

# Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked<sup>†</sup>

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## INTRODUCTION

In 1992, the release of the song *Cop Killer*<sup>1</sup> by the rap musician Ice-T ignited a nationwide protest. The song, an imagined response to police mistreatment of African Americans, incensed law enforcement groups<sup>2</sup> with lyrics such as “I’m ’bout to bust some shots off, I’m ’bout to dust some cops off” and “die, pig, die.”<sup>3</sup> A boycott of Time-Warner, Inc., whose subsidiary distributed the recording, resulted in the elimination of the song from the album and the eventual release of Ice-T from his recording contract.<sup>4</sup>

Other lyrics of the song, however, received scant attention. They reveal what may be the source of the anger behind the speaker’s violent reverie:

I’m ’bout to kill me somethin’  
A pig stopped me for nuthin’<sup>5</sup>

Unfortunately, being stopped for nothing—or almost nothing—has become an all-too-common experience for some Americans since 1968, when the United States Supreme Court decided *Terry v. Ohio*.<sup>6</sup> *Terry* marked a transformation in the law: For the first time, the Court allowed a criminal search and seizure without probable cause.<sup>7</sup> From *Terry* forward, the question

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1. ICE-T, *Cop Killer*, on *BODY COUNT* (Warner Brothers Records 1992).

2. Jerry Seper, ‘*Cop Killer*’ Song Spurs Time Boycott, WASH. TIMES, June 11, 1992, at A5 (law enforcement groups say song “advocates the killing of police officers”).

3. ICE-T, *supra* note 1.

4. Sheila Rule, *Ice-T and Warner Are Parting Company*, N.Y. TIMES, Jan. 29, 1993, at C6.

5. ICE-T, *supra* note 1.

6. *Terry*, 392 U.S. 1 (1968). Of course, police officers stopped and frisked people, especially African Americans, on very little evidence, before *Terry*; perhaps it would be more accurate to say *Terry* legitimated the practice. See Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991) (recounting widespread use of warrantless searches and seizures on the street against African Americans).

7. The first case to allow any search and seizure on less than probable cause was *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Camara*, however, involved the search of a building for violations of city housing codes. *Terry* was the first case to allow a search and seizure on less than probable cause in the context of more typical street crimes. See *infra* notes 25-52 and accompanying

would not be whether there was probable cause, but whether there was reasonable suspicion that criminal activity was afoot.<sup>8</sup> The Court based this change on a balancing of interests.<sup>9</sup> On the one hand, law enforcement called for supple new tools to respond to crime and the dangers its perpetrators posed to officers;<sup>10</sup> on the other, the Court thought the loss of individual liberty was not too great, since *Terry* only allowed a brief stop and a limited, pat-down search of outer clothing to find weapons.<sup>11</sup>

During the next twenty-five years, many cases fleshed out *Terry*'s rules. These cases gradually required less and less evidence for a stop and frisk.<sup>12</sup> A substantial body of law now allows police officers to stop an individual based on just two factors: presence in an area of high crime activity, and evasive behavior.<sup>13</sup> In other words, many courts now find that reasonable suspicion to stop exists when the person involved 1) is in a crime-prone location, and 2) moves away from the police.<sup>14</sup>

Even if this does not seem remarkable in the abstract, these "location plus evasion" cases become distressing when viewed in conjunction with a related fact: These stops and frisks are applied disproportionately to the poor, to African Americans, and to Hispanic Americans.<sup>15</sup> This is because these individuals are most likely to live in so-called high crime areas, and to have reason to avoid the police.<sup>16</sup> Police use *Terry* stops often in crime-prone areas, making people in these areas recurrent targets.<sup>17</sup> When residents react by attempting to avoid the police, "location plus evasion" cases supply a ready-made basis for more *Terry* stops. This begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling their communities. Thus "location plus evasion" cases bring into sharp focus the idea of fairness in society in general, and in the criminal justice system in particular. At a time when racial bias in the justice system is as difficult an issue as ever,<sup>18</sup> "location plus evasion" cases strengthen the impression that this country has two justice systems: one for whites and one for minorities.<sup>19</sup> Because justice requires that one set of rules applies equally to

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text.

8. *Terry*, 392 U.S. at 21-23.

9. *Id.* at 21-24, 27.

10. *Id.* at 22-24.

11. *Id.* at 24-26.

12. See *infra* notes 72-110 and accompanying text.

13. See *infra* notes 133-41 and accompanying text.

14. See *infra* notes 133-41 and accompanying text.

15. See *infra* notes 148-68 and accompanying text.

16. See *infra* notes 167-73 and accompanying text.

17. See *infra* notes 167-73 and accompanying text.

18. See, e.g., Seth Mydans, *The Courts on Trial: Los Angeles Blacks Say Bias Is Issue in Riot Case and Retrial of Four Officers*, N.Y. TIMES, Apr. 8, 1993, at A14 (stating that the Rodney King verdict has resulted in perception of justice system as racist, and trial of four black men accused of beating white man in verdict's aftermath, while factually distinct, strengthens this perception).

19. See, e.g., New York State Judicial Commission on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 186 (1992) ("[T]here are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities

everyone, regardless of race, this Article examines the law behind these inequities, and proposes a solution.

Part I of this Article discusses *Terry* and the cases that developed the stop and frisk doctrine.<sup>20</sup> Rather than an encyclopedic recitation of the law, Part I surveys a few leading cases to determine the origins of the current doctrine.<sup>21</sup> Part II explores the Supreme Court's recent decision in *Minnesota v. Dickerson*<sup>22</sup> and demonstrates that its facts are typical of a body of cases that allows the police to stop and frisk based on location in a high crime area plus evasion of the police.<sup>23</sup> Part III connects this doctrine to several realities of life in urban centers to show that this case law and the law enforcement techniques it legitimates are applied disproportionately to African Americans and to Hispanic Americans.<sup>24</sup> Part IV discusses and proposes reforms.

### I. FROM *TERRY* FORWARD: HOW MUCH IS ENOUGH TO STOP AND FRISK?

*Terry v. Ohio* broke new ground. For the first time,<sup>25</sup> the Supreme Court allowed searches and seizures in traditional on-the-street encounters between police and citizens with less than probable cause. In addition, *Terry* began in earnest the balancing of law enforcement and privacy interests now common throughout Fourth Amendment jurisprudence.<sup>26</sup>

In *Terry*, an experienced officer walking his beat observed a group of men outside a jewelry store.<sup>27</sup> Their activities suggested that they were planning for a daylight armed robbery.<sup>28</sup> The officer approached the men, identified himself as a police officer, and asked for their names.<sup>29</sup> When the men "mumbled something" in response, the officer patted down the defendant's outer clothing and found a gun.<sup>30</sup>

After rejecting the state's contention that the officer's actions did not amount to activity that implicated the Fourth Amendment,<sup>31</sup> the Supreme

and the poor"). Perhaps most discouraging is that little seems to have changed since the release of the Kerner Commission's report in 1968, which found that members of minority groups perceived the justice system as rife with bias against the poor and uneducated. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968). See generally Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621 (1993).

20. See *infra* notes 25-111 and accompanying text.

21. See *infra* notes 25-111 and accompanying text.

22. *Dickerson*, 113 S. Ct. 2130 (1993).

23. See *infra* notes 133-41 and accompanying text.

24. See *infra* notes 148-73 and accompanying text.

25. See *supra* note 7.

26. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 185 (1991) (stating that *Terry* "transported *Camara's* 'reasonableness' balancing test from the realm of administrative searches to criminal investigations and used it to determine the reasonableness of a warrantless search, rather than merely to define 'probable cause.' The result has been a diminution in the role of the warrant clause in Fourth Amendment jurisprudence.").

27. *Terry v. Ohio*, 392 U.S. 1, 5-6, 28 (1968).

28. *Id.* at 5-6.

29. *Id.* at 6-7.

30. *Id.* at 7.

31. *Id.* at 19.

Court focused on the fact that the officer had acted without probable cause.<sup>32</sup> Before *Terry*, this would no doubt have resulted in suppression of any evidence gathered; instead, *Terry* became the occasion for the creation of an exception to the probable cause requirement.

The Court began by borrowing the balancing of interests test first articulated in *Camara v Municipal Court*<sup>33</sup> for use with so-called "special needs" or administrative searches.<sup>34</sup> Under this test, courts balanced the state's asserted need for the search or seizure against the invasion of individual privacy these actions entailed.<sup>35</sup> Applying this test to encounters such as the one in *Terry*—quickly evolving situations where the officer must rely on rapid judgments and actions to address potentially dangerous circumstances<sup>36</sup>—the Court said it would be unreasonable to require police to take unnecessary risks simply because they lack probable cause to arrest.<sup>37</sup> Instead of probable cause, a stop and frisk would require "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion.<sup>38</sup> "Inarticulate hunches" or mere suspicion would not be sufficient.<sup>39</sup> Performing searches and seizures based on less than probable cause was permissible, the Court said, based not only on the needs of law enforcement but on the fact that the intrusions would be limited in both scope and purpose.<sup>40</sup> Frisks could not go beyond a pat down of outer clothing to locate a weapon; once the officer knew no weapon was present, further searching was improper.<sup>41</sup> Thus, if a frisk exceeded the limits of *Terry* in terms of either scope (for example, reaching into pockets instead of patting outer clothing) or purpose (for example, the gathering of contraband instead of a protective search for weapons), courts should suppress any evidence gathered as a result.<sup>42</sup>

In *Terry*, the Supreme Court established a two-step analysis for stop and frisk situations. First, if the officer has reasonable, articulable suspicion to believe that crime is afoot based on her observations and rational inferences drawn from them, her training, and her experience, the officer may stop the suspect.<sup>43</sup> Second, if the crime the officer believes is occurring is a violent one, or if the officer otherwise has reasonable suspicion to believe the suspect is armed and dangerous, the officer may perform a frisk.<sup>44</sup> Except where the

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32. *Id.* at 20.

33. *Camara*, 387 U.S. 523 (1967).

34. *Id.* at 530-34; DRESSLER, *supra* note 26, at 185.

35. See DRESSLER, *supra* note 26, at 185. The very use of the test represented a departure from prior law. Before *Terry*, police either had probable cause for a search or seizure or they did not; no middle ground existed. See *Terry*, 392 U.S. at 36 (Douglas, J., dissenting).

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

37. *Id.* at 23.

38. *Id.* at 21.

39. *Id.* at 22.

40. *Id.* at 24-26.

41. *Id.* at 26-27.

42. *Id.* at 29-31.

43. *Id.* at 27.

44. *Id.*

crime is violent, a frisk does not accompany a stop as a matter of course; rather, it may only take place when the officer reasonably suspects some danger from weapons.<sup>45</sup>

The Court went to some length to spell out the limits to its decision. The officer's "inchoate and unparticularized suspicion or 'hunch'" would not be sufficient to allow a stop or frisk;<sup>46</sup> rather, only "specific reasonable inferences which [the officer] is entitled to draw from the facts in the light of [the officer's] experience" would be required.<sup>47</sup> Furthermore, any departure from *Terry* in terms of the scope of the search would result in suppression of evidence.<sup>48</sup> The Court would accept no justification for a frisk other than a need to disarm a suspect reasonably believed to be armed and dangerous;<sup>49</sup> preserving evidence, for example, would not suffice.<sup>50</sup>

Despite these limitations, it was clear that the probable cause requirement, which had served as a guiding light in encounters between police and suspects, would play a much smaller role in the future. *Terry* was—and remains—a decision that, at bottom, allowed the state to interfere with the "right of locomotion"<sup>51</sup> much more often and on much less evidence than had been the case before. It was, simply put, a pro "law and order" decision timed to address the rising violence and tension in cities and on campuses in 1968 and the political rhetoric this unrest inspired.<sup>52</sup>

*Sibron v. New York*,<sup>53</sup> a companion case to *Terry*, emphasized that the new stop and frisk law required more than just suspicion. In *Sibron*, the officer observed the defendant associating with six or eight known drug addicts over the course of eight hours.<sup>54</sup> When the defendant later entered a restaurant, he began talking with three more known addicts.<sup>55</sup> The officer ordered the defendant out of the restaurant and then said to him, "You know what I am

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 29.

49. *Id.*

50. *Id.*

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

52. One can read this between the lines in the opinion. First, the Court discounted the argument that using any standard other than probable cause "[would] only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities." *Terry*, 392 U.S. at 12. Second, the Court was no doubt aware of public concern with "law and order." See, e.g., Brief for Respondents at 6, *Sibron v. New York*, 392 U.S. 40 (1968) (No. 63) (pointing out that the "struggle" between forces of order and crime had reached such "intensity" that the outcome was uncertain); see also Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 538-39 (pointing out that the *Terry* decision reflected tensions in society at large); Maclin, *supra* note 51, at 1269 (stating that *Terry* represents a compromise between the probable cause standard and the "public's demand that something be done to promote 'law and order.'"). For more on the relationship between the civil unrest in the 1960's and political law and order rhetoric, see David A. Harris, *What Happened to Crime?*, 79 A.B.A. J. 138 (1993).

53. *Sibron*, 392 U.S. 40 (1968).

54. *Id.* at 45.

55. *Id.*

after."<sup>56</sup> As the defendant "'mumbled something and reached into his pocket,'" the officer thrust his hand into the same pocket and found heroin.<sup>57</sup>

The Supreme Court found that the officer's observations and the inferences drawn from them did not even rise to the level of reasonable suspicion that crime was afoot.<sup>58</sup> The officer heard none of the conversations the defendant had with the addicts, and observed no exchange.<sup>59</sup> In the memorable language of the trial court, "'they might have been talking about the World Series."<sup>60</sup> At bottom, "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security"<sup>61</sup> The police officer's instincts, alone, would not be a sufficient basis for a stop and frisk; a search and seizure such as the one in *Sibron* represented the prototypical "hunch" referred to in *Terry*<sup>62</sup> Further, according to Justice Harlan's concurrence, narcotics violations were not the type of crimes that one could assume were violent and would thereby justify an immediate frisk along with a stop; the officer would have to have articulable suspicion that the defendant was armed and dangerous.<sup>63</sup> Thus, *Sibron* represented an effort to demarcate the limits of *Terry*, to show lower courts that *Terry* did not mean that police could stop and frisk anyone who seemed suspicious. *Terry* was, as the Court suggested in *Sibron*, more limited than that, for *Terry* required "particular facts from which [the officer] reasonably inferred that the individual was armed and dangerous."<sup>64</sup> Reasonable suspicion required more than mere association with known criminals or addicts.<sup>65</sup>

*Brown v. Texas*,<sup>66</sup> decided eleven years after *Terry*, also set limits on when police could stop suspects. In *Brown*, the police stopped the defendant when they observed him in an area with a "high incidence of drug traffic."<sup>67</sup> The officers testified that "the situation 'looked suspicious and we had never seen [the] subject in that area before."<sup>68</sup> When the defendant refused to identify himself, the officers frisked and arrested him, charging him with violating a Texas statute that criminalized the refusal to give an officer a name and address upon a legitimate stop.<sup>69</sup> The Supreme Court stated that the circumstances preceding the stop did not give rise to a reasonable suspicion

56. *Id.*

57. *Id.*

58. *Id.* at 62.

59. *Id.*

60. *Id.* at 47 (quoting the judge from the trial court record in *People v. Sibron*, 219 N.E.2d 196 (1966)).

61. *Id.* at 62.

62. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

63. *Sibron*, 392 U.S. at 74 (Harlan, J., concurring); see also *Terry*, 392 U.S. at 21.

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

65. *Id.*

66. *Brown*, 443 U.S. 47 (1979).

67. *Id.* at 49.

68. *Id.*

69. *Id.*

that the defendant was involved in a crime.<sup>70</sup> “The fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant’s activity was no different from the activity of other pedestrians in that neighborhood.”<sup>71</sup>

Thus, *Brown* and *Sibron* stand for the proposition that neither presence in a crime-ridden area—even one where drug crime is common—nor association with known criminals standing alone will be sufficient to support a constitutional stop and frisk. Even though articulable suspicion requires less evidence than probable cause, an individual’s presence where crime consistently takes place, or association with those involved, does not rise to the level of reasonable suspicion.

After *Brown*, however, a very different theme began to emerge from the Supreme Court’s *Terry* cases: Courts hearing suppression motions based on *Terry* stops and frisks should defer to the police officers, because they have the knowledge, the expertise, and, ultimately, the responsibility for combatting crime. These cases required progressively less evidence denoting criminal activity to support findings that the police acted with the requisite reasonable suspicion. This change took place incrementally, without any direct announcement from the Court. Almost fifteen years after *Brown*, however, the result is visible. Discussion of just a few of these cases demonstrates this point.

*United States v. Cortez*,<sup>72</sup> which followed *Brown* by just two years, concerned a stop of persons suspected of smuggling illegal aliens into the United States from Mexico.<sup>73</sup> Law enforcement agents had observed not illegal activity, but legal activity consistent with smuggling illegal aliens.<sup>74</sup> The Supreme Court used *Cortez* as an occasion to clarify *Terry* Courts weighing the legitimacy of particular *Terry* stops must consider not only the facts observed by the officer at the scene. Rather, courts must judge stops based on the totality of the circumstances, or what the Court called “the whole picture.”<sup>75</sup> In addition to the facts observed by officers on the scene, this “whole picture” consisted of police reports<sup>76</sup> and “patterns of operation of

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70. *Id.* at 52-53.

71. *Id.* at 52; see also *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979) (holding that the police had no reasonable suspicion to detain the customer of a tavern, even if the police had a warrant to search the tavern and a general suspicion that drug sales took place at the tavern, when there was no indication that the customer himself was involved or armed). The Court distinguished *Brown* from other cases, such as *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), and *Christensen v. United States*, 259 F.2d 192 (D.C. Cir. 1958), in which “the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer” would rise to the level of reasonable suspicion. *Brown*, 443 U.S. at 52 n.2.

72. *Cortez*, 449 U.S. 411 (1981).

73. *Id.* at 413-16.

74. *Id.*

75. *Id.* at 417.

76. *Id.* at 418; see also *United States v. Hensley*, 469 U.S. 221, 229, 232-35 (1985) (holding that information supplied by flyer issued by one police department based upon articulable facts that supported a reasonable suspicion was, as objectively read, sufficient to justify another police department’s stop of an automobile driven by the suspect).

certain kinds of lawbreakers.”<sup>77</sup> Thus, the reviewing court was to consider all possible evidence that the suspect had been engaged in wrongdoing—whether the officer who made the stop knew about the evidence or not.

Along with this “whole picture” idea, the Court’s opinion in *Cortez* directly instructed lower courts to defer to the judgment of police. Officers are professional observers.<sup>78</sup> Training and experience sharpen their skills. Their senses thus become attuned to facts that, while ordinary and innocent to the untrained observer, actually constitute part of the pattern of criminal activity. Thus, “a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.”<sup>79</sup> Courts must permit police officers to come to “common-sense conclusions”<sup>80</sup> and weigh the appropriateness of *Terry* stops “not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”<sup>81</sup> In other words, courts hearing motions challenging the introduction of evidence obtained during *Terry* stops should view the facts brought before them to support the stop from the position of the police. Courts should ask whether a police officer—a person engaged in what the Court has called elsewhere “the often competitive enterprise of ferreting out crime”<sup>82</sup>—would feel that all of the circumstances “raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”<sup>83</sup> *Cortez* thus sent a strong signal to lower courts that deference to the police and their trained crime-fighting sensibilities would henceforth be the order of the day.<sup>84</sup>

It was this idea of deference to police observation and inference that took center stage during the 1980’s. In a series of cases involving *Terry* stops based on so-called drug-courier profiles in airports,<sup>85</sup> the Supreme Court made clear that persons stopped by police need not be engaged in illegal activity for the reasonable suspicion standard to be satisfied; rather, it is enough that some of the actions police observe fit certain broad categories that, in collective police experience, describe a person who is probably involved in the drug trade. In the first such case, *Reid v. Georgia*,<sup>86</sup> the Court held that the stop was improper. *Reid* involved an individual who had arrived on an early morning flight from Fort Lauderdale, Florida, a city

77. *Cortez*, 449 U.S. at 418.

78. *Id.* at 419. The Court indicated this by noting the “imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such fact to form a legitimate basis for suspicion of a particular person and for action on that suspicion.” *Id.*

79. *Id.* at 418.

80. *Id.*

81. *Id.* (emphasis added).

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

83. *Cortez*, 449 U.S. at 418.

84. *See, e.g.*, *United States v. Ogberaha*, 771 F.2d 655, 658 (2d Cir. 1985) (“We further note our deference to the expertise and ‘common sense conclusion[s]’ of trained customs inspectors”) (citation omitted) (quoting *Cortez*, 449 U.S. at 418), *cert. denied*, 474 U.S. 1103 (1986).

85. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam).

86. *Reid*, 448 U.S. 438.

known to law enforcement officers as a source of illegal drugs.<sup>87</sup> While walking through the airport, the individual had repeatedly glanced back at another passenger.<sup>88</sup> These facts standing alone—"isolated instances of innocent activity"<sup>89</sup>—did not amount to reasonable suspicion and were therefore insufficient to justify a *Terry* stop. The Court implied, however, that with a greater number of such "innocent" facts, the decision might have been different.<sup>90</sup>

By the end of the decade, implication became law. *United States v. Sokolow*<sup>91</sup> presented the Supreme Court with a drug-courier profile case containing a larger cluster of "innocent" activities than were present in *Reid*. The defendant in *Sokolow* traveled to Miami, a source city for illegal narcotics, purchased airline tickets with cash, checked no luggage, appeared nervous, stayed in Miami only forty-eight hours though the round trip itself took twenty hours, and travelled under a name that did not match the name in which his telephone number was listed.<sup>92</sup> While these activities might appear innocent when considered separately, a trained and experienced officer looking at them together could draw a different conclusion, a conclusion that lower courts must respect. While *Cortez* required "suspicion that the particular individual being stopped is engaged in wrongdoing,"<sup>93</sup> that element is not lacking simply because the officer gained her suspicions by comparing the defendant to a profile developed outside of the context of any particular case.<sup>94</sup> The fact that the suspect *fits* the profile supplies adequate individualized suspicion.<sup>95</sup> Thus, *Sokolow* reemphasizes the message that lower courts should defer to law enforcement and its collective knowledge and experience in passing upon the propriety of *Terry* stops.

As the 1990's began, the approval of *Terry* stops based upon ever smaller amounts of evidence continued. *Alabama v. White*<sup>96</sup> concerned the stop of a car based on an anonymous tip. The tipster had correctly described the defendant's vehicle, time and place of departure, and destination.<sup>97</sup> The Supreme Court held that the stop was justified, even though the anonymous nature of the tip permitted no estimation of its reliability. The fact that police observation corroborated some, though not all, of the tip was sufficient.<sup>98</sup> Thus, *White* permitted courts to use a sliding scale to evaluate *Terry* stops based on tips. When the informant's trustworthiness is unknown, the tip requires greater corroboration; however, if the information comes from a

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87. *Id.* at 441.

88. *Id.* at 439.

89. Katherine L. Pringle et al., *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1991-1992*, 81 GEO. L.J. 853, 882 (1993).

90. *Reid*, 448 U.S. at 441.

91. *Sokolow*, 490 U.S. 1 (1989).

92. *Id.* at 3.

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

94. *Sokolow*, 490 U.S. at 10.

95. *See id.* at 9-10.

96. *White*, 496 U.S. 325 (1990).

97. *Id.* at 327.

98. *Id.* at 329-31.

known source, less corroboration will suffice.<sup>99</sup> Thus, anonymous tips, which may actually be fabrications designed to harass or even obtain revenge,<sup>100</sup> may nevertheless serve as the basis for stops if they are accompanied by some corroboration.<sup>101</sup>

*Michigan Department of State Police v. Sitz*<sup>102</sup> represents perhaps the most far-reaching example of how far the Supreme Court is willing to let police go in stopping ordinary citizens. In *Sitz*, the police set up a fixed sobriety checkpoint. In an hour and fifteen minutes, each of the 126 cars that passed through it was stopped and its driver questioned, resulting in two arrests for driving under the influence.<sup>103</sup> The stops were made without reference to any observations of any particular car; that is, the police had *no* suspicion, reasonable or otherwise, concerning any individual who was stopped. Rather, the police stopped all cars on the blockaded road.<sup>104</sup> The Supreme Court returned to its balancing of interests analysis to justify this practice.<sup>105</sup> Given the magnitude of the drunken driving problem<sup>106</sup> and the "slight" nature of the intrusion upon the privacy of those stopped,<sup>107</sup> the Supreme Court found the stops at the checkpoint to be reasonable, despite the absence of individualized suspicion.<sup>108</sup> It mattered little that other, less intrusive and more effective techniques to fight drunken driving did not entail stopping persons about whom there was not the slightest hint of suspicion.<sup>109</sup> Again, the Court's theme was deference to police judgment: "[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."<sup>110</sup>

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99. See *id.* at 330.

100. See LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME* (Frank J. Remington ed., 1967); see also David Burnham, *F.B.I. Says 12,000 Faulty Reports on Suspects Are Issued Each Day*, N.Y. TIMES, Aug. 25, 1985, at A1.

101. This sliding scale approach, which one commentator has aptly described as "more slide than scale," Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974), exists nowhere else in Fourth Amendment jurisprudence (at least not yet) but in the treatment of *Terry* stops. This does not mean, however, that the sliding scale principle operates in a small, unimportant area; on the contrary, *Terry* stops may be the most common form of encounter between police and individuals.

102. *Sitz*, 496 U.S. 444 (1990).

103. *Id.* at 448.

104. *Id.*

105. See *supra* notes 33-41 and accompanying text.

106. *Sitz*, 496 U.S. at 451.

107. *Id.* at 451-52.

108. *Id.* at 453.

109. *Id.* at 453-54; see also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) (citation omitted) (holding that individualized suspicion for search (in this case, drug testing) was unnecessary in light of magnitude of governmental interest in preventing railroad accidents and that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.").

110. *Sitz*, 496 U.S. at 453-54. Professor Dressler notes that the suspicionless stops upheld in *Sitz* were the "fruit" of dicta in *Delaware v. Prouse*, 440 U.S. 648 (1979), and *Brown v. Texas*, 443 U.S. 47 (1979), which pointed toward the possibility that the Supreme Court would allow police to use such tools. DRESSLER, *supra* note 26, at 202-03. Interestingly, upon remand, a Michigan court of appeals

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

Have the lower courts heard this message? If so, how have they interpreted it, and what kind of police behavior has resulted? The Supreme Court's decision in *Minnesota v. Dickerson*<sup>111</sup> provides a clue; lower court decisions provide proof positive that the message has, in fact, been received.

## II. LOCATION PLUS EVASION EQUALS REASONABLE SUSPICION

### A. *Dickerson*: Defense of Terry or Representative of Its Demise?

In *Minnesota v. Dickerson*, the question before the Supreme Court was whether a lower court may admit into evidence contraband found by an officer using only his sense of touch during an otherwise proper stop and frisk.<sup>112</sup> Put another way, Minnesota asked the Court to create a tactile parallel to the "plain-view" exception.

The Court had little trouble creating the new "plain-feel" exception. According to Justice White, the author of the Court's opinion, there was nothing new about the exception.<sup>113</sup> In fact, what the Court *refused* to do is more interesting than what it *did*. In its brief, Minnesota<sup>114</sup> implicitly presented the Court with the opportunity to use *Dickerson* to expand and reinterpret *Terry*. Perhaps "reinvent" might be a better word; *Terry*, the state argued, ought to allow stops and frisks not just to locate weapons, but also to search for contraband.<sup>115</sup> Justice White's response was unequivocal; he

struck down the use of sobriety checkpoints under the Michigan Constitution, because, as construed by the court, it does not allow suspicionless searches. *Sitz v. Department of State Police*, 485 N.W.2d 135 (Mich. Ct. App. 1992), *aff'd*, 443 Mich. 744 (1993); *cf.* *State v. Sims*, 808 P.2d 141 (Utah Ct. App. 1991) (holding that the Utah Constitution allows suspicionless stops at highway roadblocks only with legislative authorization), *cert. granted*, 853 P.2d 897 (Utah 1993).

111. *Dickerson*, 113 S. Ct. 2130 (1993).

112. *Id.* at 2134. The Court stated that it wanted to resolve a conflict among the federal circuits and state courts on this question. *Id.* Some of these courts had recognized the "plain feel" exception; others had explicitly rejected it. *Id.* at 2134-35 n.1.

113. *Id.* at 2136-37.

114. Minnesota was joined by the Federal Government and numerous national and state law enforcement groups as amicus curiae. Brief for the United States as Amicus Curiae Supporting Petitioner, *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993) (No. 91-2019); Brief Amici Curiae of Americans for Effective Law Enforcement, Inc., et al., In Support of the Petitioner State of Minnesota, *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993) (No. 91-2019).

115. Certainly, this is how several of the Justices viewed Minnesota's argument. *See, e.g.*, *Minnesota v. Dickerson*, 113 U.S. 2130 (1993), Tr. of Argument at 7, 12, 13. As Justice O'Connor put it, "it sounds like you're arguing for more, that you're arguing for an extension of *Terry* and just an outright recognition that officers can search not only for weapons but for drngs." *Id.* at 13. Counsel for

rejected the argument forcefully and explicitly.<sup>116</sup> In a traditional explication of *Terry*'s principles, Justice White explained the two-step analysis required by *Terry*: First, if the conduct the officer observes leads her, in light of her experience, to believe that crime is afoot, she may stop the person involved and make inquiries designed to confirm or dispel her suspicions.<sup>117</sup> Second, if the officer reasonably believes that the individual might be armed and dangerous, the officer may pat down the person's outer clothing to determine whether the person is carrying a weapon.<sup>118</sup> Justice White said this patdown search "must be strictly 'limited to that which is necessary for the discovery of weapons'";<sup>119</sup> its purpose "'is not to discover evidence.'"<sup>120</sup> The fruits of any further search should be suppressed.<sup>121</sup>

Thus, the Court's opinion in *Dickerson* appears to resist the recent trend of allowing police ever more leeway in *Terry* situations. The Court easily could have sustained Minnesota's position based on a balancing of factors. The Court could have concluded that interests such as the growing dangers of armed crime, the number of guns on the street, the violence of the drug trade, or the need to stamp out illegal narcotics outweigh what might seem a comparatively minor type of intrusion on the defendant's person. To be sure, this approach might have required cutting *Terry* from its doctrinal moorings, but the Court has done as much before in other areas of the law.<sup>122</sup> Instead, the Court stayed true to *Terry* as it was written.

Thus at first blush *Dickerson* appears to reinforce the limits the Supreme Court put on the stop and frisk power in *Terry*. A close look at *Dickerson*'s facts, however, reveals an example of what the stop and frisk doctrine has become, and just how far the Supreme Court and lower courts have drifted from *Terry*. Although the question of whether the facts justified the *Terry* stop

Minnesota argued that the Court need not go so far, but Minnesota clearly desired exactly the "more" to which Justice O'Connor referred. In reply to a question asking whether Minnesota would object to the Court holding simply that "a police officer ought to be able to use all of his senses to search for weapons," Tr. at 12, Minnesota's counsel stated, "That is a correct statement of the existing law previous to this case, but we believe, Your Honor, that they ought to be able to use all of their senses in all the work they do in terms of law enforcement." Tr. at 13. Counsel for the respondent pointed out this poorly concealed argument: "[W]hat the State of Minnesota is asking the Court to do in this case is to make *Terry*'s rule into an evidence-gathering function." Tr. at 30; see also *State of Minnesota v. Timothy Eugene Dickerson*, District Court, Fourth Judicial District, Hennepin County, D.C. File No. 89067687, Tr. of Hearing on Suppression Motion [hereinafter *Tr. of Hearing on Suppression Motion*], at 9 (Question: "Why did you stop [the defendant]?" Answer: "To check him for weapons and contraband.").

116. *Dickerson*, 113 S. Ct. at 2135-36.

117. *Id.* at 2135.

118. *Id.* at 2136.

119. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

120. *Id.* (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

121. *Id.*

122. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981). *Belton* involved the search of a car's interior incident to a lawful arrest in which the individuals were far removed from the car and were thus unable to reach anything inside. *Id.* at 456. The Court held that the search was proper, even though prior law had allowed such searches only if arrestees could obtain weapons from areas accessible to them. *Id.* at 457-58. The Court allowed the search simply because it was incident to a lawful arrest, whether or not the arrestees could reach weapons, *id.* at 462-63, and because a bright line rule was preferable. *Id.* at 458-59.

in *Dickerson* was not the issue before the Supreme Court,<sup>123</sup> they provide a prototypical example of cases lower courts see every day

In *Dickerson*, two police officers observed the defendant leave a twelve-unit apartment building.<sup>124</sup> The officers knew that drug use and sales took place in the building. One of the officers had previously participated in the execution of search warrants at the building.<sup>125</sup> Neither officer knew the defendant or knew of any reason to connect him to prior illegal activity in the building, nor did they know where inside the building the defendant had been.<sup>126</sup> According to one officer, as soon as the man saw the police, he abruptly changed directions, turned, and entered an alley<sup>127</sup> Based on these facts alone—a location associated with criminal activity and evasive action—the officers followed the man into the alley, stopped him, and frisked him. They found one-fifth of one gram of crack cocaine in his pocket.<sup>128</sup>

While the United States Supreme Court did not rule on the propriety of the stop and frisk, the Minnesota courts did. The Minnesota Court of Appeals upheld the trial court and found the stop to be proper.<sup>129</sup> Evasive conduct alone, the court of appeals said, would have been sufficient to allow a *Terry* stop.<sup>130</sup> Surely, combining evasive conduct with the defendant's presence in an apartment complex in which there was a history of drug activity supplied more than enough evidence to support reasonable suspicion.<sup>131</sup> The Supreme Court of Minnesota agreed.<sup>132</sup>

### B. Lower Court Cases

The facts in *Dickerson* are representative of a body of federal and state cases that accept just two facts—presence in a “high crime” or “high drug

123. *Dickerson*, 113 S. Ct. at 2134.

124. *Id.* at 2133. Though the Court mentions the fact that the building had 12 apartments, it elides the fact that there was no evidence that all of these units were drug involved by labeling the entire building a “notorious ‘crack house.’” *Id.* The Court leaves the reader with only one possible conclusion—the defendant was in the building to buy drugs. The mere fact that there were 12 separate dwellings in the building, however, suggests that a person could be in the building for many reasons, drug use or purchase being only one. This was the significance of the Minnesota Court of Appeals' finding that the officer “neither recognized *Dickerson* nor identified which apartment *Dickerson* left.” *State v. Dickerson*, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991) (emphasis added). Indeed, the strongest inference that the record supports is that, at some time in the past, at most four of the twelve apartments may have been searched. *Tr. of Hearing on Suppression Motion, supra* note 115, at 22.

125. *Dickerson*, 113 S. Ct. at 2133.

126. *Dickerson*, 469 N.W.2d at 464.

127. *Dickerson*, 113 S. Ct. at 2133. During the trial, the defendant vigorously disputed this version of the facts. The trial court, however, accepted the officer's version of events. *State v. Dickerson*, 481 N.W.2d 840, 842 (Minn. 1992); *Dickerson*, 469 N.W.2d at 464.

128. *Dickerson*, 113 S. Ct. at 2133. Amazingly, the officer admitted on the stand that his purpose was to stop the suspect and search not only for weapons, but for contraband. *Dickerson*, 481 N.W.2d at 842. Nothing seems to have come of this admission.

129. *Dickerson*, 469 N.W.2d at 464.

130. *Id.* at 465 (citing *State v. Johnson*, 444 N.W.2d 824, 826-27 (Minn. 1989)).

131. *Id.* at 462.

132. *Dickerson*, 481 N.W.2d at 843.

activity" location and evasive behavior—as adequate grounds for reasonable suspicion and thus sufficient for *Terry* stops.

### 1. Location

The Supreme Court has made clear that location alone is insufficient to support the requisite reasonable suspicion.<sup>133</sup> Nevertheless, cases abound in which the defendant's presence in a "high crime area" or an "area of high drug activity"<sup>134</sup> is, if not the *only* justification for a *Terry* stop, at least the *primary* reason for the stop.<sup>135</sup> The eagerness with which locations are declared high crime areas should generate skepticism in courts, but it does not.<sup>136</sup>

133. *Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that an individual's presence in an area with a high incidence of narcotics trafficking is insufficient to support a reasonable suspicion); *see also* *Sibron v. New York*, 392 U.S. 40, 64 (1968) (associating with known drug addicts is insufficient to allow stop or frisk). Professor LaFave has noted that "simply being about in a high-crime area should not of itself ever be viewed as a sufficient basis to make an investigative stop." WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE 457-58 (2d ed. 1986).

134. There are numerous examples of cases using this terminology. *See, e.g., Brown*, 443 U.S. at 49, 52 (using the phrases "high incidence of drug traffic" and "neighborhood frequented by drug users"); *United States v. Anderson*, 754 F. Supp. 442, 443 (E.D. Pa. 1990) (finding that the police "knew this neighborhood was one of high drug-related criminal activity"); *State v. Fincher*, 603 N.E.2d 329, 331 (Ohio Ct. App. 1991) (finding that the police were patrolling in an area of "high drug activity").

135. While cases listed here come out both ways, all are examples of the fact that police make such stops with some frequency. *See, e.g., United States v. Maragh*, 695 F. Supp. 1223 (D.D.C. 1988) (police officer had no reasonable suspicion for the stop when the defendant, traveling with two other black males, stopped in a train station, a prime point of arrival for drug couriers, and made eye contact with the officer), *rev'd*, 894 F.2d 415 (D.C. Cir. 1990), *and cert. denied*, 498 U.S. 880 (1990); *State v. White*, 398 S.E.2d 778 (Ga. Ct. App. 1990) (the defendant's presence on a block with "increased drug traffic" (in his own driveway), and another individual's startled look and quick departure from the location was insufficient to support the *Terry* stop); *Bozeman v. State*, 397 S.E.2d 30, 32 (Ga. Ct. App. 1990) (the defendant's presence in a car with a companion at 4:45 a.m. parked in a remote section of a parking lot in high crime area was sufficient for reasonable suspicion); *State v. Dubose*, 291 S.E.2d 39 (Ga. Ct. App. 1982) (the defendant's presence at night in a spot where a murder had occurred 24 hours earlier and where five men "appeared to be gambling, and drinking beer and wine" justified the stop); *Gibbs v. State*, 306 A.2d 587, 593 (Md. Ct. Spec. App. 1973) (the defendant's presence in a "high crime area" for several hours was insufficient to support reasonable suspicion required for a stop); *Wold v. State*, 430 N.W.2d 171, 175 (Minn. 1988) (the defendant's presence at the scene of the crime while the victim was being taken away by paramedics supplied reasonable suspicion for the stop, even though "the record leaves some doubt as to the extent [the defendant] was involved" in a verbal altercation with the paramedics); *State v. Barth*, No. 92 CA 17, 1993 Ohio App. LEXIS 122 (Ct. App. Jan. 19, 1993) (the stop of a defendant based on his presence in a high crime area late at night was unjustified); *State v. Crosby*, 594 N.E.2d 110, 112-13 (Ohio Ct. App. 1991) (a stop based on the fact that the defendant was sitting in a car parked in a high drug area talking to an individual outside the car who ran when the police approached was not based upon reasonable suspicion); *State v. Chandler*, 560 N.E.2d 832, 837 (Ohio Ct. App. 1989) (a *Terry* stop made on basis that the area had high drug activity and that there was "rustling around" inside the vehicle was not based on reasonable suspicion); *State v. Anfield*, 770 P.2d 919 (Or. Ct. App. 1988) (no reasonable suspicion for a stop of a defendant walking down a street in a high crime area at night carrying a bag); *State v. Goggins*, Comm. Pleas, Cuyahoga County, No. 253663 (June 1992) (the presence of a car in an area of high drug activity, bad license tag, and the fact that a man outside the car talked to persons inside the car and ran as police approached did not supply reasonable suspicion for a *Terry* stop of the passenger).

136. *See* LAFAVE, *supra* note 133, at 456-57, and cases cited therein; Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 222 n.42 (1983) (asserting that courts "should be more cautious" in accepting testimony that particular areas are crime prone because some police officers

## 2. Evasion of the Police

Four courts have explicitly stated that merely avoiding the police can be enough, by itself, to justify a *Terry* stop.<sup>137</sup> This reasoning disregards the

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describe all areas that way); *see also* JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 218 (2d ed. 1975) ("If an honest citizen resides in a neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances that he might be *mistaken* for one.") (emphasis added). Caution in this area would be especially appropriate, because, as Professor Johnson has argued, when courts blindly accept police expertise in pronouncing a place an area of high crime or drug activity, they risk becoming party to police prejudice and stereotypes concerning the residents of ghetto neighborhoods. Johnson, *supra*, at 255.

137. *United States v. Jackson*, 741 F.2d 223 (8th Cir. 1984) (flight by two men in an alley upon police cruiser's appearance, which prompted one of the men to yell "It's the police, man, run," constituted suspicion reasonable enough to allow a stop); *Platt v. State*, 589 N.E.2d 222 (Ind. 1992) (flight of parked vehicle immediately upon police car pulling in behind it constitutes reasonable suspicion sufficient to allow stop); *State v. Johnson*, 444 N.W.2d 824, 826-27 (Minn. 1989) (a motorist's exit from a highway upon observing the police and reentry a short time later was enough to constitute reasonable suspicion); *State v. Anderson*, 454 N.W.2d 763, 766-67 (Wis. 1990) (the defendant's "flight from" the police, without more, was sufficient to support the stop); *see also* *State v. Williamson*, 206 N.W.2d 613, 614-15 (Wis. 1973) (there was reasonable suspicion to stop the defendant when he pulled his car over upon seeing the police and pulled it away from the curb when the police seemed to be gone). *Contra* *State v. Master*, 619 P.2d 482, 483 (Ariz. 1980) (there was no reasonable suspicion where the defendant abruptly changed the direction in which he was walking at the same time the police turned their car around for a better observation); *Cauthen v. United States*, 592 A.2d 1021, 1024-25 (D.C. 1991) (the defendant's rapidly walking away when the police approached after receiving an anonymous tip that unidentified, undescrbed males were dealing drugs was insufficient to support the stop, even though the defendant dropped the bag as the police approached); *In re D.J.*, 532 A.2d 138, 142 (D.C. 1987) (an attempt to evade the police, without more, is insufficient grounds to justify a *Terry* stop); *People v. Fox*, 421 N.E.2d 1082 (Ill. Ct. App. 1981) (driving away upon the approach of a marked police car did not support reasonable suspicion for the stop); *Commonwealth v. Stratton*, 331 A.2d 741, 742 (Pa. 1974) ("[T]here is no question that flight alone, even upon seeing a police officer, would not be sufficient to justify stopping and searching the defendant."). Note that many other cases combine evasion with just the thinnest veneer of other facts. *See, e.g.*, *Morgan v. Woessner*, 975 F.2d 629, 638-39 (9th Cir. 1992) (the fact that the suspect allegedly looked at the officers, then turned and walked away, in addition to the fact that the suspect was black, did not amount to reasonable suspicion); *People v. Thomas*, 660 P.2d 1272, 1275 (Colo. 1983) (there was no reasonable suspicion where the defendant ran to a nearby building with his hand in his pocket upon seeing the officers); *Commonwealth v. Martinez*, 588 A.2d 513 (Pa. Super. Ct. 1991) (there was no reasonable suspicion when the defendant rapidly walked away from police officers who were approaching a group of people on the corner where the defendant had been talking and the defendant "[held] her hands in the front of her coat, leaning forward, as if to be holding something").

In light of *California v. Hodari D.*, 111 S. Ct. 1547, 1549 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See* Proverbs 28:1 ('The wicked flee when no man pursueth'). We do not decide that point here"), it would hardly be surprising if lower courts felt that flight from police, by itself, was sufficient to constitute reasonable suspicion, though the Court in *Hodari D.* hesitated to go that far. *See also* *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (Kennedy, J., concurring) ("respondent's unprovoked flight gave the police ample cause to stop him."). Since *Hodari D.*, the Supreme Court has denied certiorari in at least two cases in which a state asked the Court to rule that flight from police alone justified a *Terry* stop. *Florida v. Jones*, 592 So. 2d 248 (1991), petition for writ of certiorari, Dkt. No. 91-1634 (1992) at 1 ("Question Presented: Is an individual's flight from an identifiable law enforcement officer sufficiently suspicious in and of itself to justify a temporary investigative stop pursuant to *Terry v. Ohio* and *California v. Hodari D.*["]."), *cert. denied*, 113 S.Ct. 296 (1992); *Nebraska v. Hicks*, 488 N.W.2d 359 (1992), petition for writ of certiorari, Dkt. No. 92-916 (1992) at 6 (Court should grant the writ because "[t]here is presently a conflict among the state courts and among the federal circuit courts as to whether flight from law enforcement is sufficient to justify an investigative stop."), *cert. denied*, 113 S. Ct. 1625 (1993).

fact that the Constitution allows a person to walk away when questioned by the police.<sup>138</sup>

### 3. Location and Evasion

Even if either presence in a high crime location or evasion alone would be insufficient, courts often find that the combination of these two factors is enough to sustain a *Terry* stop.<sup>139</sup> To be sure, some cases hold to the

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138. The Supreme Court has held that “[a citizen] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.” *Florida v. Royer*, 460 U.S. 491, 498 (1983) (citing *United States v. Mendenhall*, 446 U.S. 544, 544 (1980) (a citizen who does not wish to answer police questions may disregard the officer’s questions and walk away.)); *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991) (while police may question an individual about whom they have no suspicion, “an individual may decline an officer’s request without fearing prosecution.”); see also *Brown v. Texas*, 443 U.S. 43, 49 (1979) (no reasonable suspicion justified a seizure where the police stopped the defendant in an alley associated with drug trafficking and the defendant “refused to identify himself and angrily asserted that that the officers had no right to stop him.”); *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991) (refusal to answer questions cannot be the basis for reasonable suspicion because “the ominous implication in this argument is that only guilty persons have anything to keep from the eyes of the police”); *LAFAVE*, *supra* note 133, at 448 (“It is not to be doubted that [actions aimed at evading the police] may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation.”) (emphasis added). Obviously, there is more to the point. As Professor Maclin has said, it is all very well to say that a citizen need not respond to police inquiries; it is another thing to ask how many would actually resist, and why they should have to do so. “The point is not [only] that very few persons will have the moxie to assert their fourth amendment rights in the face of police authority, although we know that most will not. It is whether citizens in a free society should be forced to challenge the police in order to enjoy [their rights].” Maclin, *supra* note 51, at 1306.

139. See, e.g., *State v. Jones*, 450 So. 2d 692, 694-95 (La. Ct. App. 1984) (presence in a high crime area at night and “walking briskly away from the scene” when the police approached was sufficient to amount to reasonable suspicion), *rev’d in part on other grounds*, 456 So. 2d 162 (La. 1984); *State v. Belton*, 441 So. 2d 1195 (La. 1983) (reasonable suspicion existed to stop a defendant who fled when the police approached a bar where narcotics were sold), *cert. denied*, 466 U.S. 953 (1984); *State v. Williams*, 416 So. 2d 91 (La. 1982) (leaving the location upon seeing the police in a high crime area amounts to reasonable suspicion); *State v. Wade*, 390 So. 2d 1309, 1311-12 (La. 1980) (the defendant’s presence in a high crime area plus flight upon observing the police amounted to reasonable suspicion); *State v. Taylor*, 363 So. 2d 699, 703 (La. 1978) (presence in a high crime area plus change in speed of movement amounted to reasonable suspicion); *State v. Stinnett*, 760 P.2d 124, 127 (Nev. 1988) (the defendant’s presence in a group of men “huddled” in a drug area and his running away upon seeing a police car were sufficient to support reasonable suspicion for the stop); *State v. Butler*, 415 S.E.2d 719, 722-23 (N.C. 1992) (the defendant’s presence on the corner known as “drug hole” and the fact that the defendant “immediately turned and walked away” upon making eye contact with the police was sufficient to support the stop, even though the defendant was unknown to the officers); *State v. Andrews*, 565 N.E.2d 1271, 1273-74 (Ohio 1991) (the defendant’s presence in a high crime area and his running from the direction of a police car gave an experienced officer articulable suspicion to stop the defendant); *State v. Glover*, 806 P.2d 760, 761-62 (Wash. 1991) (the defendant’s presence in a high crime area, and his avoidance of officers upon seeing them amounted to reasonable suspicion for stop); *State v. Little*, 806 P.2d 749, 753 (Wash. 1991) (the defendant’s presence in a high crime area plus flight upon seeing an officer provided the officer with “substantial grounds of criminal activity [sic] to justify a detention.”); *State v. Rice*, 795 P.2d 739, 741-42 (Wash. Ct. App. 1990) (an officer acted with reasonable suspicion when the defendant was found in a high crime area where shots reportedly were fired and the defendant seemed “to be considering running away”); see also *United States v. Lane*, 909 F.2d 895, 898-99 (6th Cir. 1990) (the defendant’s presence in a drug area and flight from officers were sufficient to support the stop), *cert. denied*, 111 S. Ct. 977 (1991); *Stephenson v. United States*, 296 A.2d 606, 607, 610 (D.C. 1972) (there was reasonable suspicion to stop defendants seen moving at a brisk jog near the location of recent burglaries), *cert. denied*, 411 U.S. 907 (1973). Numerous other

contrary<sup>140</sup> This shows that lower courts are not all of one mind on "location plus evasion" cases. The point, however, is that these cases, whichever way they come out, represent a widespread police practice. In other words, these cases indicate that stopping people based merely on location and evasion is a common police technique, whether or not courts ultimately admit the evidence gathered.<sup>141</sup>

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cases allow stops based on location and evasion, where just one or two other innocuous factors are present. *See, e.g.*, *United States v. Anderson*, 754 F. Supp. 442, 444-45 (E.D. Pa. 1990) (the defendant's presence late at night in an area known for drug activity with others known as traffickers, plus flight upon approach of the police, was sufficient to amount to reasonable suspicion); *Peay v. United States*, 597 A.2d 1318, 1320-21 (D.C. 1991) (the defendant's presence in front of a building known for narcotics trafficking and flight into the building upon seeing the police, combined with fact that the defendant was "clutching something in his hand" amounted to reasonable suspicion); *State v. Cook*, 332 So. 2d 760, 763 (La. 1976) (the defendant's presence in a high crime area and flight when officers approached, plus looking suspiciously around the corner of a building, supported a finding of reasonable suspicion).

140. *See, e.g.*, *People v. Aldridge*, 674 P.2d 240, 243 (Cal. 1984) ("[F]light may imply a consciousness of guilt, and combined with other factors could justify an investigative stop, [but it is insufficient alone]"); *People v. Wilson*, 784 P.2d 325, 326-27 (Colo. 1989) (the defendant's presence in a drug area and flight from police were insufficient to support a stop based upon reasonable suspicion); *People v. Thomas*, 660 P.2d 1272, 1275-76 (Colo. 1983) ("It is only when a person's effort to avoid police contact is coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct that the evasive action, takes on a sufficiently suspicious character to justify a stop"); *Smith v. United States*, 558 A.2d 312, 314-17 (D.C. 1989) (there was no reasonable suspicion for the stop when defendant was seen in a "high narcotics traffic area" with other suspects and walked quickly away from the police); *Ruffin v. State*, 412 S.E.2d 850, 852-53 (Ga. Ct. App. 1991) (there was no reasonable suspicion to stop the defendant because he was in an area known for narcotics trafficking and walked "briskly" away upon noticing the police); *Watkins v. State*, 420 A.2d 270, 274 (Md. Ct. App. 1980) ("[W]e agree with the majority of courts that view the unequivocal flight of a suspect upon seeing the police as not alone necessarily indicative of criminal activity."); *People v. Shabaz*, 378 N.W.2d 451, 460 (Mich. 1985) (flight "does not alone supply particularized, reasoned, articulable basis to conclude that criminal activity [is] afoot."); *State v. Fleming*, 415 S.E.2d 782, 785-86 (N.C. Ct. App. 1992) (finding no reasonable suspicion existed to stop the defendant in a high crime area who initially walked away from an officer); *People v. Posnjak*, 72 A.2d 966 (N.Y. App. Div. 1979) (finding that no reasonable suspicion existed for the stop of a defendant who was present, with others, at the scene of a reported crime and who walked away); *State v. Fincher*, 603 N.E.2d 329, 332-33 (Ohio Ct. App. 1991) (there was no reasonable suspicion based on the defendant's presence in an area of high drug activity and change of direction upon seeing the police); *State v. Hewston*, No. 59095, 1990 Ohio App. LEXIS 3192 (Aug. 2, 1990) (there was no reasonable suspicion to stop the defendant based on presence in an area of high drug activity and flight from police); *see also* *United States v. Crawford*, 891 F.2d 680, 681 (8th Cir. 1989) (the defendant's presence at a building in which a drug trafficker had an apartment, the defendant's running around to the back of the building, and his taking a bicycle and coats out of the building while looking up and down the street did not amount to reasonable suspicion); *United States v. Montgomery*, 561 F.2d 875, 878-80 (D.C. Cir. 1977) (there was no reasonable suspicion when the defendant drove in circles in a residential area, watching officers in a rear view mirror).

141. It should go without saying that with the addition of even one or two additional factors, location and evasion stops are generally valid. LAFAVE, *supra* note 133, at 448-58 (other factors include suspects' reactions—other than flight—to police presence, whether individual fits in an area, suspect's companionship with another person lawfully arrested, and time of day).

#### 4. Automatic Frisks in Drug Cases

Perhaps as a result of the "war on drugs,"<sup>142</sup> or society's general antipathy toward accused persons, state and federal cases from all over the country have concluded that the trade in illegal narcotics almost inevitably entails the use of deadly weapons. Therefore, almost any time that the crime suspected in a *Terry* situation involves drugs, courts routinely allow a frisk following a stop as a matter of course.<sup>143</sup>

Courts allow these automatic frisks in drug cases whether or not there are any actual indications that the suspect is armed.<sup>144</sup> This is contrary to *Sibron*, which stated that "[t]he suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime."<sup>145</sup>

Courts also fail to distinguish between drug use or possession on the one hand and drug trafficking on the other for purposes of judging whether the defendant might be armed.<sup>146</sup> Thus, even if at the time *Terry* was decided courts were uncertain whether possession of drugs was the type of crime "whose nature creates the substantial likelihood that [the suspect] is armed,"<sup>147</sup> they now treat drug involvement as a proxy for a reasonable

142. See, e.g., Wayne R. LaFave, *Fourth Amendment Vagaries (Of the Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1224 (1983) ("[T]he maleficent trafficking in drugs" may produce "atrophy of the fourth amendment."); Maclin, *supra* note 51, at 1334 (the Court "remains fixated on expanding the government's investigatory powers to help control the drug crisis" despite evidence of its futility); Stephen A. Salzberg, *Another View of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 4, 23 (1986) (courts are "turning their backs on Fourth Amendment principles, in order to aid the war against illicit drugs").

143. See, e.g., *United States v. Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (the fact that "narcotics traffickers frequently carry weapons," as well as the facts that the officer recognized the driver as person previously arrested for a narcotics violation and the defendant made motions toward the floor of the car, justified a pat down); *United States v. Anderson*, 859 F.2d 1171, 1177 (3d Cir. 1988) (a pat-down was proper because the officer saw a bag in the car which contained cash, thought the cash might be drug money, and "persons involved with drugs often carry weapons"); *United States v. Nersesian*, 824 F.2d 1294, 1317 (2d Cir. 1987) (a frisk was justified because it is reasonable to assume those involved in sale of narcotics carry weapons), *cert. denied*, 484 U.S. 957 (1987); *United States v. Ceballos*, 719 F. Supp. 119, 126 (E.D.N.Y. 1989) ("[T]he need to frisk those suspected of committing a narcotics offense in the course of a street encounter is obvious. Here, the agent's reasonable suspicion that they had witnessed a narcotics transaction established the requisite premise for conducting a self-protective frisk for weapons."); *State v. Bechtold*, 783 P.2d 1008, 1010 (Or. Ct. App. 1990) (the fact that officers "knew that people involved in the manufacture and transportation of [methamphetamines] commonly carry weapons" served as part of the justification for a pat down); *State v. Flynn*, 285 N.W.2d 710, 713 (Wis. 1980) (officers may frisk for weapons in cases involving drug offenses) (dictum), *cert. denied*, 449 U.S. 846 (1980).

144. See, e.g., *State v. Dickerson*, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991) (despite the fact that the defendant made no attempt to conceal anything and that the officer "did not notice any suspicious bulges in [the defendant's] clothing," the officer frisked the defendant after stopping him).

145. *Sibron v. New York*, 392 U.S. 40, 64 (1968); see also LAFAVE, *supra* note 133, at 507 (in order for frisks to lawfully take place in minor crimes, including drug possession and trafficking in small amounts, circumstances other than the crime itself must be present).

146. E.g., *Dickerson*, 469 N.W.2d at 465 (an officer had experience with weapon-carrying drug traffickers; from this, he testified that "drug possessors often carry weapons") (emphasis added).

147. *Sibron*, 392 U.S. at 74 (Harlan, J., concurring).

suspicion that the person is armed and dangerous. Therefore, any person stopped for any drug-related activity automatically may be frisked.

### III. IMPLICATIONS: OPEN SEASON IN THE INNER CITY

As the four groups of cases discussed above show, police have considerable power to stop citizens and perform searches based on very limited facts. The implications of this point, however, differ depending on who the citizen stopped and frisked is, and where he or she lives. The unfortunate fact is that *Terry* and its progeny have resulted in stops and frisks of residents of inner cities—primarily poor persons, African Americans, and Hispanic Americans—far out of proportion to their numbers,<sup>148</sup> and often without justification.<sup>149</sup> These searches and seizures carry a high price, not only to the individuals involved but to all of society

#### *A. The Inner City: Location of High Crime and Drug Trafficking Areas*

The “high crime areas” and “areas associated with high levels of drug activity” in the cases explored in this Article are not, by any means, evenly distributed across urban areas.<sup>150</sup> On the contrary, zones of high crime activity are concentrated in inner city neighborhoods.<sup>151</sup> In fact, the terms “inner city neighborhood” and “high crime area” are synonymous for many Americans, including many of the regular participants in the criminal justice process.<sup>152</sup> These neighborhoods tend to be poorer, older, and less able to support jobs and infrastructure than either city neighborhoods more distant from the urban core or suburban locations.

#### *B. Minority Groups: Residents of Inner Cities*

It will not surprise anyone who lives or works in an urban center to learn that these areas share another characteristic in addition to the presence of crime: They are racially segregated. African Americans and Hispanic

148. See *infra* notes 169-73 and accompanying text.

149. See *infra* notes 150-75 and accompanying text.

150. DAVID T. HERBERT, *THE GEOGRAPHY OF URBAN CRIME* 102 (1982) (studies identifying large cities and densely populated areas as “main problem areas” of crime).

151. *Id.* at 19; Associated Press, *Capitol Led the Nation in '88 Justice Spending*, N.Y. TIMES, July 16, 1990, at A11 (higher per capita spending on criminal justice in urban areas explained, in part, by the fact that “there’s more crime in high-population-density areas than in rural areas”); John Hood, *Making Parents Pay: Atlanta Law Sets Off a Curfew Craze of Questionable Value*, CHI. TRIB., Apr. 25, 1991, at Tempo 17 (“[I]n fact, some areas are more dangerous than others, and studies show that the dangerous ones, for various reasons, tend to be poor, black neighborhoods.”).

152. James M. Doyle, “*It’s the Third World Down There!*” *The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71 (1992) (lawyers, police officers, and others involved in the criminal justice system use colonial “White Man’s” frame of reference in relating to and articulating “stories” concerning crime and inner cities).

Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.<sup>153</sup>

Twenty-five years after the Kerner Commission found America moving toward "two societies, one black, one white—separate and unequal,"<sup>154</sup> studies continue to show that racial segregation remains one of the most significant characteristics of American cities.<sup>155</sup> For example, Professor George C. Galster has argued that "virtually all of our major metropolitan centers where large numbers of minorities live are highly segregated."<sup>156</sup> Numerous forces cause this segregation; the huge economic disparities that persist between the races play a key role.<sup>157</sup> Segregation's effects are nothing short of devastating. It narrows and weakens networks and institutions that support minority communities; it may encourage the growth of isolating "subcultural attitudes, behaviors, and speech patterns" that can impede mainstream success; it results in the attraction of only low-paying, short-term employment; and it increases "racial competition and suspicion."<sup>158</sup>

While segregation harms society as a whole, the more important point for purposes of this discussion is that African Americans and Hispanic Americans find themselves segregated into crime-prone locations. Minorities "tend to cluster in or near the older, core municipality of the metropolitan area."<sup>159</sup> By virtue of their relative socioeconomic status, not to mention persistent racial discrimination,<sup>160</sup> African Americans and Hispanic Americans find themselves living in the very areas of cities labeled "high crime areas" and "drug trafficking locations." More importantly, they not only live there, they are also more likely to work in these areas than in safer, suburban locations.<sup>161</sup> Thus, for purposes of the two major locational foci of modern life—place of residence and place of employment—many members of minority groups will find themselves in areas associated with criminal activity

153. See *supra* notes 151-52 and accompanying text and *infra* notes 154-59 and accompanying text.

154. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968).

155. George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1430-31 (1993).

156. *Id.* Professor Galster demonstrates this segregation of urban areas by using a "dissimilarity index," that "shows how evenly various racial and ethnic groups are spread across neighborhoods within metropolitan areas." *Id.* A score of zero indicates completely even integration; a score of one hundred shows complete segregation. The data Galster uses shows urban areas where African Americans and Hispanic Americans live to be highly segregated, with members of those groups virtually the only residents. *Id.* at tbl. 9.

157. *Id.* at 1431.

158. *Id.* at 1431-32.

159. *Id.*

160. *Id.* at 1431.

161. *Id.* at 1432 ("[M]inorities' employment opportunities will be restricted in light of progressive decentralization of jobs (especially those paying decent wages with only modest skill requirements) in metropolitan areas. The ability of minorities both to learn about and to commute to jobs declines as proximity to them declines.").

### C. Avoiding the Police

Opinions in post-*Terry* cases that include avoidance of the police create a distorted picture. These cases convey the impression that only one reason exists to avoid police: escaping apprehension for a crime. After all, the cases all end in a seizure of some evidence, which seizure the defendant then contests as unconstitutional. These opinions, however, represent only one part of the universe of cases in which people are stopped because they avoided the police. It is simply not true that only the guilty avoid the police; there are many innocent reasons a person might run from them.<sup>162</sup>

To be sure, the question for resolution in a hearing to suppress evidence gained during a *Terry* stop is not whether the activity observed is innocent, but whether, in conjunction with other actions, it gives rise to a suspicion that crime is afoot. The point is that while people may avoid the police for a variety of reasons, reported cases focus only on those with guilty motivations.<sup>163</sup> Others who are without guilt are nevertheless stopped and frisked. They are not charged because the search yields no evidence and no reported case ever results. Even stops and frisks that do not result in charges carry a cost, however, albeit one that remains largely invisible: *Large numbers of people are searched and seized, and treated like criminals, when they do not deserve to be.*

With this cost in mind, the question becomes whether some people might be less inclined to stop and cooperate with police than others. Put another way, do any particular people have reasons other than guilt to fear encounters with police and therefore have strong motives to avoid contacts with them? The answer is yes. More importantly, these are the same people sentenced by segregation to live in inner city, "high crime" areas.

Put in the simplest terms, the criminal justice system treats African Americans and Hispanic Americans differently than it does whites. This disparate treatment reaches beyond the end product of the system, that is, the fact that African Americans are vastly overrepresented in prisons and jails relative to their numbers in the general population.<sup>164</sup> Rather, these inequities reach down to the first level of the criminal justice process, the points at which police decide who they will investigate, approach, stop, frisk, and ultimately arrest. Police are much more likely to stop African-American men

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162. See, e.g., EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.08 (1987) ("In your evaluation of this evidence of [flight] you may consider that there may be reasons—fully consistent with innocence—that could cause a person to [flee]. *Fear of law enforcement or a reluctance to become involved in an investigation may cause a person who has committed no crime to immediately [flee]* ") (emphasis added).

163. Reported cases focus only on guilty persons because only those persons who are found through stops and frisks to possess contraband or to be committing a crime in some other manner are charged. Only persons who are charged and convicted appeal their cases, resulting in reported opinions.

164. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990) (one in four young African-American men are under custodial supervision of some kind; the comparable figure for whites is one in 25).

than white men.<sup>165</sup> Many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process.<sup>166</sup> While the causes of this phenomenon are no doubt complex—among other factors, racism and simple ignorance surely play a role<sup>167</sup>—the effect is undeniable: African Americans, as more frequent targets of undesirable treatment by police than whites, are naturally more likely to want to avoid contact with the police.<sup>168</sup> They wish to avoid harassment, baseless stops and frisks, and even more extreme actions, such as beatings, at the hands of police.<sup>169</sup>

These facts bring us full circle. In many courts an individual's presence in a high crime location plus evasion of the police equals suspicion reasonable enough to allow a stop under *Terry*. African Americans, Hispanic Americans, and poor people are likely to find themselves in such high crime areas, simply because they live and work there. If these people choose to avoid the police—a choice they have the constitutional right to make<sup>170</sup>—the police may stop them. If the location is not just a high crime area but a location

165. See, e.g., KENNETH C. DAVIS, *POLICE DISCRETION* 18 (1975) (police discretion results in disproportionate willingness to stop and search member of the "kinky (criminal) class," who officers can recognize by "physical characteristics and appearance") (footnote omitted). See generally Johnson, *supra* note 136; Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 446-47 (1967).

166. See, e.g., Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 251-53 (describing numerous instances of less than legal street encounters between police and black males, concluding that "[b]lack men know they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent. This applies to black men of all economic strata, regardless of their level of education, and whatever their job status or place in the community."); Charles N. Jamison, Jr., *Racism: The Hurt That Men Won't Name*, ESSENCE, Nov. 1992, at 63; see also Les Payne, *Up Against the Wall: Black Men and the Cops*, ESSENCE, Nov. 1992, at 134. Anecdotal evidence of these practices is quite common. See, e.g., *Morgan v. Woessner*, 975 F.2d 629, 633 (9th Cir. 1992) (former baseball player Joe Morgan was accosted at airport and seized as drug trafficker because he was black and allegedly changed directions when he saw undercover officers); Amy Wallace & Stephanie Chavez, *Understanding the Riots—Six Months Later*, L.A. TIMES, Nov. 16, 1992, at J11 (a black psychologist leaves work with his identification badge on during his drive home in anticipation of being stopped by the police); Michael Winery, *Building Stronger Cases in Gun Trials*, N.Y. TIMES, July 4, 1993, at A21 (black attorney, described as a "middle aged, black professional" says that "he has been stopped in his Volvo in Brooklyn and hassled by the police for no reason").

167. Gaynes, *supra* note 19, at 624 (suggesting both racism and whites' inability to distinguish between law-abiding and law-breaking African Americans lies at the bottom of the problem).

168. See, e.g., *id.* at 625 (recounting both overall patterns and anecdotal evidence of police harassment of black men). Some courts have recognized these realities. For example, in *Ohio v. Crosby*, 594 N.E.2d 110 (Ohio Ct. App. 1991), two officers in an inner city "drug area" observed a man leaning into the passenger window of a car in which the defendant driver and his passenger sat. When the officers approached, the man leaning into the car ran. Both the defendant and his passenger were ordered out of the car (and in the passenger's case, frisked). *Id.* at 111-12. The court declared that the fact that having a conversation with a person leaning into a vehicle in an area known for drug activity, behavior that the officer called "indicative of drug trafficking," was insufficient to justify a stop and frisk. *Id.* at 111. "It is not unreasonable for a young, black male living in a neighborhood with drug sales and liable to be stopped to run when approached by a police car whose officers assume a drug sale whenever someone speaks to someone in a car and believe the mere act of congregating justified a seizure." *Id.* at 112-13 (quoting *State v. Arrington*, 512 N.E.2d 649, 651-52 (Ohio Ct. App. 1990)).

169. See, e.g., Williams, *supra* note 6, at 567-69 (recounting the beating of the author's father by police officers, witnessed by the author).

170. See *supra* note 138.

known for drug activity, the police may go further: They may search the individual, performing a *Terry* pat-down. In other words, every person who works or lives in a high crime area and who avoids the police is subject to automatic seizure, and to automatic search if the crime suspected involves drugs. Due to the disproportionately high number of African Americans and Hispanic Americans living in those areas, they are subject to this treatment much more often than are whites.<sup>171</sup>

African Americans and Hispanic Americans therefore become caught in a vicious cycle. Police use *Terry* stops aggressively in high crime neighborhoods; as a result, African Americans and Hispanic Americans are subjected to a high number of stops and frisks.<sup>172</sup> Feeling understandably harassed, they wish to avoid the police and act accordingly. This evasive behavior in (their own) high crime neighborhoods gives the police that much more power to stop and frisk.

If this phenomenon only affected the guilty, those possessing contraband, perhaps it would be easier to live with. It is certain, however, that for all the stops and frisks that produce evidence there are many that do not. Courts see only the most skewed sample of all *Terry* stops police perform: those that produce incriminating evidence. While statistics concerning the total number of stops are unavailable (since only stops that result in charges make it into police and court records), the anecdotal evidence overwhelmingly suggests that police frequently stop and frisk African Americans and Hispanic Americans based on very little evidence.<sup>173</sup>

These fruitless searches and seizures represent a cost, both to individuals and to society. Not the least of this cost is the effect these stops have in widening the racial divide in the United States. "Location plus evasion" stops and frisks, in which police forces consistently treat all-black neighborhoods like enemy territory, have become the source of a distinctly racial abrasiveness for African Americans. Those communities most in need of police protection may come to regard the police as a racist, occupying force. This results in an American form of apartheid, in which racially segregated areas are patrolled by police agents of the white power structure imbued with special powers because of the "dangerous" nature of the areas they control. Perhaps it is no wonder Ice-T reaches so many people when he talks about being stopped for nothing.

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171. One could, of course, make a much more direct attack on the use of race as a criterion for stopping suspects under *Terry*. See Johnson, *supra* note 136, at 225-50 (criticizing the broad use of race in *Terry* cases on both probabilistic and constitutional grounds); Williams, *supra* note 6, at 567 (indicating that *Terry*'s condemnation of racial harassment by police has been eroded by subsequent cases). Such efforts deserve applause. My purpose here, while obviously related, is different: to show how the facts of location in a crime-prone area and evasion of the police are effectively used as proxies for race in *Terry* detentions and searches.

172. See *supra* notes 169-71 and accompanying text.

173. See *supra* notes 165-69 and accompanying text.

## IV PROPOSALS

Resolving the problems associated with *Terry v. Ohio* presents many challenges. Three possibilities are examined here. The first is a return to the pre-*Terry* standard used for all searches and seizures. The second is a recalibration of the *Terry* balancing test. Both of these proposals aspire to address the full universe of *Terry* problems. The third proposal is aimed only at the problems highlighted in this Article. Perhaps because it attempts to solve only one set of difficulties raised by *Terry*, the third proposal's chance of success may be the best of the three.

*A. Return to the Probable Cause Standard*

Overturing *Terry* represents the cleanest solution to the numerous problems the case has raised from the beginning. A return to pre-*Terry* law for all searches and seizures would address these difficulties comprehensively<sup>174</sup> Courts would have no need to describe the perhaps inarticulable line between a "mere" hunch and a reasonable suspicion.<sup>175</sup> The problem of deciding how much evidence of innocent conduct clustered together is enough to amount to reasonable suspicion would be easier to address at the level of probable cause. The inconsistency between cases such as *Reid v. Georgia* and *United States v. Sokolow* (defensible, if at all, only on the basis of the number of activities and some deceit by the defendant in the latter case) could be avoided. There would be no need for emphasis on deference to police within a category of judgments ruled by a special (*that is*, reasonable suspicion) standard; instead, courts could make the same probable cause determination that they customarily do when they issue warrants. If stops and frisks based only on location and avoidance of police seem questionable under the reasonable suspicion standard, they would be even more so under the probable cause standard and therefore less likely to be found constitutional. Perhaps most importantly, a return to the probable cause standard addresses the most troublesome aspect of *Terry*: its balancing of the interests of the state against the "limited"

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174. See, e.g., Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471-72 (1985) (recommending that the Court cease inventing exceptions to the warrant and probable cause requirement and employ them energetically, or adopt a comprehensive reasonableness test); Maclin, *supra* note 51, at 1332-33 (recommending abandonment of reasonable suspicion standard and return to probable cause, even if the latter is now "diluted"). See generally Amsterdam, *supra* note 101, at 393-94 (a return to pre-*Terry* law would focus fourth amendment inquiry on the warrant clause, with probable cause needed except under exigent circumstances).

175. See, e.g., *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("Terms like 'articulable reasons' and 'founded suspicion' are not self-defining"); *Sibron v. New York*, 392 U.S. 40, 62 (1968) (talking with six or eight drug addicts over a long period will not support reasonable inference that defendant is engaged in narcotics trafficking); see also Wayne R. LaFare, "*Street Encounters*" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 73-75 (quantum of evidence necessary for arrest is "more probable than not that the person has committed an offense," but for a *Terry* stop it is "sufficient that there is a substantial possibility that a crime has been or is about to be committed" by the defendant).

intrusion of stops and frisks.<sup>176</sup> Once this balancing is in place, the erosion of the quantum of evidence necessary to allow intrusions on individuals becomes almost a foregone conclusion. Returning to pre-*Terry* law would eliminate this entire set of difficulties.

Solving a problem, however, requires a practical approach. Only one of the sitting Supreme Court Justices might favor a return to pre-*Terry* law.<sup>177</sup> Notwithstanding the belief of some commentators that the original intent of the Constitution's framers and its text are the only legitimate source of constitutional law,<sup>178</sup> the Court seems quite content with *Terry* as decided<sup>179</sup> even though *Terry* arguably represents a clear departure from the Constitution's text.<sup>180</sup> *Terry*'s status as a fixed part of constitutional criminal procedure seems secure.

Perhaps this illustrates that what underlies the Court's *Terry* jurisprudence is not constitutional philosophy, but a political approach to criminal justice. The Court seems as focused as ever on crime control as the central tenet of criminal procedure,<sup>181</sup> notwithstanding its refusal to overrule or even contain

176. See, e.g., Schwartz, *supra* note 165, at 448-49 ("Are all of the subtle considerations to be balanced on the spot, in a matter of seconds or minutes, subject to second guessing by the courts? If the policeman's 'balancing' turns out to produce evidence of crime, how many courts will be ready to find that he balanced wrongly, that there was not enough suspicion for the crime suspected?"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988) (noting difficulty in deciding what qualifies specific police tactics for evaluation under the *Terry* balancing test). A return to the probable cause standard that predated *Terry* would not, however, be without problems. It could be that the probable cause test would simply be diluted, so that arrests would be permitted on what is now called reasonable suspicion. These arrests would simply carry the probable cause label. It might also be that "location plus evasion" stops might not cease under the pre-*Terry* standard, but simply continue, albeit less visibly. Nevertheless, the return to the pre-*Terry* law would oblige courts to work with just one standard, and would obviate the need for the balancing test.

177. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2140 (1992) (Scalia, J., concurring) (emphasizing that while "the 'stop' portion of the *Terry* 'stop-and-frisk' holding" accords with pre-*Terry* law, there is no support for the frisking of persons stopped unless they are first arrested).

178. See, e.g., *id.* at 2139 (Scalia, J., concurring) ("I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification."); JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY* 27 (2d ed. 1991) ("A familiar claim in constitutional law is that the original intent of the framers ought to control constitutional interpretation."). Compare Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228 (1988) (stating that opponents of original intent "[reject] the conventional norm of judicial review—adherence to the original intentions of the Constitution's enactors"), with Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (critiquing both textualism and originalism, stating that "explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents").

179. See, e.g., *Dickerson*, 113 S. Ct. at 2135-36. In the face of Minnesota's efforts to persuade the Supreme Court to turn *Terry* into an evidence-gathering tool, see *supra* note 115, the Court reaffirmed that *Terry* is an "exception" to the Fourth Amendment probable cause requirement and that if a frisk goes beyond its protective function, its fruits will be suppressed.

180. *Terry v. Ohio*, 392 U.S. 1, 36-38 (1968) (Douglas, J., dissenting) ("[P]olice officers up to today have been permitted to effect arrests or search without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*. The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him.") (emphasis added).

181. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-246 (1968) (contrasting crime control and due process models of the criminal justice system); Maclin, *supra* note 51, at 1334

certain cases<sup>182</sup> that symbolize the “discredited” jurisprudence of the Warren Court.<sup>183</sup> *Terry* may have originated with the Warren Court, but it is fundamentally a decision that gives the police added leverage in confronting street crime. Its origins in the context of civil unrest in 1968 and the “law and order” political rhetoric that accompanied this violence speak volumes about the underlying purpose of the case. That purpose—simple crime control—seems, if anything, more attractive today than it did in 1968.<sup>184</sup> Thus while a return to the probable cause standard seems desirable from the points of view of both doctrine and legal problem solving, it is, at least in the current environment, an impractical idea.<sup>185</sup>

### B. Recalibrating *Terry*

Several commentators advocate reforming *Terry* by readjusting the balance it strikes between police and individual interests.<sup>186</sup> Requiring a greater amount of evidence in *Terry* cases in order to find the existence of reasonable suspicion could solve the problem highlighted here—location plus evasion equals reasonable suspicion—and in general would tip the balance away from law enforcement and toward greater protection of civil liberties.

Recalibrating *Terry* creates two problems. First, some of these proposals are so complex, and the recalibration of *Terry* they propose so subtle, that in the end they may make little difference.<sup>187</sup> Especially in light of the cases that

(stating that the Court “remains fixated on expanding the government’s investigatory powers to help control the drug crisis” despite evidence of its futility).

182. See, e.g., *Minnick v. Mississippi*, 498 U.S. 146, 147 (1990) (extending the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which itself is an extension of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

183. OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 119 (1986) (calling Warren Court decisions in the area of criminal procedure “a discredited criminal jurisprudence”).

184. David A. Harris, Review Essay, *The Realities of Punishment*, 83 J. CRIM. L. & CRIMINOLOGY 1301, 1314-15 (1993) (despite the fact that a dozen years of incarceration-based criminal justice has had negligible effect on crime, political leaders continue to use fear of crime on voters, who continue to respond); Phil Gramm, *Don’t Let Judges Set Crooks Free*, N.Y. TIMES, July 8, 1993, at A11 (arguing that “domestic crime is now the greatest threat to the safety and well being of Americans”).

185. In general, the Court simply seems unwilling to upset the balance struck in the criminal procedure cases of the 1960’s and 1970’s. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 424-28 (1986) (while the Court refused to extend *Miranda*, it would not overturn it).

186. See Sundby, *supra* note 176, at 386 (stating that the proposed “composite model” of the Fourth Amendment “appropriately reorients fourth amendment analysis toward protecting privacy interests”); see also LaFave, *supra* note 175, at 124 (1968) (recommending, inter alia, that legislative bodies participate in regulating police conduct in field interrogations); Esther J. Windmueller, Note, *Reasonable Articulate Suspicion: The Demise of Terry v. Ohio and Individualized Suspicion*, 25 U. RICH. L. REV. 543, 563-64 (1991) (advocating “a return to strict *Terry* interpretation”). Professor Johnson makes a related point: Factors evaluated in the *Terry* balancing test should be evaluated both probabilistically, to ensure that they actually predict criminal behavior and not simple prejudice, and constitutionally, under the Fourteenth Amendment. Johnson, *supra* note 136, at 215-25.

187. For example, Professor Sundby’s composite model is an imaginative and well-crafted attempt to reconcile the reasonableness and warrant clauses of the Fourth Amendment. In its handling of *Terry* stops, however, the model is quite complex and may make little difference in the outcome. *Terry* stops would be analyzed under the warrant clause, shifting the focus of these encounters back to the warrant and probable cause requirements. However, exigent circumstances (in the form of the danger to the officer’s safety) would supply an exception; therefore, probable cause would *not* be required. Professor

obligate courts reviewing *Terry* stops to defer to police and consider facts from the police point of view, these proposals simply may not make enough of a difference to change anything. Second, these proposals leave the balancing process in place. To the extent that the balancing of interests represents the root cause of the types of difficulties highlighted in this Article,<sup>188</sup> the problems may recur.

### C. Innocent and Necessary and Constitutionally Protected Activities

A third proposal is to make the combination of innocent and necessary activity and constitutionally protected activity legally insufficient to rise to the level of reasonable suspicion.

This proposal is less ambitious than either of the first two. To be sure, it will not resolve all of the larger structural problems that underlie and accompany *Terry*; only a return to pre-*Terry* law can do that. Nevertheless, this recommendation would address the subset of *Terry* problems discussed here.

The "location plus evasion" cases involve two categories of activities. The first category is innocent and necessary activity; the second is activity protected by the Constitution. Innocent but necessary activity consists of noncriminal actions that people cannot avoid. The prototypical example would be the act of being in a place where one lives or works. If one resides or works in a particular location, his presence in that location is more than innocent if no criminal activity is taking place; it is necessary for that person's day-to-day functioning as a human being. Those engaged in innocent and necessary activity can avoid police intrusions based on such factors only by forgoing these activities.

Surely, not all activity that takes place in these locations is innocent. Further, if these locations are frequently host to illegal activities, presence in them might make an observer suspicious in a way that presence in more

Sundby admits that this:

poses a new problem. To avoid coming full circle back to initiatory intrusions and the reasonableness clause, the solution should preserve individualized suspicion but modify the level of suspicion to accommodate the exigency. If *Terry* was decided under the composite model, therefore, the ultimate standard for a stop and frisk would be the same, reasonable suspicion, except the reasoning would depend upon a warrant clause—exigent circumstances analysis rather than a reasonableness clause—balancing test analysis.

Sundby, *supra* note 176, at 421-22.

188. *See, e.g., id.* at 439 ("[The] difference in the nature of the individual and government interests" causes the balancing test to naturally favor the government, since government's interests—"saving lives, catching illegal aliens, stopping the flow of illegal narcotics"—overshadow the individual's "much less tangible" privacy interests.); Schwartz, *supra* note 165, at 448 (pointing out that having police officers balance "subtle considerations" in the field seems too much to ask); Windmueller, *supra* note 186, at 559 (balancing test favors government); *see also* Maclin, *supra* note 51, at 1264 (stating that the Supreme Court's claim that it uses a balancing test is "deceptive", it actually uses "three tacit rules that provide the doctrinal foundation for its decisions involving police encounters"). *But see* LaFave, *supra* note 175, at 57 ("The balancing test makes more sense if it is viewed not so much as a matter of case-by-case application, but rather as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action.").

neutral locations would not. The point is that basing reasonable suspicion upon presence in these areas puts an unfair burden on those who must, of necessity, be there.<sup>189</sup> This idea no doubt forms part of what is behind cases such as *Brown v Texas*.<sup>190</sup> Presence in a place where crimes occur, even in proximity to persons who commit those crimes, is insufficient to permit a *Terry* stop, let alone an arrest.<sup>191</sup>

The second category of activities encompasses those in which people have an explicit constitutional right to engage. For purposes of this discussion, the most important such activity is the exercise of the right to be left alone by the police. Even if the police have a right to walk up to and address any person, the person addressed has an equal right to walk away.<sup>192</sup> The fact that the subject walks away does not bring the encounter to the level of reasonable suspicion needed for a *Terry* stop.<sup>193</sup> If this were not so, the right to walk away would be meaningless; exercising the right would extinguish the freedom the right protects.

If neither the innocent but necessary activity of being in a high crime area, nor avoidance of the police could supply a sufficient basis for a *Terry* stop, both factors together should not support one either. Those who find it necessary to be in high crime areas are often the same people who find it prudent to exercise their constitutional right to avoid the police. To allow a seizure based on the combination of the two factors, each insufficient by itself, robs both factors of any significance. Thus, the conjunction of location and evasion should never be enough, alone, to give rise to reasonable suspicion.<sup>194</sup>

The argument as to drug-connected frisks is similar. Location in an area of drug activity carries a double penalty: it allows both a stop (through a suspicion that crime is afoot) and a frisk (through the fiction that any drug-related activity is always armed activity). If *Terry* frisks truly require

189. Cf. Maclin, *supra* note 51, at 1324 ("The fundamental point is that police officials should not be free to effect seizures based upon factors allegedly possessed by those engaged in criminal conduct, but also shared by a significant percentage of innocent persons").

190. *Brown*, 443 U.S. 47, 52 (1979).

191. *Id.*

192. See *supra* note 137 and accompanying text. Certainly, people have a right to engage in the innocent but noncriminal activity described earlier. This right is so obvious that finding explicit protection for it in the Constitution might be difficult. For that reason, I separate these two categories.

193. *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); *Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[A person] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.")

194. Professor Johnson set out a similar scheme of categories: conduct resembling a crime, conduct that appears to reflect consciousness of guilt, characteristics of the actor, and the environment in which the actor is observed. She then evaluated them both probabilistically and constitutionally. Johnson, *supra* note 136, at 215-25. My point is both narrower and somewhat different, though related. Location carries grave danger of probabilistic error to those who live in crime-prone areas due to societal constraints; evasion is both constitutionally protected and, for many people, understandable. Therefore, I argue that rather than making a probabilistic and constitutional evaluation, these factors ought not to be available to courts at all, even in combination, as a basis for reasonable suspicion, unless other factors clearly indicative of criminality are present.

reasonable suspicion that the suspect is armed and dangerous, allowing the frisk just because the original suspicion and stop is based on presence in a drug-plagued area represents nothing more than bootstrapping. If combining location and evasion should not allow a *Terry* stop, the drug-related nature of the location should not be enough to support a frisk.

In order for a stop and frisk to take place, the law should require that something more than a location of high crime or drug activity and evasion of the police be present, something clearly indicative of criminality. For example, gestures known to be characteristic of drug activity, such as using particular hand signals to indicate the availability of contraband, in addition to location and evasion, could be enough. For a frisk, the law should require not just possible drug possession or trafficking, but an indication that the suspect is armed.

Such a rule would not necessarily require a rethinking of *Sokolow*<sup>195</sup>. While all of the defendant's actions in *Sokolow* are consistent with innocence, no activity in *Sokolow* is both innocent *and* necessary, in the sense that being at one's home or place of work is necessary. Additionally, to the extent that both the "location plus evasion" cases and *Sokolow* are about clusters of innocent activity, *Sokolow* contains more than two such activities.<sup>196</sup>

The rule proposed here would have at least two salutary effects. First, existing law that protects, separately, the rights to be in a place and to refuse to respond to police stops without reasonable suspicion would be respected and kept vital. Allowing a *Terry* stop based on the combination of location and evasion empties both rights of meaning and content. It causes the rights to, in effect, cancel each other out, instead of existing as related, complementary rights protecting personal freedom and autonomy. Second, it would remove from the courts a set of cases, and from the police arsenal a group of techniques, that clearly have a disproportionate impact on the poor, and on racial and ethnic minorities.

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195. *United States v. Sokolow*, 490 U.S. 1 (1989) (involving use of drug courier profile at airport). The United States Court of Appeals for the Ninth Circuit heard the *Sokolow* case below, reversing the conviction. *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987). It used a theory similar to the one proposed here. The Court of Appeals divided facts into two categories, the first of which included "ongoing criminal activity," such as the use of aliases. *Id.* at 1419. The second category consisted of "personal characteristics," such as using cash to pay for tickets, or appearing nervous. *Id.* at 1420. According to the Ninth Circuit, "personal characteristics" were relevant only if there was also evidence of "ongoing criminal behavior", the court found none of the latter. *Id.* The Supreme Court in *Sokolow* rejected this test, finding it "not in keeping with our decisions." 490 U.S. at 8. In fact, the Supreme Court really seems to be most troubled by the Ninth Circuit's division of evidence into the two categories, with the former being strong and the latter merely "probabilistic." *Id.* The Supreme Court's treatment of the evidence is not actually so different from what the Ninth Circuit did, though the two courts came out differently. This similarity of the analyses between the two opinions supports the conclusion that the court of appeals' method is generally correct, though in *Sokolow* it may have been wrongly applied.

196. *Sokolow*, 490 U.S. at 1.

## CONCLUSION

Twenty-five years after *Terry v Ohio*, *Minnesota v Dickerson* presents an opportunity to see the effect of allowing searches and seizures based on less than probable cause. The balancing of law enforcement and individual interests has become so routine that it barely stirs interest anymore. Nevertheless, what the cases make obvious is alarming: a steady decline in the amount of evidence needed to find reasonable suspicion. The cases after *Terry*, *Sibron*, and *Brown* progressed from statements mandating deference to law enforcement, to support for searches and seizures based on groups of innocent activities, to seizures based on no suspicion at all if the needs of law enforcement seem serious enough.

The result is hardly surprising. As the war against crime, and especially drugs, became a more important public policy objective, presence in areas where these activities take place, in conjunction with failure to cooperate with police, emerged as sufficient legal justification for *Terry* stops and frisks. The fact that these bare circumstances appear in so many cases attests to the fact that police view such stops and frisks as both productive and potent as law enforcement tools.

This represents a cost to society. People are seized and searched who might not have been under the probable cause standard. The cost falls unevenly across society. Most Americans of the majority race do not pay this cost; poor people and members of racial and ethnic minority groups do. Division of the cost of crime fighting along racial lines would never be defended openly; yet there it is. The unfairness of the situation is obvious. The disrespect it engenders for law enforcement in people who have to cope with this treatment day in and day out is incalculable.

Replacing the current regime with a rule that requires more for reasonable suspicion than a high crime location plus avoidance of police is the minimum that must be done to restore some balance to inner-city law enforcement. The criminal justice system—including the police—must not only be and appear just in the courtroom; it must also be and appear just on the street. Racially disparate use of stops and frisks offend every principle of fairness and evenhandedness that our society purports to hold.