in a way it had not previously. At the time of *Terry*, there was certainly recognition that police abuses were fueling some of the growing discontent among black

42. *Id.* at 81. As the violence spread beyond the initial location of the gunfight, blacks and whites both were injured by random and senseless acts of racially-motivated violence. Herb Reed, a 21-year-old white patrolman was pulled from his car within blocks of the shoot-out and severely beaten by a mob of black teenagers. *Id.* at 61. Two miles away, Clifford Miller, a 22-year-old black Marine who was absent without leave, was shot and killed by marauding whites after they approached him while he and his friends stood waiting for a bus. *Id.* at 62. White police officers were accused of some of the more outrageous acts of violence, including beating to the point of unconsciousness two reporters who were covering the riots for NBC. *Id.* at 77–79.

43. *Id.* at 89.

44. *Id.* at xiv.

45. *Id.* at 95.

46. MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S, at 1–2 (2005).

47. *See* DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963-1964, at 27–30 (1999).

Americans.[48] Appreciation for these abuses would seem to have militated against affording officers even greater discretion. Rather, greater police training and enhanced judicial oversight would presumably have been more appropriate remedies.[49] However, recognizing justification for some of the anger of black Americans was not at odds with a parallel belief that this anger, no matter the source, was becoming more dangerous and thus in greater need of policing. It was with this view of the rising (and increasingly violent) social unrest among black Americans that the *Terry* Court changed the landscape of constitutionally permissible police interactions with citizens.[50]

Prior to 1968, a citizen's interactions with the police were characterized in a binary fashion as either consensual or arrests. Consensual encounters were wholly unregulated by the Fourth Amendment.[51] In contrast, arrests (or seizures) required the justification of a warrant or probable cause.[52] *Terry*, however, expanded this dualistic approach and created a broad intermediate level of interaction that lay between the two poles.[53]

The facts in *Terry* were as follows: Detective McFadden was patrolling his usual beat in downtown Cleveland.[54] McFadden saw John Terry and another man, Richard Chilton, standing on the corner.[55] McFadden, who was white, could not say what drew his attention to Terry and Chilton, who were black, other than his observation that "they didn't look right to me."[56] McFadden watched as the two men made roughly two dozen trips past one particular store window.[57] McFadden suspected Chilton and Terry were casing the store in preparation for a robbery.[58] After a third man arrived, McFadden approached

48. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 363 (1998); Earl C. Dudley, Terry v. Ohio, *The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 893 (1998).

49. Indeed, one of the challenges to a liberal critique of *Terry* was the Court's declaration that its abandonment of the probable cause standard was more privacy protective than the alternative. *See* Maclin, *supra* note 7, at 1275–76.

50. *See* Dudley, *supra* note 48, at 893 ("[C]ollectively [Justices] were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets.").

51. Florida v. Royer, 460 U.S. 491, 497–98 (1983) (holding that law enforcement officers do not violate the Fourth Amendment in consensual encounters).

52. *Id.* at 498 (stating that all seizures had to be justified by probable cause prior to *Terry v. Ohio*).

53. Terry v. Ohio, 392 U.S. 1, 17–19 (1968) (holding that stop-and-frisk is subject to the Fourth Amendment).

54. *Id.* at 5.

55. *Id.*

56. *Id*.

57. *Id.* at 6.

58. *Id.*

the group and asked for their names.[59] Dissatisfied with the response, McFadden grabbed Terry.[60] Patting down Terry's outer clothing, McFadden felt a pistol.[61] Ultimately, McFadden retrieved a .38-caliber revolver from Terry and a second revolver from Chilton.[62] No weapon was found on the third man, Katz.[63] Following conviction on the charge of carrying a concealed weapon, Terry's case found its way to the Supreme Court.[64]

The Court made no pretense that McFadden's observations established probable cause. If the Court had maintained the then-existing constitutional framework, that shortfall would have rendered the seizure and search unconstitutional, thereby necessitating the suppression of the weapons found.[65] The Court instead considered whether it was time to depart from the probable cause paradigm. Defending probable cause as the constitutional minimum, advocates for Terry urged that "the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment."[66] In the defense view, legitimating police activity that was neither consensual nor based on probable cause ran counter to the commands of the Constitution.[67] On the other hand, advocates for the government contended that departure from the paradigm was appropriate because "in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."[68]

The Court embraced the government's view. Recognizing that Terry was "seized" once his freedom to walk away was restrained, the Court found the seizure was justified even though it was unsupported by probable cause.[69] Bemoaning the inability of the exclusionary rule to end the purposeful harassment of racial minorities by the police,[70] the Court incongruously lowered the constitutional standards. In the

59. *Id.* at 6–7.
60. *Id.* at 7.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 8.
65. *Id.* at 24.
66. *Id.* at 11.
67. *Id.* at 11–12.
68. *Id.* at 10.
69. *Id.* at 19, 30.
70. *Id.* at 14–15 ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.").

Court's view, if excluding evidence would not eradicate deliberate harassment by the police, the Court should tip the balance in favor of police safety and crime prevention.[71] The Court evaluated officer McFadden's conduct not by the warrant or probable cause standards, but instead by the Fourth Amendment's general demand for reasonableness, which required the balancing of interests.[72] In so holding, the Court rejected its long standing conclusion that for purposes of the Fourth Amendment an appropriate balance had already been struck by the warrant/probable cause model.[73] This was a significant shift.

Reasonableness balancing in the absence of a warrant/probable cause measures the interests in effective crime prevention and officer/bystander safety against the individual's interest in personal security. In *Terry*, the Court found the balancing of these interests justified creation of "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[74] Known as the *Terry* stop and frisk, this authority allowed officers to act on suspicion amounting to less than probable cause. Commensurate with their lesser suspicion, the police are limited in the scope of the authorized intrusion.[75]

Justice Douglas was the lone dissenter in the case. He lambasted the decision as an unfortunate deconstruction of the Court's then-existing Fourth Amendment jurisprudence. Justice Douglas's critique rested in large part on his view that "[t]o give power to the police to seize a person on some grounds different from or less than 'probable cause' would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person."[76] Justice Douglas did not dispute that law enforcement needs were changing, or that the police desired additional flexibility.[77] But he saw it as the Court's job to resist the "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees

71. *Id.* at 15 ("[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.").

72. *Id.* at 19–20.

73. The Court specifically rejected Terry's argument that "the law of arrest has already worked out the balance between the particular interests involved here – the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual." *Id.* at 26.

74. *Id.* at 27.

75. *Id.*

76. *Id.* at 36 n.3 (Douglas, J., dissenting).

77. *Id.*

and give the police the upper hand."[78] To allow a seizure to occur on less than probable cause was, thus, in Justice Douglas's view, a feat to be accomplished by constitutional amendment, not judicial fiat.[79]

One criticism of *Terry* is that it lowered the standards by permitting searches and seizures on mere reasonable suspicion—*i.e.*, something less than probable cause.[80] However, the less frequently critiqued, but perhaps more deleterious aspect of the decision was that it restored the need for reasonableness balancing in a significant percentage of individual cases.[81] Historically, if probable cause is required there is no need for reasonableness balancing because, in the absence of extraordinary circumstances, the Fourth Amendment has already struck the appropriate balance between police objectives and personal privacy.[82] The presumptive constitutional balance is the demand for probable cause.[83] Consequently, though imperfect, "[t]he 'long-prevailing standards' of probable cause embodied the best compromise that has been found for accommodating [the] often opposing interests in safeguard[ing] citizens from rash and unreasonable interferences with privacy and in seek[ing] to give fair leeway for enforcing the law in the community's protection."[84]

Operationally, this means that, as a general matter, cases falling within the probable cause rubric need not employ a case-specific weighing of government interests against a defendant's rights. Indeed, case-by-case analysis has been characterized as inimical to responsible Fourth Amendment doctrine.[85] As the Court found in *Place*, "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances

78. *Id.* at 39.

79. *Id.* at 38 ("To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.").

80. *Id.* at 39.

81. *See* Michigan v. Long, 463 U.S. 1032, 1063 (1983) (Brennan, J., dissenting).

82. *See* Whren v. United States, 517 U.S. 806, 818 (1996).

83. United States v. Place, 462 U.S. 696, 718 (1983) (Brennan, J., concurring) ("[B]alancing inquiries should not be conducted except in the most limited circumstances."); Michigan v. Summers, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting) (noting that there are "only two types of seizures that need not be based on probable cause").

84. Dunaway v. New York, 442 U.S. 200, 208 (1979) (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)) (internal quotation marks omitted).

85. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (recognizing that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review").

presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the often competitive enterprise of ferreting out crime."[86]

Four years after *Terry*, the Court decided a second stop-and-frisk case *Adams v. Williams*,[87] which substantially expanded *Terry*'s reach. The need to engage reasonableness balancing was a substantial reason for the erosion. In *Williams*, the Court found that stop-and-frisk authority existed even if a police officer's reasonable suspicion was based not upon his first-hand observations but upon a confidential informant's in-person report that a man sitting in a car across the street from the officer had "narcotics on his person and . . . a gun in his waistband."[88] The *Williams* case not only dramatically increased the categories of cases to which *Terry* applied but also reduced the quantum of evidence needed to surmount the evidentiary hurdle of reasonable suspicion.

The *Williams* dissenters were vocal in their opposition. By 1972, the lone dissent in *Terry* had grown to a chorus of three—Justices Brennan, Douglas and Marshall. In separate opinions, the three dissenting justices condemned the *Williams* majority's easy expansion of the categories of cases to which *Terry* applied. As Justice Brennan noted, unlike the suspected crime in *Terry*, the suspected offenses in *Williams* were possessory only.[89] In his view, the rule in *Terry* was a response to cases of serious and imminent danger that did not apply to the less pressing concerns of possessory offenses. Expanding stop-and-frisk authority to included suspected possessory crimes, he warned, created a substantial "danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."[90] The dissenters also each attacked the exiguous nature of the evidence the majority found adequate to establish suspicion. Particularly when compared with the rather substantial, first-hand observations made by officer McFadden in *Terry*, the dissenters found the

86. *Place*, 462 U.S. at 718–19 (internal quotation marks omitted) (citing Dunaway v. New York, 442 U.S. 200, 213 (1979)); *see also* Ker v. California, 374 U.S. 23, 33 (1963) (noting that "there is no formula for the determination of reasonableness" and "[e]ach case is to be decided on its own facts and circumstances").

87. 407 U.S. 143 (1972).

88. *Id.* at 155.

89. *Id.* at 151–52 (Brennan, J., dissenting) (quoting Williams v. Adams, 436 F.2d 30, 38–39 (1970) (Friendly, C.J., dissenting) ("To begin, I have the greatest hesitancy in extending [*Terry*] to crimes like the possession of narcotics . . . . Connecticut . . . gives its police officers no special authority to stop for the purpose of determining whether [a] citizen has [a gun].")).

90. *Id*.

evidence in *Williams* severely lacking.[91] In an eloquent and sweeping denunciation, Justice Marshall summed up his concerns with the majority's holding as follows:

> It seems that the delicate balance that *Terry* struck was simply too delicate, too susceptible to the "hydraulic pressures" of the day. As a result of today's decision, the balance struck in *Terry* is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.[92]

Notwithstanding these cautions, the Court over the next several years would do even more to broaden the authority of police officers to stop and frisk.

Five years after *Williams*, in a per curiam opinion, the Court again expanded the *Terry* doctrine, this time empowering police officers to order any driver out of her car during a routine traffic stop, even in the absence of suspicion particular to the driver.[93] In *Pennsylvania v. Mimms*, two Philadelphia police officers saw Harry Mimms driving a car with expired tags.[94] The officers stopped Mimms and ordered him out of his car.[95] As one of the officers explained at the suppression hearing, they had no reason to suspect Mimms of any wrongdoing.[96] Rather, it was simply their practice to order all drivers out of the car during traffic stops.[97] When Mimms got out of his car, one of the officers noticed a bulge in his jacket that the officer thought

91. *Id.* at 157–59 (Marshall, J., dissenting) ("It was central to our decision in *Terry* that the police officer acted on the basis of his own personal observations . . . . [T]he officer may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of liberty."); *id.* at 151–53 (Brennan, J., dissenting) ("The informer was unnamed, he was not shown to have been reliable with respect to guns or narcotics, and he gave no information which demonstrated personal knowledge . . . .").

92. *Id.* at 162 (Marshall, J., dissenting).

93. Though the Court had suggested equivalent categorization previously, in 1984, the Court expressly confirmed that "most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." Berkemer v. McCarty, 468 U.S. 420, 439 n.29 (1984).

94. 434 U.S. 106, 107 (1977)

95. *Id.*

96. *See id.* at 109–10.

97. *Id.*

was a gun.[98] Accordingly, the officer frisked Mimms and found a loaded .38-caliber handgun in his waistband.[99]

Taking up the case, the Court found it perfectly reasonable for the officer to order Mimms out of the car. The Court engaged the reasonableness balancing that it relied upon in *Terry*. On one side of this balance, the Court placed officer safety—an interest which the Court described as "both legitimate and weighty."[100] On the other side it placed what it described as the "mere inconvenience" of the officer's order to step out of the car.[101] There should be little surprise that the *Mimms* Court found in favor of officer safety.[102] The dissenters were once again alarmed by the Court's casual expansion of *Terry*. In particular, the dissenting justices were concerned with the majority's willingness to authorize an additional warrantless intrusion by law enforcement—the order to step out of the car—even though that intrusion had no specific justification.[103] As Justice Stevens wrote, "[T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits."[104] The dissenting justices also cautioned that the newly sanctioned discretion would no doubt be exercised in discriminatory ways—"Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely."[105]

In 1983, the Court determined in *Michigan v. Long* that the authority to "frisk" granted by *Terry* extended beyond the search of a person to the search of an area. Specifically, the Court found that the principles of *Terry* justified a cursory search of the interior of a car if a suspect was stopped while driving.[106] In *Long*, the *Mimms* dissenters once again joined forces to decry the Court's continued expansion of

98. *Id.* at 107.

99. *Id.*

100. *Id.* at 109–11.

101. *Id.* at 111.

102. In 1997, the Court confirmed that the rule of *Mimms* applied with equal force to passengers. Thus, upon a lawful traffic stop both drivers (*Mimms*) and passengers (*Wilson*) may be ordered from the car for reasons of officer safety. Maryland v. Wilson, 519 U.S. 408, 414 (1997).

103. See *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("Until today the law applicable to seizure of a person has required individualized inquiry into the reason . . . The Court holds today that 'third-class' seizures may be imposed without reason.").

104. *Id.* at 122.

105. *Id.*

106. Michigan v. Long, 463 U.S. 1032, 1034–35 (1983).

Terry. In the view of two dissenters, *Terry* frisks were clearly limited to the body of the suspect only, and did not justify a broader search.[107] Rather than logically applying *Terry*'s "reasonableness balancing" to the facts before it, these dissenters complained that "the Court [was] simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause."[108] Justice Brennan characterized as "frightening" the implications of the continued expansion of *Terry*.[109]

However, by the end of the first decade of the aughts, vocal objection to *Terry* had dissipated in the high court. In 2009, the Court unanimously reaffirmed its commitment to *Terry*'s stop and frisk framework. In *Arizona v. Johnson*, officers who were members of an Arizona gang taskforce lawfully stopped a car with three occupants because it had a suspended registration.[110] One of the officers observed that the passenger in the back seat, Johnson, was dressed in a manner she considered consistent with gang membership.[111] Based on this observation and a desire to question Johnson away from the other passenger, the officer asked Johnson to step out of the car.[112] Suspecting that Johnson may have a weapon, the officer patted him down and found a gun in his waistband.[113] Johnson was charged with weapons possession.[114] He challenged the legality of the pat down as inconsistent with *Terry*.[115] But a unanimous Court affirmed the right of the police to frisk passengers during a lawful traffic stop if they have a reasonable belief that the passengers are armed.[116]

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107. *See id.* at 1056 (Brennan, J., dissenting) ("It is clear that *Terry* authorized only limited searches of the person for weapons . . . Nothing in *Terry* authorized police officers to search a suspect's car based on reasonable suspicion.").

108. *Id.* at 1054; *see also id.* at 1065 ("The Court takes a long step today toward 'balancing' into oblivion the protections the Fourth Amendment affords.").

109. *Id.* at 1062.

110. 555 U.S. 323, 327 (2009).

111. *Id.* at 328.

112. *Id.*

113. *Id.*

114. *Id.* at 329.

115. *Id.*

116. Approximately a decade before its decision in *Johnson*, the Court stated in dicta that an officer conducting a routine traffic stop had the authority to pat down both drivers and passengers upon suspicion that they were armed and dangerous. The *Johnson* Court confirmed this as law. *Id.* at 332 (quoting Knowles v. Iowa, 525 U.S. 113, 117–18 (1998)) ("Officers who conduct 'routine traffic stop[s]' may 'perform a patdown of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.'").

It was thus over the course of decades that the flexibility of *Terry*'s reasonable suspicion standard was used to expand police power.[117]Although the Court has never deviated explicitly from its declaration in *Terry* that "inarticulate hunches" are insufficient to satisfy the reasonable suspicion standard,[118] it has not been particularly demanding in reviewing official observations that are said to satisfy the standard. Indeed, the Court has explained that reasonable suspicion is a "fluid concept[ ]" that must be applied in each case.[119] Such context-based assessments of the standard have led the Court to endorse even the observation of innocent behavior as sufficient to establish reasonable suspicion. In *Illinois v. Wardlow*, for example, the Court found that William Wardlow's flight upon seeing police in a "high-crime" neighborhood was sufficient to satisfy the reasonable suspicion standard.[120]

The amount of discretion afforded police officers would be concerning from a libertarian perspective even if exercised evenhandedly across the American populace. But, as discussed in greater detail in the next section, the extraordinary discretion afforded by *Terry*'s reasonable suspicion standard is further complicated by matters of race and poverty.

II.
As Reasonableness Balancing Erodes, Abuses Increase

A sociological study of the mid-1960s found that the average police officer is more suspicious than the average American.[121] "Policemen are indeed specifically *trained* to be suspicious, to perceive events or changes in the physical surroundings that indicate the occurrence or probability of disorder."[122] In addition, studies have found that an officer's decision to seize an individual is governed in large part by the officer's perception of the subject as disrespectful toward the police.[123] As with the Court's decision in *Terry*, in the real world

117. *See* Maclin, *supra* note 7, at 1277–78 ("[T]he Court will not second-guess police action that advances law enforcement interest . . . Thus, intrusive actions that can be termed 'good police work' . . . will be permitted even though the actions do not fit within . . . permissible police procedures.").

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

119. Ornelas v. United States, 517 U.S. 690, 696 (1996).

120. 528 U.S. 119, 121, 125 (2000).

121. Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 46–47 (1994).

122. *Id.* at 48.

123. Donald Black, *The Social Organization of Arrest*, 23 Stan. L. Rev. 1087, 1097–101 (1971); William Westley, *Violence and the Police*, 59 Am. J. Sociol. 34,

of American law enforcement, these professional predilections are not executed on a blank slate. Rather, police officers operate within a cultural atmosphere where stereotypes of young black men as dangerous, violent and criminal are prevalent.[124]

In addition to overt racial stereotypes, implicit biases against black Americans have also been documented by decades of scientific research.[125] As one study found, all things being equal, observers perceive chaos and turmoil in black neighborhoods more readily than they do in comparable white ones.[126] The combination creates particularly pernicious challenges. The presence of implicit bias means, as Song Richardson has noted, that "an officer might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed."[127] Andrew Taslitz, too, has documented the fact that police officers see suspects in "categories of cases rather than [as] unique individuals or situations."[128] When coupled with the considerable discretion afforded by the reasonable suspicion standard, the heightened suspicions of police officers create ample opportunity for trouble.

In the years since *Terry* was decided, there have been an increasing number of stories suggesting that the concerns expressed in the *Terry* dissent were valid. In 2012, the New York City Police Department stopped more than 700,000 New Yorkers.[129] The overwhelming majority of these—nearly eighty-five percent—were young black and Latino men.[130] Records from at least one earlier year reflect that these stops were not a particularly efficient or even accurate method of iden-

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38 tbl.1 (1953). The historical studies are entirely consonant with more modern narratives describing the experience of police force being "often used . . . in response to being asked the reason for a stop or an arrest." CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 5 (2012), *available at* http://stopandfrisk.org/the-human-impact-report.pdf.

124. *See, e.g.*, Jennifer L. Eberhardt, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.").

125. Sophie Trawalter, *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).

126. Robert Sampson & Stephen Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCHOL. Q. 319, 336 (2004).

127. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011).

128. Andrew Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 9, 48 (2007).

129. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 123, at 3.

130. *Id*.

tifying wrongdoers. For example, of the stops conducted in 2009, drugs or other contraband were found in just 1.6% of the more than one-half million stops made that year.[131] Guns were found even less frequently—in just 1.1% of the encounters.[132] Of the 4.4 million people stopped between 2004 and 2012, almost ninety percent of these stops resulted in the targeted individual being released at the scene after no evidence of wrongdoing was found.[133]

David Floyd was one such New Yorker caught up in the storm. In 2007, while walking down his block on Beach Avenue in the Bronx, Floyd was approached by three NYPD officers who surrounded him and asked where he was going.[134] Floyd, who left New York in 2010 to attend medical school, explained that he was walking home.[135] Upon request, Floyd also gave the officers his out-of-state driver's license.[136] He was told it was illegal not to have a New York State identification.[137] One of the officers patted down Floyd's entire body, including pushing Floyd's cellphone out of his pocket with a finger.[138] Finding nothing, the officers returned to their van.[139]

Lalit Clarkson presented a similar story. Clarkson was a teaching assistant at a charter school in the Bronx.[140] On his lunch break, Clarkson walked to a nearby bodega to buy food.[141] As he was leaving the store, Clarkson was approached by two plainclothes officers.[142] The two stood in front of Clarkson, between him and the street, and asked where he was coming from.[143] Clarkson explained that he was on his lunch break, and pointed to the school across the street.[144] The officers told Clarkson they thought he was coming from a building that was a known drug market.[145] Clarkson explained that he was coming from the Subway restaurant that was just past the building the

131. Bob Herbert, Op-Ed., *Jim Crow Policing*, N.Y. TIMES, Feb. 2, 2010, at A27.
132. *Id.* For a defense of aggressively targeted policing policies, see generally Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641 (2005).
133. Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *13 (S.D.N.Y. August 12, 2013).
134. *Id.* at *64.
135. *See id*.
136. *Id.*
137. *Id.*
138. *Id.*
139. *See id*.
140. *Id.* at *61.
141. *Id*.
142. *Id*.
143. *Id.* at *62.
144. *See id*.
145. *Id*.

officers referred to.[146] One of the officers asked Clarkson twice if he "had any contraband on him."[147] Clarkson answered that he did not have contraband and that he was not consenting to a search.[148] The officers left.[149]

In May of 2011, Charles Bradley, a 50-year-old black security guard, traveled to his fiancée's apartment building in the Bronx for a visit.[150] His fiancée, who is deaf in one ear, did not respond when he rang the bell.[151] Consequently, Bradley waited for her downstairs. An officer approached Bradley.[152] In later court records, the officer explained that he approached because he thought Bradley was engaged in suspicious behavior.[153] After frisking Bradley, the officer went through his pockets but found nothing other than a cell phone, keys and a wallet.[154] Nonetheless, Bradley was arrested for trespassing.[155] At the precinct, he was strip searched, and instructed to appear several months later in criminal court.[156]

It is not just men of color who are disproportionately targets of abusive stop-and-frisk practices. In the summer of 2011, a young woman of color was stopped on the stairs of her home at a New York public housing project with her sisters and cousins.[157] She described a troubling confrontation between police officers and the group of children, ages 8 to 16:

> [They] told us to stand up take off our shoes, socks, hoodies, and told everybody to take their top shirt off and leave only their undershirt or one shirt on. They told us to unbutton our pants and roll the waistband down. Three of us were in pajamas. They made us stand and wait with backs turned until a female officer came. She turned us around by our necks and frisked us. They were looking for weed. They found nothing, but took us to the precinct anyway, where our mother had to come get us.[158]

146. *Id*.
147. *Id.*
148. *Id*.
149. *Id*.
150. Jeffrey Toobin, *Right and Wrong: A Judge Takes on Stop-and-Frisk*, NEW YORKER, May 27, 2013, at 36, 41.
151. *Id.*
152. *Id.*
153. *See id.*
154. *See id.*
155. *Id.*
156. *See id.*
157. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 123, at 13.
158. *Id.*

But, New York is far from the only jurisdiction where such abuses have been documented. For example, in Avon, Connecticut, a report drafted by the Town Attorney revealed that the leadership of the local police department, acting on a belief that gang members might be traveling through the jurisdiction, directed his officers to find reasons for stopping black and Latino drivers and pedestrians alike.[159] In Philadelphia, officers of the infamous 39th District described themselves as "society's realists, doing the dirty work of protecting polite (read white) society from the spreading menace of the criminal black underclass."[160] As one resident of the 39th District explained, "[f]orget about your rights. This is the ghetto, man. They do whatever they want."[161]

Moving from the Northeast to southern Florida, earlier this year, Tremaine McMillian, a 14-year-old black teenager, was hanging out at the beach with friends and family for Memorial Day.[162] He was playing at the shoreline with a friend. Apparently mistaking the two teens' roughhousing for something more serious, a Miami-Dade police officer approached the two and ordered them to stop fighting.[163] Though the officer realized almost immediately that the boys were not really fighting, he nevertheless ordered McMillian to point to his mother. McMillian says he did; the officer claims he did not.[164] There is no dispute that McMillian then walked away, carrying his new puppy, Polo, in his arms.[165] The officer jumped onto his ATV and chased the teen down.[166] Claiming he was suspicious of McMillian's "dehumanizing stares and clenched fists," the officer tackled McMillian to the ground, using a chokehold so powerful the teen wet his pants because

159. *See* Kathleen Gorman, *Avon Police Target Black, Hispanic Drivers, Report Says*, HARTFORD COURANT, Apr. 13, 1994, at A1, *available at* http://articles.courant.com/1994-04-13/news/9404131141_1_police-officer-avon-police-department-black-officer.

160. Mark Bowden & Mark Fazlollah, *With '91 Case, Scandal Unfolded The Student Told of Torment at the Hands of Two 39th District Police Officers. Investigators' Findings Were the Tip of a Corruption Iceberg*, PHILA. INQUIRER, Sept. 10, 1995, at A1, *available at* http://articles.philly.com/1995-09-10/news/25718837_1_police-corruption-police-officers-dozens-of-criminal-convictions.

161. *Id.*

162. Tremaine McMillian*, 14-Year-Old with Puppy, Choked by Miami-Dade Police Over 'Dehumanizing Stares*,' HUFFINGTON POST (May 30, 2013, 9:30 PM), www.huffingtonpost.com/2013/05/30/tremain-mcmillian-14-year-old-miami-dade-police_n_3362340.html.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

he could not breathe.[167] According to the officer, "[a]ll of that body language alone is already letting the officers know that this is a person that now is obviously getting agitated and can become violent."[168]

Clearly the officer did not have probable cause to believe McMillian was engaged in any criminal activity. Indeed, it is difficult to surmise what crime the officer suspected was afoot when he forced McMillian to the ground. Nonetheless, McMillian has been charged with a felony—resisting arrest with violence, and a misdemeanor—disorderly conduct. Significantly, both charges are based on McMillian's alleged conduct *after* he was thrown to the ground.[169]

The above are just a handful of descriptive examples documenting the abuse of people of color that has been permitted by a liberal reading of *Terry*. With the exception perhaps of Tremaine McMillian's case, the motivation of each stopping officer described above, to the extent such motivation is discernible, appears to have been a view that the people targeted *may* have been in possession of something illegal. The officers who searched Clarkson told him they believed he was coming from a known area of drug sales. And the teenaged girl who was searched reported that the officers were looking for marijuana. Though less explicit about what they believed they might find, the officers who stopped Bradley and Floyd, clearly thought the men were carrying something, as both men were searched within seconds of being stopped. The officers who stopped black and brown motorists and pedestrians in Avon were looking for gang members presumably in possession of weapons or drugs. And, the rampant improper conduct in Philadelphia's 39th District came to light after officers kidnapped and assaulted a Temple student who they thought was a drug dealer.[170]

In thinking about whether there is a need to modify our application of *Terry*, the magnitude of the problem is relevant to the need for constitutional attention. As the Court noted in the context of considering whether warrantless arrests are permitted for misdemeanor offenses, it is relevant to consider "how bad the problem is out there."[171] The "dearth of horribles demanding redress" was a substantial factor in the Court's determination that a new constitutional rule was not

167. *Id.*

168. *Id.*

169. *See* Rebecca McCray, *14-Year-Old Arrested for Playing with Puppy While Black. Seriously.*, ACLU BLOG OF RIGHTS (June 5, 2013, 3:09 PM), https://www.aclu.org/blog/racial-justice/14-year-old-arrested-playing-puppy-while-black-seriously.

170. Bowden & Fazlollah, *supra* note 160.

171. Atwater v. City of Lago Vista, 532 U.S. 318, 351–52 (2001).

needed.[172] Quite the contrary is true in the instant case. As the statistics from New York alone reflect, hundreds of thousands of innocent citizens are being stopped annually as the department pursues robust implementation of the authority granted under *Terry*.[173]

III.
A Proposal: Removing Possessory Offenses from *Terry*'s Reach

One method for attacking stops and frisks is to attack the reasonableness of the seizing officer's suspicion by directly challenging whether observed behavior was truly suggestive of criminality. Such an approach works within the framework of *Terry*, and does not challenge the general soundness of the reasonable suspicion doctrine. Indeed, working within the framework of *Terry* has been a central theme of the current lawsuit against the New York City Police Department.[174] However, for a variety of reasons such intra-doctrine attacks while useful in some cases, cannot be the only implement in the toolbox.

The primary mechanism for attacking violations of the Fourth Amendment is the exclusionary rule.[175] However, the vast majority of improper stops never reach the courtroom. In the New York stop and frisk cases, for example, just over ten percent of the stops and frisks resulted in actual arrests.[176] Thus, the overwhelming majority of those stopped would be unable to seek protection in the exclusionary rule because, quite simply, there was no case against them and no evidence to exclude from it.

For those cases that do make it into a courtroom, another reason the remedy of suppression is inadequate when grounded in existing doctrine is that, under the current regime, very few suppression motions are successful. The government's burden under *Terry* is not terri-

172. *Id.* at 353.

173. As noted in Section III, there is also support for the contention that a certain percentage of stops are conducted without any basis for suspicion, and, thus, are not functions of *Terry* but rather are clear violations of the guidelines provided by that case. *See infra* Part III. To the extent that is true, my proposal limiting *Terry*'s application would certainly have a more modest impact. I reserve for future exploration the extent to which documented abuses are simply wholesale violations of the existing rules.

174. Floyd v. City of New York, 813 F. Supp. 2d 457, 466 (S.D.N.Y. 2011).

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

176. *See, e.g.*, Joseph Goldstein, *Trial to Start in Class Suit on Stop and Frisk Tactic*, N.Y. Times, March 17, 2013, at A5 ("Of the five million stops in New York that the police have recorded since 2004, some 88% of those encounters ended with the person's walking away without a summons or an arrest.").

bly onerous. The reasonable suspicion standard has been described as requiring "simply . . . 'a particularized and objective basis' for suspecting the person stopped of criminal activity."[177] The Court has also said the standard requires only "a minimal level of objective justification for making the stop."[178] The expansion of stop-and-frisk to circumstances well beyond the suspected armed robbery at issue in *Terry* means this lower level of justification now applies to many more involuntary police-citizens encounters. A variety of studies have concluded that suppression motions in various contexts are successful less than one percent of the time.[179]

Finally, existing doctrine, which assumes a racially unbiased law enforcement officer, fails to account for the effects of implicit bias on police decision-making. Where officers may not be aware of the impact of race on their decisions, a review process that seeks to identify only transparently arbitrary conduct will not adequately protect the constitutional rights of racial minorities.[180]

Historian Michael Klarman has suggested that the Supreme Court's criminal procedure cases may actually have had a negative impact on black Americans embroiled in the criminal justice system because the decisions offered the veneer of legitimacy to a racially corrupted process.[181] In consonance with this sentiment, legal commentators, too, have moved beyond existing doctrine to suggest alternatives that might better address the insidious effects of race on police decision-making in the context of the Fourth Amendment. To name just a few, Akhil Amar suggested we inform our understanding of Fourth Amendment reasonableness with principles of equal protection.[182] Tracey Maclin, among other proposals, has proposed a return to the probable cause standard.[183] Bernard Harcourt and Tracey

177. Ornelas v. United States, 517 U.S. 690, 696 (1996).

178. Illinois v. Wardlow, 528 U.S. 119, 119 (2000).

179. *See, e.g.,* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 AM. B. FOUND. RES. J. 611, 617 (1983); Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. Rev. 949, 950 n.8 (2010) (noting that available data regarding the success rate of suppression motions has not changed much in the last forty years); *see also* Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585 (1983).

180. Richardson, *supra* note 127, at 2072–73.

181. M.J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 282 (2004).

182. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994).

183. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1332–33 (1990).

Meares have recommended moving away from a Fourth Amendment model of individualized suspicion to a model of randomization.[184] And Song Richardson has explored why the science of implicit social cognition must inform our understanding of police conduct.[185] Significantly, many who advocate explicit consideration of race in the context of *Terry* stops seem to presuppose that such consideration is currently proscribed by the Court's 1996 decision in *Whren v. United States*.[186] The hypothesis that *Whren* does not preclude consideration of race in *Terry* stops of pedestrians is one I will explore in a future article.[187]

Certainly, there is no one judicial response that will entirely ameliorate the disparate impact of race on the criminal justice system.[188] However, while modification to doctrine may not eliminate the need for concern, it may help to mitigate abuse. I, therefore, propose an additional remedy to add to the list of those already under considera-

184. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 851–52 (2010).

185. Richardson, *supra* note 127, at 2073 ("When the effects of implicit social cognitions on behavior are considered, it is apparent that allowing officers to act on their interpretations of ambiguous behavior and to rely on memories of their experiences to justify encroachments on privacy is unreasonable."); *see also* Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 3 (2011).

186. Though demonstrating compellingly that pre-*Whren* cases signify the relevance of race to Fourth Amendment concerns, Professor Maclin nonetheless submits on the ultimate issue—whether *Whren* precludes the consideration of race in all Fourth Amendment contexts. *See* Maclin, *supra* note 48, at 362–63, 368; *see also* Janet Koven Levit, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L.J. 145, 186 (1996).

187. The Court has often said that an assessment of Fourth Amendment reasonableness is an objective one. Ohio v. Robinette, 519 U.S. 33, 39 (1996). Consequently, the Court's decision in *Whren* is arguably a straightforward application of this rule. In *Whren*, the Court determined that where probable cause existed to arrest, the legitimacy of that arrest is not undermined by the arresting officer's ulterior motives. Whren v. United State, 517 U.S. 806, 812–13 (1996). In reaching this conclusion, the Court rejected any notion that the reasonableness of the *Whren* officer's conduct should be subject to reasonableness balancing. As the Court explained, "[w]ith rare exceptions not applicable here . . . the result of that balancing is not in doubt where the search or seizure is based on probable cause." *Id.* at 817. As applied to *Terry* stops of pedestrians, this is precisely the point, the reasonableness balancing eschewed in *Whren* to evaluate probable cause arrests is the very analysis embraced to assess the constitutionality of *Terry* stops. Indeed, the *Whren* Court confirmed that "detailed 'balancing' analysis" is necessary to "seizures without probable cause." *Id.* at 818. Indeed, at least some justices on the Court have stated explicitly that "[n]owhere did *Terry* suggest that [race based] concerns cannot inform a court's assessment of whether reasonable suspicion sufficient to justify a particular stop existed." Illinois v. Wardlow, 528 U.S. 119, 135 n.11 (2000) (Stevens, J., concurring in part and dissenting in part). A full exploration of this issue is deferred to future analysis.

188. *See generally* Richardson, *supra* note 127, at 2082–83.

tion. Specifically, I recommend that the expansive understanding of police authority to stop suspects on nothing more than reasonable suspicion be limited to cases in which an officer reasonably believes the suspect is engaged in something more than a mere possessory offense. For purposes of this proposal, I intend "possessory offense" to include cases where the suspect is believed to have weapons or any other contraband on her person or in her possession.

A part of the justification for reducing the probable cause standard in *Terry* was the perceived urgency of needing to stop an imminent armed robbery. However, no similar justification for reducing the standard attaches in run-of-the-mill possession cases. For such cases, the traditional limitations of the Fourth Amendment—including the warrant requirement and its well-defined exceptions[189]—would apply. This proposed narrowing of *Terry*'s application will allow police to operate under the more lenient reasonable suspicion standard only in cases of the greatest need from a public safety perspective.

It is important at this juncture to make clear what is not being said. I do not, in this article, purport to limit the authority of a police officer to frisk a suspect, once the officer has lawfully detained the individual to investigate illegal conduct other than possession of contraband.[190] As the Court noted in *Terry*, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying

189. The Court has long recognized a number of exceptions to the general warrant requirement. For example, searches incident to a lawful arrest, *Maryland v. King*, 133 S. Ct. 1958, 1974 (2013), immediately identifiable contraband in plain view, *Kentucky v. King*, 131 S. Ct. 1849, 1852 (2011), consent searches, *id.*, and searches conducted under exigent circumstances, *id.* at 1856, have, among other exceptions, all been exempted from the basic Fourth Amendment mandate that warrantless searches are per se unreasonable.

190. As stated, I do not at this time challenge the *Terry* Court's creation of a conditional right to frisk. Rather, my proposal is confined to exploring limits upon the authority to stop. However, though beyond the scope of this paper, it is worth mention that the legitimacy of the right to frisk has been questioned. In his concurring opinion in *Minnesota v. Dickerson*, Justice Scalia suggested that the "frisk" created in *Terry* may stand on shaky or non-existent constitutional footing. "There is good evidence, I think, that the 'stop' portion of the *Terry* 'stop-and-frisk' holding accords with the common law. . . . I am unaware, however, of any precedent for a physical search of the person thus temporarily detained for questioning." Minnesota v. Dickerson, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring). Justice Scalia went on to note, "I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous to such indignity." *Id.* at 381 (emphasis added).

a weapon."[191] Assuming the logic of this assertion, I do not take this occasion to challenge the authority of the police to conduct a protective frisk when justified following a stop for a non-possessory offense. Rather, the limitation proposed here is directed at the initial stop, and constrains the authority of police officers to forcibly engage suspects at close range for mere possessory crimes.

Before turning to examine the legal landscape in which the instant proposition would be sited, it is worth mention that retaining a police officer's authority to frisk for weapons in suspected non-possessory cases is wholly consistent with a simultaneous determination that a forcible stop on an identical suspicion of weapons possession would be unlawful. Put another way, making concessions for the potential danger entailed when a police officer questions a suspect at close range does not require a parallel commitment to forcible stops of anyone an officer reasonably suspects is armed. As Justice Harlan wrote in concurrence in *Terry*, "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence."[192] Thus, while the limitation proposed herein will have the presumed effect of reducing the total number of frisks that are conducted, it will do so by limiting forced police encounters in the first instance, not by limiting the authority to frisk once a suspect has been lawfully engaged. Let us turn now to examine how the instant proposal squares with existing law.

Though the Court has never expressly adopted the proposed approach, it is entirely consistent with much of the Court's past language. For example, in *Welsh v. Wisconsin* the Court indicated that the seriousness of the suspected offense was relevant to the question of whether warrantless police conduct was excused by exigency.[193] In that case, the Court noted that more serious offenses requiring urgent police action often involve violence or the *imminent* threat of it.[194] Citing Justice Jackson's concurrence in *McDonald v. United States*,

191. Terry v. Ohio, 392 U.S. 1, 24 (1968).

192. *Id.* at 32 (Harlan, J., concurring).

193. 466 U.S. 740, 750 (1984) (citing Payton v. New York, 445 U.S. 573, 586 (1980) (finding in the context of a warrantless arrest for drunken driving in the home that "[w]hen the government's interest is only to arrest for a minor offense, [the] presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.").

194. *Id.* at 751 (citing McDonald v. United States, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring)).

the *Welsh* Court explained, "[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some *real immediate and serious consequences* if he postponed action."[195] Similarly, in *Tennessee v. Garner*, though rejecting a strict "felony-misdemeanor" distinction, the Court did find that the reasonableness of police conduct under the Fourth Amendment is impacted by whether a real risk of physical harm exists.[196] In that case, the Court rejected the notion that a fleeing burglar escaping over a fence presented a *serious* threat of physical harm to the pursuing officer.[197] In keeping with the sentiments expressed in *Welsh* and *Garner*, at least one other justice has remarked that any assessment of reasonableness under the Fourth Amendment must take some notice of the type of crime being investigated. As Justice Marshall wrote, "[w]e have never suggested that all law enforcement objectives, such as the investigation of possessory offenses, outweigh the individual interests infringed upon."[198]

One criticism of my proposal might be that ending the ability of police officers to stop suspects upon suspicion of a possessory offense will make our streets more dangerous because officers won't be allowed to forcibly stop people even if they suspect those people are in possession of dangerous weapons. There are several responses to this critique.

First, merely possessing a weapon, while certainly a *potential* threat to public safety, does not present the same sort of *urgent* threat that is presented by, for example, an imminent robbery. Critics who suggest otherwise must acknowledge that Illinois and the District of Columbia are the only two jurisdictions in the nation that do not have permitting systems that allow citizens to carry firearms in public.[199] This nationwide statutory liberalization of gun possession makes clear that we don't believe as a nation that *any* possession of a weapon outside of the home is imminently dangerous.

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195. *Id.* (quoting McDonald v. United States, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring)).

196. *See* 471 U.S. 1, 14 (1985).

197. *Id.* at 21.

198. United States v. Sharpe, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., dissenting) (citing Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) ("Judicial exceptions to the Fourth Amendment should depend somewhat upon the gravity of the offense.")). *But see* Alabama v. White, 496 U.S. 327 (1990) (assuming without deciding that *Terry* stop for suspected possessory offense was appropriate); United States v. Sokolow, 490 U.S. 1 (1989) (same).

199. *See generally* Gun Laws: Right to Carry 2012, NRA Institute for Legislative Action (available online at http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx).

Second, when people behave in ways that are truly dangerous with weapons, there are already mechanisms in the Fourth Amendment for dealing with them quickly. For example, if someone has a visible handgun in a jurisdiction where they are illegal, the police will have probable cause to make an instant arrest. Alternatively, if a person is behaving in a dangerous way with a weapon (without regard for the legality of that possession) the exigent circumstances doctrine would allow the immediate stop of the person and seizure of the gun.

Finally, the current data on stop and frisk practices suggests that limiting the practice to non-possessory offenses will not substantially undercut police efforts to combat violent crime. This is because the broad discretion currently enjoyed by officers is not being used primarily to combat violent crime. Separate reports recently issued by the American Civil Liberties Union and the Center for Constitutional Rights suggest that current stop-and-frisk practices are being used to target the criminalization of just one drug—marijuana—and are not successful at removing illegal weapons from the street.[200] The ACLU report further found that the enforcement, which costs more than $3.6 billion annually, does nothing to prevent the use or availability of the drug.[201]

In 2010, for example, there were nearly 300,000 more arrests for violation of the marijuana laws than there were arrests for all violent crimes combined.[202] The overwhelming majority of these marijuana arrests—eighty-eight percent—were for possessory offenses.[203] However, despite the tough enforcement of the drug laws, from 2002 to 2011, the percentage of marijuana use among the total population has risen.[204] Moreover, despite roughly similar rates of marijuana usage, black Americans are arrested for marijuana possession at a rate of 716 per 100,000 while their white counterparts are arrested at a rate of just 192 per 100,000.[205] As the ACLU found "while the criminal justice

200. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 10 (2013), *available at* https://www.aclu.org/sites/default/files/assets/100413-mj-report-rfs-rel1.pdf; CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 123, at 4 ("[W]eapons and contraband yield from stops and frisks hovered around only 1.14%—a rate no greater than would be found by chance at random check points.").

201. AM. CIVIL LIBERTIES UNION, *supra* note 200, at 10.

202. Editorial, *Racially Biased Arrest for Pot*, N.Y. TIMES, June 15, 2013, at SR10.

203. AM. CIVIL LIBERTIES UNION, *supra* note 200, at 4.

204. *Drug Facts*: *Nationwide Trends*, NAT'L. INST. ON DRUG ABUSE (Dec. 2012), http://www.drugabuse.gov/publications/drugfacts/nationwide-trends.

205. AM. CIVIL LIBERTIES UNION, *supra* note 200, at 9, 17. In some states the disparity in arrest rates is even greater. For example in Iowa the arrest rate for whites is 174 per 100,000 while the arrest rate for black is 1,454 per 100,000. A similarly alarming

system casts a wide net over marijuana use and possession by Blacks, it has turned a comparatively blind eye to the same conduct occurring at the same rates in many white communities."[206]

Of course, a fair question is whether modifying the scope of *Terry* would do anything to resolve disparities such as those described above. The empirical data suggests that it would. A recent study identifies the increased use of stop, frisk and search tactics as likely "a major contributor to the increase in arrests for marijuana possession across the country, particularly in communities of color."[207] The data from New York confirms this supposition. In 2010, there were more than 103,000 arrests for marijuana possession, more than half of these—59,000—in New York City.[208]

The above statistics suggest that stop-and-frisk practices as currently deployed are sweeping up huge numbers of offenders of drug possession laws, and are doing little better than chance at removing illegal guns from the streets. It would therefore be difficult to characterize the practice as effective in absolute terms. Moreover, studies suggest there is no clear correlation between an increase in arrests for the minor offense of marijuana possession, and reduced rates of serious crime like homicide, robbery and aggravated assault.[209] Though there is a need for greater research, there is little reason to anticipate a different result regarding the correlation with similar arrests for other minor offenses. Moving out one level of abstraction, there is thus reason to question whether our streets are being made any safer by the large arrest numbers for possessory offenses that the current stop-and-frisk practice has produced.

The Court has suggested in other contexts that a lack of efficacy is a relevant consideration when considering whether a particular police policy is constitutionally reasonable. For example, responding to government arguments in *Tennessee v. Garner* that the use or threatened use of force was necessary to secure effective compliance with police orders, the Court stated, "[w]ithout in any way disparaging the importance of [the police] goals, we are not convinced that the use of deadly force is a *sufficiently productive means* of accomplishing

disparity exists in the District of Columbia where the difference is 1,489/100,000 as compared to 185/100,000. *Id.* at 18.

206. *Id.* at 9–10.

207. *Id.* at 91; *see also id.* at 118 (recommending "explicit guidelines outlining the specific, limited circumstances under which the Fourth Amendment permits a stop, frisk, and subsequent search.").

208. *Id.* at 39, 94.

209. *Id.* at 95–96.

them to justify the killing of nonviolent suspects."[210] While the *Garner* Court was obviously troubled by the contrast between deadly force and non-violent criminal conduct, another undeniable thread of the Court's analysis was its concern for the apparent inefficacy of the government's selected means. Similarly in *Delaware v. Prouse*, the Court found that the marginal efficacy of a police practice of stopping motorists to check their documents was relevant to the Fourth Amendment treatment of such stops.[211] The lessons of *Garner* and *Prouse* are useful here, where the currently available data does not suggest that use of stop-and-frisk for possessory offenses is a sufficiently productive way of advancing law enforcement's general desire to combat crime.

My proposal to exclude possessory offenses from *Terry*'s reach might also be questioned on administrability grounds. Without question the Court has expressed concerns about drawing Fourth Amendment lines based on "major-minor" crime distinctions.[212] For example, in *Atwater*, petitioner suggested that the line of constitutional authority to make warrantless arrests should be drawn between "jailable" and "fine-only" offenses. As the Court rightly noted, however, information entirely unknowable to the officer on the scene, like the particular criminal history of a defendant, may make an otherwise "fine-only" offense a "jailable" one.[213] Similar concerns do not impact the viability of the current proposal, for the distinction I recommend is entirely dependent upon information within the officer's possession and is entirely consistent with what is already required of officers.

Presently, officers seeking to defend their warrantless conduct must provide "at least a minimal level of objective justification for making the stop."[214] It is the officer making the observations who explains the facts creating a reasonable, particularized suspicion that the target is committing a crime.[215] Whether the officer suspects a target of a possessory offense or something more serious is, thus, a far cry from the question of whether the suspected offense was "jailable."

Moreover, unlike the "major-minor" crime distinction suggested by petitioner in *Atwater*, the distinction suggested here is far more objective. As the Court explained, "Atwater's various distinctions be-

210. Tennessee v. Garner, 471 U.S. 1, 10 (1985) (emphasis added).
211. Delaware v. Prouse, 440 U.S. 648, 661–62 (1979) ("[T]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure.").
212. Atwater v. City of Lago Vista, 532 U.S. 318, 346 (2001).
213. *Id.* at 348–49.
214. Illinois v. Wardlow, 528 U.S. 119, 123 (2000).
215. *Id.* at 124.

tween permissible and impermissible arrests for minor crimes strikes us as very unsatisfactory lines to require police officers to draw on a moment's notice."[216] In contrast, the line I suggest is one that officers must already explain—"why do you believe criminal activity was afoot."

The New York City Police Department currently requires that officers articulate a reason for each stop. Officers may select from some ten separate categories of behavior to indicate their basis for a stop. These categories include items like "casing a victim or location," "actions indicative of a drug transaction," or "actions of engaging in a violent crime."[217] The categorization that officers are already required to make easily lends itself to an assessment of whether the suspected offense was merely possessory, and thus was not an appropriate basis for a *Terry* stop. Let's assume, for example, an officer says he believes criminal activity is afoot because the suspect ran in a high crime area after seeing the officer. Under current doctrine such observations are sufficient to make a *Terry* stop without any further obligation on the part of the officer to articulate exactly what type of criminal conduct he suspected. Under the instant proposal, the officer also would have to articulate what about the suspect made him believe he was engaged *in something other than a possessory criminal offense*. Asking an officer to provide this sort of detail is not all that different from what they are currently required to do as a matter of internal policy. Without question, for some categories of behavior, officers may be required to state with greater particularity what sort of criminal conduct they believed the target is engaged in. But, this is hardly a complex undertaking. Indeed, an officer's inability to suggest at least generally what it is she suspects the target of doing may be a strong indication that the officer's suspicions do not rise to the level of reasonable suspicion, but instead amount to little more than an inarticulate hunch.

Conclusion

Every year, the police stop hundreds of thousands of people nationwide because the police are suspicious those individuals may be engaged in criminal activity. The authority to engage in these stops was created by the Supreme Court at a time when the nation confronted a particular moment of violent racial strife. The Court, per-

216. *Atwater*, 532 U.S. at 350.

217. Raymond Kelly, New York City Police Department Stop Question & Frisk Activity: Reports Prepared During the Period January 1, 2013 through Mar 31, 2013, at 36 (2013), *available at* www.nyclu.org/files/2013_1st_Qtr.pdf.

ceiving a need to give law enforcement greater authority to deal with danger on the streets, loosened the probable cause standard and allowed officers to impinge upon liberty and privacy interests with a degree of misgiving amounting only to reasonable suspicion. At the time this looser standard was created, the dissent warned that it was only a first step toward widespread relaxation of Fourth Amendment standards. In the years after *Terry*, justices writing in dissent routinely warned that the *Terry* doctrine was being deployed in a way that reduced constitutional protection. Since *Terry*, data is increasingly proving that the loosening of constitutional standards is causing substantial harms to people of color nationwide.

The authority to stop and frisk was created in response to "the rapidly unfolding and often dangerous situations on city streets"[218] that police officers face. It strains reason, however, to suggest that a mere possessory offense, where no further wrongdoing is suspected, necessitates the same immediate and flexible police response that a "rapidly unfolding" imminent robbery might. Though far more will be needed to fully address the problem of racial disparities in the criminal justice system, this article joins the existing scholarly discussion to suggest one additional tool that might be used to address the racial impact of just one enforcement policy. Put directly, it is time to "stop" *Terry* to avoid the further erosion of rights caused by *Terry* stops.

218. Terry v. Ohio, 392 U.S. 1, 10 (1968).